

No. 10-10751

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE CITY OF FARMERS BRANCH, TEXAS,
Appellant,

v.

VILLAS AT PARKSIDE PARTNERS d/b/a VILLAS AT PARKSIDE,
LAKEVIEW AT PARKSIDE PARTNERS d/b/a LAKEVIEW AT PARKSIDE,
CHATEAU RITZ PARTNERS d/b/a CHATEAU DE VILLE, and
MARY MILLER SMITH,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, CIVIL ACTION
NO. 3:08-CV-1551-B

BRIEF OF APPELLEES, VILLAS PLAINTIFFS

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NO. 3:08-CV-1551-B CITY OF FARMERS BRANCH, TEXAS v. VILLAS AT PARKSIDE PARTNERS d/b/a VILLAS AT PARKSIDE, LAKEVIEW AT PARKSIDE PARTNERS d/b/a LAKEVIEW AT PARKSIDE, CHATEAU RITZ PARTNERS d/b/a CHATEAU DE VILLE, and MARY MILLER SMITH v. VALENTIN REYES, ALICIA GARCIA, GINGER EDWARDS, JOSE GUADALUPE ARIAS, ALFREDO VASQUEZ, MARIA DE LA LUZ VASQUEZ, AND AIDE GARZA

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal.

A. Interested Persons:

1. City of Farmers Branch, Texas, Defendant;
2. Villas at Parkside Partners d/b/a Villas at Parkside, Plaintiff;
3. Lakeview at Parkside Partners d/b/a Lakeview at Parkside, Plaintiff;
4. Chateau Ritz Partners d/b/a Chateau De Ville, Plaintiff;
5. Mary Miller Smith, Plaintiff;
6. Edward B. Frankel;
7. Valentin Reyes, Plaintiff;
8. Alicia Garcia, Plaintiff;
9. Ginger Edwards, Plaintiff;
10. Jose Guadalupe Arias, Plaintiff;
11. Alfredo Vasquez, Plaintiff;
12. Maria De La Luz Vasquez, Reyes; and
13. Aide Garza, Reyes Plaintiff.

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STATEMENT REGARDING ORAL ARGUMENT

Villas at Parkside Partners d/b/a Villas at Parkside (“Villas”), Lakeview at Parkside Partners d/b/a Lakeview at Parkside (“Parkside”), Chateau Ritz Partners d/b/a Chateau De Ville (“Chateau”), and Mary Miller Smith (“Smith”) (together, “Villas Plaintiffs”), hereby request oral argument. This matter involves significant issues of constitutional and immigration law that require an analysis of a local ordinance that regulates immigration – *i.e.*, determines which aliens may live in the City of Farmers Branch, Texas (the “City” or “Farmers Branch”) – and, thus, conflicts with and is preempted by federal law. Villas Plaintiffs believe that oral argument would be of assistance to the Court in resolving those important issues.

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I.

STATEMENT OF CASE

Dissatisfied with the federal government's efforts to enforce the nation's immigration laws, Farmers Branch undertook to determine for itself which aliens would be accorded the fundamental right to reside in the City and which would be effectively "deported." Having already failed twice to adopt an ordinance passing constitutional muster, the City adopted Ordinance 2952 (the "Ordinance"), which sought to deny the right to live in the City to aliens deemed "not lawfully present." Like its predecessors, the City's latest licensing scheme impermissibly intrudes on the federal immigration system. Federal law neither determines which aliens may be denied housing nor requires the removal of all aliens "not lawfully present." The Ordinance thus undermines and interferes with the necessary discretion inherent in the federal government's exclusive authority over matters of foreign policy in general and immigration in particular.

Accordingly, on March 24, 2010, the District Court granted Villas Plaintiffs summary judgment on the grounds that the Ordinance is preempted as a regulation of immigration and is also both field and conflict preempted.¹ Having declared Ordinance 2952 unconstitutional and found that Villas Plaintiffs would suffer

¹ See Clerk's Record No. 3:08-CV-1551-B ("CR") at 10513.

irreparable harm if the Ordinance took effect, the District Court permanently enjoined effectuation and enforcement of the Ordinance and entered judgment.²

II.

STATEMENT OF FACTS

A. The Parties

The City is located in Dallas County, Texas.³ Plaintiffs Villas, Lakeview, and Chateau own and operate apartment complexes in Farmers Branch.⁴ Plaintiff Smith is a former member of the City Council of Farmers Branch and a resident tenant in an apartment complex located in Farmers Branch.⁵

B. The City's Initial Foray Into The Immigration Arena

The prelude to the City's adoption of a series of three self-styled "Immigration Ordinances" was Resolution 2006-099, pursuant to which the Farmers Branch City Council declared:

[I]t has been estimated that there are currently hundreds of illegal aliens living in the City of Farmers Branch . . . [T]he citizens . . . of the City of Farmers Branch are concerned, worried, upset, frustrated and downright mad that President Bush and the Executive Branch of the United States government has [sic] and is [sic] totally failing in the enforcement of the Immigration Act as it relates to the influx of illegal aliens . . . *[T]he citizens of Farmers Branch, due to the inaction of the*

² See *id.* at 10549-52 (Order at 37-40); *id.* at 13243 (Amended Judgment).

³ See *id.* at 838 (Answer ¶ 5).

⁴ See *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 846 (N.D. Tex. 2010) (hereinafter "*Villas I*"); CR at 5024, 5033 (Diamond Declaration ¶¶ 2, 34); *id.* at 5055 (Brown Declaration ¶¶ 3, 4).

⁵ See *Villas II*, 701 F. Supp. 2d at 846; CR at 5057-58 (Smith Declaration ¶¶ 2-4, 6).

*Executive and Legislative Branch of our Federal Government to enforce the Immigration Act, are imploring, urging, and demanding their City Council to enact its own laws to help in the enforcement of the Immigration Act [T]he City of Farmers Branch’s City Council is not only sympathetic to the pleas of its citizens, but is in agreement with the major concerns expressed and is, consequently, carefully reviewing the role the City can take to help support and enforce the United States immigration laws and will in the near future . . . out of absolute necessity brought about by the inaction of our federal government, take whatever steps it legally can to respond to the legitimate concerns of our citizens about the utter breakdown and failure of the United States government to enforce immigration laws.*⁶

As Resolution 2006-099 reflects, because the federal government was purportedly failing to remove “illegal aliens” from the United States – and, particularly, from Farmers Branch – the City prepared to assume a portion of that task itself, at least with respect to such persons living within its boundaries.⁷

On November 13, 2006, the City adopted Ordinance 2892, which provided, as a condition to entering into any “apartment complex” lease, that owners require the submission of satisfactory “evidence of citizenship or eligible immigration status for each tenant family.”⁸ That ordinance was repealed on January 22, 2007, pursuant to Ordinance 2903, which continued to require citizenship and immigration status verification as a prerequisite to entering into any “apartment

⁶ CR at 7467-68 (Resolution No. 2006-009, fourth, sixth, eighth, thirteenth, fourteenth “whereas” clauses) (emphasis added).

⁷ *See id.*

⁸ *See id.* at 1450-51 (Ordinance 2892 § 2).

complex” lease.⁹ On May 23, 2008, the United States District Court for the Northern District of Texas permanently enjoined the City from effectuating or enforcing Ordinance 2903 based on the Supremacy and Due Process Clauses of the United States Constitution.¹⁰ The City did not appeal that judgment.

C. The City Unveils Its Third And Latest “Immigration Ordinance.”

1. The purpose and intended effect of the Ordinance

On January 22, 2008, the City adopted Ordinance 2952, which provides, in pertinent part:

[F]ederal law prescribes certain conditions (found principally in Title 8, United States Code, Sections 1101, *et seq.*), that must be met before an alien may be lawfully present in the United States . . . [A]liens not lawfully present in the United States, as determined by federal law, do not meet such conditions as a matter of law when present in the City of Farmers Branch . . . [I]t is the intent of the City of Farmers Branch to enact regulations that are harmonious with federal immigration law and which *aid in its enforcement*.¹¹

On its official website, the City characterized and referred to the Ordinance, Resolution No. 2006-130 (entitled “Resolution Declaring English as the Official Language of the City of Farmers Branch”), and former Ordinance 2903 as “Immigration Ordinances.”¹² According to the City, “Ordinance 2952 will prevent

⁹ See *id.* at 1456-64 (Ordinance 2903 § 3).

¹⁰ See *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 861 (N.D. Tex. 2008) (hereinafter “*Villas I*”).

¹¹ CR at 407-08 (Ordinance, first, second, seventh “whereas” clauses) (emphasis added); see *id.* at 841 (Answer ¶ 44).

¹² See *id.* at 7461-62 (Responses to Request for Admissions Nos. 47, 49).

aliens not lawfully present in the United States from obtaining rental housing in the City of Farmers Branch, thus discouraging such aliens from unlawfully remaining in the United States.”¹³

2. The relevant terms of the Ordinance

Under the Ordinance, prospective renters must complete an occupancy license application, pay a \$5 fee to the City, and obtain a residential “occupancy license” before they may occupy a single-family residence or apartment in Farmers Branch.¹⁴ If multiple occupants live within one home or apartment, each must sign a separate residential occupancy application and obtain a separate occupancy license.¹⁵

The Ordinance requires prospective occupants to attest to their citizenship.¹⁶ If the applicant attests to being a United States citizen, the City will issue an occupancy license and will not check the applicant’s citizenship or immigration status.¹⁷ For other applicants, however, the City’s building inspector is required to “verify with the federal government whether the occupant is an alien lawfully present in the United States.”¹⁸

¹³ *See id.* at 5083 (Answer to Interrogatory No. 8).

¹⁴ *See id.* at 414 (Ordinance § 3).

¹⁵ *See id.*

¹⁶ *See id.* at 415.

¹⁷ *See id.* at 414-15.

¹⁸ *See id.* at 416.

If the federal government reports the status of the occupant as an alien “not lawfully present in the United States,” the building inspector shall send the occupant a deficiency notice stating that “the occupant may obtain a correction of the federal government’s records and/or provide additional information establishing that the occupant is not an alien not lawfully present in the United States.”¹⁹ After at least sixty days from the sending of the deficiency notice, “the building inspector shall again make an inquiry to the federal government seeking to verify or ascertain the citizenship or immigration status of the occupant.”²⁰ If the “federal government reports that the occupant is an alien who is not lawfully present in the United States, the building inspector shall send a revocation notice to both the occupant and the lessor” revoking the occupant’s residential occupancy license.²¹

The Ordinance subjects landlords, lessors, “persons responsible for the management of an apartment complex,” and “any agent of a landlord with authority to initiate proceedings to terminate a lease or tenancy” to potential criminal prosecution.²² It is an offense for such a person to knowingly permit an

¹⁹ *See id.* at 408-18.

²⁰ *See id.*

²¹ *See id.*

²² *See id.* at 416.

occupant to occupy a residence or apartment without a valid residential occupancy license.²³

3. Determining eligibility for licenses under the Ordinance

The City “intends to use the Systematic Alien Verification for Entitlements [SAVE] Program to determine whether occupancy license applicants are eligible to rent housing in Farmers Branch.”²⁴ However, the United States Citizenship and Immigration Services (“USCIS”), through its representative, testified that the SAVE Program does not inform inquiring parties whether an individual is “lawfully present” or “unlawfully present” in the United States; rather, it merely provides information regarding the individual’s “immigration status.”²⁵ Indeed, neither “lawfully present” nor “unlawfully present” is an “immigration status” utilized in any federal immigration database.²⁶

The Ordinance imposes upon the City’s building inspector the responsibility of enforcing its provisions, which includes verifying with the “federal government” whether an applicant for a residential occupancy license is “lawfully” or “unlawfully” present in the United States.²⁷ Significantly, the City’s building inspector testified that, although he will have to make determinations regarding

²³ *See id.* at 415-16.

²⁴ *See id.* at 842 (Answer ¶ 65).

²⁵ *See id.* at 6445, 6489 (Roessler Depo. at 56:3-7, 161:12-20).

²⁶ *See id.* at 5301-04 (Pickett Depo. at 87:13-18, 144:17-19, 145:22-25).

“lawful” presence, he has no knowledge of how he will do so based on information regarding an applicant’s “immigration status.”²⁸

III.

SUMMARY OF ARGUMENT

The City erroneously asserts that the District Court erred in granting Villas Plaintiffs summary judgment because: (1) the District Court failed to apply a presumption against preemption; (2) it failed to apply the purported *Salerno* standard for facial challenges; (3) the Ordinance is not a regulation of immigration; (4) the Ordinance is not field preempted; and (5) the Ordinance is not conflict preempted.

First, the Ordinance is not entitled to a presumption against preemption because the City is attempting to regulate in an area with a history of significant federal presence (namely, which aliens should be removed), not a field traditionally occupied by the states.²⁹ In any event, the presumption was overcome because the subject matter regulated by the Ordinance – immigration – permits no other conclusion.³⁰

²⁷ See *id.* at 408-18 (Ordinance §§ 1, 3).

²⁸ See *id.* at 5114-15 (Olk Depo. at 156:22-157:5, 163:20-23).

²⁹ See *United States v. Locke*, 529 U.S. 89, 108 (2000) (The “‘assumption’ of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.”).

³⁰ See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996).

Second, the requirements for a facial challenge have been satisfied because:

(a) the purported *Salerno* standard does not apply due to the fact that Villas Plaintiffs' preemption claim is a challenge to the City's authority to enact the Ordinance;³¹ and (b) the City has failed to identify a set of circumstances under which the Ordinance would not be preempted.

Third, the Ordinance is an impermissible regulation of immigration because:

(a) it creates its own immigration classification scheme for determining which aliens are permitted to reside in the City; (b) it would deny residence to aliens whom the federal government allows to remain in the United States; and (c) the City, not the federal government, will determine which aliens are entitled to remain in Farmers Branch.

Fourth, the Ordinance intrudes into at least four fields of regulation that the federal government has occupied: (a) the removal of aliens; (b) alien registration; (c) alien eligibility for benefits; and (d) restrictions on harboring of aliens.

Fifth, the Ordinance conflicts with federal law and policy, both in intent and effect. Indeed, the Ordinance was borne of the City's frustration with the federal government's failure to enforce the nation's immigration laws consistent with the City's expectations and prior demands. The Ordinance thus seeks to counteract, not enforce, federal policy.

³¹ See *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643-44 (2d Cir. 2005).

IV.

APPLICABLE STANDARD

A grant of summary judgment is subject to *de novo* review.³²

V.

ARGUMENTS AND AUTHORITIES

A. The Judgment Should Be Affirmed Because The Ordinance Is Not Entitled To A Presumption Against Preemption.

The District Court held that the Ordinance is preempted because it is a regulation of immigration, intrudes in a field exclusively occupied by the federal government – the removal of aliens – and conflicts with federal law and policy.³³ Rather than squarely address those issues, the City asserts that the District Court erred because it failed to begin its analysis by presuming that the Ordinance is not preempted. That contention is without merit for at least two reasons.

First, the Ordinance is not entitled to a presumption against preemption. The Supreme Court has made clear that the presumption is inapplicable when a state regulates in an area with a history of significant federal presence.³⁴ Regulation of immigration is not a historic police power of the states entitled to a presumption

³² See *Patrick v. Ridge*, 394 F.3d 311, 315 (5th Cir. 2004).

³³ See *Villas II*, 701 F. Supp. 2d at 853-57.

³⁴ See *Locke*, 529 U.S. at 108. The City's reliance on *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) and *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) is misplaced because those cases did not supersede the decision in *Locke*, but instead merely reiterate the rule that "[w]hen addressing questions of express or implied preemption, we begin our analysis with the

against preemption; it is an exclusive federal power.³⁵ The City’s contention that the Ordinance merely regulates a field traditionally occupied by the states (rental housing) is belied by the text of the Ordinance.³⁶ Neither the title of the Ordinance nor the “whereas” clauses discuss the need to regulate rental accommodations.³⁷ Instead, the Ordinance expressly refers to the City’s intent to enact regulations pertaining to *immigration*.³⁸ Further, the history of the Ordinance and its predecessors indicate that the purpose of the Ordinance is to address immigration – namely, the removal of “illegal” aliens from Farmers Branch.³⁹ Indeed, the genesis of the Ordinance was the federal government’s “failure” to crack down on the presence of “illegal” aliens, as the City demanded in Resolution 2006-099.⁴⁰ The Ordinance, therefore, is not an attempt to regulate housing that incidentally touches on immigration issues; it is an immigration ordinance that incidentally regulates

assumption that the *historic police powers of the State* are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress” (emphasis added).

³⁵ See, e.g., *Lozano v. City of Hazleton*, 620 F.3d 170, 220 (3d Cir. 2010) (“Deciding which aliens may live in the United States has always been the prerogative of the federal government. Hazleton purposefully chose to enter this area of ‘significant federal presence.’ Accordingly, we will not presume non-preemption.”).

³⁶ See *Villas II*, 701 F. Supp. 2d at 853-57.

³⁷ See CR at 407-08 (Ordinance at 1-2).

³⁸ See *id.* at 407.

³⁹ See *supra* 2-5.

⁴⁰ See CR at 7468 (Resolution No. 2006-099); *supra* n. 6.

housing.⁴¹ Accordingly, the Ordinance is not entitled to the presumption against preemption.⁴²

Second, even if the presumption were applied, the Ordinance is preempted. The presumption is overcome if: (1) “the regulated subject matter permits no other conclusion;”⁴³ or (2) preemption “is the clear and manifest purpose of Congress.”⁴⁴ Intent is primarily discerned from the statute itself and the statutory framework surrounding it.⁴⁵ The exclusive constitutional grant of power to the federal government to regulate immigration is clear.⁴⁶ The regulated subject matter – *i.e.*, aliens who may live in Farmers Branch and those who are prohibited from doing

⁴¹ See *infra* Section V(D)(1); *Villas II*, 701 F. Supp. 2d at 857; see also *Lozano*, 620 F.3d at 220.

⁴² See *supra* n. 35. The City’s reliance on *Gray v. City of Valley Park*, No. 4:07CV00881, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008) is misplaced because: (1) it concerned the regulation of employment – a field traditionally regulated by the states – not the conditions under which aliens remain in the City; (2) it addressed an exception to preemption (the “savings” clause) in the Immigration Reform and Control Act (“IRCA”), which applies to employment laws, not housing regulation; (3) the ordinance adopted federal standards; and (4) the decision was not based on the presumption. See *id.* at *8-18; *Villas I*, 577 F. Supp. 2d at 865; *Lozano*, 620 F.3d at 220. Moreover, the City fails to mention that Valley Park repealed its housing ordinance after litigation ensued. See *Gray*, 2008 WL 294294, at *1.

⁴³ *Medtronic*, 518 U.S. at 486.

⁴⁴ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001).

⁴⁵ See *Medtronic*, 518 U.S. at 486.

⁴⁶ See *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (“That the supremacy of the national power . . . over immigration, naturalization and deportation, is made clear by the Constitution was pointed out by the authors of *The Federalist* in 1787.”).

so – permits no other conclusion; the Ordinance is preempted as a regulation of immigration.⁴⁷

B. The Judgment Should Be Affirmed Because The Requirements For A Facial Challenge Have Been Satisfied As There Is No Set Of Circumstances Under Which The City Is Authorized To Regulate Immigration.

Based on *dicta* from the often criticized *United States v. Salerno* decision,⁴⁸ the City argues that it can deputize itself as an immigration enforcement agent as long as it acts in accordance with federal law in some circumstances. The City’s argument is wrong for at least two reasons.

First, the purported *Salerno* standard does not apply to preemption cases such as this one because the preemption claim challenges the City’s authority to enact the Ordinance.⁴⁹ The potential application of the Ordinance, therefore, is

⁴⁷ See, e.g., *Villas II*, 701 F. Supp. 2d at 857-59; *Lozano*, 620 F.3d at 220 (“The rest of our analysis flows directly from our conclusion that Hazelton’s housing provisions regulate which aliens may live there. . . . [A] state or locality may not ‘regulate immigration’ . . . Such power is delegated by the Constitution exclusively to the federal government”); *Truax v. Raich*, 239 U.S. 33, 42 (1915).

⁴⁸ See *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *City of Chicago v. Morales*, 727 U.S. 41, 55 n. 22 (1999) (“To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself.”) (plurality opinion); *Wash. v. Glucksberg*, 521 U.S. 702, 740 (1997) (“I do not believe the Court has ever actually applied such a strict standard, even in *Salerno* itself, and the Court does not appear to apply *Salerno* here.”) (Stevens, J., concurring).

⁴⁹ See *Villas II*, 701 F. Supp. 2d at 852 n. 19; *Green Mountain*, 404 F.3d at 643-44; *AES Sparrows Point LNG, LLC v. Smith*, 470 F. Supp. 2d 586, 600-01 (D. Md. 2007) (“The all-or-nothing stakes of [federal] preemption renders the inquiry under *Salerno* moot, because once preemption is called for, the categorical nature of this conclusion automatically commands that ‘no set of circumstances exists under which the [statute] would be valid.’”) (citations omitted);

irrelevant to the constitutional inquiry because the Ordinance on its face attempts to regulate immigration.⁵⁰ Accordingly, the purported *Salerno* standard does not apply.⁵¹

Second, the City has not identified a set of circumstances under which the Ordinance would be valid – *i.e.*, a situation where the Ordinance is not preempted.⁵² As purported examples of how the Ordinance may be constitutionally applied, the City points to United States citizens and “legal permanent resident aliens” who will not have their licenses revoked. That the Ordinance burdens all renters, not just the disfavored aliens that the City seeks to remove, does not, as the City appears to suggest, mean that the Ordinance has a

United States v. Manning, 434 F. Supp. 2d 988, 1008 (E.D. Wash. 2006); *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, No. CV 06-01416-JF, 2007 WL 2439499, at *7-8 (C.D. Cal. Apr. 30, 2007); *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Cmm’n*, No. 01-516-cv, 2011 WL 447052, at *3 (2d Cir. Feb. 10, 2011).

⁵⁰ See *infra* Sections V(C)-(E).

⁵¹ Moreover, the City’s reliance on *Salerno* is misplaced because, in that case, defendant unquestionably had the authority to regulate as the Due Process Clause did not categorically create an “impenetrable wall” to the type of regulation challenged. See *Salerno*, 481 U.S. at 748-52. Conversely, the Ordinance in question here is a regulation of immigration that is absolutely barred.

⁵² Moreover, the District Court’s finding that the Ordinance is preempted did not rely on a “hypothetical” or “imaginary” case because every time the City revokes an occupancy license of a person it determines to be not “lawfully present,” it will be revoking the license of a person who, by definition, the federal government has not removed. Further, the City’s suggestion, in passing, that Villas Plaintiffs may lack standing was properly rejected by the District Court because Villas Plaintiffs have demonstrated that they are directly regulated by the Ordinance and would suffer concrete injury if the Ordinance was not enjoined. See *Villas II*, 701 F. Supp. 2d at 845-50; see also *Lozano*, 620 F.3d at 188-94.

constitutional application.⁵³ As demonstrated below, the Ordinance, both in purpose and effect, is an impermissible regulation of immigration, regulates in a field occupied by the federal government, and conflicts with federal law because it creates a licensing regime under which the City would revoke the licenses of those individuals that it determines are “alien[s] not lawfully present in the United States.”⁵⁴ Accordingly, a facial challenge to the Ordinance is proper because the Ordinance has a “plainly [il]legitimate sweep.”⁵⁵

C. The District Court Correctly Held That The Ordinance Is Preempted As An Improper Regulation Of Immigration.

The District Court correctly characterized the Ordinance as a regulation of immigration.⁵⁶ After all, the stated purpose of the Ordinance is to “aid” in the “enforcement” of the federal immigration laws.⁵⁷ Pursuant to the Ordinance, the City seeks to register and identify aliens living in Farmers Branch, assess whether they are “lawfully present,” and force landlords to expel those whom the City determines are “not lawfully present,” thereby preventing them from residing

⁵³ In fact, the reason why Congress crafted a limited alien registration scheme was to avoid more intrusive schemes like the Ordinance. *See Hines*, 312 U.S. at 71-74.

⁵⁴ *See infra* Sections V(C)-(E). The City notes that the Ordinance includes a severance clause, but: (1) does not contend that parts of the Ordinance can be severed; and (2) did not raise the issue with the District Court. Accordingly, the argument is waived. *See Lozano*, 620 F.3d at 182 n. 13; *Avina v. JP Morgan Chase Bank*, No. 10-20677, 2011 WL 661566, at *3 (5th Cir. Feb 23, 2011).

⁵⁵ *See Wash. State Grange*, 552 U.S. at 449.

⁵⁶ *See Villas II*, 701 F. Supp. 2d at 855.

within the City limits and forcing them to go elsewhere, preferably outside the United States.⁵⁸ By adopting the Ordinance, the City has determined that certain aliens may stay in Farmers Branch (*i.e.*, those in the undefined category “lawfully present”) and others must leave (*i.e.*, those aliens in the undefined category “not lawfully present”), and has implemented a licensing system to enforce those determinations.⁵⁹ Deciding who may stay and who must depart, however, is at the very core of the power entrusted exclusively to the federal government.⁶⁰ Because the Ordinance’s purpose is to effectively expel those purportedly having no right to reside in this country, the Ordinance is an impermissible regulation of immigration.⁶¹

In response, the City makes four arguments: (1) the federal government’s exclusive power over immigration is narrow; (2) the City is permitted to use federal immigration classifications for any purpose not expressly prohibited by Congress; (3) the City is authorized to enact and enforce the Ordinance pursuant to federal statutes; and (4) restricting alien access to housing is no different than

⁵⁷ See CR at 407 (Ordinance, seventh “whereas” clause).

⁵⁸ See *Villas II*, 701 F. Supp. 2d at 858 n. 29; CR at 408-18 (Ordinance §§ 1, 3).

⁵⁹ See CR at 408-18.

⁶⁰ See *Toll v. Moreno*, 458 U.S. 1, 11 (1982); *Truax*, 239 U.S. at 42; *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948).

⁶¹ See *Villas II*, 701 F. Supp. 2d at 855; see also *Lozano*, 620 F.3d at 220.

restricting alien access to employment. As the District Court properly concluded, each of those arguments is without merit.

1. **The Ordinance intrudes into the highly discretionary powers to control and regulate immigration that the Constitution vests solely in the federal government.**

Relying on an unwarranted, hyper-technical reading of *DeCanas*,⁶² the City wrongly accuses the District Court of creating its own definition of “regulation of immigration” rather than faithfully applying the law. In *DeCanas*, the Supreme Court reiterated that the “[p]ower to regulate immigration is unquestionably exclusively a federal power,” but not “every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.”⁶³ That holding is consistent with prior and subsequent Supreme Court decisions. In fact, the “power to exclude or expel aliens” has long been a considered “a power affecting international

⁶² See Appellant’s Brief at 20 (quoting *DeCanas v. Bica*, 424 U.S. 351, 355 (1976)) (“[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a *determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.*”) (emphasis supplied by the City). The use of the term “essentially” and the words “standing alone” (which the City omitted), which immediately precede the portion quoted, indicate that the Supreme Court in *DeCanas* was not overruling prior decisions that gave Congress exclusive power over questions relating to alien residency. See *Takahashi*, 334 U.S. at 419. Based on an improper reading of *Takahashi*, the City asserts that “rental housing” is not the same as “residence.” The City’s assertion is without merit because: (1) *Takahashi* did not change the plain meaning of the word “residence” – the place where a person resides; and (2) even if “residence” means only “the period [aliens] may remain” in the country, the Ordinance is preempted because the City, and not the federal government, would decide how long certain aliens may reside in the City.

⁶³ See *DeCanas*, 424 U.S. at 354-55.

relations”⁶⁴ and, as such, beyond the power of state and local governments.⁶⁵ The “authority to control immigration – to admit or exclude aliens – is vested solely in the Federal Government,”⁶⁶ and even a partial encroachment on the federal power over immigration renders a state law invalid.⁶⁷

When the federal government “has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land,” and “[n]o state can add to or take from the force and effect of such treaty or statute.”⁶⁸ In the immigration context, the state and local governments “can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.”⁶⁹

A critical aspect of the federal government’s authority in the area of immigration is the discretion inherent in that authority, and states are forbidden from encroaching upon matters within that discretion.⁷⁰ For example, only the

⁶⁴ *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); see *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

⁶⁵ See *Fong*, 149 U.S. at 706-07.

⁶⁶ *Truax*, 239 U.S. at 42; see also U.S. CONST., Art. I, § 8.

⁶⁷ See *Truax*, 239 U.S. at 42-43.

⁶⁸ *Hines*, 312 U.S. at 62-63.

⁶⁹ *Takahashi*, 334 U.S. at 419 (emphasis added).

⁷⁰ See *Hines*, 312 U.S. at 62-63.

federal government holds the power “to exclude foreigners from the country, whenever, *in its judgment*, the public interests require such exclusion.”⁷¹ The decision to remove or deport aliens already present in this country entails an even greater exercise of discretion⁷² – especially given the size and importance of the undocumented alien population in the United States,⁷³ and the undisputed human consequences of a deportation decision.⁷⁴ “In light of the *discretionary federal power* to grant relief from deportation, a State cannot realistically determine that any particular undocumented child [or adult] will in fact be deported until after deportation proceedings have been completed.”⁷⁵

Federal immigration laws, combined with the administrative discretion that is inherent in the United States government’s enforcement of those laws, give rise to a complex and frequently unpredictable regulatory scheme involving numerous and varied classifications.⁷⁶ “States enjoy no power with respect to the

⁷¹ *Fong*, 149 U.S. at 707 (emphasis added). The City’s suggestion that *Takahashi* only limits states’ ability to impose burdens upon the residence of aliens “lawfully” within the United States and, therefore, the federal government’s power to regulate “legal” aliens is exclusive, but its power to regulate “illegal” aliens is not, is without support and draws an overly simplistic, false dichotomy between “legal” and “illegal” immigration that ignores the complexity of the federal immigration system.

⁷² See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999).

⁷³ See *Plyler v. Doe*, 457 U.S. 202, 218-19 (1982).

⁷⁴ See *Reno*, 525 U.S. at 497-98 (Ginsburg, J., concurring).

⁷⁵ *Plyler*, 457 U.S. at 226.

⁷⁶ See *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003); *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988).

classification of aliens,”⁷⁷ and “Congress may not constitutionally authorize states to set their own standards to determine who is and is not an illegal alien.”⁷⁸ Thus, “the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation.”⁷⁹ Accordingly, states and local governments may not vary the conditions imposed by Congress upon the residence of aliens in the United States⁸⁰ or determine immigration status.⁸¹ A “state alien residency requirement” that would deny “abode” to aliens whom the federal government allows to reside in this country would be “inconsistent with federal policy,” would “encroach upon exclusive federal power,” and would be “constitutionally impermissible.”⁸²

The District Court properly applied this well-established law in holding that the Ordinance: (1) imposes additional local restrictions on those aliens that wish to

⁷⁷ *Plyler*, 457 U.S. at 225.

⁷⁸ *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 602, 608 (E.D. Va. 2004).

⁷⁹ *Hines*, 312 U.S. at 68 (emphasis added).

⁸⁰ *See Toll*, 458 U.S. at 11 (“[The states] can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.”); *Truax*, 239 U.S. at 42.

⁸¹ *See Plyler*, 457 U.S. at 236 (Marshall, J., concurring) (“[T]he structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported.”); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. at 755, 770 (C.D. Cal. 1995) (hereinafter (“*LULAC I*”) (“Indeed, determinations of immigration status by state agents amounts to immigration regulation whether made for purposes of notifying aliens of their unlawful status and reporting their presence to the INS or for the limited purpose of denying benefits.”).

⁸² *See Graham v. Richardson*, 403 U.S. 365, 379-80 (1971).

reside in Farmers Branch; (2) creates its own classification of aliens who are eligible for housing in Farmers Branch; and (3) as a result, effectively regulates which aliens may remain in Farmers Branch in a manner that has more than a speculative and indirect impact on immigration.⁸³ The Ordinance, which expels aliens based on criteria established by the City, is not a regulation that merely “touches” on aliens but, instead, is an intentional effort to perform immigration-related tasks arising from the City’s conclusion that the federal government has failed to remove sufficient numbers of “illegal” aliens.⁸⁴ While the City does not “admit” aliens to the country under the Ordinance, it does effectively “admit” or “deny” aliens residence in Farmers Branch, which is impermissible.⁸⁵ Moreover, contrary to the City’s assertion, the Ordinance is a regulation of immigration whether or not it makes it impossible for certain aliens to live in Farmers Branch. The Ordinance imposes “conditions” under which an alien may “remain” in Farmers Branch,⁸⁶ and the City may not impose any conditions on an alien’s ability

⁸³ See *Villas II*, 701 F. Supp 2d at 855-56.

⁸⁴ See CR at 407 (Ordinance at 1); CR at 7466 (Resolution 2006-099).

⁸⁵ See *supra* nn. 59, 60; *Lozano*, 620 F.3d at 220-21 (In holding that Hazleton’s housing provisions regulate immigration and are field and conflict preempted, the Third Circuit stated: “We also recognize that Hazleton’s housing provisions regulate presence only within its city limits, not the entire country. This does not change the analysis. To be meaningful, the federal government’s exclusive control over residence in this country must extend to any political subdivision. Again, it is not only Hazleton’s ordinance that we must consider. If Hazleton can regulate as it has here, then so could every other state or locality.”).

⁸⁶ See *Takahashi*, 334 U.S. at 419.

to reside in the City, even if the conditions are not 100% effective at removing an alien.⁸⁷

2. The Ordinance’s alleged reliance on purported federal classifications and federal resources does not save it from preemption.

In an effort to justify its intentional foray into the exclusive federal domain of immigration regulation, the City asserts that: (1) the Ordinance is constitutional because it relies on federal classifications; and (2) it can use federal classifications in any manner it desires to discourage illegal immigration, so long as the federal government has not expressly forbidden it from doing so. Those arguments are without merit.

a. The Ordinance requires the City to create and apply immigration classifications not provided by federal law.

The Ordinance is an impermissible regulation of immigration, notwithstanding its purported use of federal classifications, for at least three reasons.

⁸⁷ See *Truax*, 239 U.S. at 42-43 (“It is insisted that the act should be supported because it is not ‘a total deprivation of the right of the alien to labor. . . . But the fallacy of this argument at once appears. If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective . . . We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly; but underlying the classification is the authority to deal with that at which the legislation is aimed.”); *Lozano*, 620 F.3d at 221 (“Hazleton posited that aliens lacking lawful status could still reside in the City through purchasing a home, or through staying with friends. The response is as disingenuous as it is unrealistic.”).

First, the Ordinance has not adopted a uniform federal classification for determining eligibility to stay within the United States. Because the City is prohibited from creating its own immigration classifications, the Ordinance must use a known, recognized, and well-understood federal classification for those persons who, however temporarily, are permitted to remain in the United States.⁸⁸ The term “lawfully present,” however, is not a uniform federal classification.⁸⁹ The fact that the federal government may use the term in certain limited situations does not make the term a classification or a standard, much less a standard that state or local governments can follow.⁹⁰ Moreover, the Ordinance does not itself define “lawfully present.”⁹¹ Accordingly, the Ordinance does not use a uniform

⁸⁸ See *Plyler*, 457 U.S. at 219 n. 19; *id.* at 225 (“The States enjoy no power with respect to the classification of aliens.”); *Villas I*, 577 F. Supp. 2d at 871.

⁸⁹ A survey of the United States Code and the Code of Federal Regulations reveals numerous different definitions and uses of the term, each utilized primarily within its own unique statutory or regulatory context – none involving the licensing of the right to shelter. See, e.g., 8 U.S.C. § 1182(a)(9)(B); 8 C.F.R. § 103.12; 8 U.S.C. § 1229a(c)(2); 49 C.F.R. § 24.2; see also 8 U.S.C. § 1357; 8 U.S.C. § 1621(d); 42 U.S.C. § 1436a; 26 U.S.C. § 3304(a)(14)(A); 7 U.S.C. 2015(f); 42 U.S.C. § 4605.

⁹⁰ That the term does not always include the same categories is demonstrated by the fact that the firearm regulation would deem aliens with various temporary statuses as unlawfully in the United States while the social security regulation would deem them lawfully present. Compare 8 C.F.R. § 103.12 (including various temporary statuses and applicants as lawfully present), with 27 C.F.R. § 478.11 (defining unlawfully in the United States to include such categories).

⁹¹ See CR at 407-19; *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 485 (M.D. Pa. 2007).

federal classification regarding which aliens are eligible for housing,⁹² and thereby impermissibly creates its own alien classification scheme.

Second, even if such a uniform and precisely-defined classification existed, an alien's status as "unlawfully present" would not be tantamount to a determination by the federal government denying that person a right to housing while remaining in the United States. Although it is unclear what "lawful presence" means, it is clear that a determination of an alien's unlawful presence is not equivalent to a determination by the federal government that the alien must leave the United States. For instance, this Court has repeatedly held that an alien can be unlawfully present even though the alien had been granted permission to stay and work in the United States by the federal government.⁹³ Likewise, an alien can be found "unlawfully present" by the federal government and even ordered to be eventually removed, while nonetheless being permitted to stay – temporarily,

⁹² The absence of specific definitions or citations to federal statutes or regulations containing such definitions is what makes the Ordinance different than state and local laws that limit employment to "authorized aliens," benefits to "qualified aliens," or driver's licenses to aliens with "lawful status." Federal law specifies which categories of aliens are in those broader categories. See 8 U.S.C. § 1641(b) (listing the immigration statuses that are included in the category "qualified alien"); 8 U.S.C. § 1324a (prohibiting employment of "unauthorized aliens" and defining "unauthorized alien"); Real ID Act, 119 Stat. 231, Public Law 109-13, Div. B, Tit. II § 202(c)(2)(B) (listing the categories of aliens with "lawful status" for purposes of determining eligibility for driver's licenses).

⁹³ See *United States v. Lucio*, 428 F.3d 519, 524-26 (5th Cir. 2005); *United States v. Flores*, 404 F.3d 320, 326-28 (5th Cir. 2005).

indefinitely, or otherwise.⁹⁴ There are countless other situations where an alien might be “unlawfully present” yet be permitted to remain in the United States.⁹⁵ Accordingly, the Ordinance is a preempted regulation of immigration.⁹⁶

Third, the Ordinance is an impermissible regulation of immigration because the City, and not the federal government, will be required to make determinations regarding an alien’s residency rights.⁹⁷ The Ordinance requires the building inspector to revoke the residential occupancy license of any resident whom “the federal government reports . . . is an alien who is not lawfully present in the United States.”⁹⁸ The Ordinance, however, relies on federal verification of a person’s “immigration status”⁹⁹ – which does not indicate whether that person

⁹⁴ See *Clark v. Martinez*, 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

⁹⁵ See *Plyler*, 457 U.S. at 226; *id.* at 241 n. 6 (Powell, J., concurring); *Lozano*, 620 F. 3d at 222; *Hazleton*, 496 F. Supp. 2d at 530; 8 C.F.R. § 274a.12(a)(11-13), (c)(8-11, 14, 18-20, 22, 24) (listing categories of persons who can receive federal permission to work, and implicitly to stay, in the United States even though they may be violating immigration laws).

⁹⁶ See, e.g., *Equal Access Educ.*, 305 F. Supp. 2d at 602; *Truax*, 239 U.S. at 42 (explaining that federal law preempts any state attempt to deny aliens “entrance and abode”); *Villas II*, 701 F. Supp. 2d at 856; *Lozano*, 620 F.3d at 220-21.

⁹⁷ The City argues that the Ordinance does not regulate immigration because it provides that it will not be enforced unless the federal government reports that an alien is “unlawfully present.” Of course, regardless of whether the City ever expels any aliens from its borders under the Ordinance, the Ordinance is still an impermissible foray into immigration regulation because its undefined “unlawfully present” classification “[d]epends on determinations made under an inapplicable federal standard” and, therefore, “constitutes an improper regulation of immigration.” See *Villas II*, 701 F. Supp. 2d at 856.

⁹⁸ See CR at 408-18 (Ordinance §§ 1, 3).

⁹⁹ See *id.* at 413-18 (Ordinance § 3).

must leave the country.¹⁰⁰ In fact, neither “lawfully present” nor “unlawfully present” is an “immigration status.”¹⁰¹ Instead, the City’s building inspector must convert an “immigration status” provided by the federal government into a determination of whether an alien is “lawfully present” and, thus, entitled to live in Farmers Branch.¹⁰² The City, therefore, would make its own determinations of who is eligible to reside in Farmers Branch and who will effectively be removed from, or kept out of, the City.¹⁰³ Such conduct is plainly preempted.¹⁰⁴

b. The City does not have *carte blanche* to use federal classifications for any purpose it sees fit.

The City asserts that the District Court turned the “presumption against preemption inside out” by finding that “[a]bsent authority, the City may not extend the reach of federal immigration classifications without creating an impermissible regulation of immigration.” The City’s claim that it may extend federal

¹⁰⁰ See *Hazleton*, 496 F. Supp. 2d at 532 (“More than resorting to . . . ‘SAVE’ is necessary to determine if the federal government seeks the removal of an individual.”); 65 Fed. Reg. 58301, 58302 (“(SAVE) response showing . . . an immigration status making the individual ineligible for a benefit is not a finding of fact or conclusion of law that the individual is not lawfully present.”) (emphasis added).

¹⁰¹ See *supra* n. 26.

¹⁰² See *Villas II*, 701 F. Supp. 2d at 856.

¹⁰³ See CR at 5111-15 (Olk Depo. at 154:19-155:1-8, 156:22-157:5, 163:20-23).

¹⁰⁴ See *Villas II*, 701 F. Supp. 2d at 856; *Lozano*, 620 F.3d at 219-22; *Villas I*, 577 F. Supp. 2d at 874; *LULAC I*, 908 F. Supp. at 770 (“determinations of immigration status by state agents amounts to immigration regulation”).

classifications into new regulatory realms has been rejected by the Supreme Court¹⁰⁵ and is without merit for at least two reasons.

First, a presumption against preemption does not apply because the Ordinance is not an exercise of the City's historic police powers and, in any event, it is overcome because the Ordinance regulates immigration by determining which aliens may live in Farmers Branch.¹⁰⁶

Second, the doctrine of constitutional preemption in the field of immigration does not require a clear and unmistakable statement of congressional intent. Unlike field and conflict preemption, constitutional preemption is not based on congressional intent to displace the states. States and localities are precluded from enacting regulations of immigration because the Constitution delegates that power exclusively to the federal government.¹⁰⁷ Moreover, the City's interpretation of the doctrine of preemption would eviscerate the concept of *implied* preemption (essentially allowing only express preemption).¹⁰⁸

¹⁰⁵ See *Takahashi*, 334 U.S. at 418-19 (“It does not follow . . . that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications” for other purposes.).

¹⁰⁶ See *supra* Section V(A).

¹⁰⁷ See *Lozano*, 620 F.3d at 220. The City contends that preemption occurs only if Congress clearly intended to preempt state laws. That contention is based on the discussion in *DeCanas* of field preemption that is irrelevant to whether a state law constitutes a regulation of immigration.

¹⁰⁸ Moreover, congressional silence, when combined with congressional action, can suffice to demonstrate congressional intent to preempt state regulation. See *United States v. Arizona*, 703 F. Supp. 2d 980, 1000-01 (D. Ariz. 2010).

In sum, contrary to its assertion that the District Court “inverted” the preemption doctrine, it is the City which turns the doctrine on its head. The City does not have free rein to use inapposite federal immigration classifications to determine which aliens may live in Farmers Branch.¹⁰⁹

3. The City is not authorized to use federal immigration classifications to regulate housing.

The District Court correctly held that federal law does not authorize or contemplate the City’s use of federal alien classifications to regulate rental housing.¹¹⁰ Nonetheless, the City contends that: (1) 8 U.S.C. § 1373(c) provides clear authorization to use federal immigration classifications “for any purpose;” and (2) 8 U.S.C. § 1621(c) requires the verification of the federal immigration status of aliens seeking “licenses.” The City’s assertions are without merit.¹¹¹

The City’s claim that the federal government must report an alien’s “immigration status” is irrelevant because “lawfully present” is not an “immigration status” that the federal government can or will report in relation to the Ordinance.¹¹² Therefore, to enforce the Ordinance, the City’s building inspector (and not the federal government) will have to determine whether an alien is “not lawfully present” by interpreting the indeterminative “immigration status”

¹⁰⁹ See *supra* Section V(C)(1); *Lozano*, 620 F.3d at 220.

¹¹⁰ See *Villas II*, 701 F. Supp. 2d at 856-57.

¹¹¹ See *id.* at 856.

information provided by the “federal government” and drawing his own conclusions.¹¹³ Accordingly, despite its invocation of the words “lawfully present,” the City has impermissibly created its own alien classification scheme by which to deny access to housing.

In any event, the City’s reliance on 8 U.S.C. § 1373(c) is without merit. That provision merely obligates INS (now abolished) to respond to state or local governments’ requests for verification of immigration status for “any purpose authorized by law.” The City cites no statute or other authority suggesting that “any purpose authorized by law” means “for any purpose” municipalities deem appropriate – or, more importantly, for purposes of deciding eligibility for unprecedented municipal residency licenses.¹¹⁴ In fact, the legislative history of section 1373 indicates that Congress merely wanted state and local governments to retain immigration information in order to assist the federal government in its enforcement efforts.¹¹⁵

¹¹² See *supra* n. 25.

¹¹³ See *supra* n. 28.

¹¹⁴ Contrary to the City’s suggestion, the formal system of records notice published in December 2008 (73 Fed. Reg. 75,445-52) merely clarifies that, in addition to checking status for benefits eligibility, SAVE can be used for authorized background investigations – it does not authorize the use of the SAVE Program to determine “lawful presence” or otherwise indicate that SAVE could be used by a municipality to determine eligibility to live or reside therein.

¹¹⁵ See S. Rep. No. 104-249, 104th Cong., 2d Sess., at 19-20 (1996) (“The acquisition, maintenance, and exchange of immigration related information by State and local agencies is consistent with, and potentially of considerable assistance to, the *Federal regulation of*

Similarly, the City's contention that 8 U.S.C. § 1621(c) permits the City to remove "illegal" aliens in Farmers Branch was properly rejected by the District Court.¹¹⁶ The Ordinance states that pursuant to "Title 8, United States Code Sections 1621, *et. seq.*" some aliens "are not eligible for certain State or local public benefits, including licenses."¹¹⁷ That is true. Congress has explicitly denied specified classes of aliens access to specified benefits, permitted other classes of aliens access thereto, and authorized state and local governments to limit eligibility for particular types of benefits.¹¹⁸ However, the "residential occupancy license" required by the Ordinance is not a state or local "benefit" that the federal government has authorized local governments to deny.¹¹⁹ Accordingly, the City's

immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.") (emphasis added).

¹¹⁶ See *Villas II*, 701 F. Supp. 2d at 857.

¹¹⁷ See CR at 407 (Ordinance, third "whereas" clause).

¹¹⁸ See 8 U.S.C. §§ 1621(a)-(b), 1622, 1624.

¹¹⁹ See 8 U.S.C. § 1621(c); *Villas II*, 701 F. Supp. 2d at 856. The City's attempt to read "residential occupancy license" into the statutory definition of "public benefits" ignores that the definition does not include "residential occupancy licenses," or even the broad term "license." Nonetheless, the City asserts that its occupancy licenses constitute a "public benefit" because such licenses are not listed among the statutory exclusions. Of course, the exclusionary provision is intended to exclude items that would otherwise be included in the statutory definition. Moreover, under the canon of construction *expressio unius est exclusio alterius*, the statutory definition of "public benefits" itself excluded "residential occupancy license" because such a term or category (or anything remotely similar) was not included among the items listed. See *Valley Ice & Fuel Co. v. United States*, 30 F.3d 635, 639 n. 5 (5th Cir. 1994). The City also erroneously relies on a publication entitled Privacy Impact Assessment USCIS, Verification Information System, dated April 1, 2007, for its overbroad definition of "public benefits." That publication did *not*, as the City suggests, redefine the detailed statutory definition of "public benefits."

attempt to restrict alien eligibility to housing is without authorization from Congress.¹²⁰ Thus, the District Court properly held that the Ordinance regulates immigration and is, therefore, preempted.

4. Regulation of alien access to housing is fundamentally different than regulation of alien employment.

Despite the clear motivation behind the Ordinance – to do what the federal government has thus far elected not to do, *i.e.*, remove from Farmers Branch “illegal” aliens who reside or seek to reside therein¹²¹ – the City objects to the District Court’s finding that the Ordinance’s denial of housing to aliens “not lawfully present” amounts to a municipal deportation. The City claims that access to housing is not “fundamentally different” from access to employment or other benefits.

As the District Court noted, the Ordinance “effectively den[ies] [‘illegal’ aliens] *residence* by prohibiting rental or remaining in the City as a long-term

¹²⁰ In fact, as set forth below, the federal regime occupies the field and preempts the Ordinance. *See infra* V(D)(3). The City’s reliance on *LULAC I*, 908 F. Supp. at 770 is misplaced because the court merely determined that using SAVE would be adequate to determine if the federal criteria were met for denying benefits to aliens and held other provisions were preempted. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2009) is inapposite because Arizona adopted the appropriate federal immigration classification and was authorized to do so.

¹²¹ *See supra* n. 6.

guest.”¹²² In fact, the point of denying housing to certain aliens under the Ordinance is to directly remove them from the borders of Farmers Branch because the federal government has not done so.¹²³

Unlike employment measures that merely “touch” on aliens and have only a “speculative and indirect impact on immigration,” the Ordinance has a “direct” and intended impact on alien residence within Farmers Branch – they are to be banned and removed.¹²⁴ Moreover, employment laws rely on a federal classification (“unauthorized aliens”) and a federal preemption savings clause.¹²⁵ As the District Court found – and the Third Circuit confirmed in *Lozano* – regulation of immigration through housing ordinances is fundamentally different from employment regulations that merely “touch” on aliens.¹²⁶

¹²² *Villas II*, 701 F. Supp. 2d at 858 n. 29 (emphasis added); *see also id.* at 855 n. 22 (“In contrast [to the employment and benefit cases], no federal court has approved a local measure conditioning *residence* on federal immigration status.”) (emphasis added).

¹²³ The City’s contention that denying “illegal” aliens access to rental housing does not equate to denying them residence in Farmers Branch is without merit. *See Lozano*, 620 F.3d at 221. Moreover, the fact that the Ordinance removes aliens only from the borders of Farmers Branch does not change the fact that the City is impermissibly regulating immigration. *See id.*

¹²⁴ *See Villas II*, 701 F. Supp. 2d at 858 n. 29.

¹²⁵ *See Chicanos Por La Causa*, 558 F.3d at 861-62. Moreover, the significant difference between employment and residence is codified in federal law. The federal government grants some aliens permission to be here but denies them authorization to work – *e.g.*, tourists and some students. *See* 8 U.S.C § 1324a(h)(3); 8 C.F.R. 274a.12.

¹²⁶ *See Lozano*, 620 F.3d 170 at 219-20.

D. The District Court Correctly Held That The Ordinance Is Preempted Because It Intrudes Into Fields Occupied By Federal Regulation.

Federal law preempts state and local laws that seek to regulate conduct in a field that Congress intended the federal government to occupy exclusively.¹²⁷ Such an intent “may be inferred from a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”¹²⁸

The District Court correctly held that the Ordinance is field preempted because it intrudes on the federal scheme for determining who may reside in the country and who must be removed.¹²⁹ In addition, the Ordinance is field preempted because it intrudes on the federal government’s comprehensive schemes for: (1) alien registration; (2) public benefits; and (3) anti-harboring.

1. The Ordinance is preempted because it intrudes on the federal scheme for the removal of aliens and the adjudication of their status.

The District Court began its analysis by observing that the federal government, through the INA, has provided the exclusive means for removal of aliens and adjudication of their status for that purpose and that the complex federal

¹²⁷ See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

¹²⁸ *Id.*

removal scheme is structured to allow federal discretion.¹³⁰ As a result, “‘an illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen’ though he or she was initially subject to deportation.”¹³¹ The District Court concluded that the Ordinance effectively denies residence by prohibiting rentals and, thus, has a direct effect on alien residence within the City.¹³² Accordingly, the District Court correctly held that the Ordinance is field preempted because: (1) the INA provides the exclusive means for the removal of aliens; and (2) “the decision to deny an alien residence on the basis of that classification [the right to remain in this country] rests exclusively with the federal government.”¹³³

As it must, the City concedes that the federal government has the exclusive power to remove aliens, but asserts that the District Court nonetheless erred in holding the Ordinance field preempted because: (1) the California employment statute at issue in *DeCanas* was not field preempted by the INA; and (2) Congress has invited the City into the field. Those contentions are without merit.

First, the City fails to even identify the relevant field. Villas Plaintiffs do not contend that the INA preempts local regulation of the employment field – the

¹²⁹ See *Plyler*, 457 U.S. at 225; *Lozano*, 620 F.3d at 220; *Villas II*, 701 F. Supp. 2d at 858.

¹³⁰ See *Villas II*, 701 F. Supp. 2d at 857-59; see also 8 U.S.C. §§ 1154, 1229a, 1231.

¹³¹ *Villas II*, 701 F. Supp. 2d at 858; see also *Plyler*, 457 U.S. at 226.

¹³² See *Villas II*, 701 F. Supp. 2d at 858; see also *Lozano*, 620 F.3d at 220-21.

subject of *DeCanas* – or every local regulation touching on aliens.¹³⁴ The preempted field is defined by: (1) the motivations behind the Ordinance; and (2) the effect of the Ordinance.¹³⁵ Both factors establish that the relevant field is, as the District Court held, the denial of residency to aliens – *i.e.*, removal of aliens.¹³⁶

The City’s motivations in adopting Ordinance 2952 are clear. Its serial adoption of three “immigration ordinances” was the result of its frustration with the “inaction of our federal government” in immigration enforcement.¹³⁷ Because the federal government was failing to deport “illegal aliens” from the United States – and, particularly, from Farmers Branch – the City adopted the trinity of admitted “immigration” ordinances (namely, Ordinances 2892, 2903, and 2952).¹³⁸ In the Ordinance, the City Council noted that “aliens not lawfully present in the United States” are, by definition, unlawfully here “when present in the City of Farmers Branch.”¹³⁹ In order to remove those persons, the City passed the

¹³³ *Villas II*, 701 F. Supp. 2d at 857-58.

¹³⁴ *See DeCanas*, 424 U.S. at 358. The City’s reliance on *Chicanos Por La Causa*, 558 F.3d at 856 is misplaced because it concerned regulation of the employment field. Additionally, the City’s reliance on *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 240-41 (2d Cir. 2006) is misplaced because the court merely held that IRCA did not preempt state tort law.

¹³⁵ *See English*, 496 U.S. at 84.

¹³⁶ *See Villas II*, 702 F. Supp. 2d at 858; *see also Lozano*, 620 F.3d at 220-21.

¹³⁷ *See CR at 7467-68* (Resolution No. 2006-099).

¹³⁸ *See Villas I*, 577 F. Supp. 2d at 861; *Villas II*, 701 F. Supp. 2d at 840.

¹³⁹ *See CR at 407-08* (Ordinance, first, second, seventh “whereas” clauses).

Ordinance to purportedly enforce federal immigration laws.¹⁴⁰ The foregoing removes any doubt that the Ordinance was intended as a regulation of immigration.¹⁴¹

The effect of the Ordinance is equally clear. Aliens deemed by the City not to be “lawfully present” will be denied the right to live in Farmers Branch, and those that provide them housing will be punished.¹⁴² Accordingly, the Ordinance is preempted because it purports to regulate in a field exclusively and fully occupied by the federal government – namely, the removal of aliens.¹⁴³

Second, the City erroneously asserts that it may generally regulate in the immigration field because state and local police may arrest individuals who are guilty of violating federal criminal immigration laws. This case does not concern the authority of Farmers Branch police officers to arrest individuals who commit federal crimes.¹⁴⁴ Instead, the City has adopted its own immigration enforcement mechanism through which its building inspector and landlords will remove aliens

¹⁴⁰ *See id.*

¹⁴¹ Conversely, in *DeCanas*, the objective of the law was not to regulate immigration or even to prevent aliens without lawful residence from working in California. *See DeCanas*, 424 U.S. 352 (the statute “provides that ‘(n)o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States *if such employment would have an adverse effect on lawful resident workers*’”) (emphasis added).

¹⁴² *See Villas II*, 701 F. Supp. 2d at 857-58; *see also Lozano*, 620 F.3d at 220; CR at 978, 980, 991, 1000 (TRO Transcript at 123, 125, 136); *id.* at 408-18 (Ordinance §§ 1, 3).

¹⁴³ *See Villas II*, 701 F. Supp. 2d at 857-59; *see also Lozano*, 620 F.3d at 220-21.

¹⁴⁴ *See Villas II*, 701 F. Supp. 2d at 859.

that the City deems “not lawfully present.”¹⁴⁵ That local law enforcement may arrest people for violating federal criminal laws does not demonstrate that Congress has invited local governments to adopt their own regulations of immigration to be enforced by a building official and landlords.¹⁴⁶ There is no evidence that Congress has encouraged local efforts to supplement and supplant the federal immigration apparatus in a manner similar to the Ordinance.¹⁴⁷

2. The Ordinance is preempted because it intrudes on the federal alien registration scheme.

The Ordinance is an alien registration law, which impermissibly intrudes into Congress’ comprehensive alien registration scheme.¹⁴⁸ Over sixty years ago, the Supreme Court made clear that states and local governments cannot

¹⁴⁵ See *Villas II*, 701 F. Supp. 2d at 859; CR at 417-18 (Ordinance at 10-11). Notably, the building inspector who is charged with implementing the Ordinance is prohibited from enforcing the federal anti-harboring statute. See 8 U.S.C. § 1324(c).

¹⁴⁶ In fact, 8 U.S.C. § 1357(g)(1) requires an agreement by the federal government to deputize state officers as immigration officers, demonstrating that Congress granted states, at most, a very limited invitation into the field of immigration. See 8 U.S.C. § 1357(g)(1); *Villas I*, 577 F. Supp. 2d at 873. Moreover, the City’s attempt to equate mere renting of an apartment to an “illegal” alien with “harboring” is without merit. Instead of punishing “harboring” of a known illegal alien, the Ordinance punishes those who fail to enforce the City’s immigration scheme. See *infra* Section V(D)(4).

¹⁴⁷ The City cites inapposite cases holding that local law enforcement are not prohibited from arresting aliens for violating federal criminal immigration laws. See *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (city police were not precluded by federal law from arresting aliens who allegedly violated criminal provisions of the immigration laws); *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987) (police were not prohibited from detaining stowaways that were to be deported under federal law). In addition, the City’s reliance on a California state court case, *In re Jose*, 45 Cal. 4th 534, 550-55 (2009), is misplaced because that court merely concluded that a juvenile court is not preempted from adjudicating whether federal anti-smuggling laws had been violated.

¹⁴⁸ See, e.g., 8 U.S.C. §§ 1301-1306.

supplement the federal alien registration scheme.¹⁴⁹ The Ordinance, like the unconstitutional Pennsylvania statute in *Hines*, requires the registration of all applicants over eighteen, disclosure of the person’s country of citizenship and alien identification numbers, and the payment of a fee.¹⁵⁰ Just as the Pennsylvania statute required proof of registration in order to obtain a motor vehicle, the Ordinance requires proof of registration to obtain rental housing.¹⁵¹ Because states and local governments lack authority to implement additional or supplementary registration schemes, the District Court properly enjoined the Ordinance.¹⁵²

3. The Ordinance is preempted because it intrudes on the federal scheme regulating alien eligibility for benefits.

The Ordinance is preempted because Congress has enacted a comprehensive scheme regulating the eligibility of aliens for certain public benefits and licenses and the “residential occupancy license” under the Ordinance purports to create additional, non-federal regulations within that occupied field.

The Ordinance states that pursuant to “Title 8, United States Code Sections 1621, *et. seq.*” some aliens “are not eligible for certain State or local public benefits, including licenses.”¹⁵³ Those sections of the United States Code – the

¹⁴⁹ See *Hines*, 312 U.S. at 56, 66-67, 71-74.

¹⁵⁰ See *id.*; CR at 408-18 (Ordinance §§ 1, 3).

¹⁵¹ See *id.*

¹⁵² See *Hines*, 312 U.S. at 66-67; *Arizona*, 703 F. Supp. 2d at 995.

¹⁵³ See CR at 408 (Ordinance, third “whereas” clause).

Personal Responsibility and Work Opportunities Act (“PRWORA”) – set out a comprehensive scheme for determining alien eligibility for certain federal, state, and local benefits.¹⁵⁴ Significantly, however, the “residential occupancy license” required by the Ordinance is not a “state or local benefit” that the federal government permits local governments to deny,¹⁵⁵ and the City’s attempt to require an applicant to submit immigration information to establish eligibility for housing in Farmers Branch is precluded by 8 U.S.C. § 1625.¹⁵⁶ It is unsurprising that Congress did not allow local governments to deny aliens the right to contract for private housing because the purpose of the PRWORA was to encourage self-reliance and discourage aliens from obtaining public assistance.¹⁵⁷ Accordingly, the Ordinance is preempted.

4. The Ordinance is preempted because it intrudes on the federal anti-harboring regime.

The Ordinance purports to be an anti-harboring ordinance that equates renting to “illegal aliens” with harboring.¹⁵⁸ Merely renting housing to an alien,

¹⁵⁴ See 8 U.S.C. §§ 1601-1646; *supra* Section V(C).

¹⁵⁵ See 8 U.S.C. § 1621(c); *see also* *Rajeh v. Steel City Corp.*, 157 Ohio App. 3d, 722, 735 (Ohio App. 2004).

¹⁵⁶ See 8 U.S.C. § 1625; *LULAC v. Wilson*, 997 F. Supp. 1244, 1251, 1255 (C.D. Cal. 1997) (“Because the PRA is a comprehensive regulatory scheme that restricts alien eligibility for all public benefits, however funded, the states have no power to legislate in this area.”).

¹⁵⁷ See 8 U.S.C. § 1601.

¹⁵⁸ See CR at 408 (Ordinance, fourth “whereas” clause).

however, is not “harboring” under 8 U.S.C. § 1324(a)(1)(A).¹⁵⁹ The federal anti-harboring statute prohibits harboring aliens who the person knows remain in the United States in violation of federal law.¹⁶⁰

¹⁵⁹ See *Delrio-Mocci v. Connolly Prop., Inc.*, No. 08-2753, 2009 WL 971394, at *4 (D.N.J. Apr. 9, 2009) (“No court has ever held that the mere provision of housing to an illegal alien constitutes harboring. . . . Here, Plaintiff has not alleged facts sufficient to support the predicate act of harboring. Defendants rented the apartments to illegal aliens with the purpose of making a profit. This is easily distinguished from situations in which parties employ undocumented workers and then provide them with housing free of charge or tied to their wages, in order to conceal their presence from the authorities.”). Further, none of the cases on which the City relies sustained a conviction of a landlord who merely rented to an illegal alien. See *United States v. Cantu*, 557 F.2d 1173, 1175-76 (5th Cir. 1977) (helped aliens attempt to evade detection and capture by INS agents during a search of defendant’s restaurant); *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1072 (5th Cir. 1982) (“warned [aliens] in an attempt to prevent their being detected as illegal aliens by alerting them to flee”); *United States v. Shum*, 496 F.3d 390, 392 (5th Cir. 2007) (employed aliens and made and provided false identifications to help them pass background checks required to clean government buildings); *United States v. Herrera*, 584 F.2d 1137, 1141-42 (5th Cir. 1978) (employed aliens as prostitutes, installed alarm system with a signal to warn prostitutes of INS raids, and instructed aliens on how to escape in the event of a raid); *United States v. Martinez Medina*, No. 08-30150, 2009 WL 117611, at *1-2 (5th Cir. Jan. 16, 2009) (knowingly provided illegal aliens with jobs, transportation, housing, and utilities, and advised them not to run when border patrol agents drove by in order to avoid arousing suspicion); *United States v. Varkonyi*, 645 F.2d 453, 459 (5th Cir. 1981) (instructed aliens to avoid detection, offered to provide aliens with immigration papers, provided aliens with employment and lodging, forcibly interfered with INS agents, and assisted an alien’s escape from custody); *United States v. Balderas*, 91 Fed. Appx. 354, 355 (5th Cir. 2004) (home had a signal for illegal aliens and homeowner did not care that illegal aliens were using it as a residence); *United States v. Gomez-Moreno*, 479 F.3d 350, 354 (5th Cir. 2007) (reversing conviction for harboring on evidentiary grounds where defendant operated a safehouse in which aliens could stay concealed); *United States v. Zheng*, 306 F.3d 1086 (11th Cir. 2002) (harbored illegal aliens for commercial advantage or private financial gain by knowingly providing both employment and rent-free housing for illegal aliens and using an employment agency that specifically recruited illegal aliens); *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999) (upholding conviction based on employment of illegal aliens); *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008) (granted aliens employment and provided them a place to live, daily transportation, money to purchase necessities, and counterfeit immigration papers); *United States v. Aguilar*, 883 F.2d 662, 669-70 (9th Cir. 1989) (convicted of masterminding and running a modern-day underground railroad that smuggled aliens across the Mexican border); *United States v. Sanchez*, 963 F.2d 152, 155 (8th Cir. 1992) (defendant said he would provide immigration papers to known illegal aliens, pay for rent, and arrange for transportation to and from work).

In contrast, the Ordinance prohibits the act of knowingly renting apartments and single-family residences to unlicensed occupants, whose presence may or may not violate federal immigration law.¹⁶¹ The Ordinance, therefore, radically expands criminal liability by dispensing with both the “harboring” and the *mens rea* elements of the federal anti-harboring act and, instead, punishes those who merely fail to implement the City’s administrative scheme.¹⁶² Further, the Ordinance exposes certain alien occupants (the “harbored”) to potential criminal liability,¹⁶³ whereas the federal anti-harboring statute only subjects the “harborors” to criminal sanction.¹⁶⁴ In any event, local anti-harboring laws could never be compatible with the federal statute because they would intrude upon the prosecutorial discretion invested in the federal government. The Ordinance does

¹⁶⁰ See 8 U.S.C. § 1324(a)(1)(A)(iii); *Lozano*, 620 F.3d at 223.

¹⁶¹ See CR at 408-18 (Ordinance §§ 1, 3). The federal government has acknowledged that a person cannot “know” an alien is “illegal” merely based on information obtained from the SAVE program. See 65 Fed. Reg. 58301 (Sept. 28, 2000). Contrary to the City’s assertion to the District Court, this regulation was not overridden by the implementation of the REAL ID Act. See 72 Fed. Reg. 10820. The SAVE program is adequate to determine whether an alien has “lawful status,” a defined class of aliens under the REAL ID Act, but that does not mean that the program determines that an alien is not lawfully present sufficiently for a person to “know” the alien is “illegal.”

¹⁶² See CR 414-19 (Ordinance § 3).

¹⁶³ See CR at 413-18 (Ordinance § 3). The imposition of criminal penalties on the “harbored” coupled with the failure to distinguish between aliens who have illegally entered the country and those who are merely illegally present creates a conflict, as Congress has made the former a criminal offense and the latter only a civil matter. See *Gonzales*, 722 F.2d at 474-76.

¹⁶⁴ See 8 U.S.C. § 1324(a).

not “reinforce” the anti-harboring statute; it seeks to supplant the existing federal immigration scheme. Accordingly, the Ordinance is preempted.¹⁶⁵

E. The District Court Correctly Held That The Ordinance Is Preempted Because It Conflicts With Federal Law And Policy.

The Ordinance is also preempted because it conflicts with federal law and policy.¹⁶⁶ Conflict preemption occurs where state law “stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.”¹⁶⁷ Here, the Ordinance stands as an obstacle to federal law because it alters the *status quo* and undermines the federal government’s careful balancing of objectives in the field of immigration.¹⁶⁸

1. The Ordinance is preempted because it seeks to counteract, not enforce, federal policy.

The City contends that the Ordinance is valid because it represents permissible “concurrent enforcement of the federal prohibition against harboring illegal aliens.” The City’s argument is without merit for at least three reasons.

First, the Ordinance is preempted because it seeks to *counteract*, not enforce, federal policy. Indeed, the entire purpose of the Ordinance is to substitute

¹⁶⁵ See *Lozano*, 620 F.3d at 224; *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1056 (S.D. Cal. 2006).

¹⁶⁶ See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

¹⁶⁷ *Hines*, 312 U.S. at 67; *Lozano*, 620 F.3d at 204.

¹⁶⁸ See *Villas II*, 701 F. Supp. 2d at 858-59.

proactive municipal enforcement in place of the federal government's unwillingness to enforce immigration laws to the City's satisfaction.¹⁶⁹

The federal government's alleged "failure" to take action, however, is no accident – it represents a deliberate exercise of its enforcement discretion and prioritization of federal resources. The federal government's *de facto* immigration policy was acknowledged by the Supreme Court in *Plyler*, in which it held that because there is no assurance that an alien "subject to deportation will ever be deported," a state may not deny certain fundamental rights to aliens "enjoying an inchoate federal permission to stay."¹⁷⁰ In addition to acknowledging such "inchoate federal permission," the Supreme Court noted the Attorney General's statement that, "We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community."¹⁷¹

Because the Ordinance seeks to remove aliens from Farmers Branch who, by definition, the federal government has not removed, it interferes, and is in direct conflict, with federal policy.¹⁷² Accordingly, the doctrine of concurrent

¹⁶⁹ See *supra* n. 6; CR at 7467-68 (Resolution No. 2006-099); *id.* at 7461-62 (Responses to Request for Admissions Nos. 47, 49).

¹⁷⁰ See *Plyler*, 457 U.S. at 226; *Lozano*, 620 F.3d at 221-22.

¹⁷¹ *Plyler*, 457 U.S. at 219 n. 19 (emphasis added).

¹⁷² See *Lozano*, 620 F.3d at 222 ("[T]he government purposefully exercises its discretion not to prosecute in certain instances, and thereby tacitly allows the presence of those whose

enforcement does not save the Ordinance from preemption because the Ordinance attempts to undermine, rather than enforce, federal immigration policy.

Second, the City misconstrues the concept of concurrent enforcement. As shown in the cases on which the City relies, concurrent enforcement involves state law enforcement officers enforcing federal criminal statutes.¹⁷³ Here, in contrast, the City's building inspector (not the police department) would enforce the City's own deportation scheme (not federal criminal law).¹⁷⁴ Moreover, concurrent enforcement activity is authorized only where "state enforcement activities *do not impair federal regulatory interests*."¹⁷⁵ The City argues that the Ordinance satisfies this standard because it "was drafted with meticulous care to match the terminology and scope of federal law."¹⁷⁶ The alleged use of federal standards,

technical status remains 'illegal.' Furthermore, once the government initiates these proceedings, whether they will result in removal is far from certain."); *Hazleton*, 496 F. Supp. 2d at 531. In addition, Congress has anticipated circumstances in which an alien may have unlawfully entered the United States or violated the conditions for his admission, but for whom the United States nonetheless has an interest in providing humanitarian relief. *See, e.g.*, 8 U.S.C. § 1158; *id.* § 1254a; *id.* § 1227(a)(1)(E)(iii); *id.* § 1182(d)(5). Moreover, the Ordinance's focus on criminal sanctions is at odds with the federal policy of channeling certain aliens into civil removal proceedings or permitting them to leave the country without criminal penalty or incarceration. *See* 8 U.S.C. § 1229c; *id.* § 1225(a)(4).

¹⁷³ *See supra* n. 159; *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) (state trooper permitted to arrest defendant transporting alcohol in violation of the Eighteenth Amendment and federal Prohibition statutes).

¹⁷⁴ *See* CR at 408-12 (Ordinance § 1); *Villas II*, 701 F. Supp. 2d at 856.

¹⁷⁵ *Lozano*, 620 F.3d at 218 (emphasis in original).

¹⁷⁶ The City erroneously asserts that the District Court failed to acknowledge that the Ordinance's "use of federal standards is essential to preemption analysis in the immigration context." The District Court's analysis acknowledged the Ordinance's ties to federal statutory

however, is not enough to save legislation from preemption where, as here, the “regulatory scheme . . . is designed to further [a] single objective of federal law that [the City] deems important,” while ignoring the balance of other congressional objectives.¹⁷⁷ The City is not concurrently enforcing federal immigration laws – it is seeking to independently enforce its own immigration law that incorporates inapposite, indefinite federal standards for purposes not contemplated by Congress.¹⁷⁸ Put simply, “[r]egulatory cherry picking is not concurrent enforcement, and it is not constitutionally permitted.”¹⁷⁹

Third, the Ordinance does not constitute concurrent enforcement of the federal prohibition against harboring illegal aliens. As set forth above, the Ordinance imposes requirements that far exceed those of the federal anti-harboring law.¹⁸⁰ That the Ordinance and the federal prohibition against harboring may share some purposes does not save the Ordinance from preemption.¹⁸¹ To the contrary, local and federal laws having a common purpose are still “directly at odds with each other” where they “strike the balance between [legislative] goals

language but found that the City’s attempt to use federal verifications of immigration status was an inappropriate way to determine “lawful presence” or entitlement to an occupancy license. *See Villas II*, 701 F. Supp. 2d at 859.

¹⁷⁷ *See Lozano*, 620 F.3d at 218-19.

¹⁷⁸ *See Villas II*, 701 F. Supp. 2d at 859.

¹⁷⁹ *See Lozano*, 620 F.3d at 219.

¹⁸⁰ *See supra* Section V(D)(4).

differently.”¹⁸² Because the Ordinance criminalizes conduct not encompassed by the federal anti-harboring statute, it does not merely “concurrently enforce” federal law but, instead, seeks to supplant the existing federal immigration scheme.¹⁸³

2. The Ordinance is preempted because it undermines the purpose and natural effect of legislation granting the federal government the sole authority and discretion to regulate immigration.

Wholly apart from the City’s intent to counteract federal policy on immigration enforcement, the Ordinance is preempted because it undermines the federal government’s careful balancing of objectives in the field of immigration law. The federal government has discretion in deciding whether and when to initiate removal proceedings, and such proceedings are the “sole and exclusive procedure” for removing “illegal aliens” from the United States.¹⁸⁴ Under the Ordinance, however, the City’s building inspector will be required to play the role of immigration prosecutor, and landlords will be required to expel those aliens

¹⁸¹ See *Lozano*, 620 F.3d at 219.

¹⁸² See *id.*

¹⁸³ See *id.* at 222-23. The City’s assertion that because conflict preemption analysis does not require “perfect symmetry” between local and federal law, “the proper approach is to reconcile the operation of both statutory schemes with one another” misses the mark because there can be no such reconciliation here. The Ordinance impairs federal regulatory interests, undermines federal balancing of objectives, criminalizes conduct not encompassed under the federal anti-harboring statute, and uses federal standards for purposes not contemplated or authorized by Congress. Those are not “slight differences” – they are fundamentally inconsistent provisions that stand as an obstacle to, and place the Ordinance directly at odds with, federal law.

¹⁸⁴ See *id.* at 221-22.

whom the City has deemed unfit to live in Farmers Branch,¹⁸⁵ notwithstanding the fact that only immigration judges or other appropriate federal officials may determine whether removal is authorized.¹⁸⁶ Moreover, the Ordinance attempts to remove persons from Farmers Branch “based on a snapshot of their current immigration status, rather than based on a federal order of removal” and, thus, is fundamentally inconsistent with federal immigration law.¹⁸⁷

Furthermore, by mandating the use of federal government resources to verify the immigration status of residents of Farmers Branch, the Ordinance would impermissibly impose burdens on the federal immigration system that would shift the allocation of resources away from the federal government’s established priorities.¹⁸⁸ Accordingly, the Ordinance undercuts the purpose and effect of federal immigration legislation by attempting to alter the roles, responsibilities, and priorities of federal officials in the regulatory scheme. Therefore, it constitutes an impermissible obstacle to the effectuation of federal law.¹⁸⁹

¹⁸⁵ See CR at 408-18 (Ordinance §§ 1, 3).

¹⁸⁶ See 8 U.S.C. § 1229a(a)(3).

¹⁸⁷ See *Lozano*, 620 F.3d at 221.

¹⁸⁸ See *Arizona*, 703 F. Supp. 2d at 995-96; *Escondido*, 465 F. Supp. 2d at 1057.

¹⁸⁹ See *Crosby*, 530 U.S. at 373-74, 379; *Lozano*, 620 F.3d at 204. The City mischaracterizes the District Court’s holding as being based on a “new theory of conflict preemption” – “uniform enforcement.” The District Court mentioned “uniform” twice in the context of a comparison between the INA’s “exclusive means for removing aliens or adjudicating their status for that purpose” and the “alternative path for determining an alien’s eligibility for residence” provided by the Ordinance. The District Court found that the

The City seeks to justify its attempted usurpation of federal authority by claiming that Congress has encouraged local governments to enact programs and measures to discourage illegal immigration. Congress, however, has not encouraged states or municipalities to directly regulate the availability of housing based on immigration status¹⁹⁰ – and the City cites no authority to the contrary. Indeed, the “examples” the City cites as evidence that Congress has encouraged local efforts to reduce illegal immigration show that such “encouragement” is limited to statutes relating to: (1) the exchange of information between federal and state or local governments; and (2) cooperation between state and local law enforcement and the federal government in the execution of federal immigration law.¹⁹¹ Additionally, unlike the Law Enforcement Support Center and section

Ordinance created an irreconcilable conflict with those federally-mandated procedures – an “illegal” alien who had not been deported through the procedure mandated by the federal government would be, in effect, expelled from his residence by the new scheme created by the Ordinance. Moreover, the City’s “uniform enforcement” argument relies heavily on inadmissible hearsay that was not presented to the District Court and is not part of the record on appeal. *See* Appellant’s Brief at 58-59, nn. 17-20; FED. R. EVID. 801(c). Villas Plaintiffs object to the introduction of that evidence, which should be disregarded. *See McIntosh v. Partridge*, 540 F.3d 315, 327 (5th Cir. 2008). In any event, the uneven distribution of federal resources depending upon a given area’s need does not change the fact that a uniform procedure is utilized to deport “illegal” aliens.

¹⁹⁰ *See Lozano*, 620 F.3d at 224.

¹⁹¹ Moreover, unlike employment regulation – the context of the cases cited by the City – nothing in the federal regulatory scheme on which the Ordinance relies indicates that preventing unlawful aliens from obtaining housing is a congressional objective. *See Lozano*, 620 F.3d at 220, 224. As set forth above, the City’s reliance on employment cases is misplaced. *See supra* nn. 124-26, 134; *see also Lozano*, 620 F.3d at 220. In addition, *Chicanos Por La Causa, Inc.*, 558 F.3d 856 is currently on appeal to the United States Supreme Court. *See Chamber of Commerce of the United States v. Candelaria*, 130 S. Ct. 3498 (U.S. 2010) (granting *certiorari* in *Chicanos Por La Causa*).

1357(g),¹⁹² the Ordinance does not involve the City’s law enforcement officials cooperating with the federal government in its efforts to enforce *federal law*.¹⁹³ Accordingly, the City’s reliance on cases involving efforts by state law enforcement officers to enforce federal laws is unjustified.¹⁹⁴ Moreover, section 1357 requires an agreement between the United States Attorney General and the City before its agents may be deputized as immigration officers.¹⁹⁵ Thus, far from demonstrating that Congress has sanctioned the Ordinance, the foregoing establishes that the Ordinance is unauthorized and that Congress did not, as the City contends, give states and municipalities blanket authorization to enact their

¹⁹² In footnotes 16 and 18, the City cites materials that are not part of the record on appeal, were not before the District Court, and constitute inadmissible hearsay. Therefore, those materials – which stand only for the uncontroversial proposition that state and local law enforcement may cooperate with the federal government in the enforcement of federal criminal law – should be disregarded. *See McIntosh*, 540 F.3d at 327.

¹⁹³ While the City contends that the 1357(g) program evidences a federal intent to permit otherwise unauthorized local enforcement of federal immigration laws, the City’s agreement with the Department of Homeland Security indicates otherwise. *See* CR at 4607 (Memorandum of Agreement at 1) (“[T]he exercise of the immigration enforcement authority granted under this MOA to participating LEA [law enforcement agency] personnel shall occur only as provided in this MOA.”). Moreover, the City’s agreement recognized the federal government’s discretion not to remove all aliens subject to removal. *See id.* at 4610 (Memorandum of Agreement at 4) (“The immigration laws provide ICE Detention and Removal Operations (DRO) with discretion to manage limited ICE detention resources, and ICE Field Office Directors may exercise this discretion, in appropriate cases, by declining to detain aliens whose detention is not mandated by Federal statute.”).

¹⁹⁴ *See, e.g., United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999) (state police officer, acting on request of federal immigration officer, arrested alien who admitted that he was an “illegal alien”).

¹⁹⁵ *See* 8 U.S.C. § 1357(g)(1). The City’s reliance on 8 U.S.C. § 1357(g)(10) is misplaced because it merely clarifies that 8 U.S.C. § 1357(g)(1) does not prevent local

own programs and regulations to discourage illegal immigration. Accordingly, the City's reliance on purported congressional "encouragement" as a justification for the Ordinance is without merit.

VI.

CONCLUSION

For all the foregoing reasons, Villas Plaintiffs request that the Court affirm the District Court's Order and Judgment, award them their reasonable attorneys' fees and costs of appeal, and award them such further relief to which they may be entitled.

governments from communicating with the Attorney General or otherwise cooperating with the Attorney General in regard to immigration enforcement.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC SUBMISSION

I hereby certify that: (1) all required privacy redactions have been made; (2) the electronic submission of the foregoing is an exact copy of the corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ C. Dunham Biles

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2011, I electronically submitted the following document to the Clerk of the Court for the United States Court of Appeals, Fifth Circuit using the electronic case filing system of the Court. The electronic case filing system sent a “Notice of Electronic Filing” to individuals who have consented in writing to accept this Notice as service of this document by electronic means. In addition, I certify that on March 24, 2011, I forwarded a copy of the foregoing to the counsel listed below as follows:

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I hereby certify that:

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