No. 13-516

IN THE

Supreme Court of the United States

THE CITY OF FARMERS BRANCH, TEXAS,

Petitioner,

v.

VILLAS AT PARKSIDE PARTNERS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

VILLAS RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a municipal ordinance restricting residence in rental housing to aliens with "lawful presence" within the United States a preempted "regulation of immigration?"

2. Is a municipal ordinance restricting residence in rental housing to aliens with "lawful presence" within the United States impliedly field preempted?

3. Is a municipal ordinance restricting residence in rental housing to aliens with "lawful presence" within the United States impliedly conflict preempted?

PARTIES TO THE PROCEEDING

The petitioner is The City of Farmers Branch, Texas.

The Villas Respondents are Villas at Parkside Partners, d/b/a Villas at Parkside; Lakeview at Parkside Partners, Ltd., d/b/a Lakeview at Parkside; Chateau Ritz Partners, d/b/a Chateau de Ville; and Mary Miller Smith.

The Reyes Respondents are Valentin Reyes; Alicia Garza; Ginger Edwards; Jose Guadalupe Arias; and Aide Garza.

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Respondents Villas at Parkside Partners, d/b/a Villas at Parkside; Lakeview at Parkside Partners, Ltd., d/b/a Lakeview at Parkside; Chateau Ritz Partners, d/b/a Chateau de Ville; and Mary Miller Smith ("Villas Respondents") respectfully pray that this Court deny the petition for a writ of certiorari (the "Petition") submitted by The City of Farmers Branch, Texas (the "Petitioner").

JURISDICTION

Villas Respondents agree that the Court has jurisdiction.

STATEMENT OF THE CASE

This suit involves a preemption challenge to Ordinance No. 2952 (the "Ordinance"), which was formally adopted by Petitioner City of Farmers Branch, Texas (the "City") on January 22, 2008. The Ordinance is the City's third attempt to deny rental housing to aliens based on City-selected criteria. Like its predecessors, the Ordinance has never taken effect because courts have enjoined the City from implementing or enforcing it.

1. The City's quest to override the federal government's enforcement decisions

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

> [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 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.[1]

As the Resolution reflects, the City chose to take action to override the policy choices of Congress and the President because the federal government was purportedly failing to remove "illegal aliens" from the United States. Unfortunately for the City, the phrase "illegal alien" has no specific meaning in the law, and the City's attempts to restrict rental housing based on a non-existent "legal"-or-"illegal" dichotomy have collided with the complex, discretionary nature of the immigration system created by Congress.

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[1] City of Farmers Branch Resolution 2006-99 at 2-3, fourth, sixth, eighth, thirteenth, fourteenth "whereas" clauses, in the Clerk's Record at 7467-89 (emphasis added). Hereinafter, the Clerk's Record is abbreviated "CR".

The City's first attempt to regulate alien eligibility for rental housing occurred on November 13, 2006, when the City formally adopted Ordinance No. 2892. That ordinance 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."[2] Ordinance No. 2892 was repealed on January 22, 2007, pursuant to Ordinance No. 2903, which continued to require citizenship and "eligible immigration status" verification as a prerequisite to entering into any "apartment complex" lease.[3] On May 23, 2008, the United States District Court for the Northern District of Texas, Judge Sam Lindsay presiding, permanently enjoined the City from effectuating or enforcing Ordinance No. 2903.[4] The District Court enjoined that ordinance because the criteria the City used to restrict eligibility was either: (1) not appropriate for the City's purpose, and thus preempted; or (2) unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

The City formally adopted the third and present Ordinance on January 22, 2008, between the issuance of the preliminary and permanent injunctions barring the effectuation and enforcement of Ordinance No. 2903. According to the City's interrogatory responses, the Ordinance "will prevent aliens not lawfully present in the United States from obtaining rental

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[2] *See* City of Farmers Branch Ordinance 2892 at 2-3 (CR at 1450-51).

[3] *See* City of Farmers Branch Ordinance 2903 (CR at 1456-64).

[4] *See Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 861 (N.D. Tex. 2008).

housing in the City of Farmers Branch, thus discouraging such aliens from unlawfully remaining in the United States."[5]

2. The terms of the Ordinance

Under the Ordinance, prospective renters must complete an occupancy license application, pay a $5 fee, and obtain a "residential occupancy license" before they may occupy a single-family residence or apartment in Farmers Branch. If multiple occupants live within one home or apartment, each must obtain a separate occupancy license.[6] Unless they stay within the same apartment complex, occupants must obtain a new license each time they move.[7]

The Ordinance requires prospective occupants to attest to their citizenship.[8] 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.[9] For other applicants, however, the City's *building inspector* is required to "verify with the federal government whether the occupant is an alien lawfully

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[5] *See* Defendant City of Farmers Branch's Objections and Answers to Plaintiff Lakeview at Parkside's First Set of Interrogatories at 5 (CR at 5083).

[6] *See* Ordinance § 3 (adding Section 26-199(B)(2) to the Code of Ordinances, City of Farmers Branch, Texas (hereinafter "City Code")), in the Appendix to the Petition (hereinafter abbreviated "App.") at 224.

[7] *See* Ordinance § 3 (adding City Code § 26-119(B)(4)) (App. 224).

[8] *See* Ordinance § 3 (adding City Code § 26-119(B)(5)(h)) (App. 225).

[9] *See* Ordinance § 3 (adding City Code § 26-119(D)(1)) (App. 228).

present in the United States."[10] "Federal government" is nowhere defined in the Ordinance, and thus, the City's building inspector is given no guidance as to which department, agency, unit, or person (by job title, position, or otherwise) to whom such a request for verification must be made.

If the federal government reports the status of the occupant as an alien "not lawfully present," the building inspector shall send the occupant a deficiency notice.[11] After at least sixty days from sending 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."[12] 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."[13]

The Ordinance subjects landlords, lessors, managers of apartment complexes, and those "with authority to initiate proceedings to terminate a lease" to potential criminal prosecution.[14] It is also a crime for an occupant whose license has been revoked to remain in

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[10] *See* Ordinance § 3 (adding City Code § 26-119(D)(1)) (App. 228).

[11] *See* Ordinance § 3 (adding City Code § 26-119(D)(2)) (App. 228).

[12] *See* Ordinance § 3 (adding City Code § 26-119(D)(4)) (App. 229-30).

[13] *See* Ordinance § 3 (adding City Code § 26-119(D)(4)) (App. 230).

[14] *See* Ordinance § 3 (adding City Code § 26-119(C)(7)) (App. 227).

the rental housing.[15] It is also a crime for landlords and managers to knowingly allow an occupant to occupy a residence or apartment without a valid residential occupancy license.[16] A landlord has a "defense" to prosecution if it has taken steps to terminate the lease or tenancy that permits the occupant to reside in the rental housing.[17]

3. The consequences of the City's impermissible entry into the immigration arena

While the City's goal was to single out "illegal aliens" and deny them residence and shelter, the Ordinance has other wide-ranging consequences. Three of the Villas Respondents own apartment complexes that rent to corporations for use by employees, and the loss of revenue due to the difficulties of obtaining "residential occupancy licenses" for such employees would severely affect their business.[18] In addition to suffering the indignity of having to obtain permission from the government in order to live in your hometown, citizens like plaintiff Mary Miller Smith risk losing their residence if friends or relatives stay too long without obtaining a license. Moreover, the Ordinance conscripts landlords to serve as immigration police responsible for evicting entire

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[15] *See* Ordinance § 3 (adding City Code § 26-119(C)(1)) (App. 226).

[16] *See* Ordinance § 3 (adding City Code § 26-119(C)(7)) (App. 227).

[17] *See* Ordinance § 3 (adding City Code § 26-119(C)(7)) (App. 227).

[18] The Petition refers to "tenants" and "occupants" interchangeably, but the leaseholder and the occupant(s) are often not the same.

families if one occupant fails to meet the City's eligibility criteria.

The Constitution and federal law entrust authority regarding aliens and immigration to those most competent to consider the complexity and totality of the circumstances involved. Congress created an adjudicatory process involving federal immigration officers and judges to determine whether an alien may stay or must leave, and municipalities cannot replace that process with a building inspector looking at a database printout. Indeed, the City's building inspector testified that he has no idea how he would convert "immigration status" information provided by the federal government into a determination of "lawful presence" as required by the Ordinance.[19]

The Supremacy Clause protects the business and livelihood of the Villas Respondents from the harmful effects of immigration regulations that municipalities are neither competent nor authorized to enact. The Ordinance is preempted because Congress, not the City or its building inspector, selects and decides the criteria and process for admission, removal, and residence of aliens. In addition to intruding on this exclusive federal power, the Ordinance differs from the criteria and process enacted by Congress in the form of the comprehensive federal immigration scheme. Indeed, the purpose and effect of the Ordinance was to conflict with the decisions of the federal government of which the City disapproved.

The district court, the Fifth Circuit panel, and the Fifth Circuit *en banc* all correctly concluded that the Ordinance is preempted. As set forth herein, the

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[19] *See* Transcript of the Deposition of Jim Olk (Building Inspector) at 156:22-157:5, 163:20-23 (CR at 5114-15).

injunction preventing the enforcement and effectuation of the Ordinance is the proper result in light of this Court's precedent. While the Eighth Circuit anomalously reached the opposite result, the Court need not prolong this proceeding to correct that court's error. Accordingly, the Villas Respondents request that the Petition be denied.

SUMMARY OF ARGUMENT

The City asserted two grounds for granting the Petition: (1) a conflict among the Third, Fifth, and Eighth Circuits on the three questions presented in this case warrants review; and (2) the decision below "stands in direct conflict" with this Court's precedent. Neither argument justifies granting the Petition.

First, the conflict between the decisions of the Third and Eighth Circuits can and should be resolved without review of this case. Villas Respondents have contended that the Ordinance is preempted because it is: (1) an impermissible intrusion into the federal government's exclusive power over "regulation of immigration;" (2) a regulation in fields occupied by Congress, including the fields of alien removal, anti-harboring, and alien registration; and (3) in conflict with federal immigration laws. Unlike the Third and Eighth Circuits, the Fifth Circuit rendered no opinion regarding whether the Ordinance is preempted as a "regulation of immigration." Similarly, the Fifth Circuit also refrained from issuing an opinion on field preemption in contrast to the Third and Eighth Circuits, which reached opposite conclusions. With respect to conflict preemption, the City's failure to raise severance issues below leaves this case in a procedural posture that would impede this Court's ability to resolve the split between the Fifth and Eighth Circuits.

Second, contrary to the City's contention, the Fifth Circuit's decision is consistent with this Court's precedent. None of the City's five purported departures from precedent has merit: (1) the so-called *Salerno*[20] standard has been met, to the extent it even applies; (2) the Fifth Circuit's application of the presumption against preemption does not justify granting the Petition; (3) the introductory paragraph of one portion of this Court's decision in *Arizona*[21] is irrelevant to, rather than in conflict with, this case; (4) the Ordinance does not, as the City contends, "defer" to the federal government because it does not mirror any federal law, program, or policy; and (5) the Ordinance is not, as the City suggests, preempted by the Executive Branch, but rather the Ordinance is preempted by Congress' decision to vest discretionary authority in the Executive Branch.

REASONS FOR DENYING THE PETITION

A. The Conflict Between The Decisions Of The Third And Eighth Circuits Can And Should Be Resolved Without Review Of This Case.

Villas Respondents have consistently contended that the Ordinance is preempted on three grounds. *First*, the Ordinance is a "regulation of immigration" preempted by Congress' constitutionally exclusive power to regulate the subject matter. *Second*, the Ordinance is preempted because it intrudes on the congressionally occupied fields of: (1) removal of aliens, (2) anti-harboring, and (3) alien registration. *Third*, the Ordinance is preempted because it conflicts

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[20] *United States v. Salerno*, 481 U.S. 739, 745 (1987).

[21] *Arizona v. United States*, 132 S. Ct. 2492, 2507-08 (2012).

with federal laws regarding: (1) removal of aliens, (2) harboring of aliens, and (3) authorization to collect immigration information.

While the circuit courts have not been consistent in their decisions on some of those issues generally, for the reasons set forth below, review of this case is not necessary to resolve the conflicts between the circuits. Indeed, because of the way in which this case was argued and decided below, this case presents less than ideal circumstances for addressing the three preemption theories that would be at issue if the Petition were granted.

1. While there is a circuit split involving the "regulation of immigration" questions raised in this case, review is not necessary because the decision below did not contribute to the split.

Villas Respondents contend that the Ordinance is an impermissible "regulation of immigration." In *De Canas v. Bica*, this Court held that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."[22] Both before and after *De Canas*, the Court has held that this exclusive federal power involves the regulation of the admission, exclusion, and residence of aliens.[23] Indeed, the Court in *De Canas* reiterated this doctrine:

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[22] *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976) (citations omitted).

[23] *See Mathews v. Diaz*, 426 U.S. 67, 84 (1976) ("[I]t is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens."); *Graham v. Richardson*, 403 U.S. 365, 379 (1971) ("State alien residency requirements that either deny welfare benefits to

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they 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.[24]

The Ordinance is plainly a regulation of immigration. The Ordinance effectively creates a municipal admissions process by requiring an application for a "residential occupancy license."[25] Failure to comply with this admissions process prior to living in rental housing is an offense.[26] The Ordinance sets forth criteria to exclude aliens (*i.e.*, those "not lawfully present").[27] The Ordinance calls for the denial of residence and removal through mandatory eviction

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noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible."); *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419 (1948); *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government.").

[24] *De Canas*, 424 U.S. at 358 n. 6 (*quoting Takahashi*, 334 U.S. at 419) (emphasis added).

[25] *See* Ordinance § 3 (adding City Code 26-79 (B)) (App. 212-215).

[26] *See* Ordinance § 3 (adding City Code 26-79(C)(1)) (App. 215).

[27] *See* Ordinance § 3 (adding City Code 26-79(D)(1)-(4)) (App. 217-219).

proceedings.[28] In short, the Ordinance regulates admission, exclusion, and residence of aliens—the very subjects this Court has defined to be exclusive federal powers.

The City's defense to this conclusion is to rely on a single phrase in *De Canas*, to the exclusion of everything else this Court has said about the nature of a regulation of immigration, including in *De Canas* itself. In particular, the City asserts that the *italicized* portion of the following sentence is an exhaustive, complete, and comprehensive definition of "regulation of immigration":

> Although the "doctrinal foundations" of the cited cases, which generally arose under the Equal Protection Clause, *e. g.*, *Clarke v. Deckebach*, 274 U.S. 392, 47 S.Ct. 587, 71 L.Ed. 1115 (1927), "were undermined in *Takahashi*," *see In re Griffiths*, 413 U.S. 717, 718-722, 93 S.Ct. 2851, 2853-2855, 37 L.Ed.2d 910 (1973); *Graham v. Richardson*, *supra*, at 372-375, 91 S.Ct., at 1852-1853, they remain authority that, standing alone, the 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.*[29]

Villas Respondents contend that the Ordinance falls even within that summary formulation of this preemption doctrine; however, the City contends that unless an alien is forced to leave the country, it is not

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[28] *See* Ordinance § 3 (adding City Code 26-79(C)(7)) (App. 216).

[29] *De Canas*, 424 U.S. at 355.

a regulation of immigration. The two judges in the Eighth Circuit's majority opinion in *Fremont* agreed with this narrow, hyper-technical reading of *De Canas*.[30] In reaching the opposite conclusion, the Third Circuit in *Hazleton* recognized that regulation of residency is regulation of immigration.[31] Likewise, the Eleventh Circuit held that a law prohibiting contracts, including contracts for housing, was "preempted by the inherent power of the federal government to regulate immigration" because it was a "calculated policy of exclusion," which only the federal government can undertake.[32]

However, while there is a circuit split regarding whether the City's *De Canas* phrase or the entirety of this Court's precedent defines fully the scope of "regulation of immigration" preemption, that split does not involve the Fifth Circuit opinion below. Of the fifteen judges hearing the case *en banc*, six judges ruled that the Ordinance was not preempted as a

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[30] *See Keller v. City of Fremont*, 719 F.3d 931, 941 (8th Cir. 2013) ("[T]hese provisions neither determine 'who should or should not be admitted into the country,' nor do they more than marginally affect 'the conditions under which a legal entrant may remain.' Indeed, Plaintiffs' assertion is factually unsupported, as there is no record evidence that aliens denied occupancy licenses in the City will likely leave the country, as opposed to obtaining other housing in the City, renting outside the City, or relocating to other parts of the country.").

[31] *See Lozano v. City of Hazleton*, 724 F.3d 297, 315 (3d Cir. 2013) ("The housing provisions of Hazleton's ordinances are nothing more than a thinly veiled attempt to regulate residency under the guise of a regulation of rental housing. . . . States and localities have no power to regulate residency based on immigration status.").

[32] *United States v. Alabama*, 691 F.3d 1269, 1294 (11th Cir. 2012).

"regulation of immigration," four judges ruled that the Ordinance was preempted on that basis, and five judges provided no opinion on the subject. In short, there was no decision of the Fifth Circuit to "conflict" with the decision of another United States court of appeals.[33]

While the Court may wish to resolve the circuit dispute, it can do so by granting a petition for writ of certiorari in one of the cases generating the dispute. Given that the court below reached no decision on this issue, Villas Respondents would request that the Court not prolong this case in order to decide a question not decided by the court below.

2. Similarly, the Fifth Circuit did not contribute to the circuit split on the field preemption questions

Municipalities, like states, are "precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance."[34] In the Fifth Circuit, Villas Respondents argued that the Ordinance is field preempted because it intrudes on: (1) the federal scheme for the removal of aliens; (2) the federal anti-harboring regime; and (3) the federal alien registration scheme. While there is undoubtedly a circuit split on the questions raised by Villas Respondents, the Fifth Circuit did not contribute to the split and, thus, no review of this case is needed to resolve the split.

In particular, two of three judges in the Eighth Circuit rejected two of the field preemption arguments

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[33] Rules of the Supreme Court of the United States, Rule 10(a).

[34] *Arizona*, 132 S. Ct. at 2501.

raised in this case, namely field preemption based on the federal anti-harboring regime and alien registration scheme.[35] The Third Circuit, however, concluded that a similar ordinance was field preempted by the admission, removal, and residence regulations of the Immigration and Nationality Act and the harboring provisions.[36] That court also held, in the alternative, that the ordinance was preempted by the alien registration law.[37] The Fourth,[38] Eleventh,[39] and Ninth[40] Circuits have also held that local government attempts to regulate in the field of harboring are preempted.

In contrast, no majority view on field preemption emerged in the Fifth Circuit and, therefore, the decision of the Fifth Circuit cannot be said to "conflict" with the decision of another United States court of appeals.[41] Of the fifteen judges hearing the case *en banc*, seven judges ruled that the Ordinance was not field preempted, four judges ruled that there was field preemption here, and four judges provided no opinion on the subject. Specifically, the plurality opinion explicitly declined to address the field preemption

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[35] *See Fremont*, 719 F.3d at 942-43.

[36] *See Hazleton*, 724 F.3d at 315-16.

[37] *See id*. at 321-22.

[38] *See United States v. South Carolina*, 720 F.3d 518, 531 (4th Cir. 2013).

[39] *See Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1263-64 (11th Cir. 2012).

[40] *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1024-26 (9th Cir. 2013).

[41] Rules of the Supreme Court of the United States, Rule 10(a).

arguments.[42] The concurring opinions of Judges Reavley and Dennis both found the Ordinance to be field preempted. The dissenting judges rejected all the field preemption arguments as did Judge Higginson in his special concurring opinion.

Villas Respondents respectfully submit that the split in opinion on field preemption be reviewed, if at all, in one of the cases generating the circuit split, not this case where the court below reached no decision on the issue.

3. Because the City did not raise severance arguments below, this case presents a incomplete opportunity to resolve the dispute between the circuits on the question of conflict preemption.

The Fifth Circuit was unanimous that the Ordinance was at least partially conflict preempted;[43] however, the judges differed regarding which provisions were preempted and whether such provisions could be severed from the balance of the Ordinance. In contrast, the Third Circuit concluded that the ordinance at issue was preempted in its

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[42] *See* Opinion of Judge Higginson, joined by Chief Judge Stewart and Judges Davis, Southwick, and Haynes (hereinafter, the "Plurality Opinion") (App. 29 n. 17).

[43] *See* Plurality Opinion (App. 3); Concurring Opinion of Judge Reavley, joined by Judge Graves (hereinafter, the "Reavley Opinion") (App. 45); Concurring Opinion of Judge Dennis, joined by Judges Reavley, Prado, and Graves (hereinafter, the "Dennis Opinion") (App. 59); Concurring and Dissenting Opinion of Judge Owen (hereinafter, the "Owen Opinion") (App. 88); Dissenting Opinion of Judges Jones and Elrod, joined by Judges Jolly, Smith, and Clement (hereinafter, the "Jones and Elrod Opinion") (App. 145).

entirety[44] while the Eighth Circuit concluded that the ordinance there was not preempted at all.[45]

Although the decisions of the Fifth Circuit and Eighth Circuit differ on conflict preemption, the City's decision not to raise severance issues in the District Court would impede this Court's consideration of conflict preemption if the Petition were granted. In the District Court, neither Petitioner nor Respondents argued the preemption issues on a provision-by-provision basis, and the judgment enjoined enforcement of the Ordinance in its entirety.[46] Similarly, in its submissions to the Fifth Circuit, the City did not address the preemption arguments on a provision-by-provision basis or otherwise argue how or whether portions of the Ordinance could be severed in the event that parts were held to be preempted. Indeed, in its Petition, the City again made no attempt to divide the Ordinance into parts for separate consideration by this Court.

While the preemption issues in this case have been argued on an all-or-nothing basis, in order to resolve the split between the Eighth and Fifth Circuits, the Court might desire to engage in a provision-by-provision review. For instance, the Ordinance creates an offense for living in rental housing without a "residential occupancy license" while the Fremont Ordinance creates no such offense.[47] Therefore, the

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[44] *See Hazleton*, 724 F.3d at 323.

[45] *See Fremont*, 719 F.3d at 945.

[46] *See* Memorandum Opinion and Order of District Court Judge Jane J. Boyle (hereinafter, the "District Court Opinion") (App. 204).

[47] *Compare* Ordinance § 3 (adding City Code § 26-119(C)(1)) (App. 231) *with* City of Fremont Ordinance No. 5165 (the

Ordinance conflicts with the federal anti-harboring statute[48] in ways that the Fremont Ordinance might not.

If this Court were to engage in a provision-by-provision review to resolve the circuit split on conflict preemption, it would likely become involved in questions of severance. However, the City neither presented severance as a "question presented" to this Court nor argued a basis for which severance might be appropriate. Indeed, for the reasons set forth in the Plurality Opinion, the evidence strongly supports the conclusion that the city council would not have adopted the Ordinance in the absence of its intended impact on immigration.[49]

In the event the Court wishes to resolve the difference in opinion between the Fifth and Eighth Circuits on conflict preemption, the Court should review the Eighth Circuit decision rather than this case. In contrast to this case, the district court in *Fremont* considered questions of severance and enjoined the enforcement of only particular provisions of that ordinance.[50] Therefore, a review of the Eighth Circuit decision in *Fremont* would not require the Court to engage in the fact specific inquiries into legislative intent that would be required in a review of this case. Accordingly, the Court should not review this case and should deny the Petition.

"Fremont Ordinance") § 1 (adding Section 6-428(3) to the Fremont Municipal Code).

[48] *See* Plurality Opinion (App. 18-25).

[49] *See* Plurality Opinion (App. 29-33).

[50] *See Keller v. City of Fremont*, 853 F. Supp. 2d 959, 973 (D. Neb. 2012).

B. The Fifth Circuit's Decision Is Consistent With This Court's Precedent And, Therefore, The Court Should Not Grant The Petition.

In *Arizona*, this Court recognized that state law enforcement officers are, absent federal authorization, preempted from arresting aliens merely because they are removable.[51] Despite the clear direction from this Court, the City contends that, through the Ordinance, it may require the eviction and expulsion of aliens merely because they are purportedly removable. Indeed, the City contends that the Fifth Circuit's decision conflicts with this Court's prior precedents for five reasons. As set forth below, each of the City's five arguments is without merit.

1. The *Salerno* standard has been met, to the extent it even applies.

The Court in *United States v. Salerno* stated in dicta that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid."[52] Relying on *Salerno*, the City argues that it can deputize its employees as immigration enforcement agents as long as it acts in accordance with federal law

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[51] *Arizona*, 132 S. Ct. at 2507.

[52] *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008); *City of Chicago v. Morales*, 527 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* foundation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself.") (plurality opinion).

in *some* circumstances. The City is incorrect for four reasons.

First, the *Salerno* test has no application here, where Villas Respondents are challenging the ability of the City to enact the type of regulation at issue.[53] In other words, there is no set of circumstances in which the City can enact and enforce restrictions on rental housing based on immigration status because the City is preempted from enacting or enforcing *any* restrictions on rental housing based on immigration status.

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. As purported examples of how the Ordinance may be constitutionally applied, the City points to United States citizens and "legally resident aliens" who will not have their licenses revoked. That the Ordinance burdens all renters (especially aliens), not just the "illegal aliens" that the City seeks to remove, does not, as the City appears to suggest, mean that the Ordinance is not preempted.[54] The City is not

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[53] *See Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005) ("'The facial/as-applied distinction would be relevant only if we might find some applications of the statute preempted and others not.... [W]here a state statute is in direct conflict' with a federal statute 'or one of its processes,' the 'focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation.'"); District Court Opinion (App. 187 n. 19) ("While Plaintiffs dispute the applicability of *Salerno*, the Court finds that for purposes of the preemption challenge, that standard is met because Plaintiffs challenges the City's very authority to enact the Ordinance and contend the Ordinance is preempted all its applications.").

[54] In fact, one of the reasons regulation of immigration is exclusively a federal power is to protect aliens from overbearing

permitted to go hunting for aliens to expel, and it is not a defense that citizens are being hit in the cross-fire. As discussed herein, in every instance that the City would take action pursuant to the Ordinance, the City would be: (1) applying an impermissible "regulation of immigration;" (2) intruding into a field that is occupied by Congress; and (3) acting in conflict with the immigration procedures and criteria established by Congress.

Third, the *Salerno* argument is largely a back-door attempt to argue severance, which the City failed to raise in the district court.[55] The City has never argued that City Council would have adopted the Ordinance or wanted it to survive without its immigration related provisions, much less articulated how such a severance could actually be effectuated given the language of the Ordinance. In applying Texas severability law, the Plurality Opinion found that the language of the Ordinance, along with the evidence of legislative intent, establishes that the preempted provisions cannot be separated from the remainder of the Ordinance.[56] If the City were correct (which it is not) that the outcome of this case depends on whether

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state officials. *See Hines v. Davidowitz*, 312 U.S. 52, 71-4 (1941) ("When it made this addition to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against.").

[55] In the Court of Appeals, the City noted, for the first time, the existence of a severance clause but provided no argument regarding whether or what provisions could be severed.

[56] *See* Plurality Opinion App. 29-33.

some provision of the Ordinance could be applied in a constitutional manner, a merits brief in this Court is not the appropriate place for the City to *begin* to identify such provisions. Accordingly, this subject is not appropriate for a writ of certiorari, and the City appropriately chose not to list it as one of the questions presented.

Fourth, the dispute regarding whether an alien occupant is subject to criminal liability for living in rental housing after his or her "residential occupancy license" has been revoked is not an indication that this facial challenge is improper. Until *en banc* oral argument, even the *City* had recognized that it was an offense under the Ordinance for an alien to live in rental housing without a valid license.[57] Only after counsel for the City received a question during oral argument did the City take the novel position that an occupant can legally remain in rental housing after his or her license is revoked.[58] The Fifth Circuit plurality's rejection of the City's last-minute, strained interpretation of the Ordinance—that aliens can legally remain after their "residential occupancy license" is revoked—was not a failure to apply the

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[57] *See, e.g.,* Brief of Appellant The City of Farmers Branch, Texas at 6 ("Under Ordinance 2952, it is unlawful to, among other things, (1) occupy a rental unit without a valid license"); Brief of Appellant The City of Farmers Branch, Texas, on Rehearing En Banc at 9 ("By definition, an unlawfully present alien has no legal right to be present anywhere in the United States, much less to occupy a residence in the City of Farmers Branch.").

[58] *See* Ordinance § 3 (adding City Code § 26-119(C)(1)) ("It shall be an offense for a person to be an occupant of a leased or rented apartment without first obtaining a valid occupancy license permitting the person to occupy that apartment") (App. 226).

proper standard of review.[59] Indeed, as the City notes, the conclusion reached in the Plurality Opinion would not have changed even if the City's interpretation had been credited. Moreover, minor factual disputes are not grounds for granting the Petition.[60]

2. The Fifth Circuit's application of the presumption against preemption does not justify granting the Petition.

The City contends that "the second error committed by the judges in the majority below is that they did not apply the presumption against preemption." As stated in *Arizona*, "[i]n preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress."[61] After noting the scope of the presumption, the Court in *Arizona* made no further reference to the presumption in its analysis. The Plurality Opinion quotes *Arizona's* recitation of the presumption and, like this Court's opinion in *Arizona*, makes no further reference to the presumption.[62] The Fifth Circuit's mirror use of the presumption against preemption is hardly grounds for granting the Petition.

In addition, even if the Fifth Circuit had failed to properly apply the presumption against preemption, such failure would not be grounds for granting the

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[59] *See* Plurality Opinion (App. 16 n. 10).

[60] *See* Rules of the Supreme Court of the United States, Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

[61] *Arizona*, 132 S. Ct. at 2501.

[62] Plurality Opinion (App. 8).

Petition.[63] Moreover, the presumption is of limited usefulness because this case involves the regulation of immigration, which is a federal power and not a "historic police power of the States."[64] As this Court has held, the "'assumption' of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence."[65] The presumption, which "accounts for the historic presence of state law,"[66] cannot be of much assistance when a court is considering areas, such as immigration, where state law has historically been absent. Accordingly, the absence of extensive reference to the presumption against preemption in the Fifth Circuit opinions is not grounds for review at this Court.

3. The City's multipage analysis of one introductory paragraph in *Arizona* is irrelevant.

Before beginning its preemption analysis of Section 2(B) of S.B. 1070, the Court in *Arizona* identified three statutory "limits" on Arizona's status verification

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[63] *See* Rules of the Supreme Court of the United States, Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

[64] *Arizona*, 132 S. Ct. at 2498 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); *Takahashi*, 334 U.S. at 419 ("Under the Constitution the states are granted no such powers; they 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.").

[65] *United States v. Locke*, 529 U.S. 89, 108 (2000).

[66] *See Wyeth v. Levine*, 555 U.S. 555, 565 n. 3 (2009).

requirement.[67] The City points out that the Ordinance has two of those "limits"—a nondiscrimination clause and a requirement that the Ordinance be implemented in a manner "consistent with federal law regulating immigration." However, those two "limits" did not play any role in the Court's preemption analysis and have no relevance here either.[68]

4. The Ordinance does not mirror any federal law, program, or policy and, thus, does not "defer" to the federal government.

The City contends that "[a]s the district court found, Ordinance 2952 uses the precise terms and classifications of federal immigration law" and that, therefore, the Ordinance cannot be preempted. As an initial matter, the district court found precisely the opposite.[69] Moreover, the City is incorrect for at least three reasons.

First, the Ordinance is decidedly unlike the state law upheld in *Whiting*. In that case, the Court held that an Arizona statute revoking a business license of employers of "unauthorized aliens" did not conflict with federal law because the statute "closely tracks" federal law.[70] The Arizona statute literally adopted the federal statutory definition of "unauthorized

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[67] *See Arizona*, 132 S. Ct. at 2507-08.

[68] *See id*. at 2508-09.

[69] *See* District Court Opinion ("The Court concludes that the Ordinance, though grounded in federal immigration classifications, is an invalid regulation of immigration because it uses those classifications for purposes not authorized or contemplated by federal law.") (App. 193).

[70] *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011).

alien,"[71] copied the *mens rea* requirement,[72] and required state prosecutors to rely solely on federal determinations of work authorization.[73] The City's contention that the Ordinance similarly follows federal law is without merit because there is no federal "residential occupancy license" statutory scheme. Indeed, there is no federal law governing alien "eligibility for private housing" of any kind, much less a database or program for ascertaining which aliens are eligible for such housing. Accordingly, the Ordinance does not and cannot "defer" to a decision by the federal government regarding alien eligibility for housing.

Second, the Ordinance is a mechanism to expel aliens, not a mere provision for communication with the federal government. Indeed, the only time the building inspector is authorized to communicate immigration status information to the federal government is as part of the occupancy license revocation process.[74] In contrast, the provision upheld in *Arizona* required law enforcement officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."[75] A law enforcement officer's reporting to the federal government of his or her reasonable suspicion that an alien is unlawfully present is not analogous to

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[71] *See id*.

[72] *See id*. at 1982.

[73] *See id*. at 1981.

[74] *See* Ordinance §3 (adding City Code § 26-119(D)) (App. 228-30).

[75] *See* Ariz. Rev. Stat. § 11-1051(B).

a blanket request for information to use in the mandatory eviction of aliens.

Third, the City is not authorized to collect or use the information that the Ordinance requires be communicated to the federal government as part of the revocation process. Congress has authorized state and local governments to collect "proof of eligibility" only for "[s]tate and local public benefits (as defined in section 1621(c) of this title)."[76] A residential occupancy license is not one of the "state and local public benefits" for which an applicant can be required to submit information.[77] Given that 8 U.S.C. § 1373(c) obligates ICE to respond only to requests made for purposes "authorized by law," the City cannot avoid preemption based on that statute when it is not authorized to obtain the information the Ordinance requires be conveyed to the federal government.

5. The City's attempts to overcome the discretionary authority vested by Congress in the Executive Branch are without merit.

In *Arizona*, the Court held that law enforcement officials can query the federal government regarding the immigration status of particular aliens, even if the Executive Branch would prefer not to expend resources on such inquiries or aliens.[78] In its final argument, the City seeks to extend that principle by claiming it can expel aliens even if the Executive Branch would not do so. [79] However, this case involves

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[76] *See* 8 U.S.C. § 1625.

[77] *See* 8 U.S.C. § 1621(c).

[78] *See Arizona*, 132 S.Ct. at 2508.

[79] Petition at 35-38.

the Ordinance's departure from procedures and criteria required by *Congress*, not enforcement priorities of the Executive Branch.

Congress could have created a mechanical decision-making process regarding admission, removal, and residence of aliens similar to the process for alien authorization to work and access to benefits. Instead, Congress chose an adjudicatory process featuring individualized attention, hearings, and broad discretion vested in immigration officers and judges.[80] By replacing a case-by-case adjudicatory process with a simplistic "lawful"-or-"unlawful" classification, the City has chosen to decide the weighty question of whether an alien can live here in a manner that conflicts with the congressionally-chosen means. In enacting the present immigration scheme, Congress required the Executive Branch to use judgment, and the City's attempt to take that judgment away through mandatory evictions is preempted.

[80] *See* 8 U.S.C. § 1229a(a)(3).

CONCLUSION

For the reasons stated herein, a writ of certiorari should not be granted in this case. Therefore, Respondents request that the Petition be denied.

Respectfully submitted,

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