No. 10-10751

# United States Court of Appeals for the Fifth Circuit

VILLAS AT PARKSIDE PARTNERS d/b/a Villas at Parkside; LAKEVIEW AT PARKSIDE PARTNERS, LIMITED, d/b/a Lakeview at Parkside; CHATEAU RITZ PARTNERS, d/b/a Chateau de Ville; MARY MILLER SMITH,
*Plaintiffs-Appellees,*

vs.

THE CITY OF FARMERS BRANCH, TEXAS,
*Defendant-Appellant.*

---

VALENTIN REYES; ALICIA GARCIA; GINGER EDWARDS; JOSE GUADALUPE ARIAS, AIDE GARZA,
*Plaintiffs-Appellees,*

vs.

THE CITY OF FARMERS BRANCH, TEXAS,
*Defendant-Appellant.*

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, NOS. 3:08-CV-1551-B, 3:03-CV-1615, HON. JANE J. BOYLE, DISTRICT JUDGE

## BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF DEFENDANT-APPELLANT IN SUPPORT OF PETITION FOR REHEARING

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for *Amicus Curiae* Eagle Forum Education & Legal Defense Fund

## CERTIFICATE OF INTERESTED PERSONS

The case number is No. 10-10751. The case is styled as *Villas at Parkside Partners v. City of Farmers Branch, Texas*. 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 presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The City of Farmers Branch, Texas ("Farmers Branch")
*Appellant*

Bill Glancy, in his official capacity as mayor of Farmers Branch
*Defendant in Related State Court Case*

Harold Froelich, in his official capacity as mayor pro tem of Farmers Branch
*Defendant in Related State Court Case*

Michelle Holmes, in her official capacity as deputy mayor pro tem of Farmers Branch
*Defendant in Related State Court Case*

Tim Scott, in his official capacity as a member of the City Council of Farmers Branch
*Defendant in Related State Court Case*

David Koch, in his official capacity as a member of the City Council of Farmers Branch
*Defendant in Related State Court Case*

Ben Robinson, in his official capacity as a member of the City Council of Farmers Branch
*Defendant in Related State Court Case*

Villas at Parkside Partners d/b/a Villas at Parkside
*Appellee*

Lakeview at Parkside Partners, Ltd., d/b/a Lakeview at Parkside
*Appellee*

Chateau Ritz Partners d/b/a Chateau de Ville
*Appellee*

Mary Miller Smith
*Appellee*

Valentin Reyes
*Appellee*

Alicia Garcia
*Appellee*

Ginger Edwards
*Appellee*

Jose Guadalupe Arias
*Appellee*

Aide Garza
*Appellee*

Guillermo Ramos
*Plaintiff in Related State Court Case*

Eagle Forum Education & Legal Defense Fund
*Amicus Curiae*

P. Michael Jung; Scott Shanes; William C. Dowdy III; and Strasburger & Price, LLP
*Counsel for Appellant*

Kris W. Kobach
*Counsel for Appellant*

William A. Brewer III; James S. Renard; Michael L. Smith; C. Dunham Biles; and Bickel & Brewer Storefront, PLLC

*Counsel for Appellees 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*

Nina Perales; and Mexican American Legal Defense and Educational Fund
*Counsel for Appellees Valentin Reyes, Alicia Garcia, Ginger Edwards, Jose Guadalupe Arias, and Aide Garza*

Lisa Graybill; and American Civil Liberties Union Foundation of Texas
*Counsel for Appellees Valentin Reyes, Alicia Garcia, Ginger Edwards, Jose Guadalupe Arias, and Aide Garza*

Omar C. Jadwat; Lucas Guttentag; Jennifer Chang Newell; and American Civil Liberties Union Foundation Immigrants' Rights Project
*Counsel for Appellees Valentin Reyes, Alicia Garcia, Ginger Edwards, Jose Guadalupe Arias, and Aide Garza*

David Broiles; and Cagle and Broiles
*Counsel for Appellees Valentin Reyes, Alicia Garcia, Ginger Edwards, Jose Guadalupe Arias, and Aide Garza*

Lawrence J. Joseph
*Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund*

Dated: May 2, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund*

# TABLE OF CONTENTS

Certificate of Interested Persons ..... i

Table of Contents ..... iv

Table of Authorities ..... v

Identity, Interest and Authority to File ..... 1

Constitutional Background ..... 1

Statutory Background ..... 3

Summary of Argument ..... 5

Argument ..... 6

I. The Presumption against Preemption Applies ..... 6

II. Neither INA Nor Dormant Federal Power over Immigration Preempt the Ordinance ..... 10

A. The Panel Majority's Conflict-Preemption Analysis Is Too Broad ..... 11

B. The Panel Majority Confuses Available Federal Power with Exercised Federal Power ..... 14

Conclusion ..... 15

# TABLE OF AUTHORITIES

## CASES

*Altria Group, Inc. v. Good,* 555 U.S. 70 (2008) .......... 7

*Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968 (2011) .......... 12, 13, 15

*Cipollone v. Liggett Group,* 505 U.S. 504 (1992) .......... 2

*CSX Transp., Inc. v. Easterwood,* 507 U.S. 658 (1993) .......... 2

*DeCanas v. Bica,* 424 U.S. 351 (1976) .......... 2, 7, 9, 13, 15

*F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307 (1993) .......... 8

*Geier v. Am. Honda Motor Co.,* 529 U.S. 861 (2000) .......... 11

*Harisiades v. Shaughnessy,* 342 U.S. 580 (1952) .......... 14

*Jacobson v. Massachusetts,* 197 U.S. 11 (1905) .......... 9

*Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) .......... 6

*Morales v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992) .......... 2

*Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947) .......... 2, 6

*Securities Industry Ass'n v. Board of Governors of Federal Reserve System,* 468 U.S. 137 (1984) .......... 11

*Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) .......... 9

*U.S. v. Bass*, 404 U.S. 336 (1971) .......... 6

*U.S. v. Locke,* 529 U.S. 89 (2000) .......... 8

*U.S. v. Lopez*, 514 U.S. 549 (1995) .......... 12

*U.S. v. Morrison,* 529 U.S. 598 (2000) .......... 9

*Wyeth v. Levine,* 555 U.S. 555 (2009) .......... 6, 8, 12-13

## STATUTES

U.S. CONST. art. I, §8, cl. 4 .......... 2

U.S. CONST. art. VI, cl. 2 .......... 1

Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 .......... 3, 5-6, 8, 10-11, 13-15

8 U.S.C. §1252c(a) ........ 3
8 U.S.C. §1324a(h)(2) ........ 4
8 U.S.C. §1357(g)(10) ........ 3, 13
8 U.S.C. §1373 ........ 3
8 U.S.C. §1373(a) ........ 13
8 U.S.C. §1373(b) ........ 13
8 U.S.C. §1373(c) ........ 4, 13
8 U.S.C. §1644 ........ 3
Immigration Reform & Control Act ("IRCA"), PUB. L. NO. 99-603, 100 Stat. 3359 (1986) ........ 3-4, 14-15
City of Farmers Branch Ordinance 2952 ........ 4-5, 7-8, 10-11, 13, 15
City of Farmers Branch Code, §26-119(D)(3) ........ 13
City of Farmers Branch Code, §26-119(D)(4) ........ 13

**RULES AND REGULATIONS**

FED. R. APP. P. 29(c)(5), ........ 1

## IDENTITY, INTEREST AND AUTHORITY TO FILE

*Amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Founded in 1981, Eagle Forum has consistently defended American sovereignty before the state and federal legislatures and courts. Eagle Forum promotes adherence to the U.S. Constitution and consistently has opposed unlawful behavior, including illegal entry into and residence in the United States. Eagle Forum supports enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

## CONSTITUTIONAL BACKGROUND

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified

---

[1] By analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

three ways in which federal law can preempt state law: express preemption, field preemption, and conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). Courts rely on two presumptions to assess preemption. First, they presume that a federal statute's plain wording "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993). Under that analysis, the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992). Second, under *Santa Fe Elevator* and its progeny, courts apply a presumption against preemption for federal legislation in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Under U.S. CONST. art. I, §8, cl. 4, Congress has plenary power to regulate immigration. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica,* 424 U.S. 351, 354 (1976), the Supreme Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355 (mere "fact that aliens

are the subject of a state statute does not render it a regulation of immigration").

## STATUTORY BACKGROUND

In addition to setting federal immigration policies, the federal Immigration and Naturalization Act ("INA") includes various roles for state and local immigration enforcement. *See, e.g.,* 8 U.S.C. §§1252c(a) ("[n]otwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual" under certain circumstances), 1357(g)(10) (making clear that nothing requires prior federal agreements either to communicate with the federal government about immigration status or "otherwise to cooperate … in the identification, apprehension, detention or removal" of illegal aliens). In addition, INA prohibits all levels of government from restricting government entities' communications with the federal government on individuals' immigration status and requires the federal government to respond to such government inquiries. 8 U.S.C. §§1373, 1644.

The Immigration Reform & Control Act of 1986 ("IRCA") amended the INA to provide federal civil and criminal procedures and sanctions

for employing or recruiting "unauthorized aliens" and expressly preempts state and local employer-based sanctions for those activities "other than through licensing and similar laws." 8 U.S.C. §1324a(h)(2). Although IRCA addressed its preemptive scope with respect to *employer*-based sanctions, nothing in the law addressed its preemptive scope with respect to employee-based sanctions or sanctions based on other activities such as the purchase or rental of real property.

The City of Farmers Branch (the "City") adopted Ordinance 2952 (the "Ordinance") to require adult tenants in rental properties to obtain residential occupancy licenses. In addition to basic information (*e.g.*, name, address, date of birth), the form also asks whether applicants are U.S. citizens or nationals or, if not, to provide a federal identification number to establish lawful presence here or to declare that the applicant does not know the number. For the non-U.S. citizens and nationals, the City then contacts the federal government pursuant to 8 U.S.C. §1373(c) to verify that the applicant is not unlawfully present. If the result is negative, the City issues a deficiency notice and allows the applicant sixty days to correct the federal government's records before re-querying the federal government pursuant to 8 U.S.C. §1373(c). If

the result remains negative, the City revokes the residential occupancy license and sends copies to the applicant and landlord.

## SUMMARY OF ARGUMENT

The panel majority misapplied the presumption against preemption by (1) mischaracterizing the Ordinance as a regulation of federal immigration, and (2) failing to recognize that the presumption accounts for the presence of state and local government in the field, not the presence of the federal government in the field (Section I). With a presumption properly applied here, the Ordinance plainly is consistent with INA, as interpreted under the presumption against preemption.

Even without the presumption, however, the panel majority read too much leeway into the "prevent-or-frustrate" prong of the conflict-preemption analysis (Section II.A). By following the federal standards for classifying immigration status and then acting on that information in a sphere that INA wholly fails to address, the City plainly did not conflict with any actual INA objectives. In parts of its decision, the panel majority suggests that local measures like the Ordinance intrude into the need for a "national solution," backed by the federal interests in foreign relations and war powers, well beyond the immigration issues

raised by INA. Given that INA does not reach these issues, this field preemption of any immigration-related issues cannot stand because – if accepted – it would render numerous Supreme Court decisions wrongly decided (Section II.B)

## ARGUMENT

### I. THE PRESUMPTION AGAINST PREEMPTION APPLIES

In all fields – and especially ones traditionally occupied by state and local government – courts apply a presumption against preemption. *Wyeth v. Levine,* 555 U.S. 555, 565 (2009); *Santa Fe Elevator,* 331 U.S. at 230; *cf. U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). When this "presumption against preemption" applies, courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Santa Fe Elevator,* 331 U.S. at 230 (emphasis added); *Wyeth,* 555 U.S. at 565. Even if a court finds that Congress preempted *some* state action, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors

pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotations omitted). The panel majority made two key errors in rejecting the presumption against preemption.

First, the panel majority improperly deems the Ordinance a regulation of immigration, Slip Op. 12-13, 16, rather than what it plainly is: an exercise of the local police power to protect the health and safety of the community. *See DeCanas,* 424 U.S. at 355 ("regulation of immigration … 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"). Even in the immigration context, federal laws are not preemptive absent "persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *DeCanas,* 424 U.S. at 356. The Ordinance says nothing about who may enter or remain in the U.S., and federal law similarly does not address who may rent real property in any particular city. Although the panel majority makes much of the fact that the City acted without satisfactory study, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical

data." *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993). Cities across the country know the flashpoints are for services, expenses, and dangers in their communities. Except with respect to certain employer-based sanctions, the INA says nothing to the contrary.

Second, the panel majority relied on language from *U.S. v. Locke* to reject the presumption against preemption for state or local regulation "in an area where there has been a history of significant federal presence." Slip Op. at 9 (*quoting U.S. v. Locke,* 529 U.S. 89, 90 (2000)). The panel majority then framed its analysis as choosing a "traditional state regulation, entitled to a presumption of validity" versus "no benefit from the presumption [for] … attempt[ing] to legislate in an area of significant federal concern." *Id.* Because it went on to deem the Ordinance a regulation of immigration, the panel majority therefore rejected the presumption against preemption.

In fact, however, the presumption applies in all areas, and federal courts "rely on [it] because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth,* 555 U.S. at 565 n.3 (internal quotations omitted). Thus, "[t]he presumption …

accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* If states occupied the field historically, the presumption plainly applies.

This dispute concerns areas of traditional local concern under the police power, including public safety, negative impacts on employment, education, and the local fisc. *DeCanas,* 424 U.S. at 354-55. The authority to combat illegality is at the core of traditional police powers: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself." *Jacobson v. Massachusetts,* 197 U.S. 11, 27 (1905). Suppressing crime "has always been the prime object of the States' police power." *U.S. v. Morrison,* 529 U.S. 598, 615 (2000); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873) (states have traditionally enjoyed great latitude under their police powers to legislate as "to the protection of the lives, limbs, health, comfort, and quiet of all persons") (interior quotations omitted). Plaintiffs would deny the City the "right to protect itself" against not only the unlawful taking up of residency and all of the resulting economic ills but also the

rampant criminality associated with the illegal aliens.[2] The lawlessness that follows is predictable and, if this Court recognizes a community's "right to protect itself," entirely preventable.

If the presumption against preemption applies, the preemption case vanishes because the INA is entirely silent on the City's means of exercising its police power. That silence and the substantive issues raised in the next section leave only one possible conclusion: Congress did not intend the INA and its amendments to *address,* much less to preempt, local police power on which the City relies here.

## II. NEITHER INA NOR DORMANT FEDERAL POWER OVER IMMIGRATION PREEMPT THE ORDINANCE

With a presumption against preemption, the Ordinance plainly is consistent with INA, which nowhere even addresses the subjects that the Ordinance regulates. Even without the presumption, however, the panel majority's conflict-preemption analysis finds conflict with policy preferences, not INA provisions. In suggesting that the local problems

---

[2] The panel majority suggests that most illegal aliens obey the law. Slip Op. at 22-23. Even if the illegal-alien community in the City's part of Texas does not involve the drug crimes, human smuggling, and related crimes of other illegal-alien communities, these aliens work illegally, to the extent that they need to work to support themselves.

that the Ordinance addresses are simply a manifestation of a national problem that requires a national solution, the panel implies a field preemption that would overturn numerous Supreme Court decisions.

### A. **The Panel Majority's Conflict-Preemption Analysis Is Too Broad**

Conflict preemption includes both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because nothing prevents compliance with both INA and the Ordinance, Plaintiffs necessarily invoke the "prevent-or-frustrate" prong. As Judge Elrod recognized in her dissent, the panel majority's conflict-preemption analysis appears to allow judicial policy choices to inform the process of interpreting acts of Congress. Slip Op. at 40. This creates the real danger – from a separation-of-powers perspective – of the Judiciary's "sit[ting] as a super-legislature, and creat[ing] statutory distinctions where none were intended." *Securities Industry Ass'n v. Board of Governors of Federal Reserve System,* 468 U.S. 137, 153 (1984).

*Amicus* Eagle Forum respectfully submits that this prevent-or-

frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth,* 555 U.S. at 583 (characterizing this prong as "'purposes and objectives' pre-emption") (Thomas, J., concurring). The conflict-preemption analysis cannot be "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" without "undercut[ting] the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1985 (2011) (interior quotations omitted).

Instead, federalism's central tenet permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

*U.S. v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to

reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth,* 555 U.S. at 583 (interior quotations and citations omitted) (Thomas, J., concurring). Absent express preemption, field preemption, or sufficient actual conflict, the states retain their role.

Notwithstanding federal primacy in *regulating immigration,* mere overlap with immigration does not necessarily displace state actions in areas of state concern. *DeCanas,* 424 U.S.at 354-55 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). In any event, the Ordinance tracks the federal guidelines for determining immigration status. Ordinance, §26-119(D)(3)-(4). Indeed, Congress itself authorized state and local government to make inquiries to the federal government on these very questions. 8 U.S.C. §§1357(g)(10), 1373(a)-(c). Moreover, applying those congressionally authorized inquiries cannot frustrate congressional purpose in INA because the Supremacy Clause does not require *identical* standards. It is enough for state law to "*closely* track[] [federal law] in all *material* respects." *Whiting,* 131 S.Ct. at 1981 (emphasis added). In areas of dual federal-state concern and *a fortiori* in ones of

traditional state and local concern, Plaintiffs' arguments do not rise to the level of preemption.

### B. <u>The Panel Majority Confuses Available Federal Power with Exercised Federal Power</u>

The panel majority finds that the federal interest in immigration is so strong – owing to its being "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," Slip Op. at 23 (*quoting Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952) – that the "national problem … need[s] a national solution." *Id.* Significantly, *Harisiades* involved the federal judiciary's declining to review federal deportation proceedings involving Communist Party members during the height of the Cold War. Whether that separation of powers between branches of the federal government was appropriate then or now is an entirely different question under our Federalist structure from whether various federal enactments displace the separate sovereignty of Texas and its political subdivisions.

While a national solution is plainly within the federal power to assert, Congress has not asserted that authority in INA or IRCA. Moreover, the Executive Branch has not enforced its existing powers

with any particular vigor. Those twin abdications leave state and local government to deal with the very real implications of illegal aliens, however desirable a "national solution" might be. At bottom, the panel majority relies on the constitutional *authority* of Congress – not on particular congressional enactments like INA or IRCA – to find preemption. In essence, the majority's theory is that the constitutional authority of Congress over immigration – whether or not that authority is exercised – "field preempts" the City's Ordinance. Under that theory, however, the state laws at issue in *DeCanas* and *Whiting* would have been preempted, as well. That, of course, is not the law.

The panel majority's "national problem" is a collection of "state problems" and "local problems." Unless and until Congress enacts a national solution, nothing preempts the City from using its police power to solve its local problems.

## CONCLUSION

For the foregoing reasons and those stated in Farmers Branch's petition, the petition for rehearing *en banc* should be granted.

Dated: May 2, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
1250 Connecticut Ave. NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of May, 2012, I electronically filed the foregoing amicus brief as an exhibit to the accompanying motion for leave to file the brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit via the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that I have mailed the foregoing document by Priority U.S. Mail, postage prepaid, on the following participants in the case who are not registered CM/ECF users:

R. David Broiles
2400 Indian Cove
Fort Worth, TX 76108

/s/ Lawrence J. Joseph
Lawrence J. Joseph

**CERTIFICATE REGARDING ELECTRONIC SUBMISSION**

I hereby certify that: (1) required privacy redactions have been made; (2) the electronic submission of this document 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.

Dated: May 2, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund*

# CERTIFICATE OF COMPLIANCE

No. 10-10751, *Villas at Parkside Partners v. City of Farmers Branch, Texas*.

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

   This brief contains fifteen pages, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

   This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14-point font.

Dated: May 2, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund*