Nos. 12-1702, 12-1705, 12-1708

United States Court of Appeals for the Eighth Circuit

FRED H. KELLER, JR., *ET AL.*, *Plaintiffs-Appellants,*

vs.

CITY OF FREMONT, *ET AL.*, *Defendants-Appellees.*

MARIO MARTINEZ, JR., *ET AL.*, *Plaintiffs-Appellants,*

vs.

CITY OF FREMONT, *ET AL.*, *Defendants-Appellees.*

CITY OF FREMONT, *ET AL.*, *Defendants-Appellants,*

vs.

MARIO MARTINEZ, JR., *ET AL.*, *Plaintiffs-Appellees.*

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, CIV. NOS. 8:10-00270, 4:10-3140, HON. LAURIE CAMP SMITH, DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF DEFENDANTS-APPELLEES AND DEFENDANTS-CROSS-APPELLANTS IN SUPPORT OF AFFIRMANCE IN NOS. 12-1702 AND 12-1708 AND REVERSAL IN NO. 12-1705

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: July 17, 2012

Respectfully submitted,

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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.

STATEMENT OF THE CASE

In these consolidated actions, two plaintiff groups – the Martinez and Keller groups (collectively, "Plaintiffs") – seek to enjoin the Ordinance 5165 (the "Ordinance") of the City of Fremont, Nebraska (the "City"). Plaintiffs claim that the Ordinance is preempted by the Immigration and Naturalization Act ("INA"), the Immigration Reform & Control Act of 1986 ("IRCA"), and the Fair Housing

[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.

Act ("FHA"). The City adopted the Ordinance to remedy the negative local impacts of illegal immigration (*e.g.*, reducing crime, conserving the public fisc, preserving jobs and wage rates for lawful residents). *See Keller v. City of Fremont*, 2012 WL 537527, at 11 (D. Neb.).

The Ordinance adopts a prospective licensing regime, under which anyone seeking to occupy rental housing must obtain an occupancy license. Although the Ordinance does not penalize occupants, landlords must retain a copy of licenses and may not permit occupation without a license. As part of the application, all prospective tenants (*i.e.*, citizens and aliens) must identify their country of citizenship. The City may then verify any alien's information with the federal government under 8 U.S.C. §1373(c). For aliens that the federal government indicates as unlawfully present, the City advises the landlord and tenant and may request federal confirmation after sixty days. If the immigration status again indicates unlawful presence (*i.e.*, if erroneous information has not been corrected), the City may revoke the license after 45 days, with judicial review tolling the revocation if review is sought.

The District Court upheld the Ordinance's collecting information, but enjoined the license-revocation provisions. This Court should uphold the Ordinance in its entirety by affirming in the Plaintiffs' appeals (Nos. 12-1702 and 12-1708) and reversing in the City's cross appeal (No. 12-1705).

SUMMARY OF ARGUMENT

Plaintiffs lack standing because (1) future tenancies that might (or might not) arise are insufficiently imminent, (2) although plaintiffs must establish standing *on the merits* to obtain merits relief, the District Court addressed only generalities, relevant (if at all) to the motion-to-dismiss phase, and (3) landlords cannot assert the rights of hypothetical future tenants (Section I).

On the immigration merits, the Constitution itself does not preempt the Ordinance because state and local government retain a role vis-à-vis illegal immigration (Section II.A), unless Congress expressly or impliedly displaces that role (Section II.B). Here, federal law preserves state and local authority with respect both to harboring and to determining immigration status using federal standards (Section II.B), which is reinforced by the presumption against preemption (Section II.B.1). Consequently, Plaintiffs cannot establish express, conflict, or field preemption (Sections II.A, II.A.2, II.A.3). Similarly, federal housing law does not preempt the City's Ordinance (Section III.A), the City did not intentionally discriminate (Section III.B), and the Ordinance would not violate FHA standards even if the FHA allowed disparate-impact claims (Section III.C).

ARGUMENT

I. THE PLAINTIFFS LACK STANDING

Under Article III, federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record" *Renne v. Geary*, 501 U.S. 312,

316 (1991), and jurisdiction cannot be conferred by consent or waiver. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Although standing "is the threshold question in every federal case, determining the power of the court to entertain the suit," *Warth v. Seldin*, 422 U.S. 490, 499 (1975), the District Court did not explain its reasoning for finding standing: "the Court … is satisfied that it has Article III subject matter jurisdiction in this case, and that each Plaintiff has standing to assert the claims presented by that Plaintiff." *Keller*, 2012 WL 537527, at 3 n.2. The District Court was correct in stating that each plaintiff must have standing for each form of relief that a plaintiff requests, *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("standing is not dispensed in gross"), but the District Court's analysis falls short on several fronts.

First, as the City explains (City Br. at 14-18), the Ordinance applies prospectively to new tenancies, not retrospectively to existing tenancies. As such, current tenants will not come under the Ordinance until they enter a new tenancy within the City. That may never happen, and it certainly lacks the imminence required by Article III. *Id.* Although the City briefs this issue well, *amicus* Eagle Forum respectfully calls an additional on-point case to the Court's attention:

> And the affiants' profession of an "inten[t]" to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough. Such "some day" intentions – without any description of concrete plans, or indeed even any

> specification of *when* the some day will be – do not support a finding of the "actual or imminent" injury that our cases require.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (emphasis in original). Plaintiffs here lack even the minimal specificity that was insufficient in *Defenders of Wildlife.* They might some day need to enter new tenancies, but they might not. *A fortiori* under *Defenders of Wildlife,* these "some day" hypotheticals cannot satisfy Article III.

Second, the summary fashion in which the District Court broadly described Plaintiffs (*e.g.*, landlord, tenant, immigration status) before announcing that court's satisfaction on standing, *Keller,* 2012 WL 537527, at 3 & n.2, suggests that the District Court conflated standing at the motion-to-dismiss stage with standing on the merits. The party invoking federal jurisdiction not only bears the burden of proof at each step of the standing analysis, *Defenders of Wildlife*, 504 U.S. at 561, but also must establish standing *on the merits* to support merits relief. *Summers v. Earth Island Institute*, 555 U.S. 488, 497-98 (2009). Thus, it is not enough that Plaintiffs' allegations support standing and that Plaintiffs represent broad classes of people or entities that *might have standing.* At this stage, Plaintiffs must have established *their* standing.

Finally, for a plaintiff to assert the rights of absent third parties, *jus tertii* (third-party) standing prudentially requires that the plaintiff have its own

constitutional standing and a "close" relationship with the absent third parties and that a sufficient "hindrance" keeps the absent third parties from protecting their own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio*, 499 U.S. 400, 411 (1991)). It is not clear whether the District Court found that any of the Plaintiffs could assert the rights of third parties (*e.g.*, landlords for tenants); but they cannot, at least not for the prospective tenancies relevant here, because the Supreme Court foreclosed basing third-party standing on the "*hypothetical* … relationship posited here." *Tesmer*, 543 U.S. at 131 (emphasis in original). Thus, each party must assert his or its own injuries.

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

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three ways in which federal law can preempt state or local laws: express preemption, "field" preemption, and implied or conflict preemption. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). In evaluating preemption claims, courts rely on two presumptions to assess preemption claims. First, preemption analysis begins with federal statutes' plain wording, which "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, particularly in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The federal government's abdication of its duties with respect to immigration and the resulting negative impacts of illegal aliens across the Nation have brought several preemption-related issues to the fore as states and localities attempt to protect themselves.

In the field of immigration, "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). Two recent Supreme Court decisions, however, are mixed on states' power to act in that field. In *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1985 (2011), the Supreme Court rejected preemption challenges to state-law licensing sanctions under 8 U.S.C. §1324a(h)(2) against those who employ illegal aliens and a state-law mandate that employers use the federal E-Verify program, notwithstanding that program's voluntary nature under federal law. In *Arizona v. U.S.*, 132 S.Ct. 2492 (2012), the Supreme Court relied on field preemption to invalidate state-law crimes for failing to carry federally required registration documents and relied on conflict preemption to invalidate two state-law provisions: (1) a state-law crimes for illegal aliens' knowingly applying for work or working, and (2) state-law

authorization for warrantless arrests of illegal aliens reasonably to be removable from the United States. Although the State of Arizona prevailed sweepingly in *Whiting* and only partially in *Arizona,* both decisions support the City here.

A. The Constitution Does Not Preempt the Ordinance

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"). As long as the Ordinance is not a "regulation of immigration," *see infra,* Plaintiffs cannot rely on the unexercised constitutional *authority* of Congress – as distinct from particular congressional enactments like INA or IRCA – to find preemption. If unexercised authority "field preempted" the Ordinance, the state laws at issue in *DeCanas* and *Whiting* would have been preempted, as well.

To the contrary, 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 v. Levine*, 555 U.S. 555, 583 (2009) (interior quotations and citations omitted) (Thomas, J., concurring). Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role. Unless and until Congress enacts a national solution, therefore, nothing in the Constitution itself preempts the City from using its police power to solve its local problems.

Far from a "regulation of immigration," the Ordinance merely applies 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") (emphasis added). For *illegal* aliens,[2] states and

[2] Precedents that address state regulation of *legal* aliens – while perhaps not always entirely *irrelevant* – are not very compelling: "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" *Plyler*, 457 U.S. at 223.

localities may address impacts within their borders:

> Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.

Plyler, 457 U.S. at 229. While it may discourage illegal aliens from remaining *in the City of Fremont*, the Ordinance is indifferent to their relocating *within the U.S.*

B. The INA Does Not Preempt the Ordinance

In this Circuit, "provid[ing] an apartment for the undocumented aliens" falls under the federal crime of harboring. *U.S. v. Tipton*, 518 F.3d 591, 594 (8th Cir. 2008). Although the Ordinance plainly addresses that harboring issue, Plaintiffs cite *DeCanas*, 424 U.S. at 354-55, to argue that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." Martinez Br. at 24. That point is as undeniably true as it is undeniably irrelevant. The question is not whether Congress *could have* preempted the Ordinance. The question is *whether* Congress *did* preempt the Ordinance.

As a general rule under the federalist "system of dual sovereignty," "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990). In fields like immigration, however, where Congress has "superior authority in this field," Congress can displace the states' dual sovereignty

by "enact[ing] a complete scheme of regulation" such that "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines v. Davidowitz,* 312 U.S. 52, 66-67 (1941).[3] As indicated below, the INA does not displace state and local police power over housing and related issues.

The INA includes various roles for state and local enforcement, both with respect to harboring itself, 8 U.S.C. §1324(c), and with respect to determining immigration status.[4] 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. Moreover, the civil component of the Racketeer Influenced and Corrupt Organizations Act ("RICO") allows *private*

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[3] The *Arizona* majority recently deemed *Hines* a field-preemption case, *Arizona*, 132 S.Ct. at __, 2012 WL 2368661, at 9, but "the categories of preemption are not 'rigidly distinct,' [and] 'field pre-emption may be understood as a species of conflict pre-emption.'" *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000) (*quoting English v. Gen'l Elec. Co.,* 496 U.S. 72, 79, n.5 (1990)).

[4] *See* 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 for state or local government to communicate with, or report to, the federal government regarding illegal aliens and "otherwise to cooperate … in the identification, apprehension, detention or removal" of illegal aliens).

enforcement with respect to harboring, 18 U.S.C. §1961(1)(F) (listing harboring, assisting, and importing illegal aliens under INA §§274, 277, and 278 as predicate offenses for RICO), which in turn allows enforcement in *state* court. *Tafflin*, 493 U.S. at 458 ("state courts have concurrent jurisdiction over civil RICO claims"). This subsequent enactment is both inconsistent with claims of federal preemption and "entitled to great weight in statutory construction" of the congressional intent in the original enactment. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969). In short, nothing in INA *expressly* preempts the Ordinance.

To prevail, then, Plaintiffs require conflict or field preemption. Before addressing those two possibilities, *amicus* Eagle Forum first addresses the threshold presumption against preemption.[5]

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[5] Another threshold issue is Plaintiffs' undue reliance on two procedurally infirm, extra-circuit decisions. Martinez Br. at 23-24 (*citing Lozano v. City of Hazleton*, 620 F.3d 170, 210 (3d Cir. 2010) *and Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802 (5th Cir. 2012)). As the City explains, the Supreme Court vacated *Hazleton*, and the Fifth Circuit ordered the *Farmers Branch* plaintiffs to respond to the city's petition for rehearing. City Br. at 25-28. More fundamentally, deferring too readily to extra-circuit decisions would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984), thereby "depriv[ing] the Supreme Court of the benefit of decisions from several courts of appeals." *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (*citing Mendoza*, 464 U.S. at 160); *Atchison, T. & S.F. Ry. v. Pena*, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring) (conflicting decisions "among the circuits ... [lend] the Supreme Court [the] benefit of additional legal views that increase the probability of a correct disposition"). Accordingly, this Court should chart its own course.

1. 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*, 555 U.S. at 565; *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"); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (interior quotations omitted, alteration in original). When this "presumption against preemption" applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator*, 331 U.S. at 230; *Wyeth*, 555 U.S. at 565.[6] This presumption shields the Ordinance from preemption.

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[6] Plaintiffs cannot rely on decisions under the National Labor Relations Act ("NLRA") to address the presumption against preemption. Contrary to the presumption *against* preemption at issue here, NLRA cases rely on "a presumption *of federal pre-emption*" derived from the National Labor Relations Board's primary jurisdiction over NLRA cases. *Brown v. Hotel & Restaurant Employees & Bartenders Intern. Union Local 54*, 468 U.S. 491, 502 (1984) (emphasis added). To invoke NLRB cases would "confuse[] pre-emption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the National Labor Relations Board." *Id.* While Congress undoubtedly *could have* written immigration or housing law as preemptively as it wrote the NLRA, Congress did not do so. If it had, *DeCanas* (for one) would have come out differently: "absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important

Moreover, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of 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 District Court correctly found the presumption to apply, but erred in applying it too narrowly.

This dispute concerns areas of traditional local concern under the police power, including public safety, negative impacts on employment, education, housing, and the local fisc. *DeCanas*, 424 U.S. at 354-55. The Ordinance's relevant provisions concern licensing real property, an area in which states have "traditionally held the reins." For all but the wealthiest, the ability to work for pay is even more central to residency than the ability to rent a home. Since the presumption against preemption applies to the former (*i.e.*, employment) under *DeCanas*, 424 U.S. at 357-58, it plainly applies here.

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).

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decision." *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 128 (1985). This Court cannot saddle the City with NLRA-style preemption.

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

Plaintiffs rely on *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." Martinez Br. at 45 (*quoting U.S. v. Locke*, 529 U.S. 89, 90 (2000)). 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 have occupied the field, the presumption plainly applies.

If the presumption applies, Plaintiffs' preemption case vanishes because the

INA is both entirely silent on the City's chosen means of exercising its police power and, in all material resects, insufficiently comprehensive to infer congressional intent to exclude state and local action. That silence and the substantive issues in the next two sections leave only one possible conclusion: Congress did not intend the INA or IRCA to preempt the local police power on which the City relies.

2. Congress Has Not Conflict-Preempted Local Police-Power Regulation of Housing

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 federal immigration law and the Ordinance, Plaintiffs necessarily invoke the "prevent-or-frustrate" prong.

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." *Whiting*, 131 S.Ct. at 1985 (interior quotations omitted). Such a freewheeling inquiry would create 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).

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"). As the Supreme Court held in *Arizona*, however, "[c]urrent federal law is substantially different from the regime that prevailed when *DeCanas* was decided." *Arizona*, 132 S.Ct. at __, 2012 WL 2368661, at 11 (rejecting employee-based criminal sanctions). The question here is whether the *Arizona* difference with respect to employee-based crimes also encompasses the housing issue presented here. It does not.

Prior to IRCA's amendments, INA would have allowed both employee- and employer-based sanctions under *DeCanas*. According to *Arizona*, however, Congress considered and rejected employee-based sanctions in IRCA's

amendments. *See Arizona*, 132 S.Ct. at __, 2012 WL 2368661, at 11-12 (citing legislative history). The Court relied on "the text, structure, and history of IRCA" to conclude "that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment." *Id.* at 12. Significantly, IRCA did not discuss the housing issue. Because the presumption of preemption continues to apply, this Court must presume that Congress did not intend to displace state and local authority over housing *sub silentio*, *Santa Fe Elevator*, 331 U.S. at 230, particularly while Congress addressed employment-related issues expressly. To read *Arizona* to extend beyond employment would unmoor that decision from its authority and reasoning and reach beyond housing to any manner of licensing, registration, and taxing authority.

The housing issues aside, the City's use of federal immigration standards tracks the federal guidelines for determining immigration status within the INA-authorized mechanisms for inquiries to the federal government. 8 U.S.C. §§1357(g)(10), 1373(a)-(c). Obviously, applying those congressionally authorized inquires 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.

3. Congress Has Not Field-Preempted Local Police-Power Regulation of Housing

Field preemption precludes state and local regulation of conduct in a field that Congress – acting within its proper authority – has carved out for exclusive federal governance. *Gade v. Nat'l Solid Wastes Management Ass'n,* 505 U.S. 88, 115 (1992). Similarly, "an authoritative federal determination that the area is best left *un*regulated … would have as much pre-emptive force as a decision *to* regulate." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 66 (2002) (emphasis in original). Neither situation applies here.

Typically, to foreclose state and local regulation, courts require that Congress make an affirmative statement against regulation, not that Congress merely refrain from regulating. For example, *Geier* involved "an affirmative policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Sprietsma,* 537 U.S. at 67 (interior quotations omitted, emphasis in original); *Rowe v. N.H. Motor Trans. Ass'n,* 552 U.S. 364, 367-68, 373 (2008) (Airline Deregulation Act intended "to leave such decisions, where federally unregulated, to the competitive marketplace" to enable "maximum reliance on competitive market forces"). But courts also can "infer" field preemption "from a framework of regulation so pervasive ... that Congress left no room for the States to supplement it or where there is a federal interest ... so dominant that the federal system will be

assumed to preclude enforcement of state laws on the same subject." *Arizona*, 132 S.Ct. at __, 2012 WL 2368661, at 7 (internal quotations omitted, alterations in original). In place of an ostensibly door-shutting congressional determination, however, federal law includes door-opening savings clauses and even private enforcement.

Specifically, INA provides for state and local government to coordinate with the federal government on immigration status, *see, e.g.*, 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c), and preserves enforcement authority with respect to harboring. 8 U.S.C. §1324(c). As indicated, Civil RICO even allows *private* enforcement with respect to harboring and related immigration issues. *See* 18 U.S.C. §§1961(1)(F), 1964(c). As long as the Ordinance does not constitute "alien registration" under *Arizona*, federal law cannot *field preempt* state and local involvement.

Unlike the Ordinance – which applies to *all* City renters, not only to aliens – the field-preempted alien registration regimes in *Hines* and *Arizona* applied only to aliens and related to the specific issue of alien registration (*e.g.*, carrying registration documents). *See Hines*, 312 U.S. at 65-66; *Arizona*, 132 S.Ct. at __, 2012 WL 2368661, at 8-9. The legislative end in those cases was registration, and the requirements applied only to aliens. Here, the Ordinance generally regulates rental housing, something well within the City's police power, to ensure that the

City's housing stock is not used in an ongoing criminal enterprise, against which the City and even private citizens have the power to enforce. 8 U.S.C. §1324(c); 18 U.S.C. §1964(c). As the City argues, City Br. at 54, to allow Plaintiffs to characterize the Ordinance as an alien-registration regime – simply because it includes immigration status for an entirely lawful, non-registration means – would overturn all manner of licensing – as well as taxing – laws. The Ordinance is not an alien-registration regime under *Arizona.*

In sum, Plaintiffs would be not merely wrong but "*quite wrong* to view [the] decision [not to regulate] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma,* 537 U.S. at 65 (emphasis added). If INA does not conflict preempt the Ordinance, INA plainly does not field preempt it, either.

4. The INA Does Not Preempt the E-Verify Provisions

After *Whiting,* Plaintiffs do not contend that federal law preempts their claims against the Ordinance's E-Verify mandate. Instead, they challenge the E-Verify mandate on a variety of state-law issues that this Court could decline to address, 28 U.S.C. §1367(c), but which – in any event – do not undermine state and local government's power to require the use of E-Verify. *Whiting,* 131 S.Ct. at 1986. Federal law does not preempt the E-Verify mandate.

III. THE FHA DOES NOT PREEMPT THE ORDINANCE, AND THE CITY HAS NOT INTENTIONALLY DISCRIMINATED BECAUSE OF RACE OR NATIONAL ORIGIN

The FHA prohibits various "discriminatory housing practices" based on race, color, religion, sex, familial status, national origin, and handicap in covered forms of housing. *See* 42 U.S.C. §3603 (outlining FHA's coverage). In addition to providing a private cause of action against those "persons" who violate the FHA's requirements, 42 U.S.C. §3613, the FHA also preempts state and local laws that require or permit "discriminatory housing practices" under the FHA:

> [A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under [the FHA] shall to that extent be invalid.

42 U.S.C. §3615. For the FHA to preempt it, the Ordinance must therefore "require or permit" a "discriminatory housing practice," *id.*, which the FHA defines as "an act that is unlawful under section 3604, 3605, 3606, or 3617." 42 U.S.C. §3602(f). Of these possible grounds for an FHA-based preemption suit, only parts of §3604 could even *potentially* apply to Plaintiffs' claims against the Ordinance.[7]

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[7] Section 3605 prohibits discrimination in connection with "loans or … other financial assistance" and "selling, brokering, or appraising of residential real property." 42 U.S.C. §3605(b). Section 3606 applies to discrimination in connection with a "multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings." 42 U.S.C. §3606. Section 3617 prohibits retaliation in connection with the exercise of certain rights secured by the FHA. 42 U.S.C. §3617. Indeed, most of §3604 is inapposite by its terms: §3604(c)-(e) apply only to advertising,

In §3604(a)-(b), the FHA prohibits "otherwise mak[ing] unavailable or deny[ing], a dwelling to any person because of race … or national origin," 42 U.S.C. §3604(a), and "discriminat[ing] against any person … in the provision of services or facilities in connection [with "the terms, conditions, or privileges of sale or rental of a dwelling"], because of race … or national origin." 42 U.S.C. §3604(b). Plaintiffs' challenge under these provisions must fail because the Ordinance "discriminates" because of illegal-alien status, not "because of race … or national origin."

A. The FHA Does Not Prohibit Actions that Disparately Impact Protected Classes without Intentionally Discriminating Against Them

As with any statutory question, courts look to the statutory text to determine whether a statute imposes liability for only intentional discrimination versus allowing liability for disparate-impact claims. Because that language indicates intentional or purposeful discrimination, this Circuit's disparate-impact analysis cannot stand.

In the limited instances where the Supreme Court has found Congress to have intended to prohibit disparate impacts, the statutes used more expansive, effect-based language, not the stark because-of language used in the FHA. *See* 42

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representations, and inducements; and §3604(f) applies only to discrimination on the basis of handicap. *See* 42 U.S.C. §3604(c)-(f).

U.S.C. §§1973c(b), 2000e-2(a)(2); 29 U.S.C. §623(a)(2); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 236-40 (2005) (plurality); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 482 (1997). Similarly, in the limited instances where Congress has abrogated a Supreme Court decision with respect to disparate impacts, Congress has done so with pinpoint precision to allow disparate-impact claims under the affected statute, *see Reno*, 520 U.S. at 482, not under all statutes.

Conversely, the "because-of" phrasing indicates disparate treatment (*i.e.*, intentional discrimination), not disparate impacts. *Ricci v. DeStefano*, 129 S.Ct. 2658, 2672 (2009); *Smith*, 544 U.S. at 236 n.6 (plurality opinion of four justices); *id.* at 246 (Scalia, J., concurring in part); *id.* at 249 (O'Connor, J., concurring with three other justices). "The words 'because of' mean 'by reason of: on account of.'" *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009) (*quoting* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966)). Thus, for example, it would be "absurd" to contend that Title IX's prohibition of discrimination "on the basis of sex" prohibited anything other than intentional discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 282 & n.2 (2001). The FHA's text indicates that it prohibits only intentional discrimination.

The presumption against preemption has particular relevance against attempts to override states and localities under the FHA in an area of traditional

state concern. As indicated in Section II.B.1, *supra*, to find preemption, this Court must find that preempting this historic state authority "was the *clear and manifest purpose* of Congress," *Santa Fe Elevator*, 331 U.S. at 230 (emphasis added), both as to the *existence* of preemption and as to the *scope* of that that preemption. *Medtronic*, 518 U.S. at 485. Even assuming *arguendo* that one could interpret the FHA to *allow* disparate-impact claims, the presumption against preemption would prevent this Court's entertaining that interpretation to preempt the City's police power if the intentional-discrimination interpretation was also viable. *Altria Group*, 555 U.S. at 77 (quoted *supra*); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Thus, the question is not whether Plaintiffs' disparate-impact interpretation *is viable*. Instead, Plaintiffs bear the burden to demonstrate that the intentional-discrimination interpretation *is not viable*. Plaintiffs cannot meet that burden.

To be sure, Plaintiffs can point to Circuit precedent – even recent Circuit precedent – that allows disparate-impact claims under the FHA. In response, *amicus* Eagle Forum emphasizes three key points: (1) issue preclusion is not binding on those who did not participate in the litigation in question, *Baker v. General Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998) ("[i]n no event… can issue preclusion be invoked against one who did not participate in the prior adjudication"); (2) *stare decicis* does not extend to issues that were not conclusively settled, *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157,

170 (2004) (*citing Webster v. Fall*, 266 U.S. 507, 511 (1925)); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("cases cannot be read as foreclosing an argument that they never dealt with"); and (3) even *stare decisis* can be applied so conclusively that it violates due process, *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999). The upshot of all of these incontrovertible principles of due process is that the City has the right to distinguish its claims from third parties' claims resolved in prior Circuit precedent. If those prior decisions never considered more recent Supreme Court decisions – such as *Sandoval*, *Smith*, *Gross*, and *Ricci* – or never considered whether the presumption against preemption applies, then those prior Circuit decisions lack the power to control the outcome here.

Simply put, statutes that prohibit discrimination *because of* race or other protected status prohibit only purposeful discrimination and disparate treatment, not disparate impacts; in other words, they prohibit actions taken *because* of the protected status, not those taken merely *in spite of* that status. *Sandoval*, 532 U.S. at 282-83 & n.2; *cf. Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (Constitution prohibits only intentional discrimination). Therefore, unless and until Congress specifies otherwise, "because" means "because."

B. Plaintiffs Have Not Made Out a Case for Intentional Discrimination under the FHA, §1981, or the Equal Protection Clause

Whether under the FHA, §1981, or the Equal Protection Clause of the

Fourteenth Amendment, Plaintiffs cannot establish that the City intentionally discriminates on the basis of race or national origin. The intentional-discrimination standard applies to action taken "at least in part *because of*, not merely *in spite of*, its adverse effects" on a protected class, *Feeney*, 442 U.S. at 279 (emphasis added), and does not reach disparate impacts. *Id.* (Equal Protection Clause); *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 388-90 (1982) (§1981); Section III.A, *supra* (FHA). While Circuit precedent may preclude this Court's excluding disparate impacts under the FHA, nothing precludes the Court's rejecting them under §1981 or the Equal Protection Clause.

Targeted against those popularly known as "illegal aliens," the Ordinance "discriminates" based on illegality, not based on race or national origin. *Plyler*, 457 U.S. at 223 ("[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy'"). However prevalent Latinos are among illegal aliens, they do not even approach the "stark" and "rare" anomaly required for courts to find intentional discrimination "unexplainable on grounds other than race" behind facially neutral principles. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) (collecting cases).

For example, in *Feeney*, the passed-over female civil servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring

constituted sex discrimination. Because women then represented less than two percent of veterans, *Feeney*, 442 U.S. at 270 n.21, men were more than *fifty times* more likely to benefit from the state law challenged in *Feeney*. Nonetheless, Massachusetts did not discriminate *because of sex* when it acted because of another, permissible criterion (veteran status). *Id.* at 272. Like Massachusetts in *Feeney*, the City acted *because of* permissible criteria, which is not unlawful discrimination.

C. Plaintiffs Have Not Made Out a Case for Discrimination under a Disparate-Impact Theory

Although it disputes that a disparate-impact test applies under the FHA, *amicus* Eagle Forum respectfully submits that Plaintiffs have not demonstrated that the Ordinance disparately impacts Latino illegal immigrants. Missing from the District Court's analysis is any indication – either by race or by national origin – of how non-Latino illegal immigrants fare vis-à-vis Latino illegal immigrants under the Ordinance. If the Ordinance operates on a permissible class – illegal aliens – and treats everyone in that class the same, there is no disparate impact by race or national origin *within that class.*

As the City explains (City Br. at 77-82), the question involves what total population to compare versus the allegedly affected subpopulation to determine whether the latter bears a disproportionate impact of a facially neutral policy. Here, the relevant total population is illegal aliens, and in this facial challenge the

Ordinance treats *all of them* – Latino and non-Latino – exactly the same. If the City at some future point treats one group of illegal aliens more leniently or more harshly under the Ordinance, that selective enforcement might be actionable under various anti-discrimination protections. At this stage, however, the City has not disparately impacted Latino illegal aliens.

CONCLUSION

For the foregoing reasons and those argued by City, this Court should affirm the judgment in Nos. 12-1702 and 12-1708 and reverse the judgment in No. 12-1705 by finding the Ordinance lawful.

Dated: July 17, 2012

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I hereby certify that on July 17, 2012, I electronically submitted the foregoing *amicus curiae* brief – together with the motion seeking to leave to file the *amicus curiae* brief – to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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