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

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is a local ordinance prohibiting the knowing harboring of illegal aliens in rental housing a preempted "regulation of immigration" under the federal Constitution?

2. Is a local ordinance prohibiting the knowing harboring of illegal aliens in rental housing impliedly field preempted by federal immigration law?

3. Is a local ordinance prohibiting the knowing harboring of illegal aliens in rental housing impliedly conflict preempted by federal immigration law?

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Rules, Regulations and Orders

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum")[1] is a nonprofit organization founded in 1981. From its inception, Eagle Forum has consistently: defended American sovereignty and promoted adherence to the U.S.

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; *amicus* lodged the petitioner's written consent with the Clerk, and the respondents have lodged blanket written consents with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

Constitution; opposed unlawful behavior, including illegal entry into and residence in the United States; stood in favor of enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens; and defended federalism, including the ability of state and local government to protect their communities and to maintain order. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

In this action, two plaintiff groups (collectively, "Plaintiffs") challenge Ordinance 2952 (the "Ordinance") of the City of Farmers Branch, Texas (the "City") as preempted both by the Immigration and Naturalization Act ("INA"), as amended by the Immigration Reform & Control Act of 1986 ("IRCA"), and by the federal government's exclusive authority under the Constitution to regulate immigration. A deeply fractured *en banc* panel of the Fifth Circuit found the Ordinance conflict preempted by federal immigration laws, but rejected Plaintiffs' claims of field and constitutional preemption.

Constitutional Background

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three forms of federal preemption: express, field, and conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). Two presumptions underlie preemption cases. First, courts presume that statutes' plain wording "necessarily contains the best evidence of Congress' pre-emptive intent," *CSX*

Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993), where the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992). Second, courts apply a presumption against federal preemption of state authority. *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 over immigration. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica,* 424 U.S. 351, 354 (1976), this 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"). Instead, 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).

Statutory Background

Under INA §274(a)(1)(A)(iii), it is a federal crime to "conceal[], harbor[], or shield[] from detection, or attempt[] to conceal, harbor, or shield from detection, [an illegal] alien in any place, including any building or any means of transportation" in "knowing or in reckless disregard of the fact that [that] alien has come to, entered, or remains in the United States in violation of law." 8 U.S.C. §1324(a)(1)(A)(iii). Under §274(c), not only federal immigration agents

designated by the Attorney General but also "all other officers whose duty it is to enforce criminal laws" may enforce §274.[2] *See* 8 U.S.C. §1324(c). Moreover, since 1996, the Racketeer Influenced and Corrupt Organization Act ("RICO") has included INA §274 as a predicate offense, PUB. L. NO. 104-132, Title IV, §433, 110 Stat. 1214, 1274 (1996) (enacting 18 U.S.C. §1961(1)(F)), thereby allowing civil enforcement not only by private parties but also in state court. *See* 18 U.S.C. §1964(c); *Tafflin v. Levitt,* 493 U.S. 455, 458 (1990).

Beyond setting federal immigration policies, INA recognizes a state and local role in immigration enforcement. For example, 8 U.S.C. §1252c(a) authorizes "State and local law enforcement officials … to arrest and detain an individual" under certain circumstances "to the extent permitted by relevant State and local law," "[n]otwithstanding any other provision of [federal] law." Under 8 U.S.C. §1357(g)(10)'s savings clause, the absence of state-federal enforcement agreements under §1357(g) does not preclude state and local government's involving themselves with immigration-related enforcement, including "otherwise to cooperate … in the identification, apprehension, detention or removal" of illegal aliens. In addition, INA both prohibits all

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[2] The Senate version of §274(c) provided that "all other officers *of the United States* whose duty it is to enforce criminal laws" could enforce §274, but the Conference Committee struck "of the United States" to enable non-federal enforcement. *Gonzales v. City of Peoria,* 722 F.2d 468, 475 (9th Cir. 1983) (*citing* Conf. Rep. No. 1505, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1358, 1360, 1361) (emphasis added).

levels of government from restricting state and local government's communicating with federal authorities about aliens' immigration status and requires the federal government to respond to such government inquiries. 8 U.S.C. §§1373, 1644.

IRCA amended INA to provide federal civil and criminal sanctions for employing "unauthorized aliens" and expressly to preempt 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 employment-related sanctions, nothing in the enacted law addressed its preemptive scope with respect to other activities such as the purchase or rental of real property.

The City adopted the Ordinance to require adult tenants 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, for a federal identification number to establish lawful presence here or a declaration that the applicant does not know the number. For non-U.S. citizens and nationals, the City then contacts the federal government under 8 U.S.C. §1373(c) to verify whether the applicant is lawfully 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 under 8 U.S.C. §1373(c). If the result remains negative, the City revokes the residential occupancy license, sending copies to the applicant and landlord. Although the Ordinance

creates various offenses (*e.g.,* prohibiting false statements and counterfeit permits), the operative provision is the suspension of the landlord's rental permit – and the ability lawfully to collect rent – until the landlord uses civil remedies – such as eviction – to cure the violation.

SUMMARY OF ARGUMENT

While its primacy on immigration is clear, the federal government lacks a police power to address the serious public-safety issues that the Ordinance seeks to address. As such, the local impacts of illegal aliens fall squarely on state and local government. That factor highlights the importance of this Court's resolving the significant circuit split over the scope of state and local police power to address those local impacts of illegal immigration. *See* Section I.

As the City explains, the circuits are deeply split on the appropriate preemption standards to apply to immigration. Pet. at 11-12, 14-15, 19-20. This divide results from reading *Arizona v. U.S.,* 132 S.Ct. 2492 (2012), over-broadly to overturn not only *DeCanas* but also *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968 (2011). This Court should grant the writ both to resolve the split in authority between the circuits and to clarify that *Arizona* limited its field-preemption holdings to alien registration and its conflict-preemption holding to employee-based sanctions and non-federal removal determinations. *See* Section II, *infra.*

Finally, Section III, *infra,* outlines why the presumption against preemption applies, Section III.B.1, *infra,* and why Plaintiffs' challenges to the

Ordinance fail under each of their three preemption theories. Sections III.A, III.B.2, III.B.3, *infra.*

ARGUMENT

I. THE ISSUES RAISED HERE ARE EXTRAORDINARILY IMPORTANT

Before showing why the decision below provides an appropriate vehicle to review the preemption issues raised here, *amicus* Eagle Forum emphasizes the extraordinary importance of these issues. While preemption issues always present important issues of competing sovereignties, these preemption issues also go to the very power of state and local government to protect public safety under the police power. Here, the federal circuits are split on state and local authority to address these issues. Only this Court can resolve those splits in authority.

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). "[T]he structure and limitations of federalism ... allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (interior quotations omitted); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873). Indeed, "[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are primarily, and historically, ... matter[s] of local concern." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996) (interior quotations omitted). By contrast, the

federal government lacks a corresponding police power: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *U.S. v. Morrison,* 529 U.S. 598, 618-19 (2000). For that reason, this Court must be certain that federal immigration law covers the issues presented here before cavalierly displacing the only government with the authority and will to protect citizens from harm.

While the concern expressed here blends with the state-sovereignty and public-health rationales for the presumption against preemption, Section III.B.1, *infra,* it bears emphasis here because of the unusual seriousness. This Court should resolve the deep split between the circuits over the extent to which state and local government have the authority to address the local impacts of illegal immigration, particularly where the enacted federal immigration laws do not clearly and manifestly preempt state and local action. If Congress wants to preempt state and local laws like the Ordinance unambiguously, Congress is free to do so. Until then, it falls to this Court to ensure that the lower federal courts do not substitute themselves for Congress in the law-making process.

II. THIS COURT MUST RESOLVE THE TENSION BETWEEN *WHITING* AND *ARIZONA* ON CONFLICT PREEMPTION

Although the State of Arizona prevailed sweepingly in *Whiting* and only partially in *Arizona,* both decisions support the City here. Nonetheless, lower courts have interpreted *Arizona* over-broadly, resulting in erroneous preemption findings here and

in two other circuits. *Georgia Latino Alliance for Human Rights (GLAHR) v. Governor of Georgia,* 691 F.3d 1250 (11th Cir. 2012); *U.S. v. Alabama,* 691 F.3d 1269 (11th Cir. 2012); *Lozano v. City of Hazleton,* 724 F.3d 297 (3d Cir. 2013); *but see Keller v. City of Fremont,* 719 F.3d 931 (8th Cir. 2013). This Court should grant the writ to resolve the circuit split and to clarify *Arizona* in the context of *Whiting* and *DeCanas.*

In *Whiting,* this Court rejected preemption challenges both to state-law licensing sanctions against those who employ illegal aliens and to Arizona's mandating *under state law* employers' use of the federally optional E-Verify program. In doing so, this Court recognized that 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). By finding other provisions of state law conflict-preempted in *Arizona,* this Court has opened two divergent modes of analysis, which this Court should reconcile.[3]

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[3] In *Arizona,* this Court upheld a requirement to confirm immigration status during stops or arrests, but relied on field preemption to invalidate state-law crimes for failing to carry federally required registration documents and on conflict preemption to invalidate two state-law provisions: (1) state-law crimes for illegal aliens' knowingly applying for work or working, and (2) state-law authorization for warrantless arrests of illegal aliens reasonably believed to be removable.

As this Court held in *Arizona,* "[c]urrent federal law is substantially different from the regime that prevailed when *DeCanas* was decided." *Arizona,* 132 S.Ct. at 2504 (rejecting *employee*-based criminal sanctions). Specifically, prior to IRCA, INA would have allowed both employee- and employer-based sanctions under *DeCanas.* According to *Arizona,* IRCA "struck" a "careful balance" by considering and rejecting employee-based sanctions vis-à-vis employer-based sanctions: "Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA … [b]ut Congress rejected them." *Id.* (citing legislative history). Based on IRCA's "text, structure, and history," this Court enforced that implied balance, relying on an inference that "Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment." *Id.* at 2505.

Under *Arizona,* then, Congress had to have considered and rejected an issue before federal courts will infer preemption from the perceived balance struck by a statutory regime. *See Alabama,* 691 F.3d at 1300 (no conflict preemption in the absence of "legislative history, similar to that of IRCA, that would reflect a 'considered judgment' on the part of Congress 'that [such penalties] would be inconsistent with federal policy and objectives'") (*quoting Arizona,* 132 S.Ct. at 2504).[4] The question here is whether this

[4] The Alabama provision in question criminalizes illegal aliens' applying for vehicle license plates, driver's licenses, identification cards, business licenses, commercial licenses, or professional licenses. *Id.* at 1297-1301.

Arizona difference with respect to employee-based crimes also encompasses the housing issue presented here. Because Congress engaged in no such balancing for housing, no conflict is present here.

Amicus Eagle Forum respectfully submits that perceiving "balance" under 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 v. Levine,* 555 U.S. 555, 583 (2009) (Thomas, J., concurring). This Court should grant the writ to clarify when a court may bind state and local governments with preemption implied by provisions that Congress did not expressly enact.

III. THE ORDINANCE IS NOT PREEEMPTED

With that background, *amicus* Eagle Forum now demonstrates that neither the federal Constitution itself nor federal immigration law preempts the Ordinance. First, *amicus* Eagle Forum outlines the application of the presumption against preemption.

A. The Constitution Does Not Preempt the Ordinance

The Fifth Circuit here split with the Third Circuit on whether a harboring ordinance qualifies as an unconstitutional non-federal regulation of immigration. *Compare* App. at 29 n.17, 44, 59, 64, 105-06 *with Lozano,* 724 F.3d at 315. Only this Court can resolve the confusion, which grows out of language in *DeCanas.*

As long as the Ordinance is not a "regulation of immigration" in conflict with the plenary power of Congress to regulate immigration, U.S. CONST. art. I, §8, cl. 4; *DeCanas,* 424 U.S. at 354, the mere fact that the Ordinance "in any way deals with aliens" will not render it "*per se* pre-empted by this constitutional power." *DeCanas,* 424 U.S. at 355. Plaintiffs cannot rely on the unexercised constitutional *authority* of Congress – as distinct from particular statutes like INA or IRCA – to find preemption.

Under *DeCanas,* 424 U.S. at 355, a "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." For *illegal* aliens,[5] states and 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 some illegal aliens from remaining in the City of

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[5] 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.

Farmers Branch, the Ordinance has no effect on illegal aliens who either remain in the same pre-Ordinance rental or purchase a home. More importantly for preemption purposes, the Ordinance is indifferent to whether any departing illegal aliens relocate *within the U.S.*

While a preemptive federal statute is plainly within the federal power to enact, 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, regardless of any future federal action or inaction.

The divide between lax federal enforcement priorities on the one hand and both federal law and local priorities on the other hand highlights federalism's central tenet,[6] which 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

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[6] As the City explains, *Arizona* rejected the proposition that the federal Executive's enforcement priorities – as distinct from federal law – can preempt state or local action. *See* Pet. at 35-36 (*citing Arizona,* 132 S.Ct at 2508). If anything, it is the lax federal enforcement that frustrates INA's congressional intent, not the actions by state and local government to battle the local effects of that lax federal enforcement.

> 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 federal system assumes that the states retain their role. Unless and until Congress amends federal immigration law to resolve these issues, nothing in the Constitution itself preempts the City from using its police power to solve its local problems.

By contrast, Plaintiffs' 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.

B. Federal Immigration Law Does Not Preempt the Ordinance

Plaintiffs consistently cite *DeCanas,* 424 U.S. at 354-55, for the proposition that the "power to regulate immigration 'is unquestionably exclusively a federal power.'" 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,* 493 U.S. at 458-59. 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). As indicated below, INA does not displace state and local police power over housing and related issues.

Although Plaintiffs argue that local ordinances upset federal immigration priorities, INA includes various roles for state and local enforcement, both with respect to harboring specifically, 8 U.S.C. §1324(c), determining immigration status generally. *See* 8 U.S.C. §§1252c(a), 1357(g)(10). Indeed, INA prohibits all levels of government from restricting state and local government's inquiring to federal immigration officials about individuals' immigration status and requires the federal government to respond to such inquiries. 8 U.S.C. §1373. These INA facets are not consistent with Plaintiffs' conflict-preemption claim, but they are not the only issues of federal law that undercut Plaintiffs' preemption case.

"[P]rovid[ing] an apartment for the undocumented aliens" can fall within the federal

crime of "harboring," *U.S. v. Tipton,* 518 F.3d 591, 594 (8th Cir. 2008), which "mean[s] 'any conduct tending to substantially facilitate an alien's remaining in the United States illegally.'" *U.S. v. Rubio-Gonzalez,* 674 F.2d 1067, 1073 (5th Cir. 1982). "The purpose of the section is to keep unauthorized aliens from entering or *remaining* in the country [and] this purpose is best effectuated by construing 'harbor' to mean 'afford shelter to' and [we] so hold." *U.S. v. Acosta de Evans,* 531 F.2d 428, 430 (9th Cir. 1976) (emphasis in original). The Ordinance provides a regulatory basis to prevent City landlords from harboring illegal aliens.[7]

Even if merely renting to illegal aliens – with nothing more – did not constitute harboring, the statutory allowances for non-federal enforcement, coupled with the nexus between housing and harboring, would nonetheless strongly suggest that Congress did not intend to preempt local regulation of local housing. Moreover, INA §274's inclusion as a RICO predicate offense allows enforcement in *state* court. *Tafflin,* 493 U.S. at 458 ("state courts have concurrent jurisdiction over civil RICO claims"). This

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[7] The circuits are split on the threshold issue of what constitutes harboring. *Compare U.S. v. Ozcelik,* 527 F.3d 88, 100 (3d Cir. 2008) ("harboring" means conduct tending to "prevent government authorities from detecting the alien's unlawful presence"); *U.S. v. Kim,* 193 F.3d 567, 574 (2d Cir. 1999) (same) *with Rubio-Gonzalez,* 674 F.2d at 1073 n.5 ("the words 'harbor,' 'conceal' and 'shield from detection' are [not] synonymous," and "'harbor' is perhaps a somewhat broader concept than 'conceal' or 'shield from detection'"); *Tipton,* 518 F.3d at 594 (*quoted supra*). This Court could resolve that split when resolving the preemption issue.

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). Nothing in INA *expressly* preempts the Ordinance.

The RICO amendment further undermines congressional intent to preempt state action on harboring and also on its local impacts:

> [I]n neither *Hines* nor [*Pennsylvania v. Nelson,* 350 U.S. 497 (1956)] was there affirmative evidence, as here, that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law. Furthermore, to the extent those cases were based on the predominance of federal interest in the fields of immigration and foreign affairs, there would not appear to be a similar federal interest in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country. Finally, the Pennsylvania statutes in *Hines* and *Nelson* imposed burdens on aliens lawfully within the country that created conflicts with various federal laws.

DeCanas, 424 U.S. at 363.[8] Here, as in *DeCanas,* the Ordinance directly affects only illegal aliens' ability

[8] In *DeCanas,* as here with RICO, the "affirmative evidence" is a subsequently enacted statute that contemplated revoking

to maintain rental housing, remedies local problems, and does not implicate the wider areas of predominant federal interest.

1. The Presumption Against Preemption Applies

Over five judges' dissent, Pet. App. 98-100, the Fifth Circuit did not provide the Ordinance the presumption against preemption. Under *Arizona,* 132 S.Ct. at 2501, the Fifth Circuit clearly should have applied that presumption; *accord Keller,* 719 F.3d at 943, which would have been dispositive.

In all fields – especially those 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"); *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" without "clear and manifest" legislative intent) (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. This presumption shields the Ordinance from preemption. Moreover,

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registrations of farm labor contractors who employed illegal aliens. *DeCanas,* 424 U.S. at 361-62.

even if Congress preempted *some* state action, the presumption against preemption still would apply to determine the *scope* of preemption. *Medtronic,* 518 U.S. at 485. 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 Ordinance can easily be read to coexist with INA.

Although *U.S. v. Locke,* 529 U.S. 89, 90 (2000), links the presumption against preemption to "area[s] where there has been a history of significant federal presence," the presumption applies in *all* areas. *Wyeth,* 555 U.S. at 565 n.3. 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]." *Id.* (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.*

The Ordinance 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 Ordinance's relevant provisions concern licensing real property, an area of traditional local concern. For all but the independently wealthy, 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,

and *Arizona,* 132 S.Ct. at 2501, it also applies here. Plaintiffs would deny the City the "right to protect itself," *Jacobson,* 197 U.S. at 27, against not only the unlawful residency and all of the resulting economic ills but also the rampant criminality associated with the illegal aliens. *See Arizona,* 132 S.Ct. at 2500. The lawlessness that follows is predictable and, if this Court recognizes a community's right to protect itself, entirely preventable.

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. Local government knows where the flashpoints are for services, expenses, and dangers in the community, and it is not the role of either Plaintiffs here or federal courts to second-guess cities' decisions. *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993) ("a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). Except for some employment-related sanctions, INA says nothing to the contrary.

If the presumption against preemption applies, Plaintiffs' preemption case vanishes because INA is entirely silent on the City's chosen means of exercising its police power. That silence and the substantive issues raised in the next two sections

leave only one possible conclusion: Congress did not intend INA and its amendments to *address,* much less to preempt, the local police power on which the City relies here.

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

The *en banc* Fifth Circuit split 10-5 to find the Ordinance conflict preempted, whereas an Eighth Circuit panel split 2-1 reject conflict preemption. *Compare* App. at 10-28, 88, 112-39 *with Keller,* 719 F.3d at 942. 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.

The Fifth Circuit majority's conflict-preemption analysis allows judicial policy choices to inform the process of interpreting acts of Congress, thereby creating 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. Bd. of Governors of Fed'l Reserve Sys.,* 468 U.S. 137, 153 (1984). This is contrary to *Whiting* and in no way compelled by *Arizona.*

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"). With respect to its standards for assessing immigration status, the Ordinance relies on federal determinations of immigration status, as Congress authorized. 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.

Specifically, IRCA did not address the housing issue. Because the presumption against 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 and subsequently *expanded* private enforcement on housing-related issues. *See* 8 U.S.C. §1324(c); 18 U.S.C. §§1961(1)(F), 1964(c). To read *Arizona* as extending beyond its employment context

would unmoor that decision from its authority, its reasoning, and even the text of that decision.[9]

For the foregoing reasons, *amicus* Eagle Forum respectfully submits that Congress did not intend to conflict-preempt regulations like the Ordinance.

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[9] The Eleventh Circuit recently held that INA preempts state laws creating state-law crimes for harboring illegal aliens. *Alabama,* 691 F.3d at 1285-88; *GLAHR,* 691 F.3d at 1263-67. In pertinent part, those Eleventh Circuit decisions are both inapposite and incorrect. *First,* the decisions are inapposite because the state laws criminalized behavior covered by federal law, whereas the Ordinance here imposes civil remedies in a regulatory capacity outside the federal criminal regime. *See Arizona,* 132 S.Ct. at 2506-07. Whatever conflict the Eleventh Circuit found state criminal laws to impose on federal immigration laws and enforcement is simply irrelevant to the City's exercise of its police power to regulate rental housing within its borders. *Second,* the Eleventh Circuit erred in finding 8 U.S.C. §1329 to establish exclusive federal jurisdiction over prosecutions: §1329 applies by its terms only to "all causes, civil and criminal, *brought by the United States*" (emphasis added). Contrary to the Eleventh Circuit's view, "section 1324(c) expressly allows for state and local enforcement." *In re Jose C.,* 45 Cal.4th 534, 552, 198 P.3d 1087, 1099 (Cal. 2009); *City of Peoria,* 722 F.2d at 475 (§1324's text and legislative history establish that "federal law does not preclude local enforcement of the criminal provisions of [INA]"), *overruled on another ground by Hodgers–Durgin v. De La Vina,* 199 F.3d 1037, 1040 n.1 (9th Cir. 1999). Moreover, Congress not only removed the restriction against state-and-local enforcement, *see* note 2, *supra,* but also allowed state-court and private enforcement via RICO. *Tafflin,* 493 U.S. at 458; 18 U.S.C. §§1961(1)(F), 1964(c).

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

While only two judges in the *en banc* Fifth Circuit split 13-2 supported field preemption of the Ordinance, a Third Circuit panel unanimously found a similar ordinance field preempted. *Compare, e.g.,* App. at App. 20 n.17, 44 *with Lozano,* 724 F.3d at 316-17. Field preemption precludes state and local regulation of conduct in fields that Congress – acting within its authority – has marked for exclusive federal governance. *Gade v. Nat'l Solid Wastes Management Ass'n,* 505 U.S. 88, 115 (1992). Thus, "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) (statute 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 2501 (internal quotations omitted, alterations in original). In place of a door-closing congressional determination, however, federal law includes not only door-opening savings clauses but also enforcement by *private* parties and enforcement *in state court* for the housing issues in the Ordinance.

Specifically, INA allows state and local government to coordinate with the federal government on immigration status, *see* 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). 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 alien-registration issues (*i.e.,* carrying state registration documents in *Hines* and state-law punishment for not carrying federal registration documents in *Arizona*). *Hines,* 312 U.S. at 65-66; *Arizona,* 132 S.Ct. at 2502-03. In each case, the legislative end 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 ongoing criminal enterprises, which the City and even private citizens can challenge. 8 U.S.C. §1324(c); 18 U.S.C. §1964(c). Collecting immigration information for entirely lawful, non-registration purposes cannot transform laws into alien-registration regimes.

In sum, Plaintiffs are 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. If it does not conflict preempt the Ordinance, INA plainly does not field preempt it.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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