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

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FRED H. KELLER, JR., et al.,
Plaintiffs-Appellants/Cross-Appellees,
v.
CITY OF FREMONT, et al.,
Defendants-Appellees/Cross-Appellants.

MARIO MARTINEZ, JR., et al.,
Plaintiffs-Appellants/Cross-Appellees,
v.
CITY OF FREMONT, et al.,
Defendants-Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES' BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

JOCELYN SAMUELS
Acting Assistant Attorney General

MARK L. GROSS
HOLLY A. THOMAS
Attorneys
Civil Rights Division
U.S. Department of Justice

STUART F. DELERY
Assistant Attorney General

DEBORAH R. GILG
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
BENJAMIN M. SHULTZ
DANIEL TENNY
JEFFREY E. SANDBERG
(202) 514-1838
Attorneys, Appellate Staff
Civil Division, Room 7215
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

INTRODUCTION AND SUMMARY

A divided panel of this Court rejected a federal preemption challenge to an ordinance designed to cause unlawfully present aliens not to come to or remain in the City of Fremont, Nebraska. The ordinance requires all renters in the City to attest to their citizenship or provide proof of their immigration status, bars aliens who are unlawfully present in the United States from living in rental housing in the City, and subjects to criminal penalties any landlords in the City who rent to these persons. The Third and Fifth Circuits have properly invalidated local ordinances with these features, and the panel's decision cannot be reconciled with those decisions. *See Lozano v. City of Hazleton*, __ F.3d __, 2013 WL 3855549 (3d Cir. July 26, 2013); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, ___ F.3d ___, 2013 WL 3791664 (5th Cir. July 22, 2013) (en banc).

The Immigration and Nationality Act (INA) vests exclusive authority over immigration and over enforcement of the INA itself in the national government. It does not permit a local or State government to adopt a policy that aliens may not obtain shelter pending the institution or outcome of a federal removal proceeding or the exercise of federal discretion. A contrary rule would undermine and conflict with the statutory process for determining whether an alien may remain in the United States, and would threaten potentially significant foreign policy consequences.

The panel majority nevertheless concluded that the local city ordinance does not present an obstacle to implementation of the national regulatory regime because,

the court reasoned, "[l]aws designed to deter, or even prohibit, unlawfully present aliens from residing within *a particular locality* are not tantamount to immigration laws establishing who may enter or remain in the country." Op. 10 (emphasis in original).

No court has previously suggested that a locality or a State may ban undocumented aliens from its borders or that the Constitution permits a balkanized scheme of immigration regulation in which localities and States police their internal borders to exclude persons based on immigration status. The panel majority was able to avoid the implications of its ruling for the Nation only by explicitly declining to consider the impact if similar laws were widely adopted by other cities and States across the country. *See* Op. 11. But a court charged with determining whether a local ordinance poses an obstacle to the effectuation of a federal scheme cannot decline to consider the collective impact of similar enactments if adopted by other localities and States. As other courts have observed, if one city can enact such an ordinance, other cities and States across the country can enact similar legislation. *See Lozano*, 2013 WL 3855549, at *16; *Villas at Parkside Partners*, 2013 WL 3791664, at *20 (en banc) (opinion of Dennis, J.).

In addition to squarely conflicting with two circuits' treatment of materially identical ordinances, the panel decision cannot be reconciled with the Supreme Court's decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012), and decisions of the Fourth and Eleventh Circuits that invalidated state law provisions designed to deter and burden undocumented aliens. *See United States v. South Carolina,* ___ F.3d ___,

2013 WL 3803464 (4th Cir. July 23, 2013); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012).

In sum, the decision presents a question of exceptional importance and conflicts with the decisions of the Supreme Court and other courts of appeals. Rehearing *en banc* is warranted.

STATEMENT

1. The City of Fremont is a Nebraska municipality. The Ordinance at issue here, passed by initiative, makes it "unlawful," as a matter of local law, for any dwelling owner in the City to "harbor" an illegal alien. Ordinance § 1(2.A). The Ordinance defines "harboring" to include a landlord's decision to lease to an alien "not lawfully present in the United States," or otherwise to "suffer or permit the occupancy of" a dwelling unit by such an alien. *Id.* §§ 1(1.A), 1(2.A).

The Ordinance provides that no individual may obtain or reside in rental housing without a City-issued "occupancy license." *Id.* § 1(3.A); *see also Id.* § 1(3.H–3.J).[1] License applicants must pay a $5 fee and provide the City Police Department with contact and other personal information. *Id.* § 1(3.B, 3.E). Applicants may sign a declaration claiming U.S. citizenship or nationality, under threat of criminal penalties for providing false information. *Id.* § 1(3.E). Applicants who are not U.S. citizens or nationals must provide "an identification number assigned by the federal government

[1] The Ordinance excepts rental contracts and tenancies that preceded the Ordinance's effective date. Ordinance § 1(2.A(3)).

that the occupant believes establishes his lawful presence in the United States" or indicate that they are unaware of any such number. *Id.* All individuals who submit completed applications are given occupancy licenses. *Id.* § 1(3.F). As to applicants who have not claimed U.S. citizenship or nationality, however, the Police Department must "[p]romptly" take action to "request the federal government to ascertain whether the occupant is an alien lawfully present in the United States." *Id.* § 1(4.A).

If the federal government reports that an individual is "not lawfully present in the United States," the City Police Department promptly notifies the individual through a "deficiency notice." *Id.* § 1(4.B). Such an individual then has 60 days to correct the federal records or provide additional information establishing lawful presence in the country. *Id.* At the end of that period, the City Police Department must make a second inquiry to the federal government. If the response again indicates that the individual is not lawfully present, the occupancy license is revoked, effective 45 days from when the City provides notice of revocation. *Id.* § 1(4.D).

A landlord or occupant who receives a deficiency or revocation notice may seek a stay and "judicial review of the notice by filing suit against the City in a court of competent jurisdiction." *Id.* § 1(4.F). The court adjudicating the suit may ask the federal government for "a new ascertainment of [the occupant's] immigration status," and it may decide "the question of whether the occupant is an alien not lawfully present in the United States." *Id.* The answer to that last question is assertedly "determined under federal law," with the court instructed to "defer to any conclusive

ascertainment of immigration status by the federal government." *Id.* But the Ordinance provides only "a rebuttable presumption" of accuracy to the federal government's most recent determination of the individual's immigration status. *Id.*

The Ordinance imposes criminal penalties on landlords who violate its provisions. *Id.* § 1(3.H–3.K). Persons found liable are subject to a $100 fine for each violation, and a separate violation occurs on each day that a landlord rents an apartment to an individual occupant without a valid city occupancy license. *Id.* § 1(3.K–3.L).

2. Before the Ordinance went into effect, two groups of plaintiffs filed suit in the District Court for the District of Nebraska seeking facial invalidation of the Ordinance on a number of different grounds. (The plaintiffs include landlords and tenants, among others.) On cross-motions for summary judgment, the district court held that the Ordinance is preempted by federal law insofar as it "provides penalties for the harboring" of illegal aliens, and insofar as it provides "for the revocation of occupancy licenses and penalties for" the lease of a dwelling following a license's revocation. JA 108. The court sustained other aspects of the Ordinance, which the court described as merely requiring the collection of information from aliens and communicating information to the federal government.[2]

[2] This brief does not address plaintiffs' claims premised on grounds other than federal preemption.

3. After both parties appealed, a divided panel of this Court upheld all the provisions of the Ordinance that are at issue. The panel majority stated that "[l]aws designed to deter, or even prohibit, unlawfully present aliens from residing within *a particular locality* are not tantamount to immigration laws establishing who may enter or remain in the country." Op. 10 (emphasis in original). The Court rejected the contention "that the rental provisions interfere with . . . the broad discretion exercised by immigration officials to determine which aliens who are not legally present in the United States should be removed from the country." *Id.* at 14.

The Court stated that the "rental provisions would only indirectly effect the 'removal' of any alien from the City," *id.*, and held that the ordinance was not preempted by the federal anti-harboring scheme, *id.* at 13–14. The panel majority saw no merit to the argument that the information provided to local officials by the federal government generally does not reflect a final determination regarding an alien's removability and cannot, therefore, be the basis for denying the alien the ability to rent an apartment.

Judge Bright dissented, concluding that "Fremont seeks to usurp power reserved to the federal government by identifying undocumented persons and forcing them out of the city, and perhaps the country." *Id.* at 30 (Bright, J., dissenting). Judge Bright would have struck down all portions of the Ordinance, including those upheld by the district court. *Id.* at 33.

ARGUMENT

1. The comprehensive federal regulatory scheme enacted by Congress in the INA does not prevent aliens who are in or may be subject to removal proceedings from obtaining shelter. A prohibition of that kind would undermine the federal removal scheme and visit unnecessary hardships on persons who may ultimately be permitted to remain in the country. Accordingly, the Third and Fifth Circuits have recently invalidated local ordinances that, like the one at issue here, require those living in rental housing to obtain "occupancy licenses" and then revoke those licenses for aliens who are not lawfully present in the United States. *See Lozano*, 2013 WL 3855549; *Villas at Parkside Partners*, 2013 WL 3791664 (en banc).

The panel in this case did not explain how the City's systematic denial of housing to aliens believed to be unlawfully present could be reconciled with the federal removal scheme. The comprehensive substantive and procedural framework of the INA "contemplates a non-citizen's residence in the United States until potential deportation" and "requires the non-citizen to provide a reliable address to the federal government to guarantee and speed the removal process." *Villas at Parkside Partners*, 2013 WL 3791664, at *5 (opinion of Higginson, J.); *see* 8 U.S.C. § 1229(a)(1)(F)(i) (requiring aliens in removal proceedings to provide "a written record of an address"); *id.* § 1226(a) (setting out bond procedures for aliens in removal proceedings).

"In addition to undermining the comprehensive procedures under which federal officials determine whether an alien may remain in this country, [the] housing

provisions would create significant foreign policy and humanitarian concerns," including retaliatory measures by other countries. *Lozano*, 2013 WL 3855549, at *16. "As the [Supreme] Court in *Arizona* emphasized, federal decisions in this arena 'touch on foreign relations and must be made with one voice,'" and "'[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.'" *Id.* (quoting *Arizona*, 132 S. Ct. at 2498–99); *see also Arizona*, 132 S. Ct. at 2498 ("Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad."); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." (internal quotation marks omitted)).

Local ordinances and state laws that deny housing to aliens believed to be unlawfully present also impermissibly infringe on federal enforcement discretion. The Supreme Court in *Arizona* emphasized that "[a] principal feature of the [INA's] removal system is the broad discretion exercised by immigration officials." *Arizona,* 132 S. Ct. at 2499. "Federal officials . . . must decide whether it makes sense to pursue removal at all," and, "[i]f removal proceedings commence," whether to grant "discretionary relief allowing [the alien] to remain in the country or at least to leave without formal removal." *Id.* The Third Circuit properly recognized that local housing laws of the kind at issue here "in effect, constitute an attempt to remove

persons from the City based entirely on a snapshot of their current immigration status. Accordingly, the housing provisions interfere with the federal government's discretion in deciding whether and when to initiate removal proceedings." *Lozano*, 2013 WL 3855549, at *15; *see also Villas at Parkside Partners*, 2013 WL 3791664, at *19 (opinion of Dennis, J.) (highlighting importance of federal discretion in invalidating similar "occupancy license" scheme); *id.* at *7–*8 (opinion of Higginson, J.) (same). More generally, other courts have consistently recognized that a locality or State cannot take "it upon itself to unilaterally determine that any alien unlawfully present in the United States cannot live within the state's territory, regardless of whether the Executive Branch would exercise its discretion to permit the alien's presence." *Alabama*, 691 F.3d at 1295; *accord South Carolina*, 2013 WL 3803464, at *8 (States have no authority to "interfere with the discretion entrusted to federal immigration officials" regarding removal).

2. The panel majority believed that it could sidestep such concerns of federal law by viewing the impact of the City of Fremont's Ordinance in isolation. The panel declared itself "unwilling to speculate whether other state and local governments would adopt similar measures, whether those measures would survive non-preemption challenges, and the impact of any such trend on federal immigration policies." Op. 11.

A proper analysis of whether a local ordinance or a state law poses an obstacle to effectuation of a federal legal scheme must account for the possibility that other

localities and States will take similar action. The Supreme Court's preemption cases have thus considered individual enactments in light of the potential effect of similar laws in cities and States across the country. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161–63 (1989) (discussing "[t]he prospect of all 50 States establishing similar protections for preferred industries"); *Wis. Dep't of Indus., Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 288 (1986) ("[I]f Wisconsin's . . . law is valid, nothing prevents other States from taking similar action against labor law violators.").

Applying that principle in *Arizona v. United States*, the Supreme Court observed that "[i]f § 3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations." *Arizona*, 132 S. Ct. at 2503. Similarly, if ordinances requiring city occupancy licenses like the one at issue here "were constitutional, all cities and states could by similar laws seek to withdraw rental housing from vast numbers of noncitizens and, in effect, accomplish their removal from the United States." *Villas at Parkside Partners*, 2013 WL 3791664, at *20 (opinion of Dennis, J.); *see also Lozano*, 2013 WL 3855549, at *16 ("'If every other state enacted similar legislation to overburden the lives of aliens, the immigration scheme would be turned on its head.'" (quoting *Alabama*, 691 F.3d at 1295 n.21)).

3. The panel correctly observed that local and state regulations are not automatically preempted by federal law merely because they take into account an individual's immigration status. But the City of Fremont's Ordinance cannot plausibly

be justified by reference to local housing policy or any other legitimate local interest, and the panel invoked no such justification. *See Lozano*, 2013 WL 3855549, at *13 ("The housing provisions of Hazleton's ordinances are nothing more than a thinly veiled attempt to regulate residency under the guise of a regulation of rental housing.").

The City's housing registration scheme, even apart from its enforcement mechanisms, is simply a means of preventing undocumented aliens from living in the City of Fremont by making it a crime to rent to them and by requiring them to submit information about their immigration status to local officials under a law that is intended for that very purpose. Its sole aim, in the words of one of its sponsors, is to ensure that no unlawfully present aliens will be "coming into our city." JA 832.

The panel majority did not attempt to square its reasoning with that of the Eleventh Circuit in addressing a State's attempt to "craft[] a calculated policy of expulsion, seeking to make the lives of unlawfully present aliens so difficult as to force them to retreat from the state." *Alabama*, 691 F.3d at 1294. The Eleventh Circuit properly recognized that because removal "power is retained only by the federal government," such efforts by a State are "preempted by the inherent power of the federal government to regulate immigration" and "conflict[] with Congress's comprehensive statutory framework governing alien removal." *Id.* "[T]he determination of removability typically must be made by an immigration judge consistent with the procedures set forth in the INA," and various federal statutes

"govern the relief available to aliens otherwise subject to removal—that is, those aliens who are in the country unlawfully but permitted to remain, whether permanently or temporarily." *Id.* (citing 8 U.S.C. § 1158 (governing an alien's application for asylum); *id.* § 1229b (regulating cancellation of removal and adjustment of the alien's unlawful status); *id.* § 1229c (prescribing the conditions of voluntary departure); *id.* § 1231(b)(3) (governing withholding of removal)).[3]

Subsequent to the issuance of the panel's decision in this case, the Fourth Circuit adopted the Eleventh Circuit's reasoning in striking down a state prohibition on an alien's "allow[ing] himself or herself to be 'transported or moved' within the state or to be harbored or sheltered to avoid detection." *South Carolina*, 2013 WL 3803464, at *8. The Fourth Circuit declared that a State has no authority to enact legislation interfering with "'the ability [of unlawfully present aliens] to maintain even a minimal existence.'" *Id.* (quoting *Alabama*, 691 F.3d at 1293). And, as noted, after the issuance of the panel's opinion, the Fifth Circuit, sitting *en banc*, and the Third Circuit both invalidated local ordinances with the same critical features as the one at issue here. This square conflict warrants *en banc* review of the panel's divided decision, which is now a distinct outlier among the courts of appeals.

[3] The Eleventh Circuit made these observations in the course of analyzing a provision of the Alabama statute that prohibited Alabama courts from recognizing contracts between a party and an unlawfully present alien but excepted contracts for overnight lodging, food, medical services, or transportation "intended to facilitate the alien's return to his or her country of origin." *Alabama*, 691 F.3d at 1293 (internal quotation marks omitted).

4. The panel mistakenly sought to justify its holding on the ground that the Ordinance "would only indirectly effect the 'removal' of any alien from the City." Op. 14. But it is irrelevant whether the City pursues its illegitimate goals through "direct" or "indirect" means. Local ordinances and state laws touching on immigration matters may survive federal preemption not because their effects are "indirect," but rather because they legitimately regulate matters that are of state or local concern and beyond the purview of the INA, which is not a basis that can justify the City of Fremont's Ordinance. Judge Bright's dissenting opinion correctly observes that the Supreme Court invalidated section 6 of the Arizona statute, which "provided for warrantless arrests where an officer had probable cause to believe the arrestee was removable," even though it "did not directly remove any undocumented person from the state." Op. 39 (Bright, J., dissenting). Judge Bright explained that the Ordinance at issue here "has a much closer relationship to removal than did section 6" of the Arizona law, under which aliens would be arrested but then turned over to federal officials. *Id.* at 41.

5. In addition to the direct conflict with the treatment of similar local ordinances by the Third and Fifth Circuits, the panel's holding is also in considerable tension with the parts of the Fourth and Eleventh Circuit decisions that held state anti-harboring laws to be preempted. *See South Carolina*, 2013 WL 3803464, at *9–*10; *Alabama*, 691 F.3d at 1285–88. The laws at issue in those cases created state crimes, parallel to a set of federal crimes, for concealing, harboring, shielding, or transporting

unlawfully present aliens. The Ordinance at issue here, while applicable only to occupancy of rental housing, similarly creates criminal liability for those who "harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law." Ordinance § 2(a). *See Villas at Parkside Partners*, 2013 WL 3791664, at *5 (opinion of Higginson, J.) (finding occupancy-license ordinance incompatible with federal harboring statutes).

The panel in this case reached a different conclusion by declining to consider the comprehensive federal regulation of harboring activity and instead limiting its analysis to the single federal provision that is most similar to the challenged Ordinance. Having thus constrained its analysis, the panel declared that "an anti-harboring prohibition contained in one sub-part of one subsection of 8 U.S.C. § 1324" does not preempt an entire field. Op. 13. But "[t]he INA provides a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens," *Lozano,* 2013 WL 3855549, at *14, which constitutes a "full set of standards" to govern the unlawful transportation and movement of aliens, *Alabama*, 691 F.3d at 1286 (internal quotation marks omitted); *see* 8 U.S.C. § 1323 (penalizing persons for unlawfully bringing aliens into the United States); *id.* § 1324 (penalizing persons for bringing in, transporting, or harboring aliens within the United States); *id.* § 1327 (penalizing persons who assist certain inadmissible aliens to enter the country); *id.* § 1328 (penalizing those who import

aliens for immoral purposes); *see also South Carolina*, 2013 WL 3803464, at *10 (citing "the vast array of federal laws and regulations on this subject"). This federal scheme leaves no room for local ordinances that impose additional criminal penalties for "harboring" undocumented aliens (in rental housing or otherwise), whether or not those provisions mirror the restrictions of federal law.

In sum, like Alabama, South Carolina, and the Cities of Hazleton and Farmers Branch, the City of Fremont "has essentially decided that unlawfully present aliens cannot be tolerated within its territory, without regard for any of the statutory processes or avenues for granting an alien permission to remain lawfully within the country." *Alabama*, 691 F.3d at 1295. The panel's determination that localities and States in this Circuit may take such extraordinary action places this Court in conflict with four other Circuits, is inconsistent with the INA's vesting of removal authority exclusively in the federal government, and threatens serious consequences for the Nation's foreign policy and the treatment of American citizens in other nations. Review by the full Court is warranted.

CONCLUSION

For the foregoing reasons, the full Court should rehear this case.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

MARK L. GROSS
HOLLY A. THOMAS
Attorneys
Civil Rights Division
U.S. Department of Justice

STUART F. DELERY
Assistant Attorney General

DEBORAH R. GILG
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

s/ Daniel Tenny
MARK B. STERN
BENJAMIN M. SHULTZ
DANIEL TENNY
JEFFREY E. SANDBERG
(202) 514-1838
Attorneys, Appellate Staff
Civil Division, Room 7215
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

AUGUST 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2013, I filed the foregoing by causing a digital version to be filed electronically via the CM/ECF system. Counsel will be automatically served by the CM/ECF system.

/s/ Daniel Tenny
Daniel Tenny
Counsel for the United States

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I hereby certify that this brief has been scanned for viruses and is virus-free.

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Daniel Tenny