No. 10-10751

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VILLAS AT PARKSIDE PARTNERS, ET AL.,

Plaintiffs-Appellees,

v.

THE CITY OF FARMERS BRANCH, TEXAS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

EN BANC BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE APPELLEES

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

In accordance with Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, in addition to the persons and entities already identified in the other briefs. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTRODUCTION AND INTEREST OF THE UNITED STATES

The Constitution and the Immigration and Nationality Act vest the National Government with the exclusive authority to regulate immigration and determine which aliens will be permitted to reside in the United States and which will be removed from the country. The City of Farmers Branch, dissatisfied with the federal government's enforcement of the immigration laws, has enacted a series of ordinances with the avowed purpose of "creat[ing] a disincentive for aliens to remain unlawfully present in Farmers Branch." City Br. 32 (emphasis omitted).

The panel majority concluded that the City's ordinance intrudes on the federal government's authority to regulate immigration, and the Supreme Court's decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012), confirms the correctness of that ruling. *Arizona* makes clear that a state or locality may not attempt to "achieve its own immigration policy," *Arizona*, 132 S. Ct. at 2506, even when it does so by purportedly regulating in areas of traditional local concern. The Supreme Court similarly made clear that restrictions on aliens are not saved from preemption because the state or locality relies on a federal determination of immigration status. Stressing the crucial role of federal discretion in the enforcement of immigration laws, the Court left no doubt that a state or locality does not "cooperate" with federal enforcement efforts when its officials take unilateral action against an alien that intrudes on the ability of federal officials to make discretionary determinations about the treatment of foreign nationals. *See* 132 S. Ct. at 2507.

Congress has not barred persons in this country who lack proper documentation from renting a room or obtaining other necessities of day-to-day existence. Such a scheme would create a host of foreign policy and humanitarian concerns and would undermine the orderly proceedings in which federal officials determine whether an alien may remain in this country. Congress has also enacted specific, comprehensive anti-harboring provisions that would be undermined by divergent state and local sanctions that operate without regard to the exercise of federal discretion.

In sum, the United States respectfully submits that the panel majority and the district court correctly held that the challenged ordinance is preempted by federal law.[1]

STATEMENT OF FACTS

I. Statutory Background

1. "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 132 S. Ct. at 2498. Pursuant to that power, Congress enacted the Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952), as amended, 8 U.S.C. §§ 1101 *et seq.*, which comprises "a 'comprehensive federal statutory scheme for regulation of

[1] The United States sought leave to participate in the *en banc* oral argument, but this Court denied that request.

immigration and naturalization' and set[s] 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *DeCanas v. Bica*, 424 U.S. 351, 353, 359 (1976)). The INA establishes the grounds on which an alien is removable from the country, and also provides for administrative proceedings, subject to judicial review, that generally constitute the "sole and exclusive procedure for determining whether an alien may be . . . removed from the United States." 8 U.S.C. §§ 1229a(a)(3), 1252. In such proceedings, aliens may seek relief from removal, including relief that allows the alien to remain in the United States, such as asylum, *id.* § 1158; cancellation of removal, *id.* § 1229b; adjustment of status, *id.* § 1255; and relief based upon the international treaty obligations of the United States, *id.* § 1252(a)(4) (judicial review of claims under UN Convention Against Torture). A "principal feature" of this system is that it vests "broad discretion" in federal immigration officials to determine whether to grant discretionary relief, or even whether to "pursue removal at all." *Arizona*, 132 S. Ct. at 2499.

The comprehensive federal immigration scheme includes criminal sanctions for facilitating the unlawful entry, residence, or movement of aliens within the United States. *See United States v. Alabama,* --- F.3d ---, 2012 WL 3553503, at *10 (11th Cir. Aug. 20, 2012) (explaining that Congress has provided a "'full set of standards' to govern the unlawful transport and movement of aliens"); 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 certain 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). Aliens themselves may be criminally prosecuted for unlawful entry or unauthorized re-entry into the United States. *See id.* § 1325 (penalizing unlawful entry); *id.* § 1326 (penalizing unauthorized re-entry following removal).

2. The federal government responds to inquiries from state and local officials regarding an individual's immigration status "for any purpose authorized by law." 8 U.S.C. § 1373(c). The Department of Homeland Security (DHS) has established several programs tailored to particular kinds of inquiries, including one known as Systematic Alien Verification for Entitlements ("SAVE").[2] Under SAVE, DHS responds to inquiries from agencies attempting to verify the immigration status of individuals seeking particular government benefits. *See* 76 Fed. Reg. 58525, 58526 (Sept. 21, 2011). DHS's responses provide information about an individual's immigration status—whether, for example, the alien is a "parolee," a lawful permanent resident, or currently seeking asylum. Typically, the responses do not, and

[2] By contrast, certain law enforcement-related queries, for example, are sent to a different part of DHS, the Law Enforcement Support Center ("LESC"). *See* ICE, Fact Sheet: Law Enforcement Support Center (May 29, 2012), http://www.ice.gov/news/library/factsheets/lesc.htm.

cannot, provide a definitive answer as to whether an alien is removable, or whether an alien is entitled to relief from removal. Such issues are generally subject to adjudication before an immigration judge in proceedings under 8 U.S.C. § 1229a. *See* ROA 3728 (noting that DHS does not give a yes or no answer in response to SAVE inquiries).

II. Factual Background

1. The City of Farmers Branch is a Texas municipality. In September 2006, the City Council passed a resolution declaring that the City was "downright mad that President Bush and the Executive Branch of the United States government . . . is [sic] totally failing in the enforcement of" the INA. ROA 7467, 7469. The resolution declared that the City was prepared to "take whatever steps it legally can to respond to the legitimate concerns of our citizens" with respect to an "utter breakdown and failure of the United States government to enforce immigration laws." ROA 7468.

Two months later, the City Council adopted Ordinance 2892, the first of three ordinances designed to prohibit housing rentals to persons not "lawfully present" in the country. ROA 5357-61. This first ordinance asserted that it had been adopted solely "for the purposes of assisting the United States Government in its enforcement of the Federal Immigration Laws." ROA 5361. A state court temporarily enjoined enforcement of the ordinance soon after its adoption. *See Villas at Parkside Partners v.*

City of Farmers Branch, 577 F. Supp. 2d 851, 852 (N.D. Tex. 2008) (describing litigation history).

The City Council responded by adopting a second measure, Ordinance 2903. *Id.*; *see also* ROA 5374-82. Like its predecessor, Ordinance 2903 generally barred landlords from renting apartments to individuals who failed to provide sufficient documentation of citizenship or "eligible immigration status." ROA 5377-80. City voters approved this second ordinance in a May 2007 referendum. *Villas*, 577 F. Supp. 2d at 852. A federal court permanently enjoined its enforcement, holding that it was preempted by federal law and violated due process. *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 866-77, 879 (N.D. Tex. 2008).

2. The City Council eventually approved a third ordinance—Ordinance 2952—which was to become effective "on the 15th day after the date on which a final and appealable judgment" was rendered by the district court hearing the challenge to the second ordinance. ROA 4524.

Ordinance 2952, which is at issue in this case, prohibits "occupants"—individuals 18 and older who reside at a single family residence unit—from obtaining rental housing unless they have a City-issued "occupancy license." ROA 4513-15. License applicants must pay a $5 fee and provide the City Building Inspector with contact information and other personal information. ROA 4514. Those applicants who claim U.S. citizenship or nationality must sign a declaration to that effect. ROA

4514. Other applicants must provide "an identification number assigned by the federal government that the occupant believes establishes his or her lawful presence in the United States." ROA 4515. Applicants unaware of such a number may indicate as much. ROA 4515.

All individuals who submit completed applications are given an occupancy license. ROA 4515. But if an applicant has not declared himself to be a U.S. citizen or national, the Building Inspector must "[p]romptly" take action under 8 U.S.C. § 1373(c) to "verify with the federal government whether the occupant is an alien lawfully present in the United States." ROA 4516.

If the federal government "reports the status of the occupant as an alien not lawfully present in the United States," the Building Inspector must notify the occupant and his landlord. ROA 4516. The ordinance provides the occupant 60 days to correct his federal records and to provide additional information establishing his lawful presence in the country. ROA 4516. At the end of that period, the Building Inspector must make a second inquiry to DHS. If the response indicates that the applicant is "an alien who is not lawfully present in the United States," the occupancy license is revoked. ROA 4517.

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 building inspector in a court of competent jurisdiction in Dallas County, Texas." ROA 4517.

The plaintiff in such a suit may require the court to attempt to use the provisions of 8 U.S.C. § 1373(c) to ask DHS for "a new verification of . . . immigration status," and he may also seek review of "the question of whether the occupant is lawfully present in the United States." ROA 4518. The answer to that last question is assertedly "determined under federal law." ROA 4518. The federal government's most recent determination of the individual's immigration status under section 1373 gives rise to "a rebuttable presumption" that such status is accurate. ROA 4518.[3]

Ordinance 2952 imposes criminal penalties on occupants and landlords who violate its provisions. *See* ROA 4515-16 (creating "offenses" for violating various provisions of the ordinance); Tex. Penal Code Ann. §§ 1.03(a), 12.02 (explaining that municipal "offenses" are subject to criminal penalties). Persons found liable for these violations are guilty of a Class C Misdemeanor, and they can be fined up to $500 for each day they are not in compliance—the highest penalty a municipality may normally assess under Texas law for violations unrelated to fire safety, zoning, or public health and sanitation. ROA 4524; *see also* Tex. Penal Code Ann. § 12.23; Tex. Loc. Gov't Code Ann. § 54.001. Additionally, if a landlord rents housing to someone who lacks an occupancy license, the Building Inspector must suspend the landlord's rental

[3] A federal determination is "conclusive" under the ordinance only if federal law gives the determination "preclusive effect." ROA 4518. SAVE inquiries would not be entitled to preclusive effect because "res judicata does not apply to non-adjudicatory proceedings." *Medina v. INS*, 993 F.2d 499, 503 (5th Cir. 1993).

license until the violation is cured to the City's satisfaction, and the landlord cannot collect rent from any tenant in the residence. ROA 4516-17.

3. Plaintiffs identify themselves as tenants and landlords who rent or own property in Farmers Branch. ROA 3968, 3999, 4002, 6647, 6667, 6670. At plaintiffs' request, the district court entered a preliminary injunction to restrain enforcement of Ordinance 2952, *see* ROA 834, and, in the order on review, made its injunction permanent after concluding that the ordinance is preempted by federal law, *see* ROA 10552.

The City appealed, and a panel of this Court affirmed, explaining that Ordinance 2952 "is an impermissible regulation of immigration posing an obstacle to federal control of immigration policy." *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802, 811 (5th Cir. 2012). Judge Elrod concurred in part and dissented in part, opining that the ordinance's judicial review provision improperly "[a]uthoriz[es] state courts to revisit federal determinations of immigration status," but that the ordinance is not otherwise preempted. *See id.* at 831-32. The City petitioned for rehearing *en banc*, which this Court granted.

ARGUMENT

Ordinance 2952 Is Preempted by Federal Law

A. The INA Establishes a Comprehensive Framework for Regulating Immigration

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 132 S. Ct. at 2498. The "power to restrict, limit, [and] regulate . . . aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation[;] . . . whatever power a state may have is subordinate to supreme national law." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

This exclusive allocation of constitutional authority to the National Government reflects in part the extent to which immigration regulation is intertwined with the conduct of foreign policy and with the paramount importance of preserving the National Government's ability to speak "with one voice" in dealing with other nations. *Arizona*, 132 S. Ct. at 2507; *see also American Ins. Ass'n v. Garamendi,* 539 U.S. 396, 424 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000). "Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Arizona*, 132 S. Ct. at 2498. Even

"[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad." *Id.*

Cognizant of these significant national interests, Congress in the INA has "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Whiting*, 131 S. Ct. at 1973 (quoting *DeCanas*, 424 U.S. at 353, 359). The INA does not preempt "every state enactment which in any way deals with aliens," and "local regulation[s]" affecting aliens do not exceed state authority based on "some purely speculative and indirect impact on immigration." *DeCanas*, 424 U.S. at 355. Equally clearly, however, even a regulation in an area of traditional state authority is preempted if it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 132 S. Ct. at 2501 (quoting *Hines,* 312 U.S. at 67).

B. Ordinance 2952 Stands As an Obstacle to the Operation of Federal Law

1. Since 2006, the City has adopted a series of ordinances to address what it believes are deficiencies in the federal government's enforcement of federal immigration laws. The City Council presaged the first of these measures with a declaration that the City was "downright mad that President Bush and the Executive Branch of the United States government . . . is [sic] totally failing in the enforcement

of" federal immigration law. ROA 7467, 7469. That declaration further stated that, absent federal action, the City would "take whatever steps it legally can to respond to the legitimate concerns of our citizens" about what it characterized as an "utter breakdown and failure of the United States government" in the immigration arena. ROA 7468. The Council voiced similar sentiments as motivating its adoption of Ordinance 2952. Council member Ben Robinson, for example, noted his concern about the effects on the country from what he characterized as "open borders" and expressed his dissatisfaction with federal immigration enforcement. *See* ROA 5602-03, 5609-10, 5613-14. Other Council members similarly linked the ordinance to their desire to increase enforcement of federal immigration law. *See, e.g.*, ROA 5796-97 (O'Hare); ROA 6617, 6622 (Scott); ROA 6018 (Greer).

In furtherance of these goals, Ordinance 2952 establishes a scheme by which all renters in the City of Farmers Branch must obtain an "occupancy license" which the City will revoke if it concludes that the license holder "is not lawfully present in the United States." ROA 4516-17. The ordinance thus purports to preclude aliens from renting a place to live based on the City's understanding of their immigration status.

Arizona makes clear that the ordinance impermissibly infringes on the federal scheme of immigration regulation, and that it would do so even if it faithfully implemented the substantive standards of federal law, which it does not. In *Arizona*, the Supreme Court explained in the context of immigration registration offenses that

"[p]ermitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted." *Arizona*, 132 S. Ct. at 2502-03 (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) (States may not impose their own punishment for fraud on the Food and Drug Administration); *Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.,* 475 U.S. 282, 288 (1986) (States may not impose their own punishment for repeat violations of the National Labor Relations Act)). The Supreme Court emphasized that the Arizona registration statute would have given the state "the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Id.* at 2503.

The ordinance, like the Arizona scheme, operates without regard to the scope of sanctions deemed appropriate by Congress and without regard to the exercise of federal discretion in enforcing the immigration laws. Congress did not make it a crime for aliens without proper documentation to rent an apartment. *See Arizona*, 132 S. Ct. at 2505 ("As a general rule, it is not a crime for a removable alien to remain present in the United States."). Indeed, such a scheme would undermine and conflict with the orderly operation of federal removal proceedings by depriving aliens of shelter while federal officials determine whether to institute removal proceedings, and while such proceedings take place. Under federal law, aliens generally may be released

on bond and remain in the United States during the pendency of removal proceedings, *see* 8 U.S.C. § 1226(a), and the INA specifically contemplates that aliens in removal proceedings will have an address at which federal immigration authorities will be able to locate them, *see id.* § 1229(a)(1)(F).

The ordinance also is premised on a fundamental misunderstanding of federal law. The ordinance mistakenly assumes that the City Building Inspector can determine if an individual is or will be permitted to remain in the United States by making an inquiry to DHS under 8 U.S.C. § 1373. In this way, according to the City, the Building Inspector can verify if a renter is "not lawfully present" in the United States and revoke his authority to rent an apartment in Farmers Branch.

The ordinance is crucially misaligned with federal law. When the federal government answers inquiries regarding immigration status under 8 U.S.C. § 1373(c), its responses do not reflect a determination about whether the alien will, or should be, placed in removal proceedings or whether an alien is entitled to any relief from removal or otherwise will ultimately be permitted to remain in the United States.[4] Although information in DHS records may indicate that an individual appears to be

[4] The City is thus incorrect in urging that *Whiting* "rejected the notion that the federal government, in responding to an 8 U.S.C. § 1373(c) request, would be unable to provide the information that a state needed." City Br. 8. The "information that a state needed" in *Whiting* was a determination about whether an individual was "authorized to work," *Whiting*, 131 S. Ct. at 1982, not a determination about whether the person is entitled or will be permitted to remain in the United States.

subject to removal proceedings, "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499. In some cases, DHS declines to initiate removal proceedings because the evidence is likely insufficient to demonstrate the alien's removability, or the alien is likely to secure some form of relief such that the alien would not be removed. In other circumstances, DHS may decline to pursue removal in the exercise of discretion, after consideration of a range of foreign-policy, humanitarian, and resource-allocation interests. The discretion exercised by federal immigration officials constitutes a "principal feature of the removal system" designed by Congress, and is "broad," *Arizona*, 132 S. Ct. at 2499—not "very narrow," as the City erroneously contends, City Br. 53. The Supreme Court stressed in *Arizona* that "[d]iscretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service." *Arizona*, 132 S. Ct. at 2499; *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-87 (1999) (recognizing the importance of the exercise of discretion in removal proceedings).

The Supreme Court also emphasized in *Arizona* that, "[i]f removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal." *Arizona*, 132 S. Ct. at 2499.[5] Aliens may prevail on such grounds even if federal officials believe that removal proceedings are warranted. Indeed, in 14% of cases decided by immigration judges in Fiscal Year 2011, the alien was granted some form of relief from removal. Executive Office for Immigration Review, *FY 2011 Statistical Year Book*, at D2.[6] In another 12% of cases, the immigration judge terminated the proceeding on other grounds, including DHS's failure to establish removability. *Id.*

2. The City's reliance on the anti-harboring provisions of federal law underscores the extent to which its ordinance infringes on the federal enforcement of immigration laws. Federal law "provides a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens." *Alabama,* 2012 WL 3553503, at *9 (internal quotation marks omitted). The INA imposes criminal penalties on an individual who "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,

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[5] For example, certain otherwise unlawfully present aliens who have been in the United States continuously for more than 10 years are eligible to seek cancellation of removal at the discretion of the Attorney General. *See* 8 U.S.C. § 1229b. Aliens who were admitted as nonimmigrants may be eligible, again at the discretion of the Attorney General, for an adjustment to lawful permanent resident status. *Id.* § 1255.

[6] *Available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf.

conceals, harbors, or shields from detection . . . such alien." 8 U.S.C. § 1324(a)(1)(A)(iii). As the City points out, Section 1324(c) explicitly permits local law enforcement officers to make arrests for violations of the anti-harboring provisions. *See id.* § 1324(c). But, "[r]ather than authorizing states to prosecute for these crimes, Congress chose to allow state officials to arrest for § 1324 crimes, subject to federal prosecution in federal court." *Alabama*, 2012 WL 3553503, at *9 (internal quotation marks omitted). Thus, the Eleventh Circuit recently invalidated an Alabama statutory provision that purported to address harboring of aliens—a term defined to include "entering into a rental agreement with [an] alien." *Id.* at *9. "Like the federal registration scheme addressed in *Arizona*, Congress has provided a 'full set of standards' to govern the unlawful transport and movement of aliens," including "criminal penalties for these actions undertaken within the borders of the United States," and thus "a state's attempt to intrude into this area is prohibited." *Id.* at *10 (internal quotation marks and citation omitted).

The federal anti-harboring provision, "[b]y confining the prosecution of federal immigration crimes to federal court . . . limit[s] the power to pursue those cases to the appropriate United States Attorney." *Id.* at *11 (internal quotation marks omitted); *see also* 8 U.S.C. § 1329. But the sanctions imposed by the ordinance leave no room for the exercise of judgment by responsible federal officials. Moreover, even assuming that the federal statute reaches a landlord's mere provision of rental accommodations

on the open market, *but see Alabama*, 2012 WL 3553503, at *12, the ordinance, unlike the federal anti-harboring law, imposes penalties directly on the alien.

3. The ordinance thus reflects a deep-seated misunderstanding of federal law and would impermissibly interfere with its operations even if it did not threaten tenants and landlords with criminal sanctions. The City seeks to deter aliens without certain documentation from seeking accommodations in Farmers Branch and to encourage them to remove themselves from the City's borders. The impact of the ordinance would be felt not only by individuals who might ultimately be subject to removal, but by individuals entitled or permitted to remain in the United States who fear that they will be unable to demonstrate their lawful status to the satisfaction of their landlord or the Building Inspector. The *in terrorem* effect would be felt, as well, by families with even one member whose lawful status would be subject to question by local officials. The ordinance thus threatens to defeat the longstanding goal of federal immigration law, as well as U.S. foreign policy, to "leave [aliens] free from the possibility of inquisitorial practices and police surveillance that might . . . affect our international relations." *Hines,* 312 U.S. at 73-74.

Nor can the full extent of the conflict with federal law be determined simply by viewing the City's ordinance in isolation. If the City's position were accepted, every state and local government would be free to impose similar prohibitions against renting housing or obtaining other goods and services based on information received

from DHS that does not even reflect a federal determination as to whether an alien should be placed in removal proceedings, let alone ultimately removed from the United States. That result would undermine the calibrated uniformity of federal law, potentially disrupt the free movement of persons throughout the Nation, and open the door to harassment of aliens, international controversy, and possible retaliation against United States citizens in foreign countries. The Constitution ensures a single, national immigration policy. *See Arizona*, 132 S. Ct. at 2498. It leaves no room for competing state and municipal regimes that purport to enforce federal immigration law by forcing immigrants across city, state, or national borders. *See also North Dakota v. United States*, 495 U.S. 423, 458 (1990) (Brennan, J., concurring in the judgment in part and dissenting in part) (considering that the difficulties presented by a state requirement would "increase exponentially if additional States adopt[ed] equivalent rules," and noting that such a nationwide consideration was "dispositive" in *Public Utilities Commission v. United States*, 355 U.S. 534, 546 (1958)).

C. The City Misunderstands the Preemption Principles Set Forth in *Arizona*, *Whiting*, and *DeCanas*.

1. The City's contrary arguments seriously misunderstand the principles that underlie the Supreme Court's decision in *Arizona* and control the resolution of this case.

The City mistakenly urges that it may take virtually any action that furthers the same goals as federal law so long as it is acting in a field that has not been expressly occupied by Congress. *See* City Br. 44 ("Concurrent enforcement . . . is a factor that makes any conflict-preemption claim difficult, if not impossible, to sustain."). Relying on this mistaken premise, the City asserts that if "a city or state relies upon the federal government's determination of an alien's immigration status, *no preemption exists*." *Id.* at 39 (emphasis added).

That contention is flatly at odds with the Supreme Court's holding in A*rizona* that the State's sanctions on aliens seeking employment were preempted even though the State "relie[d] upon the federal government's determination of an alien's immigration status," City Br. 39, and even though Congress has authorized States and localities to enact "licensing and similar laws," 8 U.S.C. § 1324a(h)(2), addressing the employment of aliens. *See Arizona*, 132 S. Ct. at 2503-05.

Arizona similarly makes clear that state provisions may be preempted even when a State purports to regulate in an area of traditional state authority. In *DeCanas*, on which the City heavily relies, the Supreme Court rejected a preemption challenge in the context of employment law "because Congress *intended* that the States be allowed, 'to the extent consistent with federal law, [to] regulate the employment of illegal aliens.'" *Toll v. Moreno*, 458 U.S. 1, 13 n.18 (1982) (quoting *DeCanas*, 424 U.S. at 361) (emphasis and alteration in original). As *Arizona* confirms, *DeCanas* did not hold that

States or municipalities have free rein to enact their own policies concerning illegal immigration under the guise of regulating an area of traditional local concern. *See* 132 S. Ct. at 2504-05 (striking down state employment statute that "interfere[d] with the careful balance struck by Congress" in its "comprehensive framework" governing the unauthorized employment of aliens).

Whiting likewise offers no support for the City's circumscribed understanding of preemption analysis. In that decision, the Court examined the 1986 amendments to the INA, enacted after *DeCanas*. Those amendments imposed sanctions on employers who knowingly hire illegal aliens, but expressly preserved state and local authority to impose employment-related sanctions "through licensing and similar laws[.]" 8 U.S.C. § 1324a(h)(2). *Whiting* held that an Arizona licensing scheme fell within the express scope of this savings clause, *see* 131 S. Ct. at 1978-81, and the Court's plurality relied heavily on that carve-out in its implied preemption analysis, concluding that Congress had specifically contemplated and authorized the resulting disuniformity and state sanction. *See id.* at 1979-80, 1981, 1984. *Whiting* did not remotely suggest that a State may bar any transaction by or with illegal aliens without triggering preemption concerns, and *Arizona* precludes the City's attempt to read *Whiting* in this manner.[7]

[7] The Supreme Court's decision in *Arizona* makes clear that *Whiting* does not, as the panel dissent suggested, immunize any local ordinance that determines

Applying these principles, the Eleventh Circuit in *Alabama* invalidated a state law that prohibited its courts from recognizing the validity of any contracts entered into by aliens not lawfully present in the United States. *Alabama*, 2012 WL 3553503, at *16-19. The Eleventh Circuit explained that the Supreme Court has repeatedly invalidated state statutes that purport to legislate in areas of traditional state concern and are not subject to field preemption. In *Crosby*, for example, the Supreme Court unanimously invalidated a Massachusetts statute that restricted the ability of state agencies to buy goods and services from companies that conducted business with Burma, finding that it constituted an impermissible obstacle to the effective operation of federal foreign policy. Similarly, in *Gould,* the Court held that a State may not add to the remedies provided by the National Labor Relations Act by refusing to contract with employers who commit multiple unfair labor practices. The Eleventh Circuit quoted the reasoning in *Gould,* observing that "even though the state purported to govern in an area of traditional state concern, it could not 'enforce the requirements' of federal regulations through its own statutory scheme." *Id.* at *19 (quoting *Gould*, 475 U.S. at 291). And it noted that in *Buckman*, the Supreme Court likewise "found that a state tort cause of action—an area of traditional state concern—was preempted

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immigration status through inquiries to the federal government. *See Villas*, 675 F.3d at 830-31 (Elrod, J., dissenting). The Court in *Arizona* recognized that conflict can arise simply from the fact that a State is superseding federal discretion, as well as from the fact that the State is imposing additional penalties not contemplated by Congress. *See* 132 S. Ct. at 2502-03.

by federal law where the underlying allegations concerned fraud against a federal agency." *See id.* (citing *Buckman,* 531 U.S. at 347-53).

The preemption principles applied in *Arizona* and *Alabama* are thus fully applicable here regardless of whether this case is thought to involve "conflict" or "obstacle" preemption rather than "field" preemption and notwithstanding the City's claim that regulation of housing is traditionally a matter of local concern. *See generally Crosby*, 530 U.S. at 373 n.6 ("[T]he categories of [field and conflict] preemption are not rigidly distinct." (internal quotation marks omitted)).

2. The City's attempts to invoke a presumption against preemption fail for similar reasons. As discussed above, that a state or locality imposes sanctions in an area within its traditional sphere of authority does not insulate its enactment from preemption analysis. *See Alabama*, 2012 WL 3553503, at *18 (rejecting contention that statute refusing to recognize contracts with illegal aliens is entitled to a presumption against preemption). Although the ordinance imposes sanctions on landlords and tenants, it is not in any meaningful sense a traditional regulation of housing. From the outset, the City made plain its determination to respond to what it viewed to be an "utter breakdown and failure of the United States government to enforce immigration laws," ROA 7468, and to enact ordinances "for the purposes of assisting the United States Government in its enforcement of the Federal Immigration Laws." ROA 5361. *See United States v. Locke*, 529 U.S. 89, 108 (2000) (no presumption when a state

"regulates in an area where there has been a history of significant federal presence" and little traditional role for the States); *Buckman*, 531 U.S. at 347 (no presumption when state enmeshed itself in the relationship between a federal agency and the entities it regulates).

The only justification for the ordinance cited by the City in its brief is that the ordinance "creates a *disincentive* for aliens to remain unlawfully present in Farmers Branch." City Br. 32. Like the statutory provisions found to be preempted in *Arizona,* the ordinance thus impermissibly seeks to "achieve its own immigration policy." *Arizona*, 132 S. Ct. at 2506. *Arizona* illustrates that provisions that do not attempt to *directly* regulate who may enter the United States may nevertheless be preempted by federal immigration laws if they interfere with the purposes and objectives of Congress. *See, e.g.*, *Arizona*, 132 S. Ct. at 2503-05 (finding state employment provision preempted even though it "attempts to achieve one of the same goals as federal law"); *id.* at 2505-07 (finding warrantless arrest provision preempted).

To the extent *DeCanas* attempted to offer a definition of a "regulation of immigration," it did so solely for the purposes of identifying those areas in which States were constitutionally prohibited from legislating even in the absence of congressional action. *See DeCanas*, 424 U.S. at 355-56. It did not provide States and localities with the authority to establish schemes to deter illegal immigration so long as

they do so by imposing sanctions in areas in which they can also regulate for reasons unrelated to immigration policy. Indeed, in the section of *DeCanas* that analyzed the compatibility of the state enactment with the congressional scheme, the Court did not conclude that the statute survived preemption analysis solely because it fell outside the purported definition of what constitutes a regulation of immigration. *See id.* at 356-63. Instead, the Court explained the specific local employment concerns addressed by the statute, and observed that the law "focuses directly on these essentially local problems and is tailored to combat effectively the perceived evils." *Id.* at 357. The ordinance at issue here is manifestly not focused on local problems.

In any event, even if a presumption against preemption did apply, it would not be sufficient to sustain the validity of the ordinance. *See Elam v. Kan. City S. Ry.*, 635 F.3d 796, 804 (5th Cir. 2011) (explaining that even when the presumption is applicable, it is less forceful in areas of significant federal presence); *Alabama*, 2012 WL 3553503, at *19 (law prohibiting courts from recognizing contracts with illegal aliens "constitutes a thinly veiled attempt to regulate immigration under the guise of contract law, and thus, we do not think the presumption against preemption applies" but "[e]ven if it does, we conclude that it is preempted.").

3. The City is equally mistaken in comparing its ordinance to the one provision of Arizona law that was upheld against a preliminary facial challenge in *Arizona*. Section 2(B) of the Arizona law "requires state officers to make a 'reasonable

attempt . . . to determine the immigration status' of any person they stop, detain, or arrest on some other legitimate basis if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.'" *Arizona*, 132 S. Ct. at 2507 (quoting Ariz. Rev. Stat. Ann. § 11-1051(B)). Officers discharge this duty by contacting the federal government's Law Enforcement Support Center, which was established to field such calls from state law enforcement personnel. The Supreme Court stressed that on its face Section 2(B) concerned only the types of communication between federal and state officials authorized by federal statute and which might, indeed, occur in the absence of the new Arizona provision. *See id.* at 2508. The City's ordinance, in contrast, establishes a scheme to determine immigration status and deter the presence of illegal aliens that is untethered to any legitimate state activity. Instead, like the provisions at issue in *Arizona* that were held to be preempted, it constitutes an attempt to unilaterally attach consequences to a person's immigration status without regard to federal priorities or the operation of the federal scheme.

D. No Provision of Federal Law Authorizes the Ordinance.

The City is on no firmer ground in arguing that Ordinance 2952 is authorized by various provisions of federal immigration law.

1. The City urges that the ordinance is not an obstacle to the workings of the INA because federal law contemplates that state and local officers will "cooperate

with [the Secretary of Homeland Security] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10). *See* City Br. 40. But the Supreme Court recognized in *Arizona* that cooperation does not exist when state officials take unilateral action against an alien that is not subject to federal direction. *See* 132 S. Ct. at 2507; *see also id.* (looking to DHS guidance to determine the meaning of "cooperation").

Ordinance 2952 does not represent cooperation with federal officials in any meaningful sense of the term. Genuine cooperation, as the statute suggests, would involve assisting federal officials responsible for administering the INA in *their* identification, apprehension, detention, or removal of aliens. The ordinance, however, looks only to the federal government for the provision of *information* and does not in any way respond to federal enforcement priorities or discretion. Instead, it unilaterally determines, based on a piece of information obtained from DHS, that a given alien should be denied rental housing in the City.

2. The City fares no better in suggesting that the ordinance is authorized by 8 U.S.C. § 1621, which provides that certain aliens who are not "qualified aliens," "nonimmigrants," or paroled aliens within the meaning of 8 U.S.C. § 1621(a), are ineligible for specified types of state and local public benefits. Section 1621 applies to a "grant, contract, loan, professional license, or commercial license provided by . . . a State or local government," 8 U.S.C. § 1621(c)(1)(A), or to a "retirement, welfare,

health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by . . . a State or local government," *id.* § 1621(c)(1)(B).

Section 1621 does *not* require States to prohibit private rentals to any aliens, and the statute's text makes plain that while it applies to a "professional license" and a "commercial license," it has no application to an "occupancy license" of the type at issue here. Nor does an occupancy license constitute a "public or assisted housing" benefit, as the City implies. City Br. 33. Indeed, nothing in the statute or legislative history suggests that Congress intended through this provision to authorize States and localities to circumvent the exclusive federal removal procedures by enacting "licensing" regimes that effectively deprive an alien of shelter in a given location and to pursue a policy of alien exclusion or legislated homelessness. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.").[8]

Contrary to the City's assertion, DHS has never expressed a different understanding of section 1621. A 2007 DHS privacy statement cited by the City

[8] The statute defines the categories of "qualified alien," "nonimmigrant," or paroled alien, that are used in determining the application of 8 U.S.C. § 1621. The statute contains no category or definition of "not lawfully present."

provided a generic background on the SAVE program and did not discuss legislative schemes like the one at issue here. *See* DHS, *Privacy Impact Assessment*, at 2 (April 1, 2007).[9] Similarly, a 2008 privacy statement recognized DHS's section 1373(c) authority to respond to inquiries when a governmental entity otherwise "has the legal authority" to ask about immigration status, and noted that this authority can extend to inquiries motivated by highly sensitive background investigations (such as for security clearances). *See* 73 Fed. Reg. 75445, 75448 (Dec. 11, 2008). Neither privacy statement purported to interpret section 1621.

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[9] *Available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_vis.pdf.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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August 30, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2012, I filed the foregoing Brief by causing a digital version to be filed electronically via the ECF system. I also certify that I will file paper copies with the Court within five days after the Court requests them.

I further certify that on August 30, 2012, I caused an electronic copy to be served through the ECF system on the following counsel who are ECF participants:

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Pursuant to Rules 29(c)-(d) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using Microsoft Word and complies with the type and volume limitations set forth in Rules 29 and 32 of the Federal Rules of Appellate Procedure. I further certify that the font used is 14 point Garamond, for text and footnotes, and that the computerized word count for the foregoing brief is 6,959 words.

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