13- No. 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a local ordinance prohibiting the knowing harboring of illegal aliens in rental housing a pre-empted "regulation of immigration?"

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

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

PARTIES TO THE PROCEEDING

The petitioner is The City of Farmers Branch, Texas.

The respondents are Villas at Parkside Partners, d/b/a Villas at Parkside; Lakeview at Parkside Partners, d/b/a Lakeview at Parkside; Chateau Ritz Partners, d/b/a Chateau de Ville; Mary Miller Smith; Valentin Reyes; Alicia Garza; Ginger Edwards; Jose Guadalupe Arias; and Aide Garza.

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Petitioner The City of Farmers Branch, Texas, respectfully prays that this Court issue a writ of certiorari to review the *en banc* opinions and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The *en banc* opinions of the United States Court of Appeals for the Fifth Circuit are reported at 726 F.3d 524 (5th Cir. 2013). They are reprinted in the appendix to this petition at App. 1-149.

The memorandum opinion and order of the United States District Court for the Northern District of Texas is reported at 701 F. Supp. 2d 835 (N.D. Tex. 2010). It is reprinted in the appendix to this petition at App. 153-208.

JURISDICTION

The judgment of the Court of Appeals panel was entered on March 21, 2012. A timely petition for rehearing *en banc* was granted. The judgment of the Court of Appeals *en banc* was entered on July 23, 2013.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1373(c) provides:

> The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

8 U.S.C. § 1324(a)(1)(A) provides, in pertinent part:

> Any person who
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> * * *
>
> (iii) 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, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;
>
> * * *
>
> shall be punished as provided in subparagraph (B).

8 U.S.C. § 1357(g)(10) provides:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a state or political subdivision of a State –

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1621(a) provides, in pertinent part:

Notwithstanding any other provisions of law . . . an alien who is not . . . a qualified alien . . . is not eligible for any State or local public benefit. . . .

STATEMENT OF THE CASE

This is a suit involving a preemption challenge to Ordinance 2952 of the City of Farmers Branch, Texas. Ordinance 2952 regulates the rental of apartments and single-family residences within the City by requiring each adult tenant to obtain a residential occupancy license, and directing that the license be revoked upon a conclusive report by the federal government that the licensee is an alien not lawfully present in the United States.

The district court held Ordinance 2952 to be impliedly preempted by federal immigration law. App. 153-208. A panel of the Fifth Circuit affirmed (over a vigorous dissent), *see* 675 F.3d 802 (5th Cir. 2012), but

the Fifth Circuit granted rehearing *en banc*. The *en banc* court produced six different opinions, collectively affirming the judgment by a vote of nine to six. *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013) (*en banc*), App. 1-149.

To obtain a residential occupancy license under Ordinance 2952,[1] the applicant must submit a one-page form to the City and pay a $5 fee. The applicant must provide basic information such as name, address, date of birth, and country of citizenship, along with the address of the proposed rental premises. An applicant who is a United States citizen or national must so declare. An applicant who is not a United States citizen or national must either provide an identification number that the applicant believes establishes his or her lawful presence in the United States or declare that the applicant does not know of any such number.

Upon receipt of a completed application and fee, the City's building inspector immediately issues the license, without scrutiny of the information provided. If the applicant has declared himself or herself to be a United States citizen or national, no further action is taken. In the case of other applicants, the building inspector exercises the City's authority under 8 U.S.C. § 1373(c) to verify the immigration status of the applicant with the federal government. If the federal government responds that the applicant is a lawfully

[1] The Ordinance appears in the appendix at App. 209-234.

present alien, no further action is taken. If the response is inconclusive, no further action is taken unless and until a final verification is received.

If the federal government notifies the City that the applicant is an alien who is not lawfully present, the building inspector issues a deficiency notice. The applicant then has a 60-day window in which to obtain a correction of the federal government's records and to submit additional information to the federal government. At the end of that time, the building inspector again queries the federal government pursuant to 8 U.S.C. § 1373(c). Only if the federal government reports for a second time that the applicant is not lawfully present does the building inspector send a notice of revocation of the residential occupancy license to the applicant and to the landlord.

Under the Ordinance, it is an offense for a tenant to occupy rental premises without first obtaining a valid occupancy license, and for the landlord not to obtain and maintain a copy of that license. It is not, however, an offense for a tenant to occupy rental premises after the tenant's license has been revoked. Instead, landlords are required to make such occupancy an event of default under their leases, and to commence and diligently pursue eviction proceedings upon learning that an occupant lacks a valid license.

Ordinance 2952 relies entirely upon the definitions of immigration status provided by federal immigration law. The City must accept the federal government's determination of each alien's status,

pursuant to 8 U.S.C. § 1373(c). City officials "shall not attempt to make an independent determination of any occupant's lawful or unlawful presence in the United States."

REASONS FOR GRANTING THE WRIT

I. Introduction.

This case involves a question of great national importance: whether municipalities may take limited steps to assist the federal government in returning the rule of law to immigration. In recent years, cities and counties across the country have used their traditional police powers to reduce the mounting fiscal and criminal burdens imposed by illegal immigration in their jurisdictions. In particular, numerous municipalities have utilized their power to regulate rental housing in order to discourage landlords from knowingly harboring illegal aliens in rented apartments or homes.[2] Such ordinances have faced lawsuits advancing a variety of implied preemption challenges. Three of those cases have reached the circuit courts, producing a pronounced and irreconcilable circuit split, described in detail below. In addition, at least one

[2] A 2010 study calculated that 46 municipalities had considered such ordinances, of which 17 had enacted the ordinances by the time the study was published. *See* Kevin O'Neil, "Hazleton and Beyond: Why Communities Try to Restrict Immigration," Migration Policy Institute Study (Nov. 2010) (available at http://www.migrationinformation.org/Feature/display.cfm?ID=805).

jurisdiction has suspended its ordinance until these legal questions are resolved.[3]

Twice in recent years, this Court has addressed the validity of state legislation directed at discouraging illegal immigration. *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492 (2012); *Chamber of Commerce v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968 (2011). In those cases, the Court considered the possible preemption of a total of five different state-law provisions, relating to employment of or by unauthorized aliens, the carrying of alien registration documents, protocols governing law enforcement encounters with suspected illegal aliens, and the determination of an alien's removability.

But the Court has not to date addressed the validity of local ordinances relating to the rental of housing to illegal aliens. And the circuit courts are in sharp disagreement – indeed, complete disarray – concerning their validity. Within a four-week period in the summer of 2013, three different circuits addressed such ordinances, *issuing a total of ten opinions and reaching diametrically opposite conclusions*

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[3] *Robert Stewart, Inc. v. Cherokee County* (N.D. Ga. Case No. 07-cv-0015). The parties agreed to suspend the relevant ordinance, and the pending litigation, until all appeals were concluded in two other cases: *Gray v. City of Valley Park,* 567 F.3d 976 (8th Cir. 2009); and *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013) (the subject of a contemporaneous certiorari petition before this Court).

about the validity of virtually-identical ordinance language.

On June 28, 2013, the Eighth Circuit decided *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), *reh'g en banc denied* (October 17, 2013), involving the rental provisions of an ordinance that were copied nearly verbatim from the Ordinance at issue in this case.[4] The majority (Judges Loken and Colloton) held that the Fremont ordinance was not a prohibited "regulation of immigration" and was neither field nor conflict preempted. Judge Colloton concurred specially, taking a different view only as to certain standing issues that did not affect the preemption claims. Judge Bright dissented, believing the ordinance to be conflict preempted.

On July 22, 2013, the Fifth Circuit, sitting *en banc*, decided the present case. A splintered court issued six different opinions. Judge Higginson's opinion for a five-judge plurality held the criminal provisions of Ordinance 2952 to be conflict preempted and the remainder of the Ordinance to be non-severable (notwithstanding the Ordinance's robust severability

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[4] The Fremont ordinance also includes provisions that require local employers to utilize the E-Verify system to confirm the work authorization of their employees, which the district court sustained against a preemption challenge. *Keller v. City of Fremont*, 853 F. Supp. 959 (D. Neb. 2012). In the wake of this Court's decision in *Whiting*, the *Fremont* plaintiffs did not press on appeal their preemption challenges to the employment provisions of the ordinance.

clause). The plurality opinion also acknowledged the circuit split with the Eighth Circuit. App. 15-16 n.9. Judge Reavley (joined by Judge Graves) concurred only in the judgment, regarding the Ordinance as a constitutionally-preempted regulation of immigration, as tantamount to a conflict-preempted "removal" of aliens, and as trenching on the federal foreign-relations power. Judge Dennis (joined by three judges) specially concurred on conflict-preemption grounds. Judge Higginson filed a special concurrence to his own plurality opinion, commenting that the Ordinance was not field preempted but raising dormant-Commerce-Clause concerns. Judge Owen concurred and dissented, believing that only two portions of the judicial review section of the Ordinance were preempted and dissenting vigorously as to the remainder of the Ordinance. Judges Jones and Elrod (joined by Judges Jolly, Smith, and Clement) vigorously defended the Ordinance as a valid exercise of the police power that was not preempted as a regulation of immigration or under field- or conflict-preemption principles. They also drew support from the Eighth Circuit's decision. App. 90 ("In an opinion just issued concerning a nearly identical local law, the Eighth Circuit agreed with us.").

Four days later, the Third Circuit decided *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013), after this Court had vacated and remanded the Third Circuit's prior decision. *City of Hazleton v. Lozano*, 131 S. Ct. 2958 (2011). The Hazleton ordinances differ in certain minor respects from the Fremont and

Farmers Branch ordinances, but they have many similar features and several identically-worded provisions. The court (speaking through Chief Judge McKee, joined by Judges Nygaard and Vanaskie) held that the rental provisions of the ordinances were a constitutionally-preempted "regulation of immigration" and were field preempted and conflict preempted.[5]

The widely-differing decisions of these three circuits on important questions of federal law on which this Court has not spoken constitute a compelling reason for the grant of a writ of certiorari.[6] *See* Sup. Ct. R. 10(a). The City of Hazleton has announced that it is also petitioning this Court for a writ of certiorari.[7] That petition is due three days after this one, on October 24, 2013. This Court may wish to combine the two cases or consider them simultaneously.

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[5] The Hazleton ordinance, unlike Farmers Branch Ordinance 2952, also contains employment provisions. The Third Circuit held those employment provisions to be conflict preempted, in spite of this Court's decision in *Whiting*.

[6] In addition to the three circuits that have ruled on this specific type of ordinance, two other circuits have decided related preemption challenges to state criminal laws that prohibit the harboring of illegal aliens. *See United States v. Alabama*, 691 F.3d 1269, 1285-88 (11th Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 2022 (2013) (state law penalizing harboring was field and conflict preempted); *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013).

[7] *See* Sam Galski, "Immigration Act Appeal Imminent," *Hazleton Standard-Speaker* (Aug. 29, 2013).

The Fifth Circuit's plurality and concurring opinions not only conflict with the opinion of the Eighth Circuit in *Fremont* and differ substantially from the opinion of the Third Circuit in *Hazleton*, but they also stand in direct conflict with the recent opinions of this Court in *Whiting* and *Arizona*. This constitutes a second, independent reason for the grant of a writ of certiorari. *See* Sup. Ct. R. 10(c).

II. The Deep Split Among the Third, Fifth, and Eighth Circuits Warrants Granting the Writ.

Implied preemption in the immigration context occurs in one of three possible ways – (1) when a state or municipality impermissibly enacts a constitutionally-preempted "regulation of immigration," *De Canas v. Bica*, 424 U.S. 351, 355 (1976), (2) through field preemption, *id.* at 357-58, or (3) through conflict preemption, *id.* at 358. The three circuits are in disagreement on all three of these forms of implied preemption, as applied to the ordinances at issue.

A. The Circuits are Sharply Divided on the Issue of What Constitutes a Preempted "Regulation of Immigration."

This Court has provided a perfectly clear (and appropriately narrow) definition of what constitutes a constitutionally-proscribed state or local regulation of immigration: "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which 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." *De Canas*, 424 U.S. at 355. In the Fifth Circuit below, the nine-judge majority divided internally on the question of whether the Ordinance constitutes a "regulation of immigration." Only four of the nine judges (Judges Reavley, Graves, Dennis, and Prado) concluded that this form of preemption applied.

Judge Reavley attempted to apply a much broader definition of "regulation of immigration" than that given by this Court. Under his theory, any law that encourages illegal aliens to voluntarily leave the relevant jurisdiction is an impermissible "regulation of immigration." He argued that the Ordinance "works to exclude and remove aliens from the City's borders. This is because no alien with an unlawful status will be able to obtain the basic need of shelter through a rental contract. Illegal aliens will therefore have no recourse but to self-deport from Farmers Branch." App. 38. Therefore, he concluded that the Ordinance constitutes a preempted regulation of immigration. Judge Dennis agreed, arguing that the Ordinance "effectively exclude[s] certain noncitizens." App. 53.

The rest of the Fifth Circuit correctly concluded that the Ordinance falls outside of this Court's definition of a "regulation of immigration." As Judges Jones and Elrod pointed out:

> The Reavley and Dennis opinions do not, because they cannot, demonstrate that the

> Ordinance runs afoul of the test in *De Canas*. The Ordinance does not determine the entry or exit of anyone into or out of the United States. It does not determine the conditions under which a "lawful" immigrant may remain. And the Ordinance's grants or denials of rental licenses are designed to follow and correspond with federal determinations concerning each applicant. This should be the end of the constitutional preemption issue.

App. 105-06.

The Eighth Circuit majority also correctly rejected the argument, adhering instead to this Court's definition of a "regulation of immigration." "[T]hese provisions neither determine 'who should or should not be admitted into the country,' nor do they more than marginally affect 'the conditions under which a legal entrant may remain.'" *Fremont*, 719 F. 3d at 941 (*quoting De Canas*, 424 U.S. at 355). The dissenting judge in the Eighth Circuit, Judge Bright, apparently disagreed, although he conflated "regulation of immigration" preemption with conflict preemption. *See id.* at 958-59.

Although only a minority of the judges of the Fifth Circuit and Eighth Circuit who considered the regulation-of-immigration argument were willing to accept it, the Third Circuit enthusiastically embraced it. Ignoring the word "legal" in this court's phrase "the conditions under which a legal entrant may remain," *De Canas*, 424 U.S. at 355, Chief Judge McKee concluded that prohibiting the harboring of illegal

aliens in apartments constituted a constitutionally-forbidden "regulation of immigration." "By barring aliens lacking lawful immigration status from rental housing in Hazleton, the housing provisions go to the core of an alien's residency. States and localities have no power to regulate residency based on immigration status." *Hazleton*, 724 F.3d at 315. In other words, under the Third Circuit's overbroad redefinition of "regulation of immigration," anything that deters unlawful residency qualifies.

In sum, of the twenty-one judges on the three circuits who ruled on this "regulation of immigration" challenge to the ordinances, thirteen rejected it and eight agreed with it. In light of this sharp disagreement, granting the writ is warranted.

B. The Circuits are Sharply Divided on Whether Field Preemption Displaces Such Ordinances.

The three circuits are also fractured on the field-preemption question. The plaintiffs in these cases argued various field-preemption theories, claiming alternatively that the ordinances intruded on the fields of alien registration, harboring, and removal.

In the Fifth Circuit below, field preemption was yet another claim that internally divided the nine-judge majority. Two judges (Reavley and Graves) concluded that the Ordinance impermissibly intruded in a preempted field. Judge Reavley's rambling analysis was detached from field-preemption doctrine and is

consequently somewhat difficult to follow. *See* App. 40-44. He suggested that the Ordinance impermissibly treads upon the field of alien removal. App. 44 ("Congress has occupied the field of alien removal."). It appears that he also believed that the Ordinance intrudes upon "the national power to control and conduct relations with foreign nations." App. 40. This second field-preemption argument was one that the plaintiffs did not make.

Other judges on the court distanced themselves from any field-preemption holding. Judge Higginson, who authored the plurality opinion, concurred separately and stated: "Because no such comprehensive federal regulation has emerged, or been identified to us, that governs the housing of non-citizens present in the country contrary to law, I do not perceive that the Supremacy Clause acts as a 'complete ouster of state power' in this area." App. 61 (*quoting De Canas*, 424 U.S. at 357).

The dissenting judges were emphatic in their rejection of the field-preemption claims. Judge Owen explained that a finding of field preemption in the harboring field would be completely contrary to this Court's holding in *De Canas*:

> I respectfully submit that the Supreme Court unequivocally held in *De Canas* that the federal harboring laws do not give rise to field preemption. In *De Canas*, the federal harboring law in existence at the time expressly provided that "'employment (including the usual and normal practices incidental to

> employment) shall not be deemed to constitute harboring.'" But a California law criminalized knowingly employing an unlawfully present alien if that employment would have an adverse effect on lawful resident workers. If the federal harboring statute occupied either the field of harboring aliens or the field of employing aliens, then a state would not have been permitted to legislate at all in these areas, and certainly, a state would not be permitted to criminalize conduct that the federal law explicitly said was not an offense.

App. 78 (internal citations omitted). The other dissenting judges were equally critical of the notion that the Ordinance was field preempted: "The premise of this argument is wrong, however, because it conflicts with the Supreme Court's incontrovertible explanation of the 'field' of removal proceedings. . . . Taken together, *De Canas*, *Whiting* and *Arizona* demonstrate how narrow the scope of field preemption is regarding local legislation that concerns illegal aliens." App. 110.

The Eighth Circuit similarly rejected all of the plaintiffs' field-preemption arguments. Judge Loken pointed out the absurdity of the argument that the ordinance intruded on the registration field:

> The occupancy license scheme at issue is nothing like the state registration laws invalidated in *Hines* [*v. Davidowitz*, 312 U.S. 52 (1941)] and in *Arizona*. . . . Although prospective renters must disclose some of the same information that aliens must disclose

> in complying with federal alien registration laws, that does not turn a local property licensing program into a preempted alien registration regime. To hold otherwise would mean that any time a State collects basic information from its residents, including aliens – such as before issuing driver's licenses – it impermissibly intrudes into the field of alien registration and must be preempted. It defies common sense to think the Congress intended such a result.

Fremont, 719 F.3d at 943. He was equally skeptical of the claim that Congress had preempted all state activity relating to harboring illegal aliens: "We find nothing in an anti-harboring prohibition contained in one sub-part of one section of 8 U.S.C. § 1324 that establishes a 'framework of regulation so pervasive . . . that Congress left no room for the States to supplement it. . . .'" *Id.* (*quoting Arizona*, 132 S. Ct. at 2501 (internal citations omitted)). Judge Bright apparently agreed, as his dissent did not recognize the validity of any field-preemption claim. *See* 719 F.3d at 953-60.

In sharp contrast, the Third Circuit did not hesitate to reach the conclusion that the Hazleton ordinances were field preempted. Indeed, Chief Judge McKee's opinion for the court found field preemption in not one, but two, fields. The court held that the ordinances "intrude on the . . . occupied field of alien harboring," 724 F.3d at 317, and that they "intrude on the field occupied by federal alien registration law." *Id.* at 321. In reaching the first holding, Chief Judge

McKee drew support from recent decisions of the Eleventh and Fourth Circuits that also concluded Congress had preempted all state criminal laws in the harboring field. *Id.* at 316 (*citing United States v. Alabama*, 691 F.3d at 1285-87; *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013)). This Court has not granted review of either of those circuits' decisions. *See United States v. Alabama*, 133 S. Ct. 2022 (2013) (denial of cert.).

Although the registration field-preemption argument is a weak one, the Third Circuit is not the only lower court that has embraced it. On October 15, 2013, the Supreme Court of Louisiana relied on this field-preemption argument, along with the field-preemption holding in *Arizona*, to find a driver's license law relating to aliens field preempted. *Louisiana v. Sarrabea*, No. 2013-K-1271 (La. Oct. 15, 2013). And the dissenting opinion relied upon the Eighth Circuit's emphatic rejection of the same argument in *Fremont*. *Id.*, slip op. at dissent 5-6 (Victory, J., dissenting).

In sum, of the twenty-one judges on the three circuits who adjudicated the various field-preemption claims against the ordinances, sixteen rejected the claims and five agreed with them. Here, too, this disagreement warrants granting the writ. This case presents an ideal vehicle for clarifying that (1) the field-preemption holding of *Arizona* does not render any collection of information about aliens a preempted "registration law," and (2) one subsubsection

of federal harboring law does not sweep the states from the harboring field.

C. The Circuits are Sharply Divided on Whether Such Ordinances Are Conflict Preempted.

Of all of the forms of implied preemption at issue in the respective cases, the three circuits are most fractured with respect to conflict preemption. The plurality opinion below by Judge Higginson maintained that the Ordinance was conflict preempted, finding obstacles to the achievement of congressional objectives in: (1) the slight differences between the harboring that is prohibited by the Ordinance and the harboring that is criminalized under 8 U.S.C. § 1324(a)(1)(A)(iii), (2) the desire of federal immigration authorities for illegal aliens to have "a reliable address," and (3) interference with a "careful balance" purportedly struck by Congress when the harboring statute was drafted. App. 11-15. Judge Dennis argued in his concurrence that the Ordinance also conflicted with the executive branch's decision not to expend its resources removing a particular alien. App. 51.

The dissenting judges vigorously rejected these conflict-preemption arguments. As Judge Owen explained, any difference in the scope of the Ordinance and the federal harboring statute does not give rise to conflict preemption:

> The Ordinance does not stand as an obstacle to the accomplishment and execution of the

> full congressional purposes and objectives in enacting the harboring laws. The harboring laws encompass and proscribe conduct that is far broader than the Ordinance. The federal harboring law and the Ordinance may be enforced simultaneously. Additionally, . . . federal law provides that most, if not all, aliens who are unlawfully present in the United States are not eligible for any State or local public benefit, including public or assisted housing, that is provided by State- or local-government-appropriated funding unless a State affirmatively so provides by enacting a state law.

App. 82. Judges Jones and Elrod were even more critical of this conflict-preemption argument:

> On the most general level, the Higginson opinion embodies the troubling concept that a federal criminal statute, standing alone, can preempt local police power regulations. The fact that the federal government has chosen to criminalize the behavior of harboring illegal aliens does not indicate Congress's intent to prevent local authorities from legislating within their traditional spheres of concern.

App. 129.

In response to the argument that the Ordinance conflicts with federal removal decisions, the dissenting judges were equally critical: the Ordinance's "limited enforcement authority plays no role in the process whereby the federal government detains and

exercises discretion in deciding whom to remove from the United States." App. 135. And as for the notion that the Ordinance conflicts with some implicit "balance" struck by Congress, Judges Jones and Elrod said the following:

> This complaint is at too high a level of generality: Any local licensing regulation touching the immigrant status – for instance, the refusal to issue drivers' licenses – could be said to conflict with the goals of federal immigration law. . . . No extant federal law regulates the housing of illegal aliens. There is thus no evidence of a deliberate congressional choice on the subject; if anything, we ought to infer congressional ambivalence from the fact that Congress passed no law concerning either "sanctuary cities" or, at the opposite pole, cities that have attempted to discourage influxes of illegal aliens.

App. 118.

The Third Circuit lined up with the majority below on the subject of conflict preemption, and the Eighth Circuit lined up with the dissenters. Chief Judge McKee wrote for the Third Circuit that "Hazleton may not unilaterally prohibit those lacking lawful status from living within its boundaries, without regard for the Executive Branch's enforcement and policy priorities." *Hazleton*, 724 F.3d at 318. Taking

a position 180° different, Judge Loken wrote for the Eighth Circuit:

> Plaintiffs' conflict preemption argument suffers from the same infirmity. As the rental provisions do not 'remove' any alien from the United States (or even from the City), federal immigration officials retain complete discretion to decide whether and when to pursue removal proceedings. Unlike § 6 of the state law invalidated in *Arizona*, the rental provisions do not require local officials to determine whether an alien is removable from the United States. . . . Indeed, the rental provisions expressly require City officials to defer to the federal government's determination of whether an alien renter is unlawfully present. The Ordinance's deference to federal determinations of immigration status "mirrors the statutory language approved in Whiting."

Fremont, 719 F.3d at 944 (*quoting Farmers Branch*, 675 F.3d at 830 (Elrod, J., dissenting)). The division between the circuits could not be more extreme.

In sum, of the twenty-one judges to rule on the question, thirteen found the ordinances to be conflict preempted, and eight found no conflict preemption. Granting the writ is necessary to provide guidance to the lower courts on this divisive question.

III. The Majority's Decision Stands in Direct Conflict with this Court's Decisions in *Whiting* and *Arizona*.

The disarray in the circuits over whether a city may prohibit the knowing harboring of illegal aliens in rented apartments is reason enough to grant the writ. But there is an equally-compelling reason for this Court to review the decision of the Fifth Circuit in this case – the opinions of the judges in the majority contradict the holdings of this Court in *Whiting* and *Arizona*. There are five ways in which the majority disregarded these precedents.

A. The Majority Failed to Apply the *Salerno* Standard for Facial Challenges.

The first error by the majority below was its complete failure to apply the *Salerno* standard for facial challenges. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully since the challenger must establish that *no set of circumstances exist under which the Act would be valid.*" *United States v. Salerno,* 481 U.S. 739, 745 (1987) (emphasis supplied). This Court reiterated the *Salerno* standard in 2008: "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008) (*quoting United States v. Raines*, 362 U.S. 17, 22 (1960)). This is because "[t]he State has had no opportunity to implement

[the law], and its courts have had no occasion to construe the law in the context of actual disputes . . . or to accord the law a limiting construction to avoid constitutional questions." *Id.* at 450.

Prior to *Arizona*, some attorneys had argued that the *Salerno* standard did not apply in the preemption context. In *Arizona*, this Court put that argument to rest. "There is basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume [the law] will be construed in a way that creates a conflict with federal law." *Arizona*, 132 S. Ct. at 2510. Judge Owen explained how the *Salerno* standard should be applied in the case at bar: "Under *Salerno*, if there are any permissible applications of the Ordinance, we should not completely invalidate it on the basis of a facial challenge." App. 97.

The majority below did not follow this Court's direction in *Arizona*. As Judges Jones and Elrod pointed out in dissent, the majority completely failed to apply the *Salerno* standard: "Unfortunately, the three opposing opinions fail to heed, much less apply, these limits on our review powers. They invalidate the Ordinance without acknowledging its valid application to citizens and legally resident aliens." App. 98. The undeniable fact that the Ordinance obviously could be validly applied where tenants were lawfully-present aliens should have been enough to defeat this facial challenge. Instead, the majority's preemption holdings rely almost entirely on hypothetical

scenarios – for example, finding conflict preemption in a future case in which an illegal alien is denied his occupancy permit by the City but Immigration and Customs Enforcement (ICE) decides to forego removal proceedings.

The Higginson plurality opinion unwittingly demonstrated precisely why facial challenges are so disfavored. Judge Higginson assumed *incorrectly* that the Ordinance could be read to permit the arrest of an unlawfully-present alien based on his immigration status. App. 18. Judges Jones and Elrod pointed out Judge Higginson's error: "Judge Higginson's conclusion that law officers will be able to hold aliens in custody for possible unlawful presence is inaccurate under the plain terms of the Ordinance. . . . Critically, the Ordinance does not impose criminal liability on *any* renter after the renter applies for an occupancy license." App. 123 (emphasis in original). Judge Higginson's inaccurate reading of the Ordinance would have been less problematic if he had applied the *Salerno* standard, giving state "courts . . . occasion to construe the law in the context of actual disputes." *Washington State Grange*, 552 U.S. at 450.[8]

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[8] This misreading of the Ordinance only affected part of Judge Higginson's decision. He divided his conflict-preemption analysis according to "offenses applying to landlords," App. 10, and "offenses applying to non-citizen renters," App. 16. Only the latter portion of his analysis was rendered immaterial by his misreading of the Ordinance.

B. The Majority Failed to Apply the Presumption Against Preemption.

The second error committed by the judges in the majority below is that they did not apply the presumption against preemption. This Court made clear in *Arizona* that the presumption against preemption applies in immigration-related cases. In *Arizona*, prior to reviewing all four challenged provisions of Arizona's SB 1070, this Court stated that, "[i]n preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*, 132 S. Ct. at 2501 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); and *citing Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). This reflects this Court's long-established "starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654 (1995) (*citing Maryland v. Louisiana*, 451 U.S. 725 (1981)). The presumption against preemption applies in "*all* pre-emption cases." *Wyeth*, 555 U.S. at 565 (emphasis supplied).

In *Whiting*, this Court explained just how difficult it is to defeat this presumption in an implied-preemption challenge in the immigration context: "Our precedents 'establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act.' That threshold is not met here." *Whiting*, 131 S. Ct. at 1985 (*quoting*

Gade v. National Solid Wastes Management Assn., 505 U.S. 88, 110 (1992) (Kennedy, J., concurring)).

The judges in the majority below completely failed to apply this presumption. As the dissent stated, "[u]nfortunately, none of the three opposing opinions accords the Ordinance this strong presumption. . . ." App. 101. In contrast, the dissenting judges correctly applied the presumption against preemption:

> The Ordinance, correctly viewed, falls within the traditional police power of the City to regulate housing by means of licensing. . . . Because the Ordinance involves the local police power, it is entitled to a strong presumption of constitutionality. This presumption operates generally in federal preemption law. . . . It operates specifically in cases where local regulations within the police power are asserted to be preempted by federal immigration law.

App. 98-100 (*citing Wyeth*, 555 U.S. at 565; *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008)); *see also* App. 65.

C. The Majority Disregarded the Three Factors in *Arizona* that Militated Against Conflict Preemption.

In *Arizona*, this Court pointed to three elements of Section 2(B) of the Arizona law that weighed against a finding of conflict preemption:

> Three limits are built into the state provision. First, a detainee is presumed not to be

> an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification. Second, officers "may not consider race, color or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s]." . . . Third, the provisions must be "implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."

Arizona, 132 S. Ct. at 2507-08 (internal citations omitted). The judges in the majority below did not even mention these factors, much less take note of the fact that all three apply to the Ordinance.

The first factor is somewhat inapposite, because the Ordinance does not authorize City officials to detain aliens, nor does it otherwise deal with arrest authority. Nevertheless, there is a presumption of status in the Ordinance, and it is *even more generous* than that in the Arizona law. Under the Ordinance, *all* tenants applying for residential occupancy licenses are presumed to be either United States citizens or aliens who are lawfully present in the United States. *All* applicants are issued occupancy licenses at the time their application forms are submitted and the fee is paid, even when an alien knows of no number verifying his or her lawful presence in the United States. When, after issuance of the license, verification of an alien's lawful presence occurs, the City does not attempt to make any independent determination

of any alien's immigration status. Instead, the City relies entirely on the federal government's verification pursuant to 8 U.S.C. § 1373(c). Moreover, the federal government must report the alien to be unlawfully present not once, but *twice*. And a tentative or inconclusive verification report triggers no adverse action.

The second limit described in *Arizona* is evident on the face of the Ordinance. Section (D)(9) of the Ordinance states: "The terms of this section shall be applied uniformly, and enforcement procedures shall not differ based on a person's race, ethnicity, religion, or national origin." § (D)(9), App. 220, 231.

The third limit is also included in the text of the Ordinance. Indeed, the Ordinance contains language regarding the manner in which it is to be construed that is virtually identical to the SB 1070 text approved in *Arizona*: "The requirements and obligations of this section shall be implemented in a manner fully consistent with federal law regulating immigration and protecting the civil rights of all citizens, nationals, and aliens." § (F), App. 221, 233.

The opinions of the majority below disregarded these factors entirely. In contrast, the dissenting judges noted and relied in part on the presence of these factors – in particular the presumption of lawful presence unless and until the federal government specifically says otherwise. "'Plaintiffs and the United States do not explain why a local law is conflict preempted when the federal government has

complete power to avoid the conflict.'" App. 138 (*quoting Fremont*, 719 F.3d at 945); *see also* App. 68-69, 84-85. Given the virtually identical wording between relevant subsections of the Ordinance and § 2(B) of the Arizona law, one would have expected the majority to at least *attempt* an explanation as to why the presence of these *Arizona* factors did not weigh in favor of the Ordinance. No such explanation was offered.

D. The Majority Disregarded the Deference to Federal Determinations of Immigration Status That Was Decisive in Both *Whiting* and *Arizona*.

As this Court made clear in both *Whiting* and *Arizona*, reliance on federal immigration classifications and federal determinations of immigration status was of decisive importance in the rejection of the conflict-preemption challenges in those cases. In *Whiting*, this Court sustained the Legal Arizona Workers Act against a conflict-preemption challenge in part because of this consistency:

> Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects. The Arizona law begins by adopting the federal definition of who qualifies as an "unauthorized alien." . . . Not only that, the Arizona law expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and

> 'shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.' § 23-212(B). What is more, a state court 'shall consider only the federal government's determination' when deciding 'whether an employee is an unauthorized alien.' § 23-212(H) (emphasis supplied). *As a result, there can by definition be no conflict between state and federal law* as to worker authorization, either at the investigatory or adjudicatory stage.... The federal determination on which the State must rely is provided under 8 U.S.C. § 1373(c).

Whiting, 131 S. Ct. at 1981 (emphasis supplied). The same two factors are present in Ordinance 2952. As the district court found, Ordinance 2952 uses the precise terms and classifications of federal immigration law. "The Ordinance is tethered to federal immigration law in several key respects, including its definitions...." App. 159. "Local enforcement based on federal standards ... remains at the foundation of the Ordinance." App. 202. In addition, Ordinance 2952 contains language nearly identical to Arizona's statutory text requiring local officials to rely solely on federal determinations of immigration status: "The building inspector shall not attempt to make an independent determination of any occupant's lawful or unlawful presence in the United States." § (D)(3), App. 218, 231.

Judges Jones and Elrod noted just how untenable the majority's conflict preemption holding was, in

light of the Ordinance's reliance on federal classifications and federal determinations of immigration status:

> But *Whiting* stands as the most obdurate obstacle to the Reavley and Dennis opinions insofar as they assert conflict preemption of the Ordinance. . . . The Court found that the mechanics of the Arizona law were enacted to correspond with federal determinations of alien status. *Whiting*, 131 S. Ct. at 1981-83. Thus the state's definition of "unauthorized alien" as an alien "not lawfully admitted for permanent residence," or not otherwise authorized to be employed, adopted the federal definition. *Id.* at 1981. State investigators were not allowed independently to determine unauthorized status but were bound by the federal government's determinations resulting from information furnished under 8 U.S.C. § 1373(c). *Id.* As a result, the Court held, "there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage." *Id.*

App. 119-20. The same is true with respect to Ordinance 2952.

Arizona continued this line of conflict-preemption analysis. Consistent with its opinion in *Whiting*, in *Arizona*, this Court sustained the provision of the Arizona law most similar to Ordinance 2952 – Section 2(B) – in part because of the state's reliance on federal determinations of immigration status. *Arizona*,

132 S. Ct. at 2507-10. Both Arizona § 2(B) and Ordinance 2952 expressly rely on 8 U.S.C. § 1373(c), which requires the federal government to provide the immigration status of any alien "for any purpose" whenever a local official inquires. Ariz. Rev. Stat. § 11-1051(B); Ordinance 2952, §§ (D)(1), (E)(5), App. 217, 221, 228, 232. The text of the federal statute is unambiguous:

> **Obligation to respond to inquiries**
>
> The Immigration and Naturalization Service *shall respond* to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency *for any purpose authorized by law*, by providing the requested verification or status information.

8 U.S.C. § 1373(c) (emphasis supplied). As this Court observed, Congress made federal compliance with local requests for immigration status verification *mandatory*: "Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status." *Arizona*, 132 S. Ct. at 2508. Through the enactment of 8 U.S.C. § 1373, Congress assured cities and states that if they enacted programs that involved immigration status inquiries, the federal government *must* respond. Where a city or state relies upon the federal government's determination of an alien's immigration status, conflict preemption is unlikely.

In contrast, this Court found Section 6 of the Arizona law to be preempted precisely because it contemplated that state officers would be making independent determinations of aliens' removability, *without input from the federal government*:

> This state authority could be exercised without any input from the federal government about whether an arrest is warranted in a particular case. . . . By authorizing state officers to decide whether an alien should be detained for being removable, § 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government.

Arizona, 132 S. Ct. at 2506.

The Ordinance steers well clear of such independent determinations by expressly forbidding them. As Judges Jones and Elrod observed in dissent:

> The building inspector has no authority to decide immigration status independently. He must defer to the binding results of inquiries to federal officials, made on two occasions, at least sixty days apart, that a particular tenant licensee is not lawfully present in the United States. The building inspector's inquiries are no different from those made by hundreds of local governments daily to the federal government to ascertain immigrants' status and qualifications for benefits ranging from housing assistance to student loans to medical care and disability income. It is the federal government's duty to get the answers

> right, not building inspector's uninformed prerogative to guess.

App. 136-37. That reality should have put to rest the conflict-preemption theories in this case.

E. Several Judges in the Majority Adopted the Notion – Rejected in *Arizona* – that Executive Branch "Enforcement Priorities" Have Preemptive Effect.

In *Arizona*, the United States made the bold claim that the executive branch's enforcement priorities could have preemptive effect. The United States then argued that if the state ever queried the federal government about the immigration status of an alien that the executive branch did not rank as a high priority for removal, the state law requiring the query would be preempted. This Court rejected that claim, stating that "federal enforcement priorities" have no preemptive effect:

> It is true that §2(B) does not allow state officers to consider federal enforcement priorities in deciding whether to contact ICE about someone they have detained. . . . In other words, the officers must make an inquiry *even in cases where it seems unlikely that the Attorney General would have the alien removed*. . . . Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of

> information about possible immigration violations. See 8 U.S.C. § 1357(g)(10)(A).

Arizona, 132 S. Ct. at 2508 (emphasis supplied). Justice Alito rebuked the United States in even stronger terms:

> The United States' attack on § 2(B) is quite remarkable. The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities. Those priorities, however, are not law. They are nothing more than agency policy. I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force. . . . If accepted, the United States' pre-emption argument would give the Executive unprecedented power to invalidate state laws that do not meet with its approval, even if the state laws are otherwise consistent with federal statutes and duly promulgated regulations. This argument, to say the least, is fundamentally at odds with our federal system.

Arizona, 132 S. Ct. at 2527 (Alito, J., concurring in relevant part).

Surprisingly, the Dennis opinion below sought to revive this discredited argument, arguing that the revocation of an occupancy permit held by an illegal alien would conflict with federal enforcement priorities if the executive branch declined to spend

the enforcement resources to remove that alien.[9] Putting a strong spin on a fragment of a sentence in the *Arizona* opinion, Judge Dennis claimed: "The [Supreme] Court held that the statute stood as an impermissible obstacle to the design and purpose of the largely discretionary immigration enforcement system Congress created because it could result in 'unnecessary harassment of some aliens . . . whom federal officials determine should not be removed. . . .'" App. 51. Judge Dennis also drew support from a recent Eleventh Circuit opinion: "Much as with the instant Ordinance, in that case 'Alabama ha[d] taken 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.'" App. 64 (*quoting United States v. Alabama*, 691 F.3d 1269, 1295 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013)).

Granting the writ is especially important with respect to this argument. *Arizona* stated that an executive branch enforcement policy (or non-enforcement policy) that ranks certain illegal aliens as low priorities for removal does not have the constitutionally-significant consequence of invalidating state laws that are consistent with federal statutes.

Judge Dennis's misunderstanding of *Arizona* in this regard is one that is particularly dangerous to

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[9] Judge Dennis's concurring opinion was joined by Judges Reavley, Prado, and Graves. *See* App. 45.

our federal system. It threatens to disrupt not only the balance between the federal government and the states, but also the balance between the executive and legislative branches of the federal government. "It is Congress – not the [Department of Defense] – that has the power to pre-empt otherwise valid state laws. . . ." *North Dakota v. United States*, 495 U.S. 423, 442 (1990). The executive branch cannot invalidate the laws of the sovereign states simply by announcing a new policy that might conceivably be in tension with those laws. Only Congress possesses that weighty constitutional power. Granting the writ is necessary to confirm this indispensable constitutional principle.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case. The judgment of the Court of Appeals should be reversed and the case should be remanded to the trial court for further proceedings.

Respectfully submitted,

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