No. 13-516

In the
Supreme Court of the United States

THE CITY OF FARMERS BRANCH, TEXAS,
PETITIONER,

v.

VILLAS AT PARKSIDE PARTNERS, *ET AL.*,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Petitioner

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QUESTIONS PRESENTED

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

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?

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STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in several recent cases, including *Arizona v. United States* ("*Arizona*"), No. 11-182, __ U.S. ___, 132 S.Ct. 2492 (2012); *Chamber of Commerce of the United States v. Whiting* ("*Whiting*"), No. 09-115, 563 U.S. __, 131 S.Ct. 1968 (2011); and *Horne v. Flores*, 557 U.S. 433, 461 n. 10 (2009) (*citing* AULDF's *amici* brief).

AULDF supports the Petition and agrees with its reasons for granting the writ. AULDF writes separately to discuss the growing number of lower courts, like the Fifth Circuit here, which appear confused by the preemption analysis used in *Whiting* and *Arizona*.

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[1] Pursuant to Rule 37.2(a), *amicus* certifies that counsel of record for all parties received notice of its intention to file this brief more than ten days prior to its due date. Counsel of record for Petitioner and Respondents Reyes, *et al.*, consented in writing to the filing of this brief; copies of those consents have been filed with the Clerk. Respondent Villas at Parkside Partners filed a blanket consent with the Clerk.

Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In December 2010 and June 2012, this Court issued two rulings on similar topics which seem to have confused several of the lower courts. In *Chamber of Commerce of the United States v. Whiting* ("*Whiting*"), 563 U.S. __, 131 S.Ct. 1968 (2010), the Court rejected a preemption challenge to an Arizona law revoking business licenses of employers of illegal immigrants. In *Arizona v. United States* ("*Arizona*"), No. 11-182, __ U.S. ___, 132 S.Ct. 2492 (2012), the Court upheld in part and rejected in part a preemption challenge to four Arizona laws providing for state and local enforcement against illegal immigrants.

There is a conflict among the Circuits, and among the judges of the Circuits, about the proper interpretation of these recent decisions. The conflicts, in large part, stem from the application of those decisions to state and local laws not related to employment of illegal immigrants, such as the occupancy licenses at issue in this and other recent cases. The confusion concerns the distinction between 8 U.S.C. § 1324, prohibiting "harboring" illegal immigrants, and 8 U.S.C. § 1324a, prohibiting the employment of illegal immigrants. These provisions are markedly different in preemption terms, and some lower courts, relying on an overbroad interpretation of *Arizona*, are not appropriately applying the distinctions.

This Court said in *Whiting* "Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor

'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Whiting*, 131 S.Ct. at 1985. Yet that is just what is happening in the lower courts. This Court should grant the Petition to give guidance to the lower courts.

ARGUMENT

I. The Lower Courts Appear to be Having Difficulty Reconciling *Whiting* and *Arizona*.

Since June 2012, a bolus of cases attempting to apply *Whiting* and *Arizona* has clogged the lower courts. This Court has already denied review of one anti-"harboring" ordinance. *United States v. Alabama*, 691 F.3d 1269, 1285-88 (11th Cir. 2012) (finding a state "harboring" provision field and conflict preempted), *cert. denied*, 133 S.Ct. 2022 (2013).

Two other similar Petitions are currently pending before the Court — this one and No. 13-531[2] – with another two likely to follow. *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), *reh'g en banc denied* __ F.3d __ (Oct. 17, 2013)(rejecting field and conflict preemption challenges to local occupancy license provision); *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1027 n. 19, (9th Cir., 2013)(finding field and conflict preemption of state occupancy license provision; "[W]e, along with the Third, Fourth[3], and

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[2] *City of Hazleton, Pennsylvania v. Lozano*, 724 F.3d 297 (3rd Cir. 2013).

[3] *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013).

Eleventh[4] Circuits, disagree with *Keller*'s analysis.").[5] These cases demonstrate a "direct conflict among the Circuits". *Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004).

Thus, whether a state or local government can enact an occupancy license ordinance which might affect aliens depends on where that government is located. In some Circuits, the laws would be held to be preempted; in the Eighth Circuit, for example, it would not. This Court should review these questions in order to preserve the uniformity of law.

II. Some Lower Courts Are Ignoring *Whiting* and Mis-citing *Arizona* to Strike State and Local Laws That Congress Never Intended to Preempt.

This case, like the other similar cases discussed above, involves local licensing regulation related to illegal immigrants. This Court, in *Whiting*, upheld state and local immigration-related licensing laws, yet *Whiting* is rarely cited in the lower court cases for its actual holding in this area. For example, the Ninth Circuit in *Valle del Sol*, cited *Whiting* only once, saying that the challenged

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[4] *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1263–65 (11th Cir. 2012); *United States v. Alabama*, 691 F.3d at 1285-88.

[5] The Ninth Circuit's characterization of the disagreements among the Courts of Appeal masks even more disagreements among the Circuit judges. The Fifth Circuit below offered six different opinions in this case, and other Circuits have faced similar conflicts. *See, e.g.*, Petition, at 14 (13 of 21 judges from the three Circuits rejected "regulation of immigration" preemption), 18 (16 of 21 judges rejected field preemption), and 22 (13 of 21 judges found conflict preemption).

"harboring" provision did not "closely track [§ 1324] in all material respects." 732 F.3d at 1029.

Similarly, in *Hazleton III*, although this Court remanded the case so that the Third Circuit could consider the effect of *Whiting*, on remand, the Third Circuit simply said as to this issue:

> No part of *Whiting* or *Arizona* considered provisions of a state or local ordinance that, like the housing provisions here, prohibit, and define "harboring" to include, allowing unauthorized aliens to reside in rental housing. Moreover, nothing in *Whiting* or *Arizona* undermines our analysis of the contested housing provisions here. On the contrary, the Court's language reinforces our view that Hazleton's attempt to prohibit unauthorized aliens from renting dwelling units in the City are pre-empted.

City of Hazleton, Pennsylvania v. Lozano ("Hazleton III"), 724 F.3d 297, 314 (3rd Cir. 2013).

Arizona, on the other hand, did not involve immigration-related licensing laws, yet is relied on heavily for holdings it never actually made. For example, the lower court here, citing *Arizona*, said: "We conclude that, … the Ordinance "interfere[s] with the careful balance struck by Congress" **with respect to the harboring of non-citizens here contrary to law.** *See Arizona*, 132 S.Ct. at 2505–06." *Villas at Parkside Partners v. City of Farmers Branch, Tex.* ("*Farmers Branch*"), 726 F.3d 524, 531 (5th Cir. 2013) (emphasis added).

Similarly, also citing *Arizona,* the Ninth Circuit recently held:

> We conclude that § 13–2929 is conflict preempted because, although it shares some

> similar goals with 8 U.S.C. § 1324, it "interfere[s] with the careful balance struck by Congress with respect to" **the harboring of unauthorized aliens**. *Arizona,* 132 S.Ct. at 2505.

Valle del Sol, 732 F.3d at 1026 (emphasis added).

But *Arizona* said no such thing about the "harboring of non-citizens here contrary to law." Indeed, the only references to "harboring" of illegal immigrants in *Arizona* are to 8 U.S.C. § 1324(c), which grants state and local law enforcement officers the authority to enforce 8 U.S.C. § 1324. 132 S.Ct. at 2506, 2528.

Arizona was specific to the circumstances before it:

> The correct instruction to draw from the text, structure, and history of IRCA[6] is that Congress decided it would be inappropriate to impose criminal penalties on aliens **who seek or engage in unauthorized employment**. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.

Arizona, 132 S. Ct. at 2505 (emphasis added).

Thus, the Ninth and Third Circuits, like the Fifth Circuit here, struck state and local harboring provisions as conflict preempted on the basis of an unsupported citation of *Arizona*. But citing *Arizona* to justify that holding is an over-step which ignores *Whiting* and this Court's other preemption decisions.

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[6]The Immigration Reform and Control Act of 1986 ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359 (1986).

A) Congress Never Intended Sections 1324 or 1324a to Preempt State and Local "Harboring" Laws.

A state law or ordinance is conflict preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 132 S.Ct. at 2501. Absent clear congressional ouster, however, States may act to prevent "local problems" caused by illegal immigration. *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976). *Arizona* addressed changing conditions since *De Canas*, but only in the context of sanctions on employers for hiring illegal immigrants. *Arizona*, 132 S.Ct. at 2503-04.

"The purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). It is not enough just to have "strong evidence" of "congressional intent to preempt." *Toll v. Moreno*, 458 U.S. 1, 13 n. 18 (1982). Preemption requires a "clear and manifest purpose of Congress" to preempt. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Arizona*, 132 S.Ct. at 2501.

So finding preemption in the "careful balance struck by Congress with respect to the harboring of unauthorized aliens," *Valle del Sol,* 732 F.3d at 1026*, Farmers Branch,* 726 F.3d at 531, depends on showing a "clear and manifest" congressional purpose that federal law **on harboring**, meaning 8 U.S.C. § 1324, cannot be enforced appropriately without striking down the state or local law. Nothing in the statute demonstrates such a clear ouster of state and local enforcement.

In fact, in 1996, Congress reinforced its intention to allow state, local and even private

enforcement of harboring prohibitions. Before 1986, 8 U.S.C. § 1324 prohibited smuggling, harboring or transporting illegal immigrants, *U.S. v. Evans,* 333 U.S. 483 (1948)(Congress intended to punish both bringing in and aiding the continued presence of illegal immigrants), but the "Texas Proviso" in Section 1324(a) said "harboring" did not include "the usual and normal practices incident to employment." *See De Canas v. Bica,* 424 U.S. at 360.

The "Texas Proviso" survived until late in the multi-year consideration of IRCA. S. Rep. 99-132, at 76 (only amending the Proviso to state that employment "by itself" was not harboring). In 1986, however, Congress finally deleted the Proviso, 8 U.S.C. § 1324(a), and added the new "employer sanctions" provisions. 8 U.S.C. § 1324a.

But the new Section 1324a "employer sanctions" provisions do not subsume the existing Section 1324 harboring provisions. Federal courts have long held that Sections 1324 and 1324a can be applied independently. *See, e.g.*, *Edwards v. Prime, Inc.,* 602 F.3d 1276, 1299 (11th Cir. 2010) ("We tend to agree with the Second Circuit that the revision history of § 1324(a)(1)(A)(iii) strongly indicates that one who hires an alien knowing or recklessly disregarding his illegal status is guilty of concealing, harboring, or shielding from detection."); *U.S. v. Kim,* 193 F.3d 567, 573 (2nd Cir. 1999) ("The fact that employers are also targeted by § 1324a provides no support for Kim's contention that he should have been prosecuted under § 1324a.").

In 1996, Congress took two additional steps to bolster state, local and even private enforcement against those who harbor illegal immigrants in violation of Section 1324. First, Congress amended

the list of RICO predicate crimes[7] to include "any act which is indictable under the Immigration and Nationality Act, section 274 [8 U.S.C. § 1324] (relating to bringing in and harboring certain aliens) . . . if the act . . . was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F). That change allows American workers to bring RICO claims against employers who hire illegal immigrants. *Williams v. Mohawk Industries*, 411 F.3d 1252, 1266 (11th Cir. 2005), *certiorari granted in part*, 546 U.S. 1075 (2005); *certiorari dismissed as improvidently granted*, 547 U.S. 516 (2006).

The addition of RICO liability also exposes those who harbor illegal immigrants to state-level RICO suits.[8] *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

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[7]The Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, added Chapter 96, entitled Racketeer Influenced and Corrupt Organizations ("RICO"), to Title 18 of the United State Code. 18 U.S.C. §§ 1961-1968; *U.S. v. Turkette*, 452 U.S. 576, 577-78 (1981). Only certain predicate crimes trigger the application of RICO. 18 U.S.C. § 1961(1).

[8]The Ninth Circuit, citing the Eleventh Circuit, recently misunderstood the import of this point:

> Arizona contends that the Eleventh Circuit erred in concluding that the federal courts have exclusive jurisdiction to "interpret the boundaries of federal law." *GLAHR,* 691 F.3d at 1265. Arizona seemingly argues that its state courts have concurrent jurisdiction over prosecutions under 8 U.S.C. § 1324. But that proposition is clearly foreclosed by 18 U.S.C. § 3231, which grants federal district courts exclusive jurisdiction over federal crimes."

Valle del Sol, 732 F.3d at 1027 n. 19. The Ninth Circuit added:

> State courts do have concurrent jurisdiction over civil RICO claims, which can include violations of 8 U.S.C. § 1324. *Tafflin v. Levitt*, 493 U.S. 455, 458,

In *Mohawk Industries* on remand, for example, the Eleventh Circuit permitted suit under Georgia's RICO statute. 465 F.3d 1277, 1292-94 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 1381, 167 L.Ed.2d 174 (2007).[9] "The fact that RICO specifically provides that illegal hiring is a predicate offense indicates that Congress contemplated the enforcement of the immigration laws through lawsuits like this one." *Mohawk Indus.*, 465 F.3d at 1292.

Second, Congress expanded Section 1324 to penalize directly (as opposed to being considered

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> (1990) ("[S]tate courts have concurrent jurisdiction over civil RICO claims."); 18 U.S.C. § 1961(1)(F) (including violations of § 1324 in the definition of "racketeering activity"). But even this argument misses the mark. … A state court has concurrent jurisdiction over a civil RICO claim concerning a violation of 8 U.S.C. § 1324. But the federal courts remain the ultimate arbiters of the meaning of § 1324.

Valle del Sol Inc., 732 F.3d at 1028 n. 19.

This is not the first time the Ninth Circuit has challenged this Court's long-standing interpretations in this area:

> The Court of Appeals questioned the wisdom of the view expressed "in the academic literature," "by some state courts," and by "several individual justices" that state courts are "coordinate and coequal with the lower federal courts on matters of federal law." [*Arizonans for Official English v. Arizona,* 939 F.2d 727,] 736 [(9th Cir. 1991] (footnote omitted). … But *cf. ASARCO Inc. v. Kadish,* 490 U.S. 605, 617 (1989) ("state courts ... possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law").

Arizonans for Official English v. Arizona, 520 U.S. 43, 58 n. 11 (1997).

[9]Kate Brumback, "Carpet maker, employees reach $18M settlement," Associated Press, April 13, 2010.

harboring) the hiring of more than ten illegal immigrants per year. 8 U.S.C. § 1324(a)(3)(A), Omnibus Consolidated Appropriations Act, 1997, Pub.L. 104-208, (1996), Div. C, Title II, § 203(b)(4).

Thus, at least by 1996, Congress did not intend "employer sanctions" under Section 1324a to offer the sole sanction levied against employers of illegal immigrants. *U.S. v. Kim,* 193 F.3d at 573. Nor did Congress intend "employer sanctions" to subsume "harboring" under Section 1324.

The new powers suggest that Congress intended particularly strenuous enforcement techniques and penalties, including state, local and private enforcement of the prohibitions in Section 1324, including under state laws. There is no indication, much less a "clear and manifest" one, that Congress contemplated preemption of the very state and local enforcement efforts it was boosting.

B) Section 1324a(h)(2)'s "Savings Clause," Upheld in *Whiting*, Protects Local "Harboring" Laws.

Some lower courts, including the Third Circuit, do recognize the difference between Sections 1324 and 1324a. *Hazleton III,* 724 F.3d at 314. Nevertheless, the Third Circuit stopped there, and, despite this Court's remand for consideration of the effect of *Whiting*, did not explain how *Whiting*, in particular, affects this analysis.

Section 1324a has an express preemption provision with a savings clause for state "licensing and similar laws." 8 U.S.C. § 1324a(h)(2); *Whiting*, 131 S.Ct. at 1973. *Whiting* upheld an Arizona statute that "purports to impose sanctions through licensing laws." 131 S.Ct. at 1977. This Court looked

to the Administrative Procedure Act definition of "license." 5 U.S.C. § 551(8) ("'license' includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission"). *Whiting*, 131 S. Ct. at 1978. This Court noted that Arizona's definition of "licensing" included "grants of authority to foreign companies to transact business in the State."[10] *Id.* "Moreover, even if a law regulating articles of incorporation, partnership certificates, and the like is not itself a 'licensing law,' it is at the very least 'similar' to a licensing law, and therefore comfortably within the savings clause." *Id.*

If it is the position of some lower courts that the prohibition on employment and its concurrent preemption clause also apply to non-employment contexts, such as occupancy licenses, why would not the statutory savings clause for licensing also apply? This is another void left in the lower courts' equating of Sections 1324 and 1324a.

In *Hazelton III*, for example, the Third Circuit simply asserts that the scope of the city's Ordinance goes beyond the business license provisions upheld in *Whiting*, and therefore the Ordinance is preempted as overbroad. 724 F.3d at 312. There is no discussion of the "licensing **and similar** laws" provision of the savings clause. 8 U.S.C. § 1324(h)(2).

Similarly, the Eleventh Circuit said: ""If every other state enacted similar legislation to overburden the lives of aliens, the immigration scheme would be

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[10] This recognition of grants of authority to foreign businesses seems at least analogous to grants of authority to foreign individuals (*i.e.*, aliens) to transact rental housing agreements.

turned on its head." *United States v. Alabama*, 691 F.3d at 1295 n. 21. But "overburden[ing] the lives of aliens" is not the standard.

The Court first faced that interpretation soon after the passage of IRCA. *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS* ("*NCIR*"), 502 U.S. 183 (1991) (upholding Attorney General's authority to deny aliens work authorization pending immigration adjudication). *NCIR* unanimously rejected the Ninth Circuit's argument that IRCA ushered in a new period of "fair and humane,"[11] or "tempered,"[12] immigration law enforcement. 502 U.S. at 188, 196. Instead the Court recognized what Judge Stephen Trott[13] had said in dissent below: "The objective of [IRCA] was to stop illegal aliens from working, period." *NCIR*, 913 F.2d at 1375 (Trott, J. dissenting).

Section 1324 penalizes any person who, *inter alia*, aids or abets an alien's residence in the United States. That penalty is generally imposed on conduct that "substantially facilitates" the alien's continued residence in the United States, including "providing them a place to live." *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008).[14] Section 1324(c) expressly provides state officers the authority to

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[11] *Nat'l Center for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1369 (9th Cir. 1990).

[12] *Id.*, 913 F.2d at 1366.

[13] Judge Trott was Assistant Attorney General of the United States during the development of IRCA and Associate Attorney General during the three years after passage. www.fjc.gov/servlet/nGetInfo?jid=2416&cid=999.

[14] *See also, United States v. Sanchez,* 963 F.2d 152, 155 (8th Cir.1992); *United States v. Kim,* 193 F.3d at 574–75.

make arrests for such conduct, and the Section 1324a(h)(2) savings clause permits "sanctions" under "licensing and similar laws." "Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Whiting*, 131 S.Ct. at 1981.

Arizona did not address harboring, looking only to employment and related contexts. "The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose **criminal penalties** on aliens **who seek or engage in unauthorized employment**." *Arizona*, 132 S.Ct. at 1505. The harboring provisions of the City Ordinances here do not provide any criminal penalties and do not apply to "unauthorized employment."

Thus, the conflicts in the Circuits indicate both a misunderstanding of *Arizona* and congressional intent, and ignorance of what *Whiting* actually said. Some lower courts are searching *Arizona* for reasons to find preemption, rather than limiting preemption to areas where Congress's intention is clear. "Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Whiting*, 131 S.Ct. at 1985. This Court should grant the Petition to assist the lower courts in understanding its two important precedents and to assure uniformity and the rule of law.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to grant the Petition and review the decision below.

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