No. 13-516

In The
Supreme Court of the United States

THE CITY OF FARMERS BRANCH, TEXAS,

Petitioner,

v.

VILLAS AT PARKSIDE PARTNERS, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITIONER'S REPLY

I. The Respondents Misstate How the Ordinance Operates.

A. Illegal Aliens Cannot Be Arrested for Remaining in Their Apartments.

In the very first sentence of their brief, the Villas Respondents incorrectly describe the Ordinance at issue in this case. They claim that "non-citizens are subject to arrest and prosecution if they remain in their current homes. . . ." Villas Br. 2. This claim is contrary to the plain text of the Ordinance, which states only that it is an offense for a tenant "to be an occupant of a leased or rented apartment without first obtaining a valid occupancy license permitting the person to occupy that apartment." Ordinance 2952, § (C)(1), App. 226. It is not an offense for a tenant to continue to occupy an apartment after his occupancy license has been revoked; at that point the landlord is responsible for evicting the tenant. § (C)(7), App. 227.

The Villas Respondents make the same error that Judge Higginson made below. As Judges Jones and Elrod noted in their dissenting opinion: "The Higginson opinion misreads the actions that constitute offenses under the Ordinance. . . . 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." App. 121-22. Judge Higginson's reading, they said, "renders the words 'first obtaining' superfluous." App. 124 n.18. Judge Owen also pointed out Judge Higginson's

error: "The only consequence to the alien is the eventual termination of her lease by the lessor or landlord. There is no fine. There is no criminal offense. The *lessor or landlord* may commit an offense if it takes no steps to terminate the alien's lease. . . ." App. 85 (emphasis in original).

The Villas Respondents inappropriately describe this issue as a "factual dispute" that might militate against granting the writ. Villas Br. 23. But it is of course a legal question of statutory construction. They also misleadingly suggest that the City has changed its position on the matter, declaring that the City first advanced its construction of the Ordinance at oral argument. *Id.* at 22. But no different reading had been advanced before – the City had assumed that the Ordinance, which imposes an obligation on the tenant only when the tenant is "first obtaining" the occupancy license, App. 226, speaks for itself.

B. The Ordinance Prohibits Local Determinations of Immigration Status.

The Respondents also misstate how determinations of an alien's immigration status are made under the Ordinance. The Reyes Respondents misleadingly claim that "the Farmers Branch building inspector will ultimately determine whether a person is 'lawfully present in the United States.'" Villas Br. 10.

Here too, the plain text of the Ordinance says otherwise. Under § (D)(1), determinations of immigration status are to be made by the federal government

pursuant to 8 U.S.C. § 1373(c). App. 228. "And Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status. See § 1373(c)." *Arizona v. United States*, 132 S. Ct. 2492, 2508 (2012). The Ordinance also states plainly that "[t]he 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. 229. As Judge Owen pointed out below, "[t]he Ordinance could not be clearer that the building inspector has no authority to make a determination of whether an occupant is lawfully or unlawfully present. . . ." App. 84.

Faced with this unmistakable language on the face of the Ordinance, the Respondents fall back to claiming that the federal government might give the City an ambiguous response, rather than the clear answer described in 8 U.S.C. § 1373(a) – a statement of the alien's "immigration status, lawful or unlawful." They claim that the federal government cannot make sense of the term "lawfully present in the United States," even though it is the most frequent term used in federal law to describe the concept.[1] *See* Reyes Br. 10. But even in that unlikely event, the Ordinance's "dead man" switch would kick in: the

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[1] *See, e.g.*, 8 U.S.C. § 1229a(c)(2); 8 U.S.C. § 1357(g)(10); 8 U.S.C. § 1182(a)(9)(B)(i)(II); 8 U.S.C. § 1623; 8 U.S.C. § 1621(d); 42 U.S.C. § 1436a(a)(3); 42 U.S.C. § 1436a(a)(5); 42 U.S.C. § 4605; 7 U.S.C. § 2015(f).

building inspector "shall take no further action until final verification from the federal government concerning the immigration status of the occupant is received." § (D)(3), App. 229. As Judge Owen succinctly pointed out below: "If the federal government, in response to an inquiry under 8 U.S.C. § 1373(c), will not or cannot advise the building inspector as to whether an alien is lawfully present, that is the end of the matter." App. 84. *See Chamber of Commerce v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968, 1982 (2011) ("In any event, if the information provided under § 1373(c) does not confirm that an employee is an unauthorized alien, then the state cannot prove its case.").

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

The Respondents acknowledge the deeply fractured nature of the decision below, which generated six different opinions. They also acknowledge, as they must, "the split between the Fifth and Eighth Circuits." Villas Br. 8. *See Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), *reh'g en banc denied* (Oct. 17, 2013). It is undeniable that those two circuits reviewed nearly identical ordinances and came to opposite conclusions. It is also undeniable that four days after the Fifth Circuit ruled, the Third Circuit struck down a very similar ordinance in *Lozano v. Hazleton*, 724 F.3d 297 (3d Cir. 2013). Nevertheless,

the Respondents search in vain for a way to minimize the vast chasm between the circuits on this issue.

A. The Circuit Split Cannot Be Obscured by Isolating Individual Arguments.

The Villas Respondents offer an odd theory in their effort to minimize the circuit split. They claim that because a full majority below agreed on only one particular type of implied-preemption argument – conflict preemption – the circuit split is somehow minimized. Because only a plurality of the Fifth Circuit agreed with the regulation-of-immigration-preemption and field-preemption arguments, they suppose, the Fifth Circuit does not really contribute to the circuit split *on those specific arguments*. Villas Br. 10-16. The theory fails, for three reasons.

First, Villas Respondents make too much of the fact that the City framed this case by dividing the implied-preemption question into three separate sub-questions, corresponding to the three types of implied preemption in immigration cases. The City did so in order to present the case with granular clarity. But the issue could just as easily have been framed as a single question: Does federal law preempt a local ordinance prohibiting the knowing harboring of illegal aliens in rental housing? Indeed, the Reyes Respondents prove this point, posing the question presented as a single, unified question. Reyes Br. i. And there is no denying that the Fifth Circuit's

decision contributes to the circuit split on this question.

Second, the argument suggests that the internal division within the Fifth Circuit somehow reduces the division among the lower courts on this question. On the contrary, it does just the opposite. Not only are the circuits split on *whether* these ordinances are impliedly preempted, but the Fifth Circuit is internally split on *why* these ordinances are impliedly preempted. As dissenting Judges Jones and Elrod observed, the judges in the majority were also confused regarding *which* preemption argument they were making: "the reasoning of the two opinions frequently uses field preemption language, although both also speak of obstacle preemption. Neither opinion identifies any specific conflict between the Ordinance's licensing provisions and federal law." App. 103. This confusion, along with the fact that the Fifth Circuit had difficulty finding a preemption argument on which the majority could agree, illustrates just how badly the lower courts need guidance on this question.

Third, the Respondents' theory would yield absurd results if applied to other cases. According to this theory, if one circuit held that a particular law violated the Establishment Clause because it failed the first prong of the *Lemon* test, but two other circuits reached the opposite conclusion by emphasizing the second prong of the *Lemon* test, then the first court did not really contribute to the circuit split. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). That would

plainly be wrong. The holding of all three circuits would concern the same question – does the law constitute an establishment of religion? Similarly, the question here is whether the Ordinance is impliedly preempted. Isolating the specific implied-preemption arguments does not erase the circuit split on this basic question.

B. The Circuit Split Cannot Be Obscured by Isolating Cases Based on Whether the Law Imposes a Penalty on the Tenant.

The Reyes Respondents attempt to mitigate the circuit split differently. They argue that circuit holdings concerning virtually identical ordinances should nevertheless be treated as inapposite simply because one penalizes both the tenant and the landlord, whereas the other penalizes only the landlord. They seize on this trivial difference between the ordinance at issue in *Fremont* and the ordinance at issue in the instant case. The two ordinances are word-for-word identical in virtually every relevant section. That is because the Farmers Branch ordinance was the model for the Fremont ordinance. However, the Farmers Branch ordinance includes an additional offense that applies to tenants: being an occupant of a rented apartment without first obtaining an occupancy license. § (C)(1), App. 226. Therefore, they declare, the circuits have "unanimously rejected" laws that impose a penalty on the harbored person.

There are several problems with this argument. First and foremost, the Eighth Circuit did not suggest that this aspect of the Fremont ordinance was important to its conclusion that the ordinance was not preempted. If this were such an important distinction – important enough to place the holdings of other circuits in the "irrelevant" file – one would have expected the court to at least mention it, but the court did not. *See Fremont*, 719 F.3d at 937-45. On the contrary, the Eighth Circuit considered and expressly rejected the preemption analysis of the panels in the Third and Fifth Circuit without mentioning this trivial distinction: "On this issue, we disagree with a pair of now-vacated panel decisions of our sister circuits. . . ." *Id.* at 942. Nor did any of the various opinions of the Fifth Circuit mention this as a distinguishing feature of the *Fremont* decision.

The second problem with the argument is that the principal negative consequence for the illegal alien is the same in all of the ordinances – the alien ultimately *loses his ability to occupy a rented apartment in the city*. That is the sanction that undoubtedly has the greatest impact on the illegal alien, and that lies at the core of the preemption challenges in these cases.

The third problem with the argument is that Reyes Respondents mischaracterize the provision as one that "penalizes harbored immigrants themselves." Reyes Br. 13. In fact, the provision penalizes tenants who do not obtain an occupancy license, regardless of whether they are citizens, lawfully

present aliens, or unlawfully present aliens. Indeed, at the commencement of an occupancy, the City does not even know if an occupant is lawfully present or not; the verification of immigration status with the federal government occurs later. As Judges Jones and Elrod noted in dissent when looking at potential violations of the Ordinance: "In none of these three circumstances is the renter's lawful or unlawful immigration status relevant to potential fines." App. 123.

III. The Decision Below Is Contrary to *Arizona*.

A. The Respondents Cite Portions of *Arizona* that Bear No Relevance to This Case.

The Villas Respondents attempt to dodge the multiple conflicts between the decision below and *Arizona* by pointing to irrelevant portions of the opinion. First, they compare the Ordinance to Section 6 of Arizona's SB 1070, which was preempted because patrolling officers were empowered to make independent determinations of aliens' removability without input from the federal government. Villas Br. 25-26. However, as explained above, the Ordinance does not allow any City official to arrest an alien for any violation of immigration laws. And the Ordinance expressly prohibits any City official from even attempting an independent determination of an alien's status. § (D)(3), App. 229. All determinations are to be made by the federal government, pursuant to 8 U.S.C. § 1373(c). § (D)(1), App. 229.

The Reyes Respondents next compare the Ordinance to Section 3 of Arizona SB 1070, which established a parallel set of state criminal penalties for aliens who violated the federal alien registration laws. Reyes Br. 26-27. That section was field preempted because it intruded on the field occupied by the federal registration system. *Arizona*, 132 S. Ct. at 2501-03. In contrast, not one opinion below found the Ordinance to be field preempted. Nor does the Ordinance concern the alien registration field.

B. The Villas Respondents Confuse Preemption by Congress with Executive Enforcement Priorities.

Arizona made clear that a state law is not preempted simply because "it is inconsistent with a federal agency's current enforcement priorities." *Id.* at 2527 (Alito, J., concurring in relevant part). As the City has pointed out, the four-judge Dennis concurrence below attempted to revive that erroneous preemption theory by arguing that the Ordinance might lead to the eviction of an illegal alien tenant who is not a high priority for removal under this Administration. Pet. 35-38. The Villas Respondents now attempt to bolster the Dennis opinion by declaring that the City seeks to "expel aliens even if the Executive Branch would not do so." Villas Br. 27. This statement is plainly incorrect. The Ordinance does not expel anyone from the City, much less from the country. An illegal alien may continue to reside in the

City in housing that he owns, work in the City, and be present in the City.

The Villas Respondents also claim that "Congress required the Executive Branch to use judgment" and that "the City[] attempt[s] to take that judgment away." Villas Br. 28. Obviously, the Ordinance does not take away any discretion from the federal executive branch. The point is that the decision of the executive branch not to expend resources removing a particular alien does not have preemptive effect. The City may still exercise its police powers to make it more difficult for landlords to harbor that illegal alien in rental housing within its jurisdiction. No act of Congress preempts the use of these police powers. And no act of Congress *could* authorize the executive branch to independently preempt such local laws.

IV. Questions of Severability Are Irrelevant.

The Villas Respondents claim that the case is not certworthy because the City has waived any severability issue. Villas Br. 16-18. But only the Dennis concurrence accepted this waiver argument, App. 46 n.1; both the plurality and the two dissenting opinions reached the merits of the severability issue. App. 29-33, 88, 139-44.[2] If this Court upholds the Ordinance in bulk, the question of whether any isolated

[2] The primary dissenting opinion cogently explained why there has been no waiver. App. 139-40 n.26.

invalid provisions are severable can and should be dealt with on remand.

The Villas Respondents also err in linking severability with the *Salerno* facial challenge standard. *Cf.* Villas Br. at 21-22. The two are totally separate concepts. And if they were not, by conjoining them the Villas Respondents would destroy their own waiver argument, inasmuch as the City has relied on *Salerno* copiously and repeatedly at all stages of this case.

V. The Question Posed Is One of Great National Significance.

Finally, the Reyes Respondents attempt to diminish the importance of the issues presented in this case by offering their prediction that state and local governments will not legislate in this area in the future. They also point out that the City Council of Fremont, Nebraska, has decided to allow voters of that city to revisit their decision to adopt their ordinance by holding a second referendum on the matter. Reyes Br. 22.

Although the Reyes Respondents are no doubt hopeful that the citizens of Fremont will change their minds this time around,[3] the possibility that an ordinance might be repealed has no bearing on

[3] Fremont voters adopted their ordinance on June 21, 2010, by popular initiative. The popular vote total was 3,906 in favor (57%) to 2,908 (43%) opposed.

whether the circuits are in conflict. The Fremont opinion will remain the law of the Eighth Circuit regardless.

Their prediction that states and cities are unlikely to enact similar laws in the future is equally tenuous. They assert that no state laws on the subject have emerged since 2011, and that "disinterest" now reigns in state capitols. Reyes Br. 23. They are evidently unaware that more than 500 immigration-related bills were considered in state legislatures across the country in 2013.[4] "[D]isinterest" hardly describes "the situation . . . on the ground," as the Reyes Respondents put it. Reyes Br. 24.

The Reyes Respondents also dismiss the 2010 study cited by the City, which states that 42 municipalities considered ordinances similar to the one in the instant case, of which seventeen were enacted.[5] Because the published report of the study does not specify the municipalities that enacted the ordinances, the Reyes Respondents discount it entirely. Reyes Br. 24 n.26. Such flawed reasoning cannot obscure the fact that numerous cities have already acted.

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[4] Federation for American Immigration Reform, *2013: Trends in State Immigration-Related Legislation* (available at http://www.scribd.com/doc/194574019/2013-Trends-in-State-Immigration-related-Legislation).

[5] 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).

Regardless of what the Respondents see in their crystal ball, the fact remains that state legislatures and city councils will face uncertainty and differing legal standards until this Court harmonizes the discord among the circuits.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case.

Respectfully submitted,

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