No. 13-516

In The
Supreme Court of the United States

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

AMICUS CURIAE BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL M. HETHMON
Counsel of Record
GARRETT ROE
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Immigration Reform Law Institute ("IRLI") assists in the representation of cities, states, municipalities and government officials against claims of preemption regarding immigration related actions. IRLI is co-counsel in two cases cited in the Petition which will be directly affected by this case. *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013) and *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013). IRLI seeks to protect the interests of its clients in these other cases. This Court should grant the City's Petition for Certiorari to correct what is becoming a confusing and conflicting application of this Court's previous precedents.

[1] All parties have consented to the filing of an Amicus Curiae brief by Immigration Reform Law Institute. Amicus Curiae gave all parties ten days notice of intent to file an Amicus Curiae brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from IRLI, their respective members, or their respective counsel made a monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO PROTECT THIS COURT'S PREEMPTION DOCTRINE THAT ONLY UNMISTAKABLE CONGRESSIONAL INTENT PREEMPTS STATE ACTION

In a concurring opinion published 22 years ago in *Plyler v. Doe*, Justice Blackmun commented that "the structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported." 457 U.S. 202, 236 (1982). Despite its non-precedential character, the confusion engendered by this quote has achieved a rhetorical stature that has wreaked havoc on preemption doctrine in the field of immigration.

This comment, postulating preemption based on uncertainty of future immigration status, was relied on by the Fifth Circuit below to hold that only a "preclusive" federal determination of immigration status – in other words completion of a removal proceeding and any subsequent administrative appeals – could prevent "conflicting state and federal rulings on the question [of whether an alien was lawfully present]." App. at 27. The Fifth Circuit's holding represents the leading edge of a trend among the circuits to create a preemption doctrine based on an allegation that immigration status might change. *See*, *e.g.*, *Lozano v. City of Hazleton*, 620 F.3d 170, 221 (3d Cir. 2010); *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1183 (M.D. Ala. 2011).

Treating the lack of absolute predictability of the course of future removal proceedings as having preemptive effect over state action targeting unlawfully present aliens conflicts with this Court's preemption jurisprudence. Preemption requires "unmistakabl[e]" intent by Congress, *De Canas v. Bica*, 424 U.S. at 361 n.9, and conflict preemption based on the "purposes and objectives of Congress" requires a "high threshold" that must be met before preemption can be found. *Chamber of Commerce v. Whiting*, 131 S. Ct. at 1985. Unlike Justice Blackmun, the majority in *Plyler* noted that, "we cannot conclude that States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernable impact on traditional state concerns." *Plyler*, 457 U.S. at 228 n.23.

The lower court's finding that a hypothetical future event regarding an alien's immigration status cannot be reconciled with those standards would ignore the majority in *Plyler*, *De Canas* and *Arizona v. United States*, 132 S. Ct. 2492 (2012). Echoing Justice Blackmun, the Fifth Circuit labeled federal immigration law as a "labyrinth of statutes and regulations governing the classification of noncitizens" and found this alleged obscurity had a preemptive impact. App. 21. The Fifth Circuit ignored Supreme Court precedent, which clearly holds that the complexity and comprehensive nature of federal immigration law does not in itself show preemptive intent by Congress, because "a detailed statutory scheme was both likely and appropriate, completely apart from any

questions of preemption." *De Canas*, at 360 (*citing New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 415 (1973)).

Where differences appear between state and federal law, this Court's required analysis is clear: "'The proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.'" *De Canas*, 424 U.S. at 357 n.5 (*quoting Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973)) (internal quotation omitted). "To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960).

In applying these preemption standards in the field of immigration law, it is significant that Justice Blackmun made his comment prior to the extensive mandatory reforms enacted by Congress in 1996. Whatever may have been the state of the law in 1982, Congress acted decisively to suppress this pseudo-doctrine of uncertainty and ensure that State and local governments could ascertain immigration status through inquiries to the federal government. To date, Justice Blackmun's quote continues to reappear in immigration preemption decisions in part because this Court has not fully reviewed these mandatory reforms. Grant of the writ would provide the opportunity for urgently needed review to affirm that the laws

created by those reforms repeatedly "leave room for a policy" requiring local officials to seek ascertainment of immigration status from federal immigration officials as a "routine matter" *Arizona v. United States*, 132 S. Ct. 2492, 2508 (2012), and that States may act on the basis of such ascertained status to "deter the influx of persons entering the United States against federal law." *Plyler*, 457 U.S. at 228 n.23.

First, Congress expressly mandated that local officials may inquire into the citizenship or immigration status of any person for any lawful purpose, and further mandated that the federal government may not restrict or discourage such inquiries, and must ascertain the status of persons of interest to the local official upon request. 8 U.S.C. §§ 1373, 1644. As this Court has held, this ascertainment duty is not a discretionary agency action. Congress mandates that the Executive Branch shall verify or ascertain the citizenship or immigration status of any individual pursuant to a State's request. 8 U.S.C. § 1373(c); *Arizona*, 132 S. Ct. 2492, at 2508 ("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)). Congress specifically preserved the pre-existing authority of a state or local government to ascertain citizenship or immigration status from the federal government and encouraged states and local governments to do so, even providing various programs and a dedicated phone system to

expedite such inquiries.[2] "Indeed, it has encouraged the sharing of information about possible immigration violations. *See 8* U.S.C. § 1357(g)(10)(A)." *Arizona*, at 2508. After 1996, it thus cannot be said that Congress intended to prevent the states from using such status determination tools to exercise that authority.

The challenged Ordinance relies on these statutes. The Ordinance requires Farmers Branch officials to rely exclusively on federal determinations of immigration status, following the grant of authority by Congress in 8 U.S.C. § 1373(c). Code of Ordinances App. 218, 229; §§ 26-79(D)(3), 26-119(D)(3). The terms and immigration classifications mentioned in the Ordinance are expressly tied to the terms and classifications of federal law. App. 221, 233; §§ 26-79(F), 26-119(F). This Court has endorsed this approach in the state action context. *Whiting*, 131 S. Ct. at 1981 ("Arizona went the extra mile in ensuring that its law closely tracks IRCA's[3] provisions in all material

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[2] One such program is the "SAVE" program which Farmers Branch indicates it may use if requested to do so by the federal government. *See* Petitioners' Br. at 163, n.7; *see also* § 1226(d)(1)(A) (requiring a system for determining whether individuals arrested for aggravated felonies are aliens). ICE's Law Enforcement Support Center operates "24 hours a day, seven days a week, 365 days a year" and provides, among other things, "immigration status, identity information and real-time assistance to local, state and federal law enforcement agencies." *Arizona*, 132 S. Ct. at 2507.

[3] IRCA is the common acronym for the Immigration Reform and Control Act, Pub. L. No. 99-603 (Nov. 6, 1986). ICE is the common acronym for the Immigration and Customs Enforcement Agency.

respects. The Arizona law begins by adopting the federal definition. . . .").

Second, in 1996 Congress fundamentally reformed immigration law to ensure that any alien discovered within the United States who has not been found to be admissible after inspection is to be placed in removal proceedings, based on that status alone. The new legal standard of admission, introduced by Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208 (Sept. 30, 1996) ("IIRIRA"), is a bright-line statutory rule which classifies all aliens found in the United States who have not been "admitted" as unlawfully present in the United States.[4] Admission requires "a lawful entry . . . into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). In 1996, Congress mandated that federal immigration officials inspect every alien applicant for admission as to their entitlement to admission to the United States. 8 U.S.C. § 1225(a)(3) (added by IIRIRA § 302) ("all aliens . . . who are applicants for admission . . . *shall be* inspected by immigration officers."). The Immigration and Nationality Act ("INA") clarifies that "an alien present in the United States who has not been admitted . . . *shall be* deemed for purposes of this Act an applicant for admission." 8 U.S.C. § 1225(a)(1).

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[4] IIRIRA distinguished "arriving aliens" from illegal aliens who have entered without inspection ("EWIs"), but categorized both classifications as "applicants for admission." 8 U.S.C. § 1225(a)(1); *see* IIRIRA § 302(a)(1) (1996).

Prior to 1996, the INA required inspection only of "aliens arriving at ports . . . at the discretion of the Attorney General." 8 U.S.C. § 1225 p. 56 (2007).

In other words, in 1996 Congress expanded the duties of INS, now DHS,[5] from discretionary inspections at ports of entry to include mandatory inspection of every alien found to be physically present in the United States who cannot establish a prior lawful admission. The function of post-IIRIRA inspection is to classify all aliens as either admitted or inadmissible. Aliens occupying rental units in Farmers Branch for whom DHS cannot ascertain a lawful inspection and admission are by statute inadmissible "applicants for admission" who are unlawfully present in the United States. DHS has estimated that such aliens, referred to in DHS and immigration bar jargon as "EWIs," constitute at least 60 percent of the entire population of illegal aliens present in the United States. Warren, R. & J.R., Unauthorized Immigration to the United States; Annual Estimates and Components of Change, 1990 to 2010, 47 Int'l Migration Review, 296 (2013).

Third, Congress in 1996 circumscribed DHS authority to exercise discretion over the disposition of aliens *subsequent* to their mandatory inspection. Congress imposed a default uniform rule for the conduct of inspections of aliens found inside the boundaries of

[5] INS is the common acronym for the Immigration and Naturalization Service. DHS is the common acronym for the Department of Homeland Security.

the United States: "[I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a proceeding under [INA] section 240." 8 U.S.C. § 1225(b)(2)(A) (emphasis added).[6]

By mandating universal inspection, Congress in 1996 established that a grant of admission must be an affirmative act, where the burden of proof is on the alien to establish that he or she is "not inadmissible," a showing that must be made "clearly and beyond a doubt." 8 U.S.C. §§ 1225(b)(2)(A), 1361. A decision by the Executive Branch not to commence a removal proceeding for an alien who cannot be admitted through inspection would violate these Congressional acts, rejecting the view expressed in Justice Blackmun's concurrence.

If this Court does not grant certiorari, confusion will prevail in immigration-related preemption doctrine by lower courts continuing to treat as doctrine a quote from a concurrence that does not follow this Court's preemption teachings regarding Congressional intent, nor is accurate after the 1996 reforms.[7]

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[6] An INA section 240 proceeding is a removal proceeding. *See* 8 U.S.C. § 1229a.

[7] In 1996 Congress also circumscribed the authority of federal *courts* to hear removal and detention appeals. *See*, *e.g.*, 8 U.S.C. § 1252(g). But IIRIRA court-stripping laws only bar judicial review of claims "*on behalf of any alien* arising from the

(Continued on following page)

Fourth, in 1996 Congress circumscribed DHS discretion to temporarily *parole* an alien applicant for admission. Congress replaced its prior more lenient standard, "for emergent reasons or for reasons deemed strictly in the public interest," by restricting its exercise to (1) "a case-by-case basis" and (2) only "for urgent humanitarian reasons or significant public benefit. . . ." 8 U.S.C. § 1182(d)(5)(A). *See* IIRIRA § 602(a).[8] Individual aliens may thus also be present in Farmers Branch in temporary parole status. But such special circumstances cannot have a preemptive effect, because the Farmers Branch Ordinance "goes the extra mile" by barring enforcement against any aliens for whom DHS is unable to ascertain presence in an unlawful immigration status. App. 218, 229; §§ 26-79(D)(3), 26-119(D)(3); *Whiting*, 131 S. Ct. at 1981.

Fifth, between 1994 and 1996 Congress passed a series of immigration enforcement statutes that unequivocally invited state and local participation in the control of illegal immigration. *See*, *e.g.*, 8 U.S.C.

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decision or action" by DHS to commence proceedings against the individual alien. The bar is construed narrowly, *Reno v. American-Arab Anti-discrimination Comm.*, 525 U.S. 471 (1999), and cannot form the basis of an implied preemption claim by DHS against Farmers Branch.

[8] The legislative history indicates that Congress undertook this statutory restriction because of "concern that parole under § 1182(d)(5)(A) was being used by the executive to circumvent congressionally established immigration policy." *Cruz-Miguel v. Holder*, 650 F.3d 189, 198-200 (2d Cir. 2011) (*citing* H.R. Rep. No. 104-169, pt. 1, at 140-41 (1996)).

§ 1357(g)(10)(A) (federal agreements for local inquiries or communications regarding the identification or removal of aliens in unlawfully present status not required); § 1226(d)(1) (DHS must assist state and local authorities to identify aliens arrested for aggravated felonies); § 1226(d)(3) (DHS must assist state courts in identifying unlawfully present aliens in state "pending" prosecution); § 1373(a)-(b) (prohibiting any government entity from restricting investigation of the immigration status of any individual, lawful or unlawful); § 1357(d) (requiring DHS to promptly determine whether to issue a detainer for any alien arrested by state or local police for violation of any law relating to controlled substances); § 1358 (recognizing state and local law enforcement jurisdiction in federal immigration facilities); § 1377 (mandating state and local law enforcement access to federal biometric databases for alien visa applicants); and § 1644 (barring "any" restriction on state or local government information sharing regarding the immigration status of any "alien in the United States"). Congress also mandated in 1996 that INS [now DHS] "shall operate" a "criminal alien identification system," and directed that the "system shall be used to assist Federal, State, and local law enforcement agencies in identifying and locating aliens who may be subject to removal by reason of . . . *not [being] lawfully present in the United States* or otherwise removable." IIRIRA § 326(a) (amending § 130002 of the Violent Crime Control and Law Enforcement Act of 1994) (emphasis added).

This body of law underlines the conclusion that Congress has not displaced the authority of the City of Farmers Branch to ascertain whether a non-citizen rental license recipient is present in any lawful immigration status by contacting the federal government. Justice Blackmun's belief that the uncertainty of an alien's future immigration status preempted state or local action was corrected by Congress through its 1996 reforms. The holding below by the Fifth Circuit, that unlawful status is not cognizable under the federal scheme, on the ground that it is not "preclusive" of future relief obtained during a removal proceeding, wrongly seeks to ignore the 1996 laws and embed the Blackmun pseudo-doctrine into immigration law by judicial fiat.

This Court's established principles do not permit the lower courts to pick and choose among the statutes that they will consider when assessing preemption claims of all types in the field of immigration law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000). Granting the writ would provide a greatly needed harmonization of these immigration statutes, which is an essential prerequisite to the coherent application of preemption doctrines in general, and in particular to the Farmers Branch Ordinance.

II. CERTIORARI SHOULD BE GRANTED TO AFFIRM THAT LOCAL GOVERNMENTS MAY EXERCISE POLICE POWERS TO RESTRICT THE RENTAL OF DWELLING UNITS TO PERSONS WHOM THE DEPARTMENT OF HOMELAND SECURITY HAS CONFIRMED LACK LAWFUL PRESENCE IN THE UNITED STATES

In a claim of implied conflict preemption between federal law and state police power, "the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (internal citations omitted); *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (Displacing state power requires that "Congress . . . unequivocally expres[s] its intent to abrogate.") (internal quotation marks and citation omitted); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 111-12 (1992) (Kennedy, J., concurring).

The Farmers Branch Ordinance is entitled to a strong presumption of constitutionality because it implements a traditional police power of municipalities, in this case to regulate housing by means of licensing. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Altria*, 555 U.S. at 76-77. The Ordinance imposes criminal penalties on a local landlord who leases a rental unit to a tenant who does not possess an occupancy license or continues to lease a rental unit to a tenant after that tenant's occupancy license has been revoked by the City. App. 215-20, 226-31; §§ 26-79(C)(4)-(7), (D); §§ 26-119(C)(4)-(7), (D). A tenant can only have his

occupancy license revoked after two conclusive determinations by DHS that the tenant is an alien who is not lawfully present in the United States, pursuant to an 8 U.S.C. § 1373(c) inquiry. *Id.*

It has been settled law since 1847 that a state and the federal government can criminalize similar conduct without violating the constitution. *See United States v. Lanza*, 260 U.S. 377, 382 (1922); *Fox v. Ohio*, 46 U.S. 410 (1847); *Moore v. Illinois*, 55 U.S. 13, 20 (1852) ("The same act may be an offence or transgression of the laws of both."); *Bartkus v. Illinois*, 359 U.S. 121, 132-33 (1959) (collecting cases). As Justice Holmes once wrote, "Of course an act may be criminal under the laws of both jurisdictions . . . The general proposition is too plain to need more than statement." *Westfall v. United States*, 274 U.S. 256, 258 (1927) (*citing Lanza*, 260 U.S. at 382). This Court has long maintained that a State may make a violation of federal law a violation of state law "even when the interest protected is a distinctively federal interest." *Halter v. Nebraska*, 205 U.S. 34 (1907); *Gilbert v. Minnesota*, 254 U.S. 325 (1920). In *Arizona*, this Court recognized that principle in the context of immigration law. 132 S. Ct. at 2503 ("[A] State may make violation of federal law a crime.").

These general principles apply to the enforcement of immigration law. Congress has not delegated exclusive authority to DHS for enforcement of federal criminal laws against aliens – and particularly not for the crime of harboring. *See* 8 U.S.C. § 1324(c) (authorizing enforcement of Title 8 alien smuggling

felonies by "all other officers whose duty it is to enforce criminal laws").[9]

No statute establishes that DHS authority to detain criminal aliens supersedes or deprioritizes its core immigration control mission to inspect, register, and monitor the status and location of the entire population of aliens in the United States. To the contrary, when creating the Department of Homeland Security Congress mandated that enforcement of immigration law against unlawfully present aliens was to be a joint responsibility, not an exclusive power, shared with the Departments of Justice, Defense, intelligence agencies, and federal, state and local law enforcement agencies nationwide. *See* 6 U.S.C. § 255(b) (requiring DHS to consult with state and local law enforcement agencies "to determine how to most efficiently conduct enforcement operations"). Even before passage of the 1996 reforms, the Fifth Circuit adopted this viewpoint. "No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws." *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987).

To date, this Court has not reviewed the modern harboring statute. In 1948, this Court reviewed a predecessor harboring statute and determined that Congress had not created any penalties for harboring

[9] The enforcement-related statutes contained in INA Title II, Chapters 4 and 7, only require that criminal aliens be given top enforcement priority for *detention* purposes.

in that statute, but did not decide the "question" of the "reach of the statute" because it was not before the Court. *United States v. Evans*, 333 U.S. 483, 489 (1948). However, in *dicta*, this Court hypothesized that "an innkeeper furnishing lodging to an alien lawfully coming in but unlawfully overstaying his visa would be guilty of harboring, if he knew of the illegal remaining." *Id.* at 489.

Congress amended the harboring statute in 1952 to add the penalties that this Court found lacking. *United States v. Lopez*, 521 F.2d 437, 440 (2d Cir. 1972) (*citing* H.R. Rep. No. 1377, 82d Cong., 2d Sess.) In amending the harboring statute, "members of Congress appear[ed] to have assumed that one providing shelter with knowledge of the alien's illegal presence would violate the Act . . . " *Id.* However, this Court has never defined the term "harboring" under 8 U.S.C. § 1324(a)(1)(A)(iii). *Evans*, 333 U.S. at 489.

In the absence of Supreme Court guidance over the past 62 years, multiple conflicting interpretations of 8 U.S.C. § 1324(a)(1)(A)(iii) have emerged. Circuits have acknowledged this circuit split as well. *See Lopez*, 521 F.2d at 440 (rejecting the Sixth Circuit's outdated "clandestine sheltering" test for harboring); *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (rejecting the Sixth Circuit's harboring requirement that aliens be hidden from detection and holding that harboring only means "to afford shelter to").

The Ninth Circuit relies on the "plain meaning" of the statute, holding that harboring means simply "to afford shelter to," with no showing of clandestine

sheltering being necessary. *Acosta de Evans*, 531 F.2d at 430; *United States v. Aguilar*, 883 F.2d 662, 689 (9th Cir. 1989). In *United States v. Franco-Beltran*, 229 Fed. Appx. 592 (9th Cir. 2007), the Ninth Circuit sustained the conviction of an apartment manager who charged inflated rent to known illegal alien tenants and who allowed multiple illegal aliens to reside in those apartments. *Id.* at *4. In the earlier Ninth Circuit case of *Acosta de Evans*, the defendant was convicted of harboring an illegal alien who had been living in the defendant's apartment for two months. 531 F.2d at 429. The defendant argued that she did not "harbor" the illegal alien because she did not try "to prevent detection by law enforcement agents." *Id.* Rejecting that argument, the court held that the "purpose" of the harboring statute was to "keep unauthorized aliens from entering or remaining in the country," and that "purpose is best effectuated by construing 'harbor' to mean 'afford shelter to.'" *Id.* at 430.

Similarly, the Eighth Circuit holds "that a showing of concealment is unnecessary, and that conduct which merely 'substantially facilitates an alien's remaining in the country illegally' is sufficient to constitute harboring." *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008).[10]

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[10] The Seventh Circuit relies solely on the three elements that are found in 8 U.S.C. § 1324a(1)(A)(iii). *United States v. Ye*, 588 F.3d 411, 416 (7th Cir. 2009); *c.f. United States v. Costello*, 666 F.3d 1040 (7th Cir. 2013).

In stark contrast, the Third Circuit requires two non-statutory elements to show harboring: "conduct 'tending to substantially facilitate an alien's remaining in the United States illegally *and to prevent government authorities from detecting the alien's unlawful presence*.'" *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008) (emphasis in original). The Sixth Circuit also requires some kind of element of preventing detection. However, that holding is 82 years old. *See Susnajar v. United States*, 27 F.2d 223, 224 (6th Cir. 1928).[11]

Until the opinion in the court below, both the Fifth and Eighth Circuits agreed that harboring only required a showing that the "conduct tends to substantially facilitate an alien's remaining in the United States illegally," with no requirement of preventing detection. *United States v. Martinez-Medina*, 2009 U.S. 890, *3 (5th Cir. 2009); *United States v. Tipton*, 518 F.3d 591 (8th Cir. 2006). In fact, the Fifth Circuit had expressly rejected any "concealment" requirement. *United States v. Herrera*, 584 F.2d 1137, 1144 (5th Cir. 1978) (To prove harboring, the government must show that the "conduct tend[ed] substantially to facilitate an alien's 'remaining in the United States illegally'" but "[s]uch conduct need not be clandestine.") (internal citations omitted).

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[11] Both the Second and Ninth Circuits rejected the *Susnajar* "clandestine sheltering" test because *Susnajar* was interpreting a pre-1952 harboring statute, and it predated the Supreme Court's 1948 *Evans* decision. *Lopez*, 521 F.2d at 440 n.3; *Acosta de Evans*, 531 F.2d at 430.

The Fifth Circuit below nonetheless found the Ordinance preempted, by taking advantage of the extensive splits and ignoring its prior Circuit precedent. App. 18. In doing so, the Fifth Circuit incorrectly held that federal harboring law does not sanction "non-citizens who may not have lawful status but face no federal exclusion from rental housing." *Id.* The opinion reaches that holding by grafting the Third and Sixth Circuit's judicially-created element of "evading federal detection" onto that Circuit's established prior construction of the harboring statute. *Id.* at 15. Based on that definition, the court below found that the Farmers Branch ordinance "interferes with the careful balance struck by Congress with respect to the harboring of non-citizens." *Id.*

The Fifth Circuit never identified the elements of this "balance" it claims was struck. While this Court has stated that Congress strikes a "balance" in "any piece of legislation," *see Whiting*, 131 S. Ct. at 1984, it is doubtful that this Court was establishing a new preemption doctrine. Such a doctrine would necessarily rely on a "freewheeling judicial inquiry" into what balance might have been struck. *Id.* at 1985.

Even if this Court were creating a new preemption doctrine, any "balance" in this case is even more suspect than the claims in *Whiting*. In *Whiting*, the "balance" involved decisions made by Congress. The unstated "balance" relied upon by the Fifth Circuit is one that is only achieved by judicially altering the harboring statute – violating this Court's principle that Congress, not the courts, preempt. *Id.* at 1985

("Implied preemption analysis does not justify a free-wheeling 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") (citations and internal quotations omitted).

Until this Court grants certiorari to "examin[e] the federal [harboring] statute as a whole and identify[ ] its purpose and effects," *Crosby*, 530 U.S. at 380, States and localities, as well as lower courts, will continue to be confused on what conduct is proscribed by 8 U.S.C. § 1324(a). The existence of this multi-element, multi-circuit split is yet another compelling reason to grant the writ under Rule 10(a).

CONCLUSION

Amicus Curiae respectfully requests this Court to Grant the Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL M. HETHMON
Counsel of Record
GARRETT ROE
IMMIGRATION REFORM
LAW INSTITUTE
25 Massachusetts Ave., NW,
Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
Attorneys for Amicus Curiae