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

REYES RESPONDENTS' BRIEF IN OPPOSITION

NINA PERALES
THOMAS A. SAENZ
MARISA BONO
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
110 Broadway, Ste. 300
San Antonio, TX 78205
(210) 224-5476
nperales@maldef.org

OMAR C. JADWAT
Counsel of Record
STEVEN R. SHAPIRO
LEE GELERNT
DROR LADIN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2660
ojadwat@aclu.org

REBECCA ROBERTSON
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS
611 South Congress Ave., Ste. 320
Austin, TX 78704
(512) 478-7300
rrobertson@aclutx.org

Attorneys for Reyes Respondents

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

QUESTION PRESENTED

Did the en banc court of appeals err in concluding, consistent with *Arizona v. United States* and decisions of the Third, Fourth, Ninth, and Eleventh Circuits, that federal law preempts a local immigrant harboring ordinance penalizing owners and occupants of rental housing?

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RELEVANT STATUTES

Tex. Code Crim. Proc. Ann. § 14.01(b) provides:

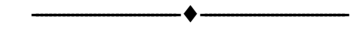
> A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

Tex. Code Crim. Proc. Ann. § 14.06(a) provides, in pertinent part:

> . . . [I]n each case enumerated in this Code, the person making the arrest or the person having custody of the person arrested shall take the person arrested or have him taken without unnecessary delay . . . before the magistrate. . . .

Tex. Code Crim. Proc. Ann. § 14.06(b) provides, in pertinent part:

> A peace officer who is charging a person . . . with committing an offense that is a Class C misdemeanor . . . may, instead of taking the person before a magistrate, issue a citation to the person. . . .



STATEMENT OF THE CASE

This case involves an ordinance enacted by the City of Farmers Branch, Texas. The ordinance, which the City characterizes as "reinforc[ing] the federal criminal immigration law against harboring," bans from rental housing any non-citizen the City has determined to be "not lawfully present in the United

States." These non-citizens are subject to arrest and prosecution if they remain in their current homes or if they move to a new rental unit. Landlords are subject to arrest and prosecution if they allow "not lawfully present" persons to remain in their properties. The district court, a panel of the court of appeals, and the en banc court of appeals all found the ordinance preempted.

A. Factual Background

Farmers Branch (the "City") is a suburb of Dallas. Like other cities, the City has experienced significant demographic change over the last two decades, including a rapid increase in its foreign-born population and its Latino population.[1]

This demographic change generated discomfort for some people in Farmers Branch. During the summer of 2006, a City Council-appointed "Farmers Branch Revitalization Task Force" convened and cited the demographic changes in the City's population,

[1] The 2000 Census reported that foreign-born persons of all nationalities grew to 25% of the City's total population over the course of the previous decade. The 2005-2007 American Community Survey conducted by the U.S. Census estimated that Latinos comprised 46% of the City's population. *See* ROA 5318-5319 (U.S. Census 2000); ROA 5320-5321 (U.S. Census Bureau, American Community Survey 2005-2007). All references to the record of appeal will appear as ROA ___.

specifically the increase in the Latino population from 5% in 1970 to 27% in 2000, as a barrier to redevelopment in Farmers Branch. The report further identified Farmers Branch's "mostly lower income, minority population" and "mostly lower cost housing" as negatives to mitigate in marketing Farmers Branch.[2]

A City Councilman, Tim O'Hare, asked the City Manager to put the issue of illegal immigration on the Council's agenda, writing: "We need to address illegal immigrants in our city and we need to do it now . . . I don't care who this issue might offend . . . [D]rive around our city. [Mayor Phelps] said he doesn't want our city to become a ghetto. Half of our city already is . . . I want to do everything we can do to . . . keep low lifes [sic] out of here."[3]

Another Councilman proposed that the City remove all foreign language books, CDs, and periodicals from the City library[4] because he was concerned that such materials "discourage learning English" for

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[2] ROA 5326 (Notes, Farmers Branch Development Committee, Aug. 31, 2006).

[3] *See* ROA 5885 (E-mail correspondence from Councilman Tim O'Hare to Mayor, City Council, and City Manager Linda Groomer (June 19, 2006)).

[4] ROA 5331-5332 (E-mail from Councilman Ben Robinson to City Manager Linda Groomer, copied to Mayor and City Council (Aug. 10, 2006)).

persons "who live here and are to [sic] lazy to learn English."[5] He also suggested that the City "discontinue subsidizing children [sic] activities unless it is proven that the parents are legal citizens"; adopt an English-only ordinance; adopt an ordinance prohibiting the assembly of day laborers; explore the Farmers Branch Police Department's response when they "encounter phony documents or a lack of documents"; and prepare draft ordinances prohibiting landlords from renting to "illegal immigrants" and prohibiting contractors who hire "illegal immigrants" from working in Farmers Branch.[6]

In August 2006, the City Council began to discuss proposed ordinances, including a proposal to prevent undocumented immigrants from renting in Farmers Branch.[7] Councilman O'Hare explained that he introduced the proposal because property values were declining and " . . . what I would call less desirable people [are] mov[ing] into the neighborhoods, people

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[5] ROA 5333-5334 (E-mail from Councilman Ben Robinson to City Manager Linda Groomer (Aug. 15, 2006)).

[6] ROA 5327-5330 (E-mail from City Manager Linda Groomer to Councilman Ben Robinson (Aug. 28, 2006) (referencing attached June 26, 2008 memorandum from Groomer to Robinson)); *see also* ROA 5576-5578 (Robinson Dep. 95:7-97:12) (agreeing memorandum was prepared in response to suggestions he raised in the summer of 2006).

[7] ROA 5709 (O'Hare Dep. 137:2-6).

who don't value education, people who don't value taking care of their properties."[8]

During this same period, four City Council members requested a meeting to discuss whether the Public Library was "too welcoming" to undocumented immigrants.[9] They suggested the library should begin checking identification and proof of citizenship at the door.[10]

A Series of Failed Ordinances

In 2006 and 2007, without requesting or considering any research on the presence or impact of unauthorized immigrants in Farmers Branch, the City Council adopted a number of immigration-related resolutions and ordinances, including two predecessors to the ordinance at issue in this case.

The first of those predecessor ordinances, Ordinance 2892, was temporarily restrained by a state district court on January 9, 2007 in *Ramos v. City of*

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[8] *See* ROA 5822 (Stephanie Sandoval, *FB Studies Tough Provisions Aimed at Illegal Immigrants*, DALL. MORN. NEWS, Aug. 21, 2006, at 1A).

[9] ROA 6080-6081; 6089-6090 (Barber Dep. 34-35; 51-52). Among other things, Council members expressed concern that the city library had allowed a group to reserve a meeting room to view a film relating to immigration. *Id.* at 6084-6085 (Barber Dep. 40-41).

[10] *See* ROA 6086-6088 (Barber Dep. 42-44).

Farmers Branch, No. 06-12227-F, 2007 WL 4809294 (116th Dist. Ct., Dallas Cty., Tex. Jan. 11, 2007).

On January 22, 2007, the Farmers Branch City Council repealed the enjoined Ordinance 2892 and adopted Ordinance 2903, which required owners and/or managers of apartment complexes in Farmers Branch to verify that each tenant is either a U.S. citizen or has "eligible immigration status."[11] Like Ordinance 2892, City officials claimed Ordinance 2903 was intended to expel undocumented immigrants from Farmers Branch.[12] Ordinance 2903 was promptly blocked by litigation in the U.S. District Court for the Northern District of Texas, and was permanently enjoined on May 28, 2008 on preemption and due process grounds. *See generally Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008). In the meantime, however, Farmers Branch had enacted the current ordinance,

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[11] ROA 5374-5382 (Ordinance 2903, entitled "AN ORDINANCE REPEALING ORDINANCE 2892; ADOPTING REVISED APARTMENT COMPLEX RENTAL LICENSING STANDARDS, MANDATING A CITIZENSHIP CERTIFICATION REQUIREMENT PURSUANT TO 24 CFR 5 ET SEQ.; REPEALING ORDINANCE 2900; CALLING AN ELECTION FOR MAY 12, 2007, TO CONSIDER THIS ORDINANCE (FOR OR AGAINST); PROVIDING FOR ENFORCEMENT; PROVIDING A PENALTY CLAUSE; PROVIDING A SEVERABILITY CLAUSE; AND PROVIDING AN EFFECTIVE DATE").

[12] *See* ROA 5793 (O'Hare Dep. 258:2-22) (agreeing that Ordinance 2892 and 2903 shared the same goal of reducing the population of illegal immigrants in Farmers Branch).

Ordinance 2952 (the "Ordinance"), to take the place of Ordinance 2903 in the event of its invalidation.

None of the immigration ordinances enacted by the City was accompanied by evidence of the number of undocumented immigrants who reside in Farmers Branch or the impact of undocumented immigrants on the economy, the cost of health care, property values, crime rates, or public schools in Farmers Branch.[13] Instead, city officials' justifications for the ordinances turned largely on observations about the growing Latino population and a concern about increased speaking of Spanish. For example, Councilman (later Mayor) O'Hare was quoted in a local newspaper interview saying, "You go look at the people in school, and you look at who's in the school, and you can figure it out pretty quick," he said. "There's no question Farmers Branch has a lot of illegal immigrants here."[14] O'Hare further expressed worry about the changes in the city's commercial center: "It just kept filling up with Spanish-speaking businesses and

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[13] *See* ROA 6112-6162 (City of Farmers Branch 30(b)(1) Rep. Greer Dep. 100-150); *see also* ROA 6164-6168 (Greer Dep. 195-199).

[14] Patrick McGee, *A CITY DIVIDED; Farmers Branch residents take sides over laws*, FORT WORTH STAR-TELEGRAM, Jan., 15, 2007, *available at* http://patrickjmcgee.wordpress.com/2009/05/13/a-dallas-suburb-turns-into-a-flashpoint-in-the-immigration-debate-as-the-city-council-tries-to-find-a-way-to-kick-illegal-immigrants-out/.

restaurants," he said. "You don't need seven or eight Mexican restaurants in one center."[15]

Councilman Ben Robinson recalled being shocked and disturbed "about where our community and our state was going" when State Representative Rafael Anchia, speaking at a local Chamber of Commerce meeting, suggested students should learn Spanish if they wanted to become economically successful.[16] Councilman O'Hare further testified that by reducing the number of children who receive bilingual education, "there would be more money to spend on education of children who had a right to be here."[17]

The Challenged Ordinance

Ordinance 2952 "seeks to regulate non-citizens who reside in the United States contrary to law" through a system of occupancy licensing provisions and criminal sanctions. App. 3. The Ordinance's preamble declares that "certain conditions (found principally in Title 8, United States Code, Sections 1101, et seq.), . . . must be met before an alien may be lawfully present in the United States," and that "aliens not lawfully present in the United States, as determined by federal law, do not meet such conditions as a

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[15] *Id.*

[16] ROA 5546-5549 (Robinson Dep. 43:12-19; 46).

[17] Reyes Summ. J. App. 0410-0539, 1450-1478 (O'Hare Dep. 265:10-266:8); *see also* App. 0410-0539, 1450-1478 (O'Hare Dep. 280:5-281:21; App. 0207-0209, Ex. 62; App. 0210-0215, Ex. 63).

matter of law when present in the City of Farmers Branch." *Id.* at 209. Any suggestion "that the Ordinance is primarily designed to promote a civil licensing scheme is contradicted not only by the Ordinance's criminal enforcement apparatus, but by the Ordinance's explicit reference to federal criminal anti-harboring law, by Farmers Branch's consistent emphasis on the Ordinance's 'concurrent enforcement' of 'federal criminal immigration law,' and by City officials' blunt and exclusionary statements in the record."[18] *Id.* at 30-31 (citations omitted).

The Ordinance requires each adult resident of every rental unit in the City to obtain a rental occupancy license. *See* Ordinance 2952 § B(1). Each non-citizen resident must supply "an identification number assigned by the federal government that the occupant believes establishes his or her lawful presence in the United States," or a declaration the he "does not know of any such number." *Id.* § B(5)(i). Once an occupant submits a completed application, the building inspector immediately issues the license and, for all non-citizens, "shall" "[p]romptly . . . verify with the federal government whether the occupant is an alien lawfully present in the United States." *Id.* § D(1).

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[18] Ordinance 2952 does not require prospective renters to provide information regarding credit-worthiness, a clean record with code enforcement or any characteristic other than U.S. citizenship or non-citizen "lawful presence."

The testimony of city and federal officials confirms that because the federal government will not provide a response that characterizes individuals as "lawfully present" or not (but instead will report information regarding their current immigration status), the Farmers Branch building inspector will ultimately determine whether a person is "lawfully present in the United States." App. 20-21; *accord id.* at 43-44 (referring to "City officials making determinations of 'lawful presence' ").

If the City determines that a resident is "unlawfully present," the resident's occupancy license will be revoked; the resident is then subject to criminal and civil penalties if he remains in the unit or moves to another rental unit. *Id.* at 4-5, 16 & n.10; Ordinance 2952 §§ 1(C)(1); 3(C)(1); 5. Although petitioner asserts that "[i]t is not . . . an offense for a tenant to occupy rental premises after the tenant's license has been revoked," Pet. 5, petitioner does not dispute that the Ordinance exposes non-citizens to arrest, detention, and prosecution for failing to secure a license before living in rental housing. Furthermore, the Ordinance's criminal provisions create a separate offense for each day a tenant occupies rental housing without first obtaining a valid occupancy license. Ordinance 2952 §§ 1(C)(1), (F); *see also* App. at 5.

The Ordinance also criminalizes: making a false statement of fact on a license application, Ordinance 2952 §§ 1(C)(2), 3(C)(2), 5; renting an apartment or single-family residence without obtaining licenses from the occupants, *id.* §§ 1(C)(4), 3(C)(4), 5; failing to

maintain copies of licenses from all known occupants, *id.* §§ 1(C)(5), 3(C)(5), 5; failing to include a lease provision stating that occupancy by a person without a valid license constitutes default, *id.* §§ 1(C)(6), 3(C)(6), 5; and allowing an occupant to inhabit an apartment without a valid license, *id.* at §§ 1(C)(7), 3(C)(7), 5. App. 4-5.

Penalties for violation of Ordinance 2952 are severe and include suspension of the landlord's rental license, during which period the landlord may not collect rent from any occupant in the rental unit, and fines of up to $500 per day. Ordinance 2952 §§ 1(D)(5)-(6); 3(D)(5)-(6); 5. A separate offense is deemed to have occurred each day a landlord or tenant violates the Ordinance. Violations of the Ordinance lead to arrest. App. 5 ("These seven offenses are Class C criminal misdemeanors. . . . In Texas, local police may make arrests for Class C misdemeanors." (citing Tex. Code Crim. Proc. Ann. art. 14.01(b), 14.06(a)-(b) (West 2011))).

The judicial review section of the Ordinance provides that "[a]ny landlord or occupant who has received a deficiency notice or a revocation notice may seek judicial review of the notice by filing suit against the building inspector in a court of competent jurisdiction in Dallas County, Texas." *Id.* at §§ 1(E)(1); 3(E)(1).

B. Procedural Background

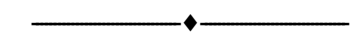
Two groups of landlords and renters in Farmers Branch filed suits (now consolidated) challenging Ordinance 2952 in September 2008. App. 166 n.10. The ordinance has been continuously enjoined by this litigation without ever going into effect. The district court, a three-judge panel of the Fifth Circuit and the Fifth Circuit en banc have all agreed that Ordinance 2952 is preempted by federal law.

After the parties conducted extensive factual discovery, the district court entered partial summary judgment on the plaintiffs' Supremacy Clause claim and issued a permanent injunction on March 24, 2010. App. 153-208 (Boyle, J).

The City appealed, and on March 21, 2012 a three-judge panel of the Fifth Circuit affirmed the judgment of the district court. *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802, 804 (5th Cir.), *vacated for reh'g en banc*, 688 F.3d 801 (2012). The City sought en banc review, which was granted on July 31, 2012, shortly after this Court's decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012).

Following additional briefing on the applicability of *Arizona v. United States* and oral argument, a substantial majority of the Fifth Circuit affirmed the district court and concluded that federal law pre-empts the Ordinance.

Nine judges of the 15-judge panel concluded that the Ordinance conflicts with federal law because it "stands as an obstacle to the full achievement of the purposes and objectives of uniform federal immigration law." App. 10, 48. Within the majority, five judges concluded "the Ordinance's criminal offense and penalty provisions and its state judicial review process conflict with federal law." *Id.* 3. An additional four judges concluded that the Ordinance "infringes on and conflicts with comprehensive and exclusively federal schemes for classifying noncitizens and with enforcing and adjudicating the implications of those federal classifications." *Id.* 59.



REASONS FOR DENYING THE WRIT

This case presents no conflict warranting this Court's attention; of six circuits that have considered preemption challenges to state or local harboring laws, five (including the Fifth Circuit below) have held that the laws are preempted, and the circuits have *unanimously* rejected laws that, like Ordinance 2892, penalize harbored immigrants themselves. Any disagreements that do exist between the five circuits that have held the laws preempted and the one outlier circuit are not dispositive here, have little practical significance, and are not nationally important at this time.

In any event, the Fifth Circuit's ruling in this case is a straightforward application of this Court's

immigration preemption decisions, and is eminently correct in concluding that Farmers Branch may not establish a legal regime that penalizes immigrants and those who house them based on the city's – or a state judge's – determination that they are not "lawfully present."

I. There Is No Division Among The Circuits That Requires This Court's Review

The circuit courts are not in "complete disarray," Pet. at 7. In fact, they are in broad consensus on state and local harboring laws overall, and unanimous as to the issue actually presented in this case.

Five courts of appeals – the Third, Fourth, Fifth, Ninth, and Eleventh – have sustained preemption challenges to sub-federal harboring laws. *Lozano v. City of Hazleton*, 724 F.3d 297, 313-23 (3d Cir. 2013), *pet. for cert. filed*, No. 13-531; *United States v. South Carolina*, 720 F.3d 518, 528-32 (4th Cir. 2013); App. 1-149; *Valle del Sol v. Whiting*, 732 F.3d 1006, 1022-29 (9th Cir. 2013); *Georgia Latino Alliance for Hum. Rights v. Gov. of Georgia*, 691 F.3d 1250, 1262-67 (11th Cir. 2012) ("*GLAHR*"); *United States v. Alabama*, 691 F.3d 1269, 1285-88 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013). Only one circuit court – the Eighth – has gone the other way. *Keller v. City of Fremont*, 719 F.3d 931, 939-45 (8th Cir. 2013). And that case did not involve a law penalizing unauthorized immigrants themselves, as this one does. Every circuit

court that has addressed a law that penalizes harbored immigrants has held the law preempted.

Of the six circuit courts that have weighed in on the authority of states or their subdivisions to enact their own statutory schemes regulating the "harboring" of unauthorized immigrants, three circuits have addressed that issue in the context of a state harboring statute, and three in the context of a local ordinance that punishes harboring in rental housing.

The state statutes have all been held preempted. In unanimous rulings in August 2012, the Eleventh Circuit, drawing primarily on this Court's decisions in *Arizona* and *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), determined that Georgia's and Alabama's harboring statutes are field and conflict preempted. *GLAHR*, 691 F.3d at 1262-67; *Alabama*, 691 F.3d at 1285-88. In July 2013, the Fourth Circuit unanimously held the South Carolina harboring statute preempted on similar grounds. *South Carolina*, 720 F.3d at 528-32. In October 2013, the Ninth Circuit followed suit, holding the Arizona harboring statute both field and conflict preempted.[19] *Valle del Sol*, 732 F.3d at 1022-29.

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[19] In *Valle del Sol*, Judge Bea dissented from the opinion of the court with respect to preemption, explaining that "[b]ecause this case is resolved on other grounds . . . I believe the court should not reach the preemption issue." 732 F.3d at 1029 (Bea, J., concurring and dissenting). Judge Bea did not express a view as to the merits of that claim.

Two of the three local ordinances have been ruled preempted. In June 2013, a divided panel of the Eighth Circuit issued the only circuit court decision holding a state or local harboring law not facially preempted. *Fremont*, 719 F.3d at 939-45. That decision, however, was followed in July 2013 by the *en banc* decision in this case holding the Farmers Branch ordinance preempted and the unanimous decision of the Third Circuit holding the Hazleton, Pennsylvania harboring ordinance preempted. *Hazleton*, 724 F.3d at 313-22.

Petitioner relies on two techniques to try to conjure greater confusion among the circuit courts than exists in reality. First, Petitioner relegates the cases involving state statutes based on federal alien-harboring prohibitions to a footnote. Pet. at 10 n.6. But by its own repeated description, Petitioner's law follows the same approach as the invalidated state statutes: "Farmers Branch[ ] insist[s] that the Ordinance concurrently enforces federal criminal law – describing it before the district court as 'clearly proscribing the same conduct [as federal harboring law], knowingly harboring an unauthorized alien in apartment building'; 'a different mechanism against the same proscribed conduct[ ] as the federal crime'; and 'reinforcing the federal criminal immigration law against harboring.'" App. 30 n.18 (alteration marks omitted).

Accordingly, the Third Circuit cited and agreed with the Eleventh and Fourth Circuits' decisions addressing state statutes in unanimously ruling that

the Hazleton local ordinance is field and conflict preempted in July 2013. *Hazleton*, 724 F.3d at 316-19. Similarly, Judge Bright, dissenting in *Fremont*, did so in part because the majority opinion conflicts with the Eleventh Circuit's state statute decisions. *Fremont*, 719 F.3d at 957, 959-60 (Bright, J., dissenting). Moreover, the Eleventh Circuit specifically addressed – and held preempted – a provision of Alabama's law that defined "entering into a rental agreement . . . to provide accommodations" as harboring.[20] There is no justification for sweeping the state law cases under the rug.[21]

Second, Petitioner attempts to manufacture conflicts among cases that reach the same result by devising a sort of box score for the three circuits that it does focus on, and assigning each judge in each case an up-or-down vote on each type of implied preemption. But that attempt rests on the misguided premise that every time a judge decides not to address a potential ground for a ruling, the judge has

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[20] In Alabama's subsequent *certiorari* petition, the state explicitly declined to seek review of that aspect of the Eleventh Circuit's decision. Pet. for Cert. in *Alabama v. United States*, No. 12-884, at 10 n.*.

[21] Indeed, petitioner's counsel's assertion that *Hazleton* is "an ideal vehicle for addressing the preemption arguments in both [state and local] contexts," Pet. for Cert. in *City of Hazleton v. Lozano*, No. 13-531, at 15 n.4, appears to recognize the intertwined nature of the state and local rulings.

"rejected" that ground.[22] And it elevates differences among individual judges to the same level of importance as conflicts between the federal circuits. Petitioner's approach is fundamentally incorrect, and its claim of conflict is grossly overstated.

In fact, the five circuit courts' decisions holding state and local laws preempted are entirely harmonious. All of the decisions hold that the laws are conflict preempted. *Hazleton*, 724 F.3d at 318 ("the housing provisions conflict with federal law"); *South Carolina*, 720 F.3d at 530 ("Sections 4(A) and (C) are . . . conflict preempted"), 531 (Sections 4(B) and (D) "are conflict preempted"); *Valle del Sol*, 732 F.3d at 1026 ("Section 13-2929 is Conflict Preempted"); *Alabama*, 691 F.3d at 1288 (harboring provisions "are conflict preempted"); *GLAHR*, 691 F.3d at 1265 ("section 7 presents an obstacle to the execution of the federal statutory scheme"). *Accord* App. 3 ("the Ordinance's criminal offense and penalty provisions and its state judicial review process conflict with federal law"); App. 59 (ordinance "infringes on and conflicts with comprehensive and exclusively federal schemes").

Furthermore, although the unanimous opinions of the Third and Fourth Circuits, the two unanimous

[22] For example, petitioner counts all of the judges in the plurality as having "rejected" field preemption, Pet. at 15-16, even though the plurality opinion explicitly states that "we need not reach" that issue, App. 29 n.17, and four of the five judges in the plurality did not join a separate concurrence, App. 59-63, that actually does reject a field preemption claim.

opinions of the Eleventh Circuit, the majority opinion of the Ninth Circuit, and the plurality and the 4-judge concurrence below are not identical, none of them disagrees with any of the principles stated by any of the others. The only disagreement is between the five circuits that have held the laws preempted, on one side, and the Eighth Circuit, on the other.

On the specific issue raised by this case, the circuits are not even in a five-to-one split; they are unanimous. While all of the laws that the circuits have addressed penalize purported "harborers" of unauthorized immigrants, some go farther as well. Specifically, the South Carolina, Alabama, Farmers Branch, and Hazleton laws directly penalize not only landlords but also the "harbored" immigrants themselves. These laws have all been ruled preempted.

The Fourth and Eleventh Circuits recognized that laws penalizing harbored immigrants are preempted for additional reasons beyond those that apply to more limited local harboring laws. *See South Carolina*, 720 F.3d at 529-30 (South Carolina's provisions punishing unauthorized immigrants for allowing themselves to be transported, sheltered or harbored within the state "stand as an obstacle to the execution of the federal removal system and interfere with the discretion entrusted to federal immigration officials" by "[i]n essence . . . criminaliz[ing] unlawful presence"); *Alabama*, 691 F.3d at 1288 (Alabama provision prohibiting "conspiracy to be transported"

conflicts with federal harboring law, which does not reach such activity).[23]

The Fifth Circuit agrees. As the plurality opinion below explains, the Farmers Branch ordinance "reaches non-citizens who may not have lawful status but face no federal exclusion from rental housing, and exposes [them] to arrests, detentions, and prosecutions based on Farmers Branch's assessment of 'unlawful presence.'" App. 18. Thus, like Section 6 of Arizona's S.B. 1070, it "puts local officials in the impermissible position of arresting and detaining persons based on their immigration status without federal direction and supervision."

In contrast, the Fremont ordinance does *not* include provisions like the ones in Farmers Branch (and Hazleton) that penalize unauthorized immigrants for remaining in rental housing in the city. *Compare* Fremont Municipal Code § 6-428 (3)(H)-(L) (violations apply only to landlords, agents, and lessors) *with* Ordinance 2952 §§ 1(C)(1-3); 3(C)(1-3) (Farmers Branch provisions penalizing residents). And nothing in *Fremont* forecloses the argument that an ordinance penalizing harbored immigrants would impermissibly conflict with federal law. The Eighth Circuit decision

[23] The Third Circuit did not specifically focus on Hazleton's provisions penalizing immigrants themselves for remaining in rental housing, *see Lozano*, 724 F.3d at 330-35 (making it a violation of the ordinance to occupy rental housing without a valid license, and setting penalties), given the multiple other preemption problems the court identified.

simply does not address, even implicitly, whether an ordinance allowing for arrest and prosecution of unauthorized immigrants without federal direction or supervision, as the Farmers Branch ordinance does, would conflict with federal law. *Cf.* App. 17-18. *Fremont* also does not address whether such a provision would conflict with Congress's decision not to criminalize unauthorized presence, or its decision not to penalize the individuals being harbored, together with their harborers, in the federal statute. *Cf. South Carolina*, 720 F.3d at 529-30; *Alabama*, 691 F.3d at 1288.

Therefore, there is no disagreement between the circuits on whether a law that penalizes harbored immigrants, like the one at issue here, is preempted. Petitioner, notably, does not claim otherwise. In fact, despite the extensive discussion in the decision below, the petition in this case does not address or deny the additional, distinct conflicts with federal law that result when states or cities penalize unauthorized immigrants through harboring statutes.

Instead, petitioner takes issue with the court's *construction* of the ordinance. Petitioner asserts that the conflicts arising from the Ordinance's subjection of unauthorized immigrants to arrest, prosecution, detention, and other penalties are "immaterial," Pet. at 25 n.8, because "[i]t is not . . . an offense for a tenant to occupy rental premises after the tenant's license has been revoked," Pet. at 5; *see also id.* at 25. That is not what the Ordinance and the decision below say. App. 4-5, 16 & n.10; Ordinance 2952 §§ 1(C)(1); 3(C)(1); 5. And in any event, an alleged error in the

circuit court's construction of a municipal statute is not a reason for this Court to grant the writ.[24]

II. The Question Presented Does Not Warrant This Court's Attention

Nothing suggests that legislatures, government officials, or courts need further guidance on this matter at all – much less on any kind of nationwide basis.

First, as a practical matter, the future of the Fremont ordinance is itself uncertain. After the Eighth Circuit ruled, the Fremont city council further postponed the effective date of the ordinance and set a special election for February 11, 2014 at which time the voters will decide whether to repeal its harboring provisions.[25]

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[24] Moreover, in this case – unlike in Fremont – testimony establishes both that the federal government would not "answer lawful presence or not," and also that faced with the responses the federal government does provide, the City's enforcement official "himself would 'have to make that determination [of whether the applicant is] lawfully present.'" App. 20-21. *Cf. Fremont*, 719 F.3d at 945 ("The record does not clarify how the government would respond to requests by the City under § 1373(c)."). It is therefore possible that, presented with this evidence, the *Fremont* court would have reached a different conclusion. And similarly, a decision in this case from this Court could affirm the judgment without addressing the Eighth Circuit's errors.

[25] *See* Joe Duggan & Alissa Skelton, *Fremont voters to decide on repeal of immigrant housing ordinance*, OMAHA WORLD-HERALD, Nov. 13, 2013, *available at* http://www.omaha.com/article/20131112/NEWS/131119584.

Second, to respondents' knowledge, no state harboring statutes have been enacted since 2011, when a number of Arizona SB 1070 copycat laws were enacted. After that single year of activity, no similar laws have emerged – indeed, no state has even enacted a new statute modeled on Section 2(B) of the Arizona law, despite this Court having declined to enjoin that provision. All of the harboring statutes passed as part of the SB 1070 wave and subsequently challenged are now enjoined, and several of the states have agreed to permanent injunctions after losing in the circuit courts. *See Georgia Latino Alliance for Hum. Rights v. Deal*, No. 1:1cv1804 (N.D. Ga. Mar. 20, 2013) (Doc. No. 143); *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11cv2484 (N.D. Ala. Nov. 25, 2013) (Doc. No. 180).

At the local level, similarly, a brief spell of legislative activity has been followed by years of disinterest. In 2006, Hazleton enacted the first version of its harboring ordinance, and a few copycat ordinances (including Farmers Branch's original ordinance) followed in the same year. Several of those ordinances have since been repealed or permanently enjoined. Some or all of the remaining ordinances are formally suspended, and all are invalid under the established law of their circuits.[26] Since 2006, it appears, all that

[26] Apart from Hazleton, Farmers Branch, and Fremont, the similar laws of which respondents are aware were enacted in Escondido, California (city stipulated to permanent injunction in 2006); Cherokee County, Georgia (suspended, and invalid under *Alabama*); Valley Park, Missouri (repealed without ever being enforced); Riverside, New Jersey (same); Altoona, Pennsylvania

(Continued on following page)

municipal legislatures have done in this area (other than repeal existing ordinances) is to amend or replace the existing Farmers Branch and Hazleton ordinances and to enact a single new ordinance in Fremont in 2010.

Given the situation in the circuits and on the ground, this simply is not a question of national importance; notably, no municipality, state, or legislator has filed an amicus brief in support of the petition. As matters percolate further, consequential areas of disagreement on this or related immigration preemption issues may emerge among the circuits one day. But that day is not here.

(same); Bridgeport, Pennsylvania (invalid under *Hazleton*); Hazle Township, Pennsylvania (same); Mahanoy City, Pennsylvania (same); and West Hazleton, Pennsylvania (same).

A web post cited in the petition, Pet. at 6 n.2, suggests that five other municipalities may have enacted "laws intended to prevent unauthorized immigrants from obtaining housing," but does not specify which ones. That source also explains that "there are no reported cases of [any of the 17 laws] being implemented on a sustained basis." Kevin O'Neil, *Hazleton and Beyond: Why Communities Try to Restrict Immigration*, Migration Policy Institute (Nov. 2010), *available at* http://www.migration information.org/Feature/ display.cfm?ID=805.

III. The Fifth Circuit Correctly Applied Established Rules When It Held The Ordinance Preempted

The decision below rests on straightforward applications of this Court's ruling in *Arizona*. Under that decision, and this Court's earlier precedents, it is plain that the Farmers Branch ordinance's provisions create precisely the sort of interference with federal law that the Supremacy Clause prohibits.

First, in *Arizona*, this Court explained that Section 6 of Arizona's S.B. 1070 is conflict preempted because it would authorize state officials to arrest individuals for unauthorized presence "regardless of whether a federal warrant has issued or the alien is likely to escape," and "without any input from the Federal Government about whether an arrest is warranted in a particular case."

Applying *Arizona*, the Fifth Circuit concluded that the same problem exists here. The Farmers Branch ordinance "allows for local authorities to . . . arrest based on perceived unlawful presence," App. 22, by making it a Class C misdemeanor for "[n]on-citizens found to be 'not lawfully present'" to reside in rental housing, *id.* 21 (*citing* Ordinance 2952 §§ 1(C)(1); 3(C)(3); 5). Under Texas law, "local officers [may] arrest and detain individuals" for such violations. Thus, "The Ordinance puts local officers in [the same] impermissible position" as Section 6 of the Arizona law. App. 22.

Second, in *Arizona*, this Court explained that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials," and that both Section 6 and Section 3 of S.B. 1070 impermissibly circumvent federal discretion by allowing state officials to take action against immigrants without the federal government deciding that such action is appropriate. 132 S. Ct. at 2499; *see id.* at 2506 (under Section 6, "[t]he result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed"); *id.* at 2503 (under Section 3, "the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies").

Applying *Arizona*, the Fifth Circuit concluded that the Farmers Branch ordinance likewise undercuts federal discretion, leaving local authorities to make their own decisions as to which non-citizens it is appropriate to target, arrest, and penalize. The ordinance allows state courts "to assess the legality of a non-citizen's presence absent a 'preclusive' federal determination," App. 27, and it allows local authorities to prosecute unauthorized immigrants and require their eviction based on their immigration status. App. 22; *accord id.* at 51 ("noncitizen renters 'could be unnecessar[ily] harass[ed]' and prosecuted under a law like that here, including individuals

'whom federal officials determine should not be removed.'"[27] As dictated by *Arizona*, the Fifth Circuit ruled that because the ordinance would "allow the [City] to achieve its own immigration policy," it conflicts with federal law. *Id.* at 23 (quoting *Arizona*, 132 S. Ct. at 2506).

Third, in *Arizona*, the Court underlined that even "a provision [that] has the same aim as federal law and adopts its substantive standards" can conflict with federal law. Thus, the Court struck down provisions that would have created "inconsistencies between [state] and federal law with respect to penalties," or "a conflict in the method of enforcement" between state and federal laws, or otherwise "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Applying *Arizona*, the Fifth Circuit concluded that the Farmers Branch ordinance likewise directly undermines multiple provisions of federal law. It imposes criminal penalties on conduct that Congress has elected not to so punish, defining as "harboring" numerous activities that are not prohibited by

[27] The Fifth Circuit correctly rejected the City's assertion that the Ordinance cannot interfere with federal law because it relies entirely on federal determinations of immigration status, both on the basis that the record does not support the City's claim and because basing sanctions on a current lack of immigration status would still impermissibly bypass federal processes and discretion. *See* App. at 20-21, 28 and n.14; *accord id.* at 53-54.

8 U.S.C. § 1324, including simple rental and occupancy of housing. App. 11-12. It also creates additional and inconsistent penalties not contemplated by federal law even where the ordinance overlaps with federal harboring law. App. 13; *see also* App. 10 ("Farmers Branch claims its Ordinance will . . . provid[e] 'a different mechanism against the same . . . conduct' criminalized by the federal government." (quoting Ordinance 2952 pmbl.)). And it bars from housing unauthorized immigrants in removal proceedings even as the federal government simultaneously requires them to provide immigration officials with a home address, App. at 12-13; *accord id.* at 52 (citing *Arizona*, 132 S. Ct. at 2504-05). Thus, the Ordinance does not adopt "the same substantive standards as federal law" – but even if it had, its penalties and methods of enforcement would still conflict with federal law, just like multiple provisions in *Arizona*.

The Court's precedent was carefully and correctly applied by the Fifth Circuit, and there is no need for further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NINA PERALES
THOMAS A. SAENZ
MARISA BONO
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
110 Broadway St., Ste. 300
San Antonio, TX 78205
(210) 224-5476
nperales@maldef.org

OMAR C. JADWAT
Counsel of Record
STEVEN R. SHAPIRO
LEE GELERNT
DROR LADIN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2660
ojadwat@aclu.org

REBECCA ROBERTSON
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TEXAS
611 South Congress Ave., Ste. 320
Austin, TX 78704
(512) 478-7300
rrobertson@aclutx.org

Attorneys for Reyes Respondents