

# Federal Circuit Courts Split on Validity of Anti-Immigrant Housing Ordinances

By Karlo Ng, NHLP Staff Attorney

In summer 2013, three federal appellate courts issued decisions on whether local jurisdictions could regulate undocumented immigrants' rights to live in rental housing.<sup>1</sup> Two of these courts—the Third and Fifth Circuit Courts of Appeals—continued the broader federal courts' trend of striking down local anti-immigrant housing laws by asserting that such laws are preempted by federal immigration law.<sup>2</sup> Notably, the Third Circuit struck down the local law and affirmed its prior ruling despite the U.S. Supreme Court's order to vacate the appellate decision and issue a new opinion pursuant to the Supreme Court's decision in *Chamber of Commerce v. Whiting*.<sup>3</sup> Conversely, in *Keller v. City of Fremont*, the Eighth Circuit affirmed the lower court's decision to uphold the City's ordinance that limited employers from hiring and landlords from renting to "illegal aliens" and "unauthorized aliens."<sup>4</sup> All three appellate courts reached their decisions by relying, in part, on *Arizona v. United States*,<sup>5</sup> a Supreme Court ruling determining whether the State of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act was preempted by federal authority to regulate and enforce immigration laws. This article briefly summarizes the *Arizona* case and provides highlights from the three appellate court decisions. It also briefly discusses the future of local laws that regulate undocumented immigrants' access to rental housing in states and local jurisdictions.

## *Arizona v. United States*

In 2012, the Supreme Court in *Arizona v. United States* considered a facial challenge to the following four sections of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act (commonly known as "S.B. 1070"):

- Section 3, which imposed state criminal sanctions for an immigrant's willful violation of federal alien registration laws;

---

<sup>1</sup>*Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013); *Villas at Parkside Partners v. City of Farmers Branch, Texas*, 726 F.3d 524 (5th Cir. 2013); *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013).

<sup>2</sup>For a summary of other federal cases that have addressed anti-immigrant housing laws, see NHLP, *Tenants, Local Governments Continue to Litigate Anti-Immigrant Housing Laws*, 42 HOUS. L. BULL. 181, 188-190 (Sep. 2012).

<sup>3</sup>131 S. Ct. 1968 (2011).

<sup>4</sup>See generally *Keller*, 719 F.3d 931.

<sup>5</sup>132 S. Ct. 2492 (2012).

---

<sup>15</sup>Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014).

- Section 5(C), which imposed criminal penalties on undocumented immigrants who seek or perform work in the United States;
- Section 6, which authorized state officers to arrest a person, without a warrant, if the officer had probable cause to believe the person had committed any offense that would make him removable from the United States; and
- Section 2(B), which required that state officers make a “reasonable attempt...to determine the immigration status of any person they stop[ped], detain[ed], or arrest[ed] on another legitimate basis if reasonable suspicion exist[ed] that the person [was] an alien and [was] unlawfully present in the United States.”

Justice Kennedy’s majority opinion emphasized the federal government’s overarching authority over immigration and the status of noncitizens. This authority rested in the constitutional power to “establish a uniform Rule of naturalization” and in the government’s “inherent power as sovereign to control and conduct relations with foreign nations.”<sup>6</sup> In addition, the opinion noted that under the U.S. Constitution’s Supremacy Clause, Congress had the power to preempt state laws.<sup>7</sup>

The Supreme Court struck down three of the four S.B. 1070 provisions at issue. The Court held that Section 3 was field-preempted because the federal government had occupied the field of alien registration such that state action on this issue, even if complementary to the federal law, would be impermissible.<sup>8</sup> The Court also found that Section 5(C) was preempted because the provision, while sharing the common goal with federal law of deterring unlawful employment, conflicted in the enforcement method. Therefore, it stood as an obstacle to the objectives of Congress “not to impose criminal penalties on aliens who [sought], or engage[d] in, unauthorized employment.”<sup>9</sup> The Court also invalidated Section 6 because the provision gave state law enforcement officers greater authority to arrest than Congress provided federal immigration officers.<sup>10</sup> Allowing such a difference from federal law would have permitted Arizona to achieve its own immigration policy.<sup>11</sup> However, the Court upheld Section 2(B) by reading it narrowly as only requiring state officers to conduct a status check during a legal detention or after the individual had been released.<sup>12</sup>

<sup>6</sup>*Id.* at 2498.

<sup>7</sup>*Id.* at 2500.

<sup>8</sup>*Id.* at 2501-2503.

<sup>9</sup>*Id.* at 2503-2505.

<sup>10</sup>*Id.* at 2505-2507.

<sup>11</sup>*Id.* at 2506.

<sup>12</sup>*Id.* at 2507-2510.

## ***Keller v. City of Fremont***

On June 28, 2013, the Eighth Circuit reversed the district court’s rulings concerning preemption and the Fair Housing Act (FHA), upholding Fremont, Nebraska’s ordinance that regulated the ability of employers to hire and landlords to rent to undocumented immigrants.

### **Employment Provisions**

The ordinance required business entities to verify the work authorization status of prospective employees, excluding independent contractors or casual labor, through participation in the E-Verify Program.<sup>13</sup> Violators risked losing their business licenses, permits, contracts, loans, or grants from the City. The district court found that the employment provisions were not preempted by federal law as they were “essentially a licensing or similar law” and, therefore, fell within the savings clause of the Immigration Reform and Control Act of 1986.<sup>14</sup> The plaintiffs—comprised of two groups of landlords, tenants, and employers—did not appeal this decision.

### **Housing Provisions**

The parties focused their appeals on the ordinance’s housing provisions. The housing section prohibited any person or business entity from renting to, or permitting occupancy by, an “illegal alien,”<sup>15</sup> “knowing or in reckless disregard of the fact that an alien has come to, entered, or remain[ed] in the United States in violation of law.”<sup>16</sup> The law required that prospective renters over the age of 18 obtain an occupancy license from the City and further obtain a new license if they moved to different rental properties. To get the license, an applicant had to pay five dollars and disclose information, including citizenship or immigration status. Once an application for a license was completed, the City issued a license that could be used by a renter to lease and occupy a dwelling. The landlord had to obtain a copy of the renter’s occupancy license. A person later found to be unlawfully present in the United States was deemed to have breached the rental lease.<sup>17</sup> Meanwhile, under the ordinance, after a license was issued, the Fremont Police Department had to verify the immigration status of an immigrant renter with the federal government. If the federal government reported that the renter was “unlawfully present,” the police sent a

<sup>13</sup>*Keller v. City of Fremont*, 719 F.3d 931, 937 (8th Cir. 2013). The E-Verify Program is an online system that purports to verify an individual’s immigration status (and thus, work eligibility in the United States) by using information from the Social Security Administration and the U.S. Department of Homeland Security. *See generally*, U.S. Citizenship and Immigration Services, *What is E-Verify?* [www.uscis.gov/e-verify/what-e-verify](http://www.uscis.gov/e-verify/what-e-verify).

<sup>14</sup>*Keller*, 719 F.3d at 938.

<sup>15</sup>An “illegal alien” is “an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, Section 1101 et seq.” *Id.*

<sup>16</sup>*Keller*, 719 F.3d at 938.

<sup>17</sup>*Id.*

deficiency notice, and the renter had 60 days to establish lawful presence. If the renter failed to do so, the police had to contact the federal government again to verify the renter's immigration status. If the federal government again reported that the renter was "unlawfully present," the police sent the renter and the landlord a 45-day notice revoking the occupancy license. Violators could be fined \$100 per violation per day.<sup>18</sup>

The district court rejected the plaintiffs' preemption challenge to the occupancy licensing requirement, finding no conflict between federal immigration law and the requirements outlined in the housing provisions of the ordinance. However, the district court concluded that if the ordinance penalized landlords for harboring "illegal aliens," revoked occupancy licenses, or provided penalties for leasing or renting dwelling units after licenses were revoked, then such acts would conflict with the Immigration and Nationality Act and, thus, would be preempted.<sup>19</sup> The district court further found that these preempted housing provisions, on their face, would violate the FHA because they would have a disparate impact on Latino residents.<sup>20</sup> Finally, under Nebraska law, the court ruled that the unlawful provisions were severable from the rest of the ordinance and permanently enjoined their enforcement.

The plaintiffs appealed, arguing that the district court erred in not finding that all the housing provisions were preempted or, alternatively, in deciding that the housing provisions were severable from the unlawful provisions. A subgroup of the plaintiffs appealed the court's state law rulings and its finding that they did not plead disparate impact under the FHA. The City cross-appealed contending that the ordinance was neither preempted nor violated the FHA.<sup>21</sup>

### Constitutional and Field Preemption

Relying on *De Canas v. Bica*,<sup>22</sup> the Eighth Circuit dismissed the plaintiffs' claim that the rental provisions were constitutionally or field-preempted. Specifically, the court disagreed with the plaintiffs' argument that these provisions were attempting to regulate immigration by expelling immigrants without lawful status from the country. Quoting *De Canas*, the Eighth Circuit found that the rental provisions neither determined "who should or should not be admitted into the country" nor did they impact "the conditions under which a legal entrant [could] remain."<sup>23</sup> The Eighth Circuit emphasized that there was no evidence that the immigrants who were denied occupancy licenses in the city would leave the country, as opposed to obtaining other housing in the city or renting outside

of the jurisdiction.<sup>24</sup> The court further noted that the Supreme Court had recognized a state's ability to enact a valid law that deterred undocumented immigrants from residing within the state, despite the federal government's exclusive power in controlling the nation's borders.<sup>25</sup> The court pointed to the Arizona employment law upheld in *Chamber of Commerce v. Whiting*, stating that the Supreme Court neither questioned whether that law illegally regulated immigration nor asked if it had an impact on driving away immigrants from the state.<sup>26</sup>

In ruling that the ordinance's housing provisions did not regulate either immigration or conduct in the field of noncitizen removal, the Eighth Circuit commented that the court was also not speculating as to whether other state or local governments that adopted similar measures would survive preemption challenges. The court further noted that it was not assessing the impact of such a trend on federal immigration policies.<sup>27</sup> The Eighth Circuit left it up to Congress to end this practice by expressly preempting state and localities' abilities to pass such laws.<sup>28</sup>

The Eighth Circuit further addressed the plaintiffs' arguments that the rental provisions were field-preempted in the areas of alien registration and "anti-harboring." The Eighth Circuit disagreed with the claimants that the occupancy licensing scheme was like the ones invalidated by the Supreme Court in *Hines v. Davidowitz*<sup>29</sup> and *Arizona*. The distinction, according to the court, was that the licensing scheme applied to all renters, including U.S. citizens and nationals. Furthermore, the scheme did not apply to all immigrants, as non-renters were excluded. The court noted that the ordinance could not be preempted just because prospective renters had to disclose information that immigrants produced when complying with federal registration laws.<sup>30</sup>

The plaintiffs also contended that the anti-harboring provision of the ordinance, which prohibited a landlord from harboring an "illegal alien" unless such harboring was otherwise permitted by federal law, was field-preempted by federal immigration laws that imposed penalties on anyone who illegally harbored immigrants.<sup>31</sup> The Eighth Circuit disagreed, finding that the federal anti-harboring laws did not preclude states' authority to pass laws that enforced on the same subject. In addition, the court distinguished this portion of the ordinance from S.B. 1070's Section 5(C) in that the present ordinance did not purport to enforce the federal anti-harboring prohibition.<sup>32</sup> Instead, it prohibited "harboring" conduct that was

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 938-939.

<sup>20</sup>*Id.* at 939.

<sup>21</sup>*Id.*

<sup>22</sup>424 U.S. 351 (1976).

<sup>23</sup>*Keller*, 719 F.3d at 940-941.

<sup>24</sup>*Id.* at 941.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at 942.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>312 U.S. 52 (1941).

<sup>30</sup>*Keller*, 719 F.3d at 942-943.

<sup>31</sup>*Id.* at 943.

<sup>32</sup>*Id.*

inconsistent with the City's local public interests, while allowing conduct that was permitted by federal law.<sup>33</sup>

### Conflict Preemption

The claimants contended that the rental provisions interfered with the federal government's removal system and the broad discretion exercised by immigration officials to determine which immigrants who were not legally present in the United States should be removed from the country.<sup>34</sup> The Eighth Circuit reiterated that the rental provisions did not "remove" immigrants from the United States, or even from the city. According to the court, under the local law, federal immigration officials still retained complete discretion to decide whether and when to pursue removal proceedings. This ordinance was different from S.B. 1070's Section 6, struck by the Supreme Court, because the Fremont ordinance did not require local officials to determine whether someone was removable.<sup>35</sup> The court emphasized that the ordinance required officials in the City of Fremont to defer to the federal government's determination of whether an immigrant renter was unlawfully present.<sup>36</sup> As such, according to the Eighth Circuit, this deference mirrored the statutory language approved in *Whiting*.<sup>37</sup>

In concluding that the plaintiffs had failed to raise successful preemption issues, the Eighth Circuit stated again that the court was not opining on the wisdom of the ordinance as a matter of federal, state, or local public policy.<sup>38</sup>

### Fair Housing Act

The district court held that the plaintiffs failed to prove that the ordinance intentionally discriminated against Latinos under the FHA. The lower court also found that the claimants did not assert an FHA disparate impact claim. The plaintiffs only appealed the disparate impact ruling. In addition, the district court deemed that Keller, a landlord in Fremont; Juan Doe, an immigrant with temporary protected status who rented month-to-month in the city; and Juana Doe #2, an undocumented immigrant who lived in a mobile park in the city, had standing to assert an FHA disparate impact claim. The City appealed this ruling.<sup>39</sup>

The Eighth Circuit reviewed the record and found that the plaintiffs did not allege a disparate impact claim or sufficient facts to support a disparate impact theory under the FHA. Therefore, the court upheld the lower court's ruling on the issue. The Eighth Circuit examined the standing issue using requirements under Article III. In

doing so, the court determined that Keller, as a landlord who would be subject to the ordinance, had standing to assert an FHA disparate impact claim. Having found that Keller had standing, the court did not analyze whether Juan Doe or Juana Doe #2 also had standing to assert the same challenge.<sup>40</sup>

However, the Eighth Circuit directed the lower court to dismiss the disparate impact claim on remand, finding that the ordinance, which was valid in all other respects, did not violate the FHA just because "local statistics can be gathered to show that a disproportionate number of the adversely affected aliens are members of a particular ethnic group."<sup>41</sup> The court further emphasized that "aliens not lawfully present in this country" did not constitute a protected class under the FHA.<sup>42</sup>

### State Law Claims

On appeal, a subgroup of the plaintiffs argued that the ordinance was beyond the City's police powers because the law did not involve "a matter of purely public concern."<sup>43</sup> The court rejected this contention, stating that the State had delegated broad police powers to the City to enact ordinances that were consistent with general state laws. In addition, the claimants raised several new arguments that were not outlined in the complaint. These contentions were (1) the E-Verify requirement for employers conflicted with general state laws because the State only required public entities and contractors to enroll in E-Verify and (2) the requirement for prospective renters to disclose their country or citizenship in order to obtain an occupancy license violated the Nebraska Fair Housing Act.<sup>44</sup> The Eighth Circuit dismissed these arguments by explaining that in not requiring all employers to use E-Verify, the state legislature did not intend to prohibit a municipality from creating such a requirement to promote public welfare within its own borders. The court further stated that requiring prospective renters to disclose their country or citizenship did not necessarily require disclosing national origin in a way that violated the state fair housing act.<sup>45</sup> The Eighth Circuit refused to analyze the issues further given the sparse record of evidence. The court did not rule out the possibility that a future fair housing claim could be brought in state court on the same matter if a more complete record were available.<sup>46</sup>

### Dissent

The dissent focused on the objective of the ordinance, which was to remove undocumented immigrants from the city. Furthermore, the practical effect of such an occu-

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 943-944.

<sup>35</sup>*Id.* at 944.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 945.

<sup>39</sup>*Id.* at 946.

<sup>40</sup>*Id.* at 946-948.

<sup>41</sup>*Id.* at 949.

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* at 950.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.* at 951.

<sup>46</sup>*Id.*

pancy licensing scheme would be to deter undocumented immigrants from renting dwelling units in the city. According to the dissent, by using this licensing mechanism, the City sought to usurp power reserved to the federal government by identifying undocumented individuals and forcing them out of the city, and perhaps out of the country. Since the federal government has the exclusive power to determine whether immigrants can reside in this country and which immigrants will be removed, no city could regulate undocumented immigrants. Therefore, the dissent would find that the occupancy licensing schedule was conflict-preempted because it stood as an obstacle to a federal objective. The dissent also summarized the federal appellate case law in other circuits that addressed the same issue. The cited sister circuits found similar anti-immigrant ordinances enacted by municipalities to be conflict-preempted.<sup>47</sup>

### ***Villas at Parkside Partners v. The City of Farmers Branch, Texas***

In July 2013, the Fifth Circuit affirmed the Northern District of Texas's decision to strike down an ordinance of the City of Farmers Branch, Texas. The ordinance prevented undocumented immigrants from renting housing in the city.<sup>48</sup> Similar to the Fremont law, this ordinance required individuals to obtain a license before occupying a rental apartment or a single-family residence.<sup>49</sup> However, unlike Fremont's ordinance, this law required that the Farmers Branch building inspector verify with the federal government whether a noncitizen occupant was lawfully present in the United States. If the federal government reported twice that an occupant was unlawfully present in the country, then the building inspector had to revoke the occupant's license after notifying the occupant and the landlord.<sup>50</sup>

Furthermore, the ordinance criminalized occupying a rented apartment or single-family residence without first obtaining a license, as well as the act of making a false statement of fact on a license application.<sup>51</sup> Additionally, the ordinance prohibited the following landlord actions or inactions: renting without obtaining licenses from occupants; failing to maintain copies of licenses from the occupants; failing to include a lease provision stating that occupancy by an individual without a valid license constituted default; and allowing an occupant to inhabit an apartment without a valid license.<sup>52</sup> If a landlord knowingly allowed an individual to occupy an apartment or house without a valid license, the building inspector would

suspend the landlord's rental license until the landlord submitted a sworn affidavit stating that the occupancy had ended. The ordinance also criminalized creating, possessing, selling, or distributing a counterfeit license.<sup>53</sup> These offenses were considered Class C criminal misdemeanors punishable by a fine of \$500 upon conviction.<sup>54</sup>

The district court found that the ordinance was preempted as an improper regulation of immigration and as an obstacle to the federal system for removing immigrants or adjudicating their status to determine whether to remove them.<sup>55</sup> The City appealed.

### **Conflict Preemption**

Applying *Arizona*, the Fifth Circuit found that creating new criminal offenses based on housing undocumented immigrants interfered with federal anti-harboring law, and allowed state officers to hold individuals in custody for possible unlawful presence without federal direction. The court rejected the City's argument that it was concurrently enforcing the federal anti-harboring law by providing a different and local mechanism.<sup>56</sup> The court noted that conflict would be imminent when there were two separate remedies to address the same activity. For example, the court highlighted that federal law prohibited anyone from knowingly and willfully harboring someone who had come to and remained in the United States in violation of law.<sup>57</sup> By contrast, the Farmers Branch ordinance did not require that a landlord know or recklessly disregard a renter's violation of federal law. Instead, the local law criminalized a landlord for merely renting an apartment to a noncitizen found to be unlawfully present in the United States.<sup>58</sup> Importantly, the court noted that there were individuals who remained in this country while removable and were not evading federal detection. In these situations, federal law required that noncitizens provide a reliable address to the federal government to guarantee and speed the removal process.<sup>59</sup> The ordinance, therefore, further obstructed the federal goal of alerting removable noncitizens to the attention of the federal authorities.<sup>60</sup>

The Fifth Circuit distinguished this law from the criminal provisions of the employment laws upheld in *De Canas* and *Whiting*. Specifically, the court noted that those laws applied only to individuals whom the federal government had declared could not work in the United States. Here, this ordinance allowed for arrests, detentions, and prosecutions based on a classification—the ability to obtain rental housing—that did not exist

<sup>47</sup>*Id.* at 953-960.

<sup>48</sup>*Villas at Parkside Partners v. City of Farmers Branch, Texas*, 726 F.3d 524 (5th Cir. 2013).

<sup>49</sup>*Id.* at 526.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* at 527.

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>In Texas, local police may make arrests for Class C misdemeanors. *Id.*

<sup>55</sup>*Villas*, 726 F.3d at 527.

<sup>56</sup>*Id.* at 528-529.

<sup>57</sup>*Id.* at 529.

<sup>58</sup>*Id.* at 530.

<sup>59</sup>*Id.* at 530.

<sup>60</sup>*Id.*

anywhere in federal law.<sup>61</sup> Therefore, immigrants without lawful status who faced no federal exclusion from rental housing would be exposed to arrests, detentions, and prosecutions. The court stated that the ordinance illegally criminalized occupancy of a rented apartment or single-family residence and placed local officials in the impermissible position of arresting and detaining individuals based on their immigration status without federal direction or supervision.<sup>62</sup>

The City contended that the building inspector's "unlawful presence" inquiry was no different from questions asked by many local governments to the federal government to ascertain an immigrant's qualifications for public benefits. However, the Fifth Circuit disagreed by explaining that the federal law provided calibrated definitions of the term "qualified alien" for the purpose of conferring benefits. By contrast, the ordinance did not clarify which of the federal classifications the City would use to resolve whether a nonimmigrant was lawfully present.<sup>63</sup> In fact, according to the court, since no federal law limited the ability of noncitizens to obtain rental housing, there would be no definition applicable to the City's inquiry.<sup>64</sup>

Additionally, the Fifth Circuit focused on the similarities between the Farmers Branch ordinance and S.B. 1070's Section 6. The Supreme Court had invalidated Section 6 in *Arizona* for intruding on the federal government's removal process, and for allowing state authorities to arrest and detain based on immigration status without federal direction and supervision.<sup>65</sup> Specifically, the court discussed the testimony of the Farmers Branch building inspector, who would have enforcement responsibilities under the ordinance. The inspector testified that since an inquiry to the federal government would only reveal an applicant's immigration status, he himself would have had to determine whether an applicant was lawfully present. Accordingly, the court concluded that the ordinance placed local officials in the position of making impermissible removal decisions based on immigration status.<sup>66</sup>

Furthermore, the Fifth Circuit differentiated the ordinance from S.B. 1070's Section 2(B), which was upheld by the Supreme Court in *Arizona*. Section 2(B) allowed state officers to make "a reasonable attempt...to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."<sup>67</sup> In *Arizona*, the Supreme Court upheld that provision only after finding that the law did not require officers to prolong detention to conduct an immigration status check. Here, on the other

hand, the ordinance allowed for arrests, detentions, and prosecutions based on an occupant's failure to obtain a rental license.<sup>68</sup>

### State Judicial Review

The Fifth Circuit also invalidated the ordinance's provision concerning state judicial review that could be requested by the landlord or occupant who had received a deficiency notice or revocation notice.<sup>69</sup> This provision allowed a landlord or occupant to seek judicial review over (1) whether the building inspector complied with the law, and (2) whether the occupant was lawfully present in the United States. On the second question, the local law outlined that the state court would be bound by any "conclusive determination of immigration status by federal government."<sup>70</sup> The court highlighted that the ordinance deferred to the federal government's decision about immigration status only if it were "conclusive," or given preclusive effect on whether an occupant was lawfully present under federal law. Otherwise, the ordinance allowed state courts to assess if a noncitizen's presence was lawful, thereby opening the door to conflicting state and federal rulings. Once again, the Fifth Circuit echoed the Supreme Court's language in *Arizona* that only the federal government could determine whether a person was removable from the United States.<sup>71</sup>

### Severability

The court further declined to apply the general severability clause to the ordinance because the law lacked any functional coherence without the illegal criminal offense and penalty provisions. The Fifth Circuit rejected the idea that the ordinance was primarily designed to promote a licensing scheme. The court referenced City officials' statements in the record reflecting that the ordinance's purpose was to prevent undocumented immigrants from renting housing in Farmers Branch, and to discourage them from remaining in the United States. The court also noted that unlike drivers' licenses, which conferred an independent benefit of promoting road safety and vehicle insurance, the rental licenses did not provide a benefit without the invalidated parts of the ordinance—the criminal offense, judicial review, and penalty provisions.<sup>72</sup>

### The Dissent

The dissent viewed the issues narrowly and echoed many of the findings made by the majority in the Eighth Circuit in *Keller*. The dissent disagreed with the holding that the ordinance banned undocumented immigrants from the City or the country. The local law, the dissent pointed out, did not apply to all undocumented immi-

---

<sup>61</sup>*Id.* at 532.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at 532-533.

<sup>64</sup>*Id.* at 533.

<sup>65</sup>*Id.* at 534.

<sup>66</sup>*Id.* at 533-535.

<sup>67</sup>*Id.* at 535.

---

<sup>68</sup>*Id.* at 535-536.

<sup>69</sup>*Id.* at 536-537.

<sup>70</sup>*Id.* at 536.

<sup>71</sup>*Id.* at 536-537.

<sup>72</sup>*Id.* at 537-538.

grants, such as those who purchased real estate within the city, visitors of rental housing, and those who stayed in shelters. The law also did not impact the hiring and employment of undocumented immigrants.<sup>73</sup> In addition, the dissent argued that the ordinance represented a legitimate exercise of the City's police powers to regulate housing by a licensing scheme. The ordinance, therefore, was entitled to a presumption of constitutionality under Supreme Court jurisprudence.<sup>74</sup> Furthermore, the dissent emphasized that the ordinance did not attempt to regulate immigration and could not be constitutionally preempted. Specifically, under the test outlined in *De Canas*, the dissent argued that the local law did not determine whether an immigrant could enter, stay, or exit the United States.<sup>75</sup> In addition, according to the dissent, the local law did not conflict with any existing federal law since there was no federal law specifically governing the housing of undocumented immigrants, nor had Congress passed a provision that would expressly preempt housing for undocumented immigrants. Furthermore, the ordinance did not create an obstacle to any federal removal procedures because the ordinance did not allow local officials to remit undocumented immigrants into federal custody or compel the federal government to act against the immigrant for removal purposes.<sup>76</sup>

### ***Lozano v. City of Hazleton***

On July 26, 2013, the Third Circuit affirmed once again the district court's decision to enjoin the enforcement of two ordinances from the City of Hazleton, Pennsylvania. These ordinances prohibited employment of undocumented immigrants, and also prevented undocumented individuals from renting housing within the city.<sup>77</sup> The court concluded that the laws were preempted by federal immigration law. The Third Circuit's prior decision on the same issue (*Lozano II*) had been vacated by the U.S. Supreme Court and remanded so that the appeals court could reconsider its analysis in light of *Chamber of Commerce v. Whiting*. The Third Circuit also had to factor in the impact of *Arizona* in its reconsideration.

#### **Employment Provisions**

The employment provisions prohibited a person from knowingly recruiting, hiring, or employing an individual without work authorization to work in the city. Businesses that applied for business permits had to sign an affidavit confirming that they did not knowingly use the services of or hire undocumented individuals. The provisions also provided for public monitoring and prosecution, and punished violators by suspending their business permits.

The ordinance further included a safe harbor for businesses that used the federal E-Verify program to verify work authorization.<sup>78</sup>

The Third Circuit reexamined its prior analysis of the employment provisions in light of the Supreme Court's decision in *Whiting*. In *Whiting*, the Court upheld an Arizona statute that allowed state courts to suspend or revoke the business licenses of employers who knowingly or intentionally employed undocumented individuals. The statute also required all employers to use E-Verify. While the Third Circuit noted that the *Whiting* decision had undermined its prior reasoning in *Lozano II* in several ways,<sup>79</sup> the court nevertheless maintained that the employment provisions were preempted because they stood as an obstacle to accomplishing and executing objectives of the Immigration Reform and Control Act of 1986 (IRCA). According to the court, the basis of this conflict preemption was not disturbed by *Whiting*.<sup>80</sup>

The Third Circuit maintained that the local law conflicted with federal law in several ways. For example, the court highlighted that the ordinance's employment provisions covered a much broader range of actors than was allowed under federal law. Specifically, Hazleton's law required employers to verify work eligibility for independent contractors and other non-employees, whereas IRCA intentionally excluded these "casual hires" from the scope of the statute's restrictions as a way to minimize employer burden.<sup>81</sup> The Third Circuit emphasized that this distinction of coverage was not immaterial, as Congress had made a deliberate distinction in determining the scope and impact of IRCA's employer sanctions.<sup>82</sup>

In addition, the Third Circuit highlighted that Hazleton's ordinance included an equally broad definition of the activities covered by the local law, and that such a definition was not permitted under IRCA. The court noted that under the ordinance, "work" included "any job, task, employment, labor, personal services, or any other activity for which compensation is provided, expected, or due, including but not limited to all activities conducted by business entities."<sup>83</sup> In addition, the restrictions applied to any "agreement to perform any service or work or to provide a certain product in exchange for valuable consideration."<sup>84</sup> The court emphasized that there was no requirement that the alleged unauthorized work be performed at a location associated with an entity's business license or in connection with activities for which a business entity has a business license. Therefore, according to the court, an employer could have its license revoked for engaging in activities unrelated to his/her licensed

<sup>73</sup>*Id.* at 564.

<sup>74</sup>*Id.* at 566.

<sup>75</sup>*Id.* at 568.

<sup>76</sup>*Id.* at 570-574.

<sup>77</sup>*Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013).

<sup>78</sup>*Id.* at 301.

<sup>79</sup>*Id.* at 305.

<sup>80</sup>*Id.* at 306.

<sup>81</sup>*Id.* at 306-307.

<sup>82</sup>*Id.* at 307.

<sup>83</sup>*Id.* at 308.

<sup>84</sup>*Id.*

business activity, such as buying used items from an undocumented person at a yard sale, or paying an undocumented worker to mow his/her lawn.<sup>85</sup> The Third Circuit denounced the use of Hazleton's business licensing law in this manner and stated that such use was at odds with Congress's deliberate decision to limit the IRCA's reach to the employer-employee relationship.<sup>86</sup>

The court explained that this analysis was consistent with the decisions in *Whiting* and *Arizona*. The Third Circuit noted that in *Whiting*, the Arizona law upheld by the Supreme Court had, unlike Hazleton's employment provisions, "closely track[ed] IRCA's provisions in all material respects."<sup>87</sup> The court also drew a parallel between the Supreme Court's rationale in invalidating S.B. 1070's Section 5(C) and the current conflict. Essentially, the Supreme Court had found that 5(C) was preempted because it conflicted with federal law in the method of enforcement. Here, similarly, Hazleton's employment provisions created a conflict with federal law by covering a category of workers that Congress had intentionally excluded from IRCA.<sup>88</sup>

The Third Circuit also discussed how the employment provisions further undermined express congressional objectives and, therefore, were conflict-preempted. Specifically, the ordinance did not provide an affirmative defense or safe harbor to employers who used the I-9 process to verify immigration status, even though Congress had established the I-9 process as an acceptable way to protect employers against sanctions.<sup>89</sup> Furthermore, the court highlighted that the ordinance provided far fewer procedural protections than IRCA. For example, under IRCA, only complaints with a "substantial probability of validity" were investigated, whereas, under Hazleton's law, any superficially valid complaint was investigated.<sup>90</sup> In addition, under IRCA, employers were given notice, right to a hearing, right to an administrative appeal, and judicial review. By contrast, Hazleton's employment provisions required the City to suspend business licenses immediately when employers failed to provide requested information about alleged undocumented workers within three business days.<sup>91</sup>

### Housing Provisions

The housing provisions required prospective renters to have a legal immigration status before entering into a lease. They further mandated that all potential occupants over the age of 18 obtain an occupancy permit. To get such a permit, the applicant had to pay ten dollars and submit identification showing proof of legal citizenship

or residency.<sup>92</sup> Landlords were required to inform all prospective renters of this requirement and were further prohibited from allowing anyone over the age of 18 to rent to anyone without an occupancy permit. Violators, which included landlords and occupants who allowed others without permits to live with them, were subject to fines and imprisonment.<sup>93</sup>

The Third Circuit found that these provisions were field-preempted because they intruded on the federal government's regulation of the presence of noncitizens in the United States and the occupied field of harboring. Here, the court clarified that it did not invalidate the housing provisions simply because noncitizens were the subject of the laws. Instead, the court emphasized that these local laws were preempted because the City attempted to regulate residence of noncitizens based only on immigration status. As the court explained, "The housing provisions of Hazleton's ordinances are nothing more than a thinly veiled attempt to regulate residency under the guise of a regulation of rental housing."<sup>94</sup> The Immigration and Nationality Act (INA) prohibited states from regulating residence in this country on the basis of immigration status. Furthermore, the court noted that even though the housing provisions did not expressly control the entry and exit of noncitizens from the city or the country, the intent of the local law was to regulate this activity.<sup>95</sup> Additionally, the Third Circuit emphasized that the INA only permitted state authorities to arrest individuals guilty of harboring.<sup>96</sup>

The court also ruled that the housing laws were conflict-preempted because they interfered with the federal government's discretion in, and control over, the removal process. Reiterating its reasoning in *Lozano II*, the Third Circuit explained that the housing provisions were an attempt to remove individuals from the city based entirely on a snapshot of their current immigration status. The court compared these laws with S.B. 1070 Sections 6 and 3, which were struck down by the Supreme Court. In invalidating those laws, the Supreme Court noted that the provisions would have impermissibly allowed the State to have its own immigration policy and would have led to unnecessary harassment of some noncitizens that the federal government decided not to remove.<sup>97</sup> Also, the Sections would have given Arizona that power to act even when federal officials decided not to prosecute. The Third Circuit stated that Hazleton was essentially attempting to do the same by preventing undocumented immigrants from living within its borders without regard for the Executive Branch's enforcement and policy priorities.<sup>98</sup>

The Third Circuit further determined that the hous-

<sup>85</sup>*Id.*

<sup>86</sup>*Id.*

<sup>87</sup>*Id.*

<sup>88</sup>*Id.* at 309.

<sup>89</sup>*Id.* at 309-310.

<sup>90</sup>*Id.* at 312.

<sup>91</sup>*Id.* at 312-313.

<sup>92</sup>*Id.* at 314.

<sup>93</sup>*Id.*

<sup>94</sup>*Id.* at 315.

<sup>95</sup>*Id.* at 315-316.

<sup>96</sup>*Id.* at 316.

<sup>97</sup>*Id.* at 318.

<sup>98</sup>*Id.* at 318-320.

ing provisions, even when considered separately from the harboring provisions, were field-preempted because they interfered with the field of federal alien registration law. The court found that Hazleton, through its rental scheme, was essentially trying to create a local registration requirement by requiring renters to report their immigration status to the City and penalizing the failure to obtain such a license based on that requirement.<sup>99</sup> The Third Circuit also found no other purpose for the rental registration scheme, other than to register the immigration status of certain individuals in the City. Therefore, the court could only view it as an impermissible alien registration requirement.<sup>100</sup>

## Conclusion

The appellate courts in *Villas* and *Lozano* continued the trend among a majority of federal courts in invalidating local laws that regulated undocumented immigrants' access to rental housing. Similar to other rulings, these decisions struck down the ordinances because these laws were either conflict- or field-preempted by federal immigration laws. In doing so, the courts examined the practical effects that the ordinances would have had when implemented and enforced both locally and in the aggregate, if other jurisdictions had enacted similar provisions. Ultimately, these courts concluded that such laws impermissibly allowed localities to create their own immigration policies and alien registration systems through the use of occupancy licensing schemes.

On the other hand, the majority in *Keller* and the *Villas* dissent examined the issues more narrowly, focusing on the language of the ordinances and what each said that it would do, instead of analyzing the impact of the laws. Importantly, the Eighth Circuit in *Keller* mentioned twice in its opinion that the court was not determining whether the Fremont ordinance was sound federal, state, or local policy. The *Keller* majority also noted it was not assessing the aggregate impact of these local laws on federal immigration policies, in the event other localities adopted similar measures. The *Keller* majority and the *Villas* dissent further emphasized that if Congress wanted to preempt such ordinances, then it should have passed laws that expressly did so.

The *Keller* decision will likely result in more localities enacting similar anti-immigrant ordinances, which will, in turn, result in additional federal litigation. It may only be a matter of time before the U.S. Supreme Court grants certiorari to address the existing circuit split. If so, the Supreme Court's order that the Third Circuit revisit its *Lozano* decision to invalidate Hazleton's ordinances suggests that the Roberts Court as currently constituted would uphold local laws regulating undocumented immigrants' access to rental housing. ■

---

<sup>99</sup>*Id.* at 322.

<sup>100</sup>*Id.*