No. 10-10751

United States Court of Appeals for the Fifth Circuit

VILLAS AT PARKSIDE PARTNERS d/b/a Villas at Parkside; LAKEVIEW AT PARKSIDE PARTNERS, LIMITED, d/b/a Lakeview at Parkside; CHATEAU RITZ PARTNERS, d/b/a Chateau de Ville; MARY MILLER SMITH,
Plaintiffs-Appellees,

vs.

THE CITY OF FARMERS BRANCH, TEXAS,
Defendant-Appellant.

VALENTIN REYES; ALICIA GARCIA; GINGER EDWARDS; JOSE GUADALUPE ARIAS, AIDE GARZA,
Plaintiffs-Appellees,

vs.

THE CITY OF FARMERS BRANCH, TEXAS,
Defendant-Appellant.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, NOS. 3:08-CV-1551-B, 3:03-CV-1615, HON. JANE J. BOYLE, DISTRICT JUDGE

BRIEF ON REHEARING *EN BANC* OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANT IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The case number is No. 10-10751. The case is styled as *Villas at Parkside Partners v. City of Farmers Branch, Texas.* The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The City of Farmers Branch, Texas ("Farmers Branch")
Appellant

Bill Glancy, in his official capacity as mayor of Farmers Branch
Defendant in Related State Court Case

Harold Froelich, in his official capacity as mayor pro tem of Farmers Branch
Defendant in Related State Court Case

Michelle Holmes, in her official capacity as deputy mayor pro tem of Farmers Branch
Defendant in Related State Court Case

Tim Scott, in his official capacity as a member of the City Council of Farmers Branch
Defendant in Related State Court Case

David Koch, in his official capacity as a member of the City Council of Farmers Branch
Defendant in Related State Court Case

Ben Robinson, in his official capacity as a member of the City Council of Farmers Branch
Defendant in Related State Court Case

Villas at Parkside Partners d/b/a Villas at Parkside
Appellee

Lakeview at Parkside Partners, Ltd., d/b/a Lakeview at Parkside
Appellee

Chateau Ritz Partners d/b/a Chateau de Ville
Appellee

Mary Miller Smith
Appellee

Valentin Reyes
Appellee

Alicia Garcia
Appellee

Ginger Edwards
Appellee

Jose Guadalupe Arias
Appellee

Aide Garza
Appellee

Guillermo Ramos
Plaintiff in Related State Court Case

United States
Amicus Curiae

Eagle Forum Education & Legal Defense Fund
Amicus Curiae

Texas Apartment Association, Inc.
Amicus Curiae

Dominican American National Roundtable
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Nina Perales; Rebecca McNeill Couto; and Mexican American Legal Defense and Educational Fund
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Lisa Graybill; and American Civil Liberties Union Foundation of Texas
Counsel for Appellees Valentin Reyes, Alicia Garcia, Ginger Edwards, Jose Guadalupe Arias, and Aide Garza

Omar C. Jadwat; Lucas Guttentag; Jennifer Chang Newell; Rebecca L. Robertson; and American Civil Liberties Union Foundation Immigrants' Rights Project
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Dated: August 22, 2012

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Founded in 1981, Eagle Forum has consistently defended American sovereignty in state and federal legislatures and courts. Eagle Forum promotes adherence to the Constitution and has consistently opposed unlawful behavior, including illegal entry into and residence in the United States. Eagle Forum supports enforcing immigration laws and allowing state and local measures to avoid the harms caused by illegal aliens. For these reasons, Eagle Forum has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

In these consolidated actions, two plaintiff groups (collectively, "Plaintiffs") seek to enjoin the Ordinance 2952 (the "Ordinance") of the City of Farmers Branch, Texas (the "City"). Plaintiffs claim that the Ordinance is preempted by the Immigration and Naturalization Act ("INA"), as amended by the Immigration Reform & Control Act of 1986 ("IRCA"). The City adopted the Ordinance to remedy the negative local impacts of illegal immigration. The District Court found

[1] By analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

the Ordinance preempted, *Villas at Parkside Partners v. City of Farmers Branch, Texas*, 701 F.Supp.2d 835 (N.D. Tex. 2010) ("*Farmers Branch I*"), and a panel of this Court affirmed over Judge Elrod's dissent. *Villas at Parkside Partners v. City of Farmers Branch, Texas*, 675 F.3d 802 (5th Cir. 2012) ("*Farmers Branch II*"). This Court granted the City's petition for rehearing *en banc* and ordered supplemental briefing. Because nothing in either federal statue prohibits the Ordinance, the *en banc* Court should reverse.

Constitutional Background

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three forms of federal preemption: express, field, and conflict preemption. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). Two presumptions underlie preemption cases. First, courts presume that statutes' plain wording "necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), where the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Second, courts apply a presumption against federal preemption of state authority. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Under U.S. CONST. art. I, §8, cl. 4, Congress has plenary power over immigration. Although the "[p]ower to regulate immigration is unquestionably

exclusively a federal power," *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), the Supreme Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration").

Statutory Background

In addition to setting federal immigration policies, INA includes various roles for state and local immigration enforcement. *See, e.g.*, 8 U.S.C. §§1252c(a) ("[n]otwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual" under certain circumstances), 1357(g)(10) (making clear that nothing requires prior federal agreements either to communicate with the federal government about immigration status or "otherwise to cooperate … in the identification, apprehension, detention or removal" of illegal aliens). In addition, INA prohibits all levels of government from restricting government entities' communications with the federal government on individuals' immigration status and requires the federal government to respond to such government inquiries. 8 U.S.C. §§1373, 1644.

IRCA amended INA to provide federal civil and criminal procedures and

sanctions for employing or recruiting "unauthorized aliens" and expressly preempts state and local employer-based sanctions for those activities "other than through licensing and similar laws." 8 U.S.C. §1324a(h)(2). Although IRCA addressed its preemptive scope with respect to employment-related sanctions, nothing in the enacted law addressed its preemptive scope with respect to other activities such as the purchase or rental of real property.

The City adopted the Ordinance to require adult tenants to obtain residential occupancy licenses. In addition to basic information (*e.g.*, name, address, date of birth), the form also asks whether applicants are U.S. citizens or nationals or, if not, for a federal identification number to establish lawful presence here or a declaration that the applicant does not know the number. For the non-U.S. citizens and nationals, the City then contacts the federal government under 8 U.S.C. §1373(c) to verify whether the applicant is lawfully present. If the result is negative, the City issues a deficiency notice and allows the applicant sixty days to correct the federal government's records before re-querying the federal government under 8 U.S.C. §1373(c). If the result remains negative, the City revokes the residential occupancy license, sending copies to the applicant and landlord. Although the Ordinance creates various offenses (*e.g.*, prohibiting false statements and counterfeit permits), the operative provision is the suspension of the landlord's rental permit – and the ability lawfully to collect rent – until the landlord

uses civil remedies – such as eviction – to cure the violation.

SUMMARY OF ARGUMENT

On jurisdiction (Section I), the panel majority erred in suggesting that the City's failure to appeal the District Court's ruling that Plaintiffs have standing shields Article III jurisdiction from appellate review. Because each Plaintiff group includes landlords – who have standing to bring a preemption challenge to laws that burden their businesses – each Plaintiff group has standing for a preemption challenge, but not (as the District Court correctly held) to assert third-party rights of tenants. Contrary to the District Court's decision, however, tenants lack a sufficiently imminent injury because the Ordinance does not apply to *current* tenancies, only to *future* tenancies. Such "some day" hypothetical injuries cannot support standing.

On the merits, the Constitution itself does not preempt the Ordinance because state and local government retain a role vis-à-vis illegal immigration (Section II.A), unless Congress expressly or impliedly displaces that role (Section II.B). The panel majority's suggestion that local measures like the Ordinance intrude into the need for a "national solution," backed by the federal interests in foreign relations and war powers, goes well beyond the immigration issues raised by INA. Given that INA does not reach these issues, the panel majority's suggestion of a form of field preemption based on *unexercised* federal authority is

wholly inconsistent with numerous Supreme Court precedents, including *DeCanas v. Bica*, 424 U.S. 351 (1976), *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968 (2011), and *Arizona v. U.S.*, 132 S.Ct. 2492 (2012). *See* Section II.A, *infra.*

With respect to the merits of INA-based preemption, federal law preserves state and local authority with respect both to housing and to determining immigration status using federal standards (Section II.B), which is reinforced by the presumption against preemption (Section II.B.1). The panel majority misapplied the presumption against preemption by (1) mischaracterizing the Ordinance as a regulation of federal immigration, and (2) failing to recognize that the presumption accounts for the presence of state and local government in the field, not the presence of the federal government in the field (Section II.B.1). With a presumption properly applied here, the Ordinance plainly is consistent with INA.

Even without the presumption, however, the panel majority reads too much leeway into the "prevent-or-frustrate" prong of the conflict-preemption analysis (Section II.B.2). By following the federal standards for classifying immigration status and then acting on that information in a sphere that INA wholly fails to address, the City plainly did not conflict with any actual INA objectives under *DeCanas*, *Whiting*, and *Arizona*. Similarly, INA does not "field preempt" the Ordinance because Congress did not preempt any fields other than registration-requirements such as state-mandated registration cards or state-based crimes for

violations of federal registration requirements (Section II.B.3).

ARGUMENT

I. THE PANEL MAJORITY ERRED IN DECLINING TO REVIEW PLAINTIFFS' STANDING

Although *amicus* Eagle Forum has no material quarrel with the District Court's holding that Plaintiffs have standing, the panel majority erred in evaluating – actually in *failing* to evaluate – Plaintiffs' standing. *Farmers Branch II*, 675 F.3d at 806 n.5 (noting that the "City has not appealed the district court's ruling on standing"). While appellate panels need not formally evaluate standing when a party's standing is obvious, the panel majority here was wrong to suggest that it *could not* evaluate standing because the City failed to appeal the issue of standing. *Id.* To avoid jurisdictional mischief in future decisions and unnecessary appeals, the *en banc* Court should correct the panel majority on this issue.

Under Article III, standing "is the threshold question in every federal case, determining the power of the court to entertain the suit," *Warth v. Seldin*, 422 U.S. 490, 499 (1975), which applies at both the appellate and trial-court levels, even if the parties do not raise the issue. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). Accordingly, jurisdiction cannot be conferred by consent or waiver. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), and federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991). As

such, the panel majority was simply wrong to suggest that failure to appeal a ruling on standing somehow forecloses appellate consideration of standing.

While *amicus* Eagle Forum does not have a *material* dispute with the District Court's analysis of standing, the District Court erred in one respect. Because each Plaintiff group includes a plaintiff with standing, however, that error perhaps warrants correction but does not require reversal.

The District Court held that tenants have standing to challenge the Ordinance, which applies only to future tenancies. *Farmers Branch I*, 701 F.Supp.2d at 846-49. Because current tenants may never enter a *future* tenancy, their alleged injuries from such future tenancies lack the imminence that Article III requires. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

> And the affiants' profession of an "inten[t]" to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough. Such "some day" intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the "actual or imminent" injury that our cases require.

Id. (emphasis in original). Plaintiffs here lack even the minimal specificity that was insufficient in *Defenders of Wildlife.* They might some day need to enter new tenancies, but they might not. *A fortiori* under *Defenders of Wildlife*, these "some day" hypotheticals cannot satisfy Article III.

Under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977), an entity like a landlord or development agency "[c]learly [meets] the constitutional requirements … [for] standing to assert its own rights … [f]oremost among [which] is [the] right to be free of arbitrary or irrational [government] actions." In pursuing that type of action, however, the entity "has no racial identity and cannot be the direct target of the [defendants'] alleged discrimination." *Id.* Here, the landlord Plaintiffs do not assert individualized rights, such as those under the Equal Protection Clause or the Fair Housing Act. They simply allege that the Ordinance imposes costs on them and is preempted by federal law. Under *Arlington Heights,* they are asserting their own rights.

Indeed, the District Court correctly held that landlords had not established the right to litigate the third-party rights of prospective tenants. *Farmers Branch I,* 701 F.Supp.2d at 851. For a plaintiff to assert the rights of absent third parties, *jus tertii* (third-party) standing prudentially requires that the plaintiff have its own constitutional standing and a "close" relationship with the absent third parties and that a sufficient "hindrance" keeps the absent third parties from protecting their own interests. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004). Third-party standing is particularly absent here because the Ordinance applies to *future* tenants, not current tenants, and *Tesmer* forecloses basing third-party standing on the "*hypothetical* … relationship posited here." *Tesmer,* 543 U.S. at 131 (emphasis in

original). Because this litigation involves only preemption – *i.e.*, not individualized claims such as fraud or discrimination – the landlords can litigate their own right to be free from allegedly preempted state laws.[2]

II. NEITHER INA NOR DORMANT FEDERAL POWER OVER IMMIGRATION PREEMPT THE ORDINANCE

In the field of immigration, "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). Two recent Supreme Court decisions, however, are mixed on states' power to act in that field. In *Whiting*, the Supreme Court rejected preemption challenges to state-law licensing sanctions under 8 U.S.C. §1324a(h)(2) against those who employ illegal aliens and a state-law mandate that employers use the federal E-Verify program, notwithstanding that program's voluntary nature under federal law. In *Arizona*, the Supreme Court relied on field preemption to invalidate state-law crimes for failing to carry federally required registration documents and relied on conflict preemption to invalidate two state-law provisions: (1) state-law crimes for illegal aliens' knowingly applying for work or working, and (2) state-law authorization for warrantless arrests of illegal aliens reasonably believed to be removable from

[2] The Supremacy Clause does not itself create rights enforceable under 42 U.S.C. §1983, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-08 (1989), but Plaintiffs presumably can challenge the Ordinance as an ongoing violation of federal law under 28 U.S.C. §1331.

the United States. Although the State of Arizona prevailed sweepingly in *Whiting* and only partially in *Arizona,* both decisions support the City here.

A. The Constitution Does Not Preempt the Ordinance

As long as the Ordinance is not a "regulation of immigration" in conflict with the plenary power of Congress to regulate immigration, U.S. CONST. art. I, §8, cl. 4; *DeCanas,* 424 U.S. at 354, the mere fact that the Ordinance "in any way deals with aliens" will not render it "*per se* pre-empted by this constitutional power." *DeCanas,* 424 U.S. at 355. Plaintiffs cannot rely on the unexercised constitutional *authority* of Congress – as distinct from particular congressional enactments like INA or IRCA – to find preemption under the Constitution.

The panel majority finds that the federal interest in immigration is so strong – owing to its being "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," *Farmers Branch II,* 675 F.3d at 817 (*quoting Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952) – that the "national problem … need[s] a national solution." *Id.* Significantly, *Harisiades* involved the federal judiciary's declining to review federal deportation proceedings involving Communist Party members during the height of the Cold War. Whether that separation of powers between branches of the federal government was appropriate then or now is an entirely different

question under our Federalist structure from whether various federal enactments displace the separate sovereignty of Texas and its political subdivisions.

Federalism's central tenet permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (interior quotations and citations omitted) (Thomas, J., concurring). Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role. Unless and until Congress enacts a national solution, therefore, nothing in the Constitution itself preempts the City from using its police power to solve its local problems.

The panel majority improperly deemed the Ordinance a regulation of immigration, *Farmers Branch II*, 675 F.3d at 810-11, 812-13, rather than what it plainly is: an exercise of the local police power to protect the health and safety of

the community. Under *DeCanas,* 424 U.S. at 355, a "regulation of immigration is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." For *illegal* aliens,[3] states and localities may address impacts within their borders:

> Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.

Plyler, 457 U.S. at 229. While it may discourage illegal aliens from remaining *in the City of Farmers Branch,* the Ordinance is indifferent to their relocating *within the U.S.*

While a national solution is plainly within the federal power to assert, Congress has not asserted that authority in INA or IRCA. Moreover, the Executive Branch has not enforced its existing powers with any particular vigor. Those twin abdications leave state and local government to deal with the very real implications of illegal aliens, however desirable a "national solution" might be. At bottom, the panel majority relies on the constitutional *authority* of Congress – not on particular congressional enactments like INA or IRCA – to find preemption. In essence, the

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[3] Precedents that address state regulation of *legal* aliens – while perhaps not always entirely *irrelevant* – are not very compelling: "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" *Plyler,* 457 U.S. at 223.

majority's theory is that the constitutional authority of Congress over immigration – whether or not that authority is exercised – "field preempts" the City's Ordinance. Under that theory, however, the state laws at issue in *DeCanas* and *Whiting* would have been preempted, as well. That, of course, is not the law.

B. INA Does Not Preempt the Ordinance

The panel majority quotes *DeCanas,* 424 U.S. at 354-55, to argue that the "power to regulate immigration 'is unquestionably exclusively a federal power.'" *Farmers Branch II,* 675 F.3d at 807. That point is as undeniably true as it is undeniably irrelevant. The question is not whether Congress *could have* preempted the Ordinance. The question is whether Congress *did* preempt the Ordinance.

As a general rule under the federalist "system of dual sovereignty," "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt,* 493 U.S. 455, 458-59 (1990). In fields like immigration, however, where Congress has "superior authority in this field," Congress can displace the states' dual sovereignty by "enact[ing] a complete scheme of regulation" such that "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines*

v. Davidowitz, 312 U.S. 52, 66-67 (1941).[4] As indicated below, INA does not displace state and local police power over housing and related issues.

INA includes various roles for state and local enforcement, both with respect to harboring illegal aliens, 8 U.S.C. §1324(c), and with respect to determining immigration status. *See* 8 U.S.C. §§1252c(a) ("[n]otwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual" under certain circumstances), 1357(g)(10) (making clear that nothing requires prior federal agreements for state or local government to communicate with, or report to, the federal government regarding illegal aliens and "otherwise to cooperate … in the identification, apprehension, detention or removal" of illegal aliens). In addition, INA prohibits all levels of government from restricting government entities' communications with the federal government on individuals' immigration status and requires the federal government to respond to such government inquiries. 8 U.S.C. §1373. These INA facets are not consistent with INA's conflict preempting the Ordinance, but they are not the only issues of federal law that undercut Plaintiffs' preemption case.

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[4] The *Arizona* majority deemed *Hines* a field-preemption case, *Arizona,* 132 S.Ct. at 2502, but "the categories of preemption are not 'rigidly distinct,' [and] 'field pre-emption may be understood as a species of conflict pre-emption.'" *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000) (*quoting English v. Gen'l Elec. Co.,* 496 U.S. 72, 79, n.5 (1990)).

"[P]rovid[ing] an apartment for the undocumented aliens" can fall within the federal crime of "harboring," *U.S. v. Tipton*, 518 F.3d 591, 594 (8th Cir. 2008), which "mean[s] 'any conduct tending to substantially facilitate an alien's remaining in the United States illegally.'" *U.S. v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 (5th Cir. 1982). "The purpose of the section is to keep unauthorized aliens from entering or *remaining* in the country [and] this purpose is best effectuated by construing 'harbor' to mean 'afford shelter to' and [we] so hold." *U.S. v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (emphasis in original). The Ordinance provides a regulatory basis to prevent City landlords from harboring illegal aliens.[5] Moreover, even if merely renting to illegal aliens – with nothing more – did not constitute harboring, the statutory allowances for non-federal enforcement, coupled with the nexus between housing and harboring, would nonetheless strongly suggest that Congress did not intend to preempt local regulation of local housing.

Significantly, since 1996, the civil component of the Racketeer Influenced and Corrupt Organizations Act ("RICO") has allowed *private* enforcement with

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[5] The circuits are split on the contours of what constitutes harboring. *See, e.g.*, *U.S. v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008) ("harboring" means conduct tending to "prevent government authorities from detecting the alien's unlawful presence"); *U.S. v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999) (same). But *Ozcelik* and *Kim* do not represent the law of this Circuit: "the words 'harbor,' 'conceal' and 'shield from detection' are [not] synonymous," and "'harbor' is perhaps a somewhat broader concept than 'conceal' or "shield from detection[.]" *Rubio-Gonzalez*, 674 F.2d at 1073 n.5.

respect to harboring, 18 U.S.C. §1961(1)(F) (listing harboring and assisting illegal aliens under INA §§274, 277 as predicate offenses for RICO),[6] which in turn allows enforcement in *state* court. *Tafflin*, 493 U.S. at 458 ("state courts have concurrent jurisdiction over civil RICO claims"). This subsequent enactment is both inconsistent with claims of federal preemption and "entitled to great weight in statutory construction" of the congressional intent in the original enactment. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969). Nothing in INA *expressly* preempts the Ordinance.

The RICO amendment provides further evidence against congressional intent to preempt state action on harboring generally and on its local impacts particularly:

> [I]n neither *Hines* nor [*Pennsylvania v. Nelson*, 350 U.S. 497 (1956)] was there affirmative evidence, as here, that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law. Furthermore, to the extent those cases were based on the predominance of federal interest in the fields of immigration and foreign affairs, there would not appear to be a similar federal interest in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country. Finally, the Pennsylvania statutes in *Hines* and *Nelson* imposed burdens on aliens lawfully

[6] Congress added §1961(1)(F) in 1996. *See* Pub. L. No. 104-132, Title IV, §433, 110 Stat. 1214, 1274 (1996).

> within the country that created conflicts with various federal laws.

DeCanas, 424 U.S. at 363.[7] Here, as in *DeCanas*, the Ordinance directly affects only illegal aliens' ability to maintain rental housing, remedies local – not national – problems, and does not implicate the wider areas of predominant federal interest.

1. The Presumption against Preemption Applies

In all fields – and especially ones traditionally occupied by state and local government – courts apply a presumption against preemption. *Wyeth*, 555 U.S. at 565; *Santa Fe Elevator*, 331 U.S. at 230; *cf. U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (interior quotations omitted, alteration in original). When this "presumption against preemption" applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator*, 331 U.S. at 230; *Wyeth*,

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[7] In *DeCanas*, as here with RICO, the "affirmative evidence" consisted of a subsequently enacted statute that contemplated revoking registrations of farm labor contractors who employed illegal aliens. *DeCanas*, 424 U.S. at 361-62.

555 U.S. at 565.[8] This presumption shields the Ordinance from preemption. Moreover, even if Congress had preempted *some* state action, the presumption against preemption applies to determine the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (interior quotations omitted). The panel majority made several errors in rejecting the presumption against preemption.

The panel majority relies on language from *U.S. v. Locke* to reject the presumption against preemption for state or local regulation "in an area where there has been a history of significant federal presence." *Farmers Branch II*, 675

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[8] Plaintiffs cannot rely on decisions under the National Labor Relations Act ("NLRA") to address the presumption against preemption. Contrary to the presumption *against* preemption at issue here, NLRA cases rely on "a presumption *of federal pre-emption*" derived from the National Labor Relations Board's primary jurisdiction over NLRA cases. *Brown v. Hotel & Restaurant Employees & Bartenders Intern. Union Local 54*, 468 U.S. 491, 502 (1984) (emphasis added). To invoke NLRB cases would "confuse[] pre-emption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the National Labor Relations Board." *Id.* While Congress undoubtedly *could have* written immigration or housing law as preemptively as it wrote the NLRA, Congress did not do so. If it had, *DeCanas* (for one) would have come out differently: "absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 128 (1985). This Court cannot saddle the City with NLRA-style preemption.

F.3d at 808 & n.27 (*quoting U.S. v. Locke*, 529 U.S. 89, 90 (2000)). The panel majority then framed its analysis as choosing a "traditional state regulation, entitled to a presumption of validity" versus "no benefit from the presumption [for] … attempt[ing] to legislate in an area of significant federal concern." *Id.* Because it went on to deem the Ordinance a regulation of immigration, the panel majority therefore rejected the presumption against preemption. In fact, however, the presumption applies in all areas, and federal courts "rely on [it] because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth*, 555 U.S. at 565 n.3 (internal quotations omitted). Thus, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* If states occupied the field historically, the presumption plainly applies.

This dispute concerns areas of traditional local concern under the police power, including public safety, negative impacts on employment, education, and the local fisc. *DeCanas*, 424 U.S. at 354-55. The Ordinance's relevant provisions concern licensing real property, an area of traditional local concern. For all but the wealthiest, the ability to work for pay is even more central to residency than the ability to rent a home. Since the presumption against preemption applies to the former (*i.e.*, employment) under *DeCanas*, 424 U.S. at 357-58, and *Arizona*, 132

S.Ct. at 2501, it plainly applies here. The authority to combat illegality is at the core of traditional police powers: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself." *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). "[T]he structure and limitations of federalism ... allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales*, 546 U.S. at 270 (interior quotations omitted); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873). Plaintiffs would deny the City the "right to protect itself" against not only the unlawful taking up of residency and all of the resulting economic ills but also the rampant criminality associated with the illegal aliens.[9] *See Arizona*, 132 S.Ct. at 2500. The lawlessness that follows is predictable and, if this Court recognizes a community's right to protect itself, entirely preventable.

Even in the immigration context, federal laws are not preemptive absent "persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *DeCanas*, 424 U.S. at 356. The Ordinance says nothing about who may enter or

[9] The panel majority suggests that most illegal aliens obey the law. *Farmers Branch II*, 675 F.3d at 816-17. Even if the illegal-alien community in the City's part of Texas does not involve the drug crimes, human smuggling, and related crimes of other illegal-alien communities, these aliens work illegally, to the extent that they need to work to support themselves.

remain in the U.S., and federal law similarly does not address who may rent real property in any particular city. Although the panel majority makes much of the fact that the City acted without satisfactory study, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Cities across the country know where the flashpoints are for services, expenses, and dangers in their communities. Except with respect to certain employment-related sanctions, INA says nothing to the contrary.

If the presumption against preemption applies, the preemption case vanishes because INA is entirely silent on the City's means of exercising its police power. That silence and the substantive issues raised in the next section leave only one possible conclusion: Congress did not intend INA and its amendments to *address*, much less to preempt, local police power on which the City relies here.

2. Congress Has Not Conflict-Preempted Local Police-Power Regulation of Housing

Conflict preemption includes both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because nothing prevents compliance with both federal immigration law and the Ordinance, Plaintiffs necessarily invoke the "prevent-or-

frustrate" prong.

As Judge Elrod recognized in her dissent, the panel majority's conflict-preemption analysis appears to allow judicial policy choices to inform the process of interpreting acts of Congress. *Farmers Branch II,* 675 F.3d at 826-27 (Eldrod, J., dissenting). This creates the real danger – from a separation-of-powers perspective – of the Judiciary's "sit[ting] as a super-legislature, and creat[ing] statutory distinctions where none were intended." *Securities Industry Ass'n v. Board of Governors of Federal Reserve System,* 468 U.S. 137, 153 (1984). Conflict-preemption analysis cannot be "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" without "undercut[ting] the principle that it is Congress rather than the courts that preempts state law." *Whiting,* 131 S.Ct. at 1985 (interior quotations omitted). *Amicus* Eagle Forum respectfully submits that this prevent-or-frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth,* 555 U.S. at 583 (characterizing this prong as "'purposes and objectives' pre-emption") (Thomas, J., concurring).

Notwithstanding federal primacy in *regulating immigration,* mere overlap with immigration does not necessarily displace state actions in areas of state

concern. *DeCanas*, 424 U.S.at 354-55 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). With respect to its standards for assessing immigration status, of course, the Ordinance tracks the federal guidelines for determining immigration status. Indeed, Congress itself authorized state and local government to make inquiries to the federal government on these very questions. 8 U.S.C. §§1357(g)(10), 1373(a)-(c). Moreover, applying those congressionally authorized inquiries cannot frustrate congressional purpose in INA because the Supremacy Clause does not require *identical* standards. It is enough for state law to "*closely* track[] [federal law] in all *material* respects." *Whiting*, 131 S.Ct. at 1981 (emphasis added). In areas of dual federal-state concern and *a fortiori* in ones of traditional state and local concern, Plaintiffs' arguments do not rise to the level of preemption.

As the Supreme Court held in *Arizona*, however, "[c]urrent federal law is substantially different from the regime that prevailed when *DeCanas* was decided." *Arizona*, 132 S.Ct. at 2504 (rejecting employee-based criminal sanctions). The question here is whether the *Arizona* difference with respect to employee-based crimes also encompasses the housing issue presented here. It plainly does not.

Prior to IRCA's amendments, INA would have allowed both employee- and employer-based sanctions under *DeCanas.* According to *Arizona*, however, Congress considered and rejected employee-based sanctions in IRCA's

amendments: "Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA … [b]ut Congress rejected them." *Arizona*, 132 S.Ct. at 2504 (citing legislative history). The Court relied on "the text, structure, and history of IRCA" to conclude "that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment." *Arizona*, 132 S.Ct. at 2505.

The Eleventh Circuit recently rejected claims of preemption where the Federal Government plaintiff failed to identify "legislative history, similar to that of IRCA, that would reflect a 'considered judgment' on the part of Congress 'that [such penalties] would be inconsistent with federal policy and objectives.'" *U.S. v. Alabama*, __ F.3d __, 2012 WL 3553503, at 22 (11th Cir. 2012) (*quoting Arizona*, 132 S.Ct. at 2504) (alterations by the Eleventh Circuit).[10] Under *Arizona*, Congress had to have considered and rejected an issue before federal courts will infer preemption from the perceived balance struck by a statutory regime.

Similarly here, the IRCA process did not discuss the housing issue. Because the presumption of preemption continues to apply, this Court must presume that Congress did not intend to displace state and local authority over housing *sub*

[10] The Alabama provision in question makes it criminal for illegal aliens to apply for a vehicle license plate, driver's license, identification card, business license, commercial license, or professional license. *Alabama*, __ F.3d __, 2012 WL 3553503, at 20-21.

silentio, *Santa Fe Elevator*, 331 U.S. at 230, particularly while Congress addressed employment-related issues expressly and subsequently *expanded* private enforcement on housing-related issues. *See* Section II.B, *supra.* To read *Arizona* to extend beyond employment would unmoor that decision from its authority, its reasoning, and even the text of that decision.

The Eleventh Circuit also recently held that INA preempts Georgia and Alabama laws that create state-law crimes for harboring illegal aliens. *Alabama*, __ F.3d __, 2012 WL 3553503, at 12; *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, __ F.3d __, 2012 WL 3553612, 8-11 (11th Cir. 2012). These aspects of the recent Eleventh Circuit decisions are both inapposite here and incorrectly decided.

First, the decisions are inapposite because the state laws there criminalized behavior covered by federal law, whereas the Ordinance here imposes civil remedies in a regulatory capacity wholly outside the federal criminal regime. *See Arizona*, 132 S.Ct. at 2506-07. Whatever conflict the Eleventh Circuit found state criminal laws to impose on federal immigration laws and enforcement priorities is simply irrelevant to the City's exercise of its police power to regulate rental housing within its borders.

Second, the Eleventh Circuit erred in relying on 8 U.S.C. §1329 to establish exclusive federal jurisdiction over prosecutions when that section applies by its

terms only to "all causes, civil and criminal, *brought by the United States*" (emphasis added). Contrary to the Eleventh Circuit's view, "section 1324(c) expressly allows for state and local enforcement." *In re Jose C.*, 45 Cal.4th 534, 552, 198 P.3d 1087, 1099 (Cal. 2009); *see also Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (§1324's text and legislative history establish that "federal law does not preclude local enforcement of the criminal provisions of [INA]"), *overruled on another ground by Hodgers–Durgin v. De La Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999). The Senate version of §1324(c) had provided that "all other officers *of the United States* whose duty it is to enforce criminal laws" could enforce these INA provisions, but the Conference Committee struck "of the United States" to enable non-federal enforcement. *Gonzales*, 722 F.2d at 475 (citing Conf. Rep. No. 1505, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1358, 1360, 1361) (emphasis added). In addition, as indicated in Section II.B, *supra*, Civil RICO allows state-court and private enforcement of INA's harboring provisions. For all of these reasons, *amicus* Eagle Forum respectfully submits that the Eleventh Circuit wrongly decided the harboring issues in the Alabama and Georgia litigation.

3. Congress Has Not Field-Preempted Local Police-Power Regulation of Housing

Field preemption precludes state and local regulation of conduct in a field that Congress – acting within its proper authority – has carved out for exclusive

federal governance. *Gade v. Nat'l Solid Wastes Management Ass'n,* 505 U.S. 88, 115 (1992). Similarly, "an authoritative federal determination that the area is best left *un*regulated … would have as much pre-emptive force as a decision *to* regulate." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 66 (2002) (emphasis in original). Neither situation applies here.

Typically, to foreclose state and local regulation, courts require that Congress make an affirmative statement against regulation, not that Congress merely refrain from regulating. For example, *Geier* involved "an affirmative policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Sprietsma,* 537 U.S. at 67 (interior quotations omitted, emphasis in original); *Rowe v. N.H. Motor Trans. Ass'n,* 552 U.S. 364, 367-68, 373 (2008) (Airline Deregulation Act intended "to leave such decisions, where federally unregulated, to the competitive marketplace" to enable "maximum reliance on competitive market forces"). But courts also can infer field preemption "from a framework of regulation so pervasive ... that Congress left no room for the States to supplement it or where there is a federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona,* 132 S.Ct. at 2501 (internal quotations omitted, alterations in original). In place of an ostensibly door-closing congressional determination, however, federal law includes

not only door-opening savings clauses but also enforcement by *private* parties and enforcement *in state court* for the housing issues relevant to the Ordinance.

Specifically, INA provides for state and local government to coordinate with the federal government on immigration status, *see, e.g.*, 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c), and preserves enforcement authority with respect to harboring. 8 U.S.C. §1324(c). As indicated, Civil RICO even allows *private* enforcement with respect to harboring and related immigration issues. *See* 18 U.S.C. §§1961(1)(F), 1964(c). As long as the Ordinance does not constitute "alien registration" under *Arizona*, federal law cannot *field preempt* state and local involvement.

Unlike the Ordinance – which applies to *all* City renters, not only to aliens – the field-preempted alien registration regimes in *Hines* and *Arizona* applied only to aliens and related to the specific issue of alien registration (namely, carrying state registration documents in *Hines* and state-law punishment for not carrying federal registration documents in *Arizona*). *See Hines*, 312 U.S. at 65-66; *Arizona*, 132 S.Ct. at 2502-03. The legislative end in those cases was registration, and the requirements applied only to aliens. Here, the Ordinance generally regulates rental housing, something well within the City's police power, to ensure that the City's housing stock is not used in an ongoing criminal enterprise, against which the City and even private citizens have the power to enforce. 8 U.S.C. §1324(c); 18 U.S.C.

§1964(c). To allow Plaintiffs to characterize the Ordinance as an alien-registration regime – simply because it includes immigration status for an entirely lawful, non-registration purpose – would overturn all manner of licensing laws. The Ordinance is not an alien-registration regime under *Arizona.*

In sum, Plaintiffs would be not merely wrong but "*quite wrong* to view [the] decision [not to regulate] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma,* 537 U.S. at 65 (emphasis added). If INA does not conflict preempt the Ordinance, INA plainly does not field preempt it, either.

CONCLUSION

The panel majority's "national problem" is a collection of state and local problems. Until Congress enacts a national solution, nothing preempts the local police power to solve local problems. This Court should reverse the District Court.

Dated: August 22, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 22, 2012, I electronically filed the foregoing brief – as an exhibit to the accompanying motion for leave to file the brief – with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed all of the participants in the case were unregistered for CM/ECF.

/s/ Lawrence J. Joseph

Lawrence J. Joseph

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CERTIFICATE OF COMPLIANCE

No. 10-10751, *Villas at Parkside Partners v. City of Farmers Branch, Texas.*

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 6,997 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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