UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

FRED H. KELLER, JR., *et al.*	)	**8:10cv270-LSC-FG3**
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
CITY OF FREMONT,	)	
	)	
Defendant.	)	
	)	
MARIO MARTINEZ, JR., *et al.*	)	**4:10cv3140-LSC-FG3**
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
CITY OF FREMONT, *et al.*	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
MARTINEZ PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs challenge the City of Fremont, Nebraska's local immigration law, Ordinance No. 5165.[1] Ordinance 5165 prohibits persons who are "not lawfully present in the United States" from renting housing in the City and sanctions business entities that fail to enroll in and use E-Verify, the voluntary federal electronic employment authorization verification program established by Congress. Both the residence restrictions and the employment provisions of the Ordinance are preempted by federal law under the Supremacy Clause of the U.S. Constitution, as the City itself previously argued to the Nebraska state courts. *See* Plaintiffs' Statement of Material Facts ("SOF") 123. Significant aspects of the Ordinance also violate the Due Process Clause of the Fourteenth Amendment because they are impermissibly vague. The Ordinance also violates Nebraska law because it exceeds the City's municipal authority. Finally, the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment – and the federal Fair Housing Act – because it was motivated at least in part by discriminatory intent against Latinos.[2]

Federal courts have uniformly concluded that state and local laws that condition a person's ability to secure housing on lawful immigration status are (or probably are) preempted. *See infra* Part I.A2.[3] The United States has repeatedly taken the same position.[4] Fremont's

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[1] The full text of Ordinance No. 5165 is set forth as Appendix A to this brief. *See also* Declaration of Kenneth J. Sugarman, Ex. A.

[2] In this brief, Plaintiffs use the term "Latino" to connote both "Latino" and "Hispanic," except where the term "Hispanic" is specifically used in evidentiary materials or testimony. The terms "Latino" and "Hispanic" are commonly used interchangeably, and have been recognized by the courts as connoting both race and national origin. *See, e.g.*, *Alonzo v. Chase Manhattan Bank*, 25 F. Supp. 2d 455, 458-60 (S.D.N.Y. 1998) (concluding that allegations regarding discrimination because of "Hispanic" background could encompass both race and national origin discrimination, and reviewing cases).

[3] All *infra* and *supra* citations refer to Parts of the Argument section of this brief.

(Footnotes continued on next page.)

residence restrictions are likewise preempted on multiple grounds. First, Fremont's attempt to prevent "illegal aliens" from residing within City borders constitutes a regulation of immigration – a power reserved in the Constitution exclusively to the federal government. Second, the housing provisions are *field* preempted because Congress has already comprehensively and pervasively regulated the status, residence, and removal of noncitizens, which is an area in which the federal interest is particularly dominant. Third, the residence restrictions are *conflict* preempted because they obstruct Congress's purposes and objectives in providing an exclusively federal, discretionary, and adjudicatory procedure for deciding whether and when noncitizens should be removed or whether they should be permitted to continue residing in the United States. *See infra* Part I.A.

The residence restrictions are also invalid under the Due Process Clause because two key terms, "occupant" and "temporary guest," are impermissibly vague, such that tenants and landlords are not provided with constitutionally sufficient notice of the conduct being prohibited. This ambiguity is also unconstitutional because it paves the way for arbitrary enforcement. *See infra* Part I.B.

The Ordinance's provisions penalizing employers who fail to verify their employees' authorization to work using E-Verify are also preempted because they conflict with the Immigration Reform and Control Act ("IRCA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Though the Supreme Court recently held that local governments may require employers to use E-Verify, the Court expressly left open the question of whether local laws that impose affirmative sanctions for failing to use E-Verify are

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[4] *See* Declaration of Kenneth J. Sugarman, Ex. T at 32-38; *id*. Ex. U at 10-18; *id*. Ex. X; *id*. Ex. Y at 7-11; *see also id*. Ex. V at 16-20 (arguing that state harboring provision is preempted); *id*. Ex. W at 11, 19-22 (same).

preempted. *Chamber of Comm. of the U.S. v. Whiting*, 131 S. Ct. 1968, 1985-86 & n.10 (2011). This brief demonstrates why that question must be answered in the affirmative here. *See infra* Part II.A.

Further, several critical aspects of the employment provisions are vague in violation of Due Process. In particular, the Ordinance provides no guidance as to the geographic nexus to Fremont that is necessary to bring employers into its coverage. *See infra* Part II.B.

In addition, both the residence and employment portions of the Ordinance exceed Fremont's municipal authority under Nebraska law. The power to enact such laws is neither expressly granted under state law nor within the scope of the City's "police" powers. Moreover, in seeking to regulate employment and residence of noncitizens, the City attempts to legislate on a matter that is not of purely local concern. This the City may not do. Indeed, as discussed below, the Nebraska Supreme Court has expressly held that it is the State – and not any municipality – that has been vested with the power to enforce employment regulations within Nebraska. *See infra* Part III.

Finally, the undisputed facts show that both the residence and employment portions of the Ordinance were impermissibly motivated by discriminatory intent against Latinos. Plaintiffs need only show that discrimination was *one* motivating factor – and the evidence here clearly meets this test. As shown below, the Ordinance was motivated by a dramatic increase in Fremont's Latino population and public complaints about Latinos in Fremont. The proponents were also well aware that the Ordinance would have a disproportionate impact on Latinos – and specifically intended such a burden. Further, supporters repeatedly relied on stereotypes of Latinos to justify the Ordinance, featuring those stereotypes in pro-Ordinance advertisements,

newspaper opinion pieces and other public statements. For this reason, the Ordinance violates both the Equal Protection Clause and the Fair Housing Act. *See infra* Part IV.

Because there is no genuine dispute as to any material fact, and for the reasons further elaborated below, Plaintiffs are entitled to summary judgment on all of their claims.

SUMMARY OF FACTS

I. Background of Ordinance 5165

Fremont is a city in Dodge County, Nebraska with a population of approximately 26,000. SOF 3. In 1990, Fremont's population was almost entirely white; less than one percent of the population was Latino. SOF 1. By 2000, Latinos comprised 4.3 percent of the City's population, while whites comprised over 95 percent of the population. SOF 2. By 2010, Latinos comprised 11.9 percent of the City's population, while whites comprised 89 percent. SOF 3. From 1992 to 2007, the Latino population in the Fremont school district grew from less than one percent to 15 percent. SOF 4; *see also* SOF 12. Latinos make up the overwhelming majority of the City's foreign-born population, comprising 79.9 percent of Fremont's foreign-born population in 2000. SOF 3. Similarly, the overwhelming majority of persons in Fremont who speak a language other than English at home are Spanish speakers. SOF 3.

In June 2008, Fremont City Council member Robert Warner proposed a new city ordinance that would prohibit hiring or renting residences to "illegal aliens." SOF 5. Among the reasons for the proposed ordinance were complaints Warner had heard about workers at the nearby Hormel meatpacking plant who spoke little English and other people not being able to get jobs there; concerns "that there were a lot of Hispanic people working for low wages at the meat packers" and that eventually Hormel would have a Latino majority workforce; complaints about unpaid hospital bills at the Fremont hospital and about growing numbers of Spanish-speaking

students enrolled in Fremont schools; and concern that the Latino population in Fremont's public schools had tripled over five years. SOF 6-12. The "problem" Warner was trying to work on was "the Hispanic influx into Fremont" and the growing number of Latinos in Fremont. SOF 13. Warner understood that some Fremont residents simply did not want so many Latino people in Fremont, which was "not altogether" true in his own case. SOF 14.

Warner's other stated, related aim was to "free Fremont of illegal aliens." SOF 15. He understood that Fremont residents "were frustrated about immigration laws not being enforced," and numerous residents had asked him, "[w]hy can't we pass a local law of illegal alien[s] and enforce it." SOF 19. Warner believed that if the proposed ordinance passed, "illegal aliens" would "have to leave Fremont," because the ordinance would take away the "basic thing[s] they need," like the ability to rent housing. SOF 15, 16. In a July 2008 guest newspaper column, Warner wrote: "[p]eople throughout this nation are frustrated by our federal government not enforcing their own law . . . . They want their own laws on immigration and they want these laws enforced." SOF 20.

On July 9, 2008, the City Council voted not to enact the proposed ordinance Warner had sponsored. SOF 21. Shortly after the vote, a petition effort was begun to try to pass essentially the same proposed ordinance as a voter initiative measure. SOF 21. Warner remained active in the effort to get the proposed ordinance passed, petitioning people in his neighborhood to sign the initiative petition, and providing the initiative petitioners with information about how much of the Fremont Area Medical Center's charity care and bad debt expense was "attributable to Hispanic patients," the expense to Fremont schools "for the language problem or barrier," and the percentage of "Hispanic [students] receiv[ing] two free meals per day," as well as confirmation that "Hispanics receive food stamps." SOF 22-26. Some of the information

Warner provided was later included in pro-Ordinance advertisements disseminated by the proponents as well as pro-Ordinance opinion pieces and interviews. SOF 36, 37, 39, 41, 77.

The three initiative petitioners were John Wiegert, Jerry Hart, and Wanda Kotas. SOF 27. Kotas originated the idea to petition to put a voter initiative on the ballot. SOF 28. The proposed ordinance, including the "whereas" recital clauses, had been authored by Defendants' counsel Kris Kobach of the Immigration Reform Law Institute. SOF 117. Kotas adopted the proposed ordinance that had failed to pass the City Council and did not know the factual basis for the claims and purported facts set forth in the proposed ordinance's recitals. SOF 29, 30. Kotas's co-petitioner John Wiegert also did not check the factual basis for the recital clauses that purport to cite a need for an immigration ordinance in Fremont. SOF 34.

The enacted Ordinance recites harms caused by "[c]rime[] committed by illegal aliens." Ord. at p.1. However, neither Warner nor any of the initiative petitioners ever asked the Fremont Police Department for any information about criminal activity in Fremont involving "illegal aliens." SOF 79. Drawing on arrest data she obtained from the Fremont Police Department, the City's media relations representative reported in July 2010 that there were "no strong indicators that illegal immigration is having a significant negative impact" on crime, an assessment with which the Chief of the Fremont Police Department agreed. SOF 80. Hart claims to have read in the newspaper that police had reported that there had been "gang crime" in Fremont but says they never "addressed whether the people were legally here or not"; Hart otherwise had no knowledge of whether there were any "gang crimes" being committed by "people here illegally." SOF 81.

When fielding media inquiries regarding the Ordinance and the general impact of illegal immigration, the City's media relations representative stated that "there is no significant impact

currently present by illegal immigration" in Fremont and that there are "no strong indicators that illegal immigration is having a significant negative impact" in Fremont. SOF 83. According to the City's media relations representative, Fremont has "great quality of life," is "very safe," and has good schools and quality healthcare. SOF 83.

In news interviews relating to the proposed ordinance, initiative petitioner Kotas remarked on interpreters being needed at a school kindergarten information session for parents, a Hispanic family paying for food with food stamps and then using $100 bills to pay for beer and other items, and her belief that children's education was suffering because children were being forced to learn Spanish instead of reading, writing, and arithmetic. SOF 31, 32. When asked by the reporter how she knew the Hispanic family she saw in the store was illegal, Kotas answered, "How do you know they're not?" SOF 31.

In his public support for the petition drive and otherwise, co-petitioner Wiegert demonstrated hostility towards Latinos for speaking Spanish and refusing to "learn our culture," stating for a published news story that, "[i]f they don't want to learn our culture, they should be sent back." SOF 35. In both public and private support for the ordinance, Wiegert stereotyped Latinos as being "illegal," stating in one article that of the 2,000 Latinos in Fremont, "the vast majority of them are [illegal];" stated his belief that all "illegal aliens" in Fremont are Latino; and repeatedly used costs attributable to Hispanics to establish purported costs caused by "illegal immigrants." SOF 35-43. Wiegert cited the increase in Fremont's Hispanic population as helping to explain his support for the ordinance, and said he had heard references at meetings and debates about people not wanting Fremont to become like Schuyler, a nearby city with a meat packing industry and a substantial Latino population. SOF 43, 44. Generally, Wiegert supported the ordinance in part as a means to regulate immigration and prevent the mere

presence of "illegal aliens," complaining that since the federal government is not doing it Fremont has to do it for itself. SOF 45-51. Wiegert believed that the ordinance would force illegal aliens to leave by taking away their place of residency. SOF 48.

The third initiative sponsor, Jerry Hart, joined the petition drive because Fremont residents were growing more concerned about the changes they were seeing in their city; when he worked out at the YMCA, he heard people griping about the visitors struggling with the weight machines who didn't speak English, and at the Fremont Walmart, he heard other customers speaking in Spanish. SOF 61. Hart believes that all or the vast majority of "illegal aliens" in Fremont are Latino because he believes most immigrants in Fremont are Latino. SOF 57. Hart believes that a high percentage of Latinos in Fremont are "illegal." SOF 64, 67. He believes that if a person is young, has been here a short period of time, and does not speak English, the person "probably [is] illegal." SOF 65. Hart believes he has probably heard people say there are too many Hispanics in Fremont. SOF 58. Hart would not deny he has ever expressed the opinion that there are too many Hispanics in Fremont. SOF 59. In one interview, Hart seemed to equate "gang members" with Hispanics. SOF 82. When Hart was going door-to-door soliciting petition signatures, some people probably made derogatory remarks about Hispanics but he could not recall specifics. SOF 60. Hart also stated the intent to have the proposed ordinance enforce the law regarding "illegal aliens" because he believes the federal government is not. SOF 52. Hart saw the hopes of the ordinance as being that it will be very hard for "illegal aliens" to remain in Fremont and they will return to their countries of origin. SOF 54, 56.

Hart, Wiegert, Kotas, and others collected signatures in support of the petition to put the ordinance on the ballot. SOF 27. Another Fremont resident who collected petition signatures

and publicly supported the proposed ordinance was Andy Schnatz. SOF 68. Schnatz sent racist jokes about Latinos and African Americans to Hart and other people on an email distribution list. SOF 69. Schnatz publicly derided a Fremont employer who had spoken about the proposed ordinance as "having Hispanics working for him" and complained that other members of a City task force looking at unauthorized immigration included "Hormel and other employers of Hispanics." SOF 70. Schnatz visited the Chief of the Fremont Police Department during the time the proposed ordinance was under consideration to ask about the involvement of undocumented immigrants in crime and showed the Chief a derogatory pamphlet. SOF 71. Schnatz collected approximately 120 signatures in support of the initiative petition. SOF 72.

There was a group of about 20 to 25 very vocal, outspoken people in Fremont known to the Fremont Chief of Police who say very derogatory things and were engaged in activity relating to the proposed ordinance. SOF 73. There were two or three times after the beginning of 2010 known to the Fremont Police Department when neo-Nazi or similarly derogatory flyers were distributed in Fremont during the night in parking lots or businesses. SOF 74. Before the immigration ordinance had been proposed, numerous residents had challenged Fremont's Chief of Police about why his department was not doing anything about the number of Hispanics in Fremont. SOF 75. In statements to the media and at public meetings relating to the proposed ordinance in addition to those already described, numerous individuals made derogatory remarks relating to Latinos. SOF 76.

Wiegert and Hart created an advertisement urging voters to vote for the illegal immigration ordinance that was published in the June 17, 18, and 19-20, 2010 editions of the *Fremont Tribune* newspaper. SOF 77. The advertisement linked its pitch to "illegal aliens" sending their earnings "home" to Mexico, charity care and bad debt expense due to "Hispanic

patients," and funds spent for instruction and support services within the Limited English Proficient program." SOF 77. The same text appeared in a postcard that was mailed to voters. SOF 77. Also before the vote on the initiative, some person(s) distributed a flyer in Fremont urging people to vote for the initiative that discussed various ways in which Mexico's immigrations laws were claimed to be stricter than those of the United States. SOF 78.

The proposed ordinance initiative was the subject of a special election on June 21, 2010. SOF 118. With approximately 45 percent of registered voters voting, the measure passed by a vote of 3,906 to 2,908. SOF 119. Following the election, the City began actively preparing to enforce the Ordinance. SOF 120.

At a City Council meeting concerning the Ordinance shortly after the passage of the Ordinance, Ordinance supporter Andy Schnatz was in attendance and referred to Hispanic individuals attending the meeting as "brown people." SOF 84. He audibly counted each Hispanic individual as he or she entered the room. SOF 84. At the same meeting, there were some racial tensions and various white attendees confronted some of the Hispanic attendees. SOF 85. In addition, when the Pledge of Allegiance was recited at the City Council meeting, a white member of the audience added the words "white people" to the end of the Pledge, so that the last line of the Pledge recited at the meeting was "with liberty and justice for all white people." SOF 86. No one in authority who was leading the City Council meeting addressed this behavior. SOF 86.

II. The City's Own Challenge to Ordinance 5165

On March 11, 2009, the City of Fremont filed a Petition for Declaratory Judgment in the Nebraska state district court seeking to enjoin the special election being requested by the petitioners. SOF 122. The City's Petition contended that "[t]he proposed ordinance violates the

Supremacy Clause of the United States Constitution and is pre-empted by federal law," and "would violate the Fair Housing Act and give rise to federal and state equal protection claims." SOF 123. In an amended complaint, the City claimed that the proposed initiative also violated the single subject rule for a city initiative. SOF 124.

The initiative petitioners moved to dismiss the City's complaint on the grounds that a pre-election challenge was non-justiciable and that the initiative measure had a single subject. SOF 125. The initiative petitioners asserted that "the single subject of the measure" was "preventing the unlawful presence of illegal aliens in Fremont." SOF 126. The Nebraska district court dismissed the complaint and its order was affirmed by the Nebraska Supreme Court. *See City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456, 463 (Neb. 2010) (finding a lack of subject matter jurisdiction and holding that the measure addressed the single subject of "regulating illegal aliens in Fremont").

III. Present Status of the Ordinance

The Ordinance was scheduled to take effect on July 29, 2010. *See* Aug. 25, 2010 Mem. and Order (ECF 32). Plaintiffs filed the complaint commencing this case on July 21, 2010. *See* Compl. (ECF 1). On July 27, 2010, after Plaintiffs had moved for a temporary restraining order and preliminary injunction, the Fremont City Council passed a resolution resolving not to enforce the Ordinance until 14 days after the issuance of final decisions in this case and the consolidated *Keller* case. *See* SOF 129.

IV. Provisions of Ordinance No. 5165

A. Residence Restrictions

Under the Ordinance, persons deemed "unlawfully present" in the United States are prohibited from renting a dwelling unit in Fremont. Ord. § 1(2)(A)(2). The Ordinance enforces

this prohibition by means of a rental occupancy licensing scheme.[5] *See id*. § 1(2)(A)(4). The scheme requires each prospective rental housing occupant to obtain an "occupancy license" from the Fremont Police Department. *Id*. § 1(3)(A). Landlords are required to notify prospective occupants of the license requirement and are prohibited from permitting occupancy of a dwelling unit unless the prospective occupant first obtains a license. *Id*. § 1(3)(C). Landlords are also required to include in the terms of their leases that occupancy of the premises by a person who does not hold a valid occupancy license constitutes an event of default under the lease. *Id*. § 1(3(I). Prospective occupants are required to pay a $5.00 application fee to the City and provide a variety of identifying information, including their country of citizenship. *Id*. § 1(3) (B), (E). An applicant who does not declare that he is a citizen of the United States is required to provide "an identification number assigned by the federal government that the occupant believes establishes his lawful presence in the United States," or to state that he does not have such a number if that is the case. *Id*. § 1(3)(E)(9)(b). Upon receipt of a complete signed application and payment of the application fee, the City initially issues an occupancy license. *Id.* § 1(3)(F).

A landlord or his agent who fails to notify prospective occupants of the license requirement, or rents to a person who has not obtained a license, or fails to obtain and retain a copy of each license, or fails to include a term in the lease that failure to hold a license is a default under the lease,is in violation of the Ordinance and subject on conviction to fines of $100.00 per violation. *See id*. § 1(3)(C), (H), (I) (J), (K). The lease or rental of a dwelling unit without obtaining and retaining a copy of the occupancy license of every known occupant is a separate violation for each occupant. *Id*. § 1(3)(L). A landlord has a defense to the offense of permitting an occupant to occupy a dwelling unit without a license if the landlord is diligently

[5] Prior to the Ordinance, Fremont did not have any occupancy license requirement. SOF 121.

pursuing eviction. *Id.* § 1(3)(J). An occupant who occupies a rented dwelling unit without a license is also subject to fines upon conviction. *Id.* § 1(3)(A), (K).

The Ordinance sets out a verification process pursuant to which the Fremont Police Department contacts the federal government to ascertain the "immigration status" of each noncitizen holder of an occupancy license. *Id.* § 1(4)(A). The Ordinance provides a process for revoking the occupancy license of an individual who the Police Department deems to be "unlawfully present" in the United States based on the information received from the federal government. *Id.* §§ 1(4)(B), (D), (F) (providing for revocation process including notice, a second inquiry to the federal government, revocation, and judicial review).

B. Employment Provisions

The Ordinance requires every business entity in the City employing one or more employees and performing "work within" the City to register in the federal E-Verify Program, and to use the E-Verify Program to verify the employment authorization of each employee hired thereafter. Ord. § 1(5)(E)-(F).

Business entities that apply for a business license, permit, grant, or loan from the City, or are awarded a contract for work to be performed within the City must comply with two prerequisites. First, they must provide the City documentation confirming their registration in E-Verify. Second, an authorized representative from each such business entity must execute an affidavit certifying that the business entity does not knowingly employ any person who is an unauthorized alien. *Id.* § 1(5)(C).

The Ordinance provides that a business entity with a license, permit, contract, loan, or grant issued by the City that fails to register in E-Verify and verify the authorization of employment of each employee shall be tried by the City Attorney at a public hearing before the

City Council. *Id*. § 1(5)(H)(1). If the entity is found to be in violation, the City Council may revoke the license, cancel the contract, recall the grant, or accelerate the loan, and institute an action to collect any sums due. *Id*. § 1(5)(H)(1). The City Attorney may also bring a civil action against any business entity suspected of failing to register in E-Verify and verify the authorization of employment of each employee hired thereafter, regardless of whether or not the entity has or is required to have any City license or permit. *Id*. § 1(5)(H)(2); *see id*. § 1(1)(G) (defining covered business entities). The City may seek injunctive relief compelling the business entity to comply with the Ordinance's E-Verify requirements. *Id*.

V. Plaintiffs

Plaintiffs Mario Martinez, Paula Mercado, Martin Mercado, Jane Doe, and Maria Roe (collectively "Tenant Plaintiffs") reside with their families in rental housing in Fremont, Nebraska. SOF 87. Some Tenant Plaintiffs have month-to-month tenancies while other Tenant Plaintiffs presently rent their homes on an annual basis. SOF 87.

Plaintiffs Martinez, Paula and Martin Mercado, and Doe are individuals of Latino background and are Spanish speakers. SOF 88. Plaintiffs Roe and Doe each reside with family who are of Latino background. SOF 88.

The Mercados are currently looking for a new rental in Fremont, and Plaintiff Roe and her family are presently contemplating looking for a new rental in Fremont. SOF 89. Personal circumstances may also make it necessary for Plaintiffs Martinez and Doe to seek to move from their current rentals to new rentals in Fremont. SOF 89.

Plaintiffs Doe and Roe have spouses who would be unable to prove "lawful presence" in the United States. SOF 90. Their spouses would be at risk of having their occupancy licenses revoked, if they obtained an occupancy license. SOF 90. If the Ordinance is enacted, Plaintiffs

Doe and Roe would not have the option of moving with their families to another rental in Fremont because their spouses would be unable to prove "lawful presence" in the United States. SOF 91.

Tenant Plaintiffs all have guests who come to stay with them from time to time for varying lengths of time, including stays of up to several months or longer. SOF 92. Tenant Plaintiffs do not check their guests' immigration status and some of their guests may be unable to establish "lawful presence" in the United States. SOF 92.

If the Ordinance is allowed to take effect, Tenant Plaintiffs would be required to comply with the Ordinance by obtaining occupancy licenses and requiring their guests who qualify as "occupants" to obtain occupancy licenses. SOF 93. Tenant Plaintiffs are afraid that if the Ordinance is enacted, they would have to limit their guests. SOF 94. Tenant Plaintiffs do not wish to comply with the Ordinance, but fear that they will be prosecuted, subject to criminal fines, and evicted if they do not comply. SOF 95, 96. Plaintiffs Doe and Roe would not comply with the Ordinance if it were to take effect. SOF 97.

Since the Ordinance was first introduced, Tenant Plaintiffs and others have experienced and witnessed incidents of discrimination against Latinos in Fremont. SOF 98. After the Ordinance was introduced, Maria Roe approached a City Council member to express her opposition to the Ordinance. She watched as the Council member laughed in response to another woman's comment that they should get the "f*%c$ing Mexicans out of Fremont." SOF 99.

Plaintiffs Steven Dahl, a Fremont resident, and Blake Harper (collectively "Landlord Plaintiffs"), each own rental properties that they rent to tenants in the City of Fremont. SOF 100. They each have vacancies from time to time. SOF 101. If the Ordinance goes into effect, Landlord Plaintiffs would be required to change their rental practices, and would have several

additional obligations that they do not currently have (e.g., notifying prospective occupants of the license requirement, obtaining and retaining a copy of each occupant's license, adding a term to their leases that failure to hold a license is a default under the lease, and undertaking eviction proceedings against occupants without licenses). SOF 102. The Ordinance would cause Landlord Plaintiffs to incur new costs and burdens. SOF 102. They also will not be able to reliably determine which guests of their tenants are "occupants" under the Ordinance. SOF 103. Landlord Plaintiffs do not wish to comply with the Ordinance, but they risk prosecution and criminal fines if they do not. SOF 104, 105.

Plaintiffs ACLU Nebraska Foundation and United Food and Commercial Workers Union, Local 293 (formerly Local 22) (collectively "Employer Plaintiffs") are employers with employees who perform work relating to, directed at, or located in Fremont. SOF 106, 108-111. They each have job vacancies from time to time. SOF 108, 111. Employer Plaintiffs currently use the traditional "I-9" paper form for verifying work authorization of newly hired employees, are not currently enrolled in E-Verify, and do not use the E-Verify program to verify the work authorization of newly hired employees. SOF 112, 113. If the Ordinance takes effect, Employer Plaintiffs will be forced to enroll in and use E-Verify or else risk prosecution and sanctions. SOF 113. If the Ordinance takes effect and Employer Plaintiffs are forced to enroll in and use E-Verify, they will incur costs, burdens, and obligations that they do not currently have. SOF 114. Employer Plaintiffs would also be harmed in other respects, such as by being forced to divert resources from their programmatic activities to work relating to compliance with the Ordinance's E-Verify provisions. SOF 115, 116.

SUMMARY JUDGMENT STANDARD

"A motion for summary judgment should be granted 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Semple v. Fed. Express Corp.*, 566 F.3d 788, 791 (8th Cir. 2009) (quoting Fed. R. Civ. P. 56(c)).

ARGUMENT

I. The Court Should Grant Summary Judgment on Plaintiffs' Claims Challenging the Ordinance's Residence Restrictions

A. The Residence Restrictions are Preempted by Federal Law

Because Ordinance 5165 impermissibly intrudes on areas exclusively reserved to the federal government and conflicts with federal immigration statutes and regulations, it is preempted by federal law under the Supremacy Clause.

The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Courts are especially sensitive to Supremacy Clause concerns in the immigration area for several reasons. The Constitution itself establishes the "preeminent role of the Federal Government with respect to the regulation of aliens within our borders." *Toll v. Moreno*, 458 U.S. 1, 10 (1982). In addition, laws relating to the treatment of foreign nationals are inextricably intertwined with the fields of foreign affairs and naturalization, and are therefore of particular federal concern. *Hines v. Davidowitz*, 312 U.S. 52, 62-63, 66-67 (1941); *see also Lung v. Freeman*, 92 U.S. 275, 280 (1875) (noting that if states had power over the "character" of regulations of foreign commerce or "the manner of their execution," a single state could "embroil us in disastrous quarrels with other nations"). Further, and critically, there is a special need for nationwide consistency in

matters affecting foreign nationals, given the "explicit constitutional requirement of uniformity," *Graham v. Richardson*, 403 U.S. 365, 382 (1971), in immigration matters and the myriad problems that would result if each of the 50 states – and each of the thousands of local governments – adopted its own rules for the treatment of noncitizens. *See Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (recognizing "the Nation's need 'to speak with one voice' in immigration matters").

Here, the Ordinance's residence restrictions are preempted on several independent preemption grounds. First, and critically, because "[p]ower to regulate immigration is unquestionably exclusively a federal power," any state or local law that constitutes a "regulation of immigration" is "per se preempted." *DeCanas v. Bica*, 424 U.S. 351, 354-55 (1976).

Preemption can also occur as a matter of congressional intent, which may be express[6] or implied. Implied preemption can take one or both of two forms. First, "field" preemption occurs where "'the nature of the regulated subject matter permits no other conclusion'" than that federal regulation should be "'deemed preemptive of state regulatory power,'" *DeCanas*, 424 U.S. at 356 (quoting *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)), or where the complete ouster of state power to regulate was Congress's clear and manifest purpose. *Id.* at 356-57; *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

Second, local regulation is impliedly preempted when it conflicts with federal law. A local law conflicts with federal law not only where it is impossible for a party to comply with both local and federal requirements, *English*, 496 U.S. at 79, but also where the local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

[6] Express preemption occurs when Congress's intent to preclude state or local regulation is "explicitly stated in the statute's language." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

Congress," *DeCanas*, 424 U.S. at 363 (internal punctuation and citations omitted); *see also, e.g. Heart of Am. Grain Inspection Serv. v. Mo. Dep't of Agric.*, 123 F.3d 1098, 1103 (8th Cir. 1997).

As demonstrated below, the Ordinance's residence restrictions are invalid for three separate reasons: they constitute an impermissible regulation of immigration, and they are both field preempted and conflict preempted.

1. Background on the Federal Immigration System

a. Admission and Removal

The Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101, et seq., along with its implementing regulations, is a "'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set[s] 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce of the U.S. of Am. v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *DeCanas*, 424 U.S. at 353, 359). Among other things, the INA sets forth the procedures for acquiring lawful immigration status and adjusting or changing one's immigration status,[7] as well as providing for proceedings to determine whether a noncitizen is removable and whether or not he or she will be removed. *See* 8 U.S.C. § 1229a.

The INA provides for removal proceedings that are generally the "sole and exclusive procedure for determining whether an alien may be . . . removed from the United States." 8 U.S.C. § 1229a(a)(3). Persons facing removal are generally entitled to an administrative hearing

[7] Generally, individuals may lack lawful status "because they entered the United States illegally, either by failing to register with immigration authorities or by failing to disclose information that would have rendered them inadmissible when they entered. In addition, aliens who entered legally may thereafter lose lawful status, either by failing to adhere to a condition of admission, or by committing prohibited acts (such as certain criminal offenses) after being admitted." *Lozano v. City of Hazleton*, 620 F.3d 170, 197 (3d Cir. 2010) (internal citation omitted), *vacated and remanded at* 131 S. Ct. 2958 (2011).

before an immigration judge, with a right to appeal and to judicial review. *See id*. §§ 1229a(c)(5); 1252(a)(1). At the immigration judge hearing, they can contest their removability, present evidence, examine the government's evidence, cross-examine government witnesses, and be represented by counsel. *See id*. § 1229a(b)(4). In these adversarial proceedings, it is the federal government's burden to prove, by clear and convincing evidence, that the individual is an alien and removable. *See id*. § 1229a(c)(3); *see also Lozano v. City of Hazleton*, 620 F.3d 170, 197 (3d Cir. 2010), *vacated and remanded at* 131 S. Ct. 2958 (2011).

Determining that an individual is removable is only the first step of the process. Frequently, aliens who lack immigration status at the outset of removal proceedings obtain temporary or permanent permission to remain in the United States during the course of the proceedings. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 226 (1982) ("An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen."); *Hazleton*, 620 F.3d at 197-98. Individuals who may obtain relief from removal include spouses and other relatives of U.S. citizens and lawful permanent residents, victims of domestic violence, and individuals entitled to protection from persecution or torture. *See* 8 U.S.C. §§ 1229b (cancellation of removal for certain relatives of U.S. citizens and lawful permanent residents); *id*. § 1229b(b)(2) (cancellation for certain battered spouses and children); *id*. § 1231(b)(3) (restricting removal of individuals subject to persecution); 8 C.F.R. §§ 208.16-18 (deferral of removal under Convention Against Torture); *see also* 8 U.S.C. § 1228(b)(5) (generally referring to the Attorney General's authority to grant relief from removal in the Attorney General's discretion).

The entry, admission, and removal scheme established by the INA provides the federal government with considerable discretion. *See Villas at Parkside Partners v. City of Farmers*

Branch, Tex. ("*Farmers Branch II*"), 701 F. Supp. 2d 835, 858 (N.D. Tex. 2010) (noting that the INA's "complex scheme is structured, in part, to allow federal discretion"), *appeal pending*. Critically, the federal government's discretion includes deciding *not* to pursue the removal of a noncitizen who may presently lack a lawful immigration status. *See Hazleton*, 620 F.3d at 197 (whether and when to initiate removal proceedings is within the discretion of DHS); *see also* 8 U.S.C. § 1227(a)(1)(E)(iii) (authority to waive removability in specified category of cases); *id*, § 1227(a)(1)(H) (same); *id*. § 1227(a)(7) (same).[8] The Department of Homeland Security also has long exercised discretion to place a person who is in removal proceedings in a "deferred action" category, allowing the person to remain in the country on humanitarian grounds. *See, e.g.*, *David v. INS*, 548 F.2d 219, 223 & n.5 (8th Cir. 1977); *see also, e.g.*, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-87 (1999) (recognizing extent of discretion in removal proceedings); 8 C.F.R. § 212.5 (allowing for parole of inadmissible or removable noncitizens).

Numerous persons who currently lack immigration status, including those who have already been found by an immigration judge to be removable, may be permitted by the federal government to remain in the United States, even indefinitely.[9] *See Lozano v. City of Hazleton*,

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[8] *See also, e.g.,* Br. for the U.S. as *Amicus Curiae* in Supp. of Appellees at 20, *Villas at Parkside Partners v. City of Farmers Branch, Tex.* (5th Cir.) (No. 10-10751) (submitted at Sugarman Dec. Ex. X) (describing circumstances in which DHS may exercise discretion not to initiate removal proceedings); Br. for Appellant at 7-11, *United States v. Alabama* (11th Cir.) (No. 11-14532-CC) (submitted at Sugarman Dec. Ex. Y) (discussing the discretion federal authorities have been given in implementing and enforcing the immigration laws, including the discretion to address humanitarian and foreign affairs objectives); Declaration of Daniel H. Ragsdale, *United States of America v. State of Alabama*, No. 11-J-2746-S (N.D. Ala. Aug. 1, 2011), ¶¶ 16-20, 40-42 (same) (submitted at Sugarman Dec. Ex. Z).

[9] Notably, the INA contemplates that individuals DHS seeks to place in removal proceedings will have addresses where they can be located or contacted. *See* 8 U.S.C. § 1229(a)(1) (providing for personal service of notice to appear or notice by mail where personal service is not practicable); *see also* §§ 1301-1306 (providing for noncitizens to register with the federal

496 F. Supp. 2d 477, 530-32 (M.D. Pa. 2007), *subsequent history omitted*; 8 C.F.R. §§ 274a.12(a)(11-13), (c)(8-11, 14, 18-20, 22, 24) (listing categories of persons who can receive federal permission to work, and implicitly to stay, in the United States even though they may be violating immigration laws). These categories of persons lacking immigration status but permitted to remain include persons who have pending applications to adjust to a lawful status pursuant to the Violence Against Women Act, *see* 8 U.S.C. § 1255(m), or under 8 U.S.C. § 1255(i), certain asylum applicants, and persons who are applying for "temporary protected status" under 8 U.S.C. § 1254a. Further, in the case of some persons who have been ordered removed, there may be no country willing to accept them. Such persons may not be detained indefinitely under the INA, and may be permitted to remain and work in the United States even though they are under orders of removal. *See Clark v. Martinez*, 543 U.S. 371 (2005); *Zadvydas*, 533 U.S. 678.

b. Harboring

The INA also imposes criminal penalties upon a person who, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation." 8 U.S.C. § 1324(a)(1)(A)(iii). The INA prescribes a scheme of fines and

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government, provide their addresses, and notify the government of changes in address); 24 C.F.R. §§ 5.508(e), 5.520 (HUD regulations permitting persons lacking lawful immigration status to reside together with family members eligible for federal housing subsidies). Once in removal proceedings, individuals are permitted to remain resident in the United States (though some may be subject to detention), including persons who have reached a stage in the proceedings at which they have been ordered removed or have agreed, and been allowed, to depart voluntarily. *See, e.g.*, 8 U.S.C. §§ 1226, 1229, 1229c, 1231.

imprisonment for persons who commit these offenses. *Id*. § 1324(a)(1)(B); *see also id*. § 1324(b)(1) (seizures of property and proceeds).

2. The Residence Provisions are Preempted by Federal Law

"[E]very court that has considered a state or local law that conditioned housing on the ability to prove lawful immigration status has held (or, in the context of preliminary-injunctive relief, found it substantially likely) that those laws are preempted." *Central Ala. Fair Housing Ctr. v. Magee*, 2011 WL 6182334, at *5 (M.D. Ala. Dec. 12, 2011). *See Hazleton*, 620 F.3d at 219-24;[10] *Central Ala. Fair Housing Ctr.*, 2011 WL 6182334 at *7-*13; *United States v. Alabama*, --- F. Supp. 2d ---, 2011 WL 4469941, *40-*45 (N.D. Ala. Sep. 28, 2011), *appeal pending*; *Farmers Branch II,* 701 F. Supp. 2d 835;[11] *Villas at Parkside Partners v. City of Farmers Branch* ("*Farmers Branch I*"), 577 F. Supp. 2d 858 (N.D. Tex. 2008); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006).

As shown below, Ordinance 5165's residence restrictions are no exception.

[10] The judgment in *Hazleton* was vacated, and the case remanded for further consideration, after the Supreme Court issued its decision in *Whiting*, 131 S. Ct. 1968, because the local law in *Hazleton* included a regulation of employment of "unauthorized aliens," the type of law upheld in *Whiting*. The state law addressed in *Whiting* did not regulate noncitizens' residence in any way. Thus, the Third Circuit's analysis of the residence provisions in *Hazleton* is unaffected by *Whiting*. *See Central Ala. Fair Housing Ctr.*, 2011 WL 6182334 at *5 n.7 ("*Whiting* is silent on housing issues. . . . [T]his court still finds *Lozano [v. Hazleton]* persuasive."); *see also Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1333-36 (N.D. Ga. 2011) (finding state harboring provision preempted and rejecting the defendant's reliance on *Whiting*); Br. for the U.S. as *Amicus Curiae* in Supp. of Appellees at 24, *Villas at Parkside Partners v. City of Farmers Branch, Tex.* (5th Cir.) (No. 10-10751) (submitted at Sugarman Dec. Ex. X) (distinguishing *Whiting*).

[11] Pursuant to the invitation of the Court, the United States submitted an amicus curiae brief in support of the appellees in the Fifth Circuit appeal of the *Farmers Branch II* case on December 13, 2011, arguing that the residence provision in *Farmers Branch II* is preempted. Br. for the United States as Amicus Curiae in Support of Appellees, *Villas at Parkside Partners v. City of Farmers Branch, Tex.* (5th Cir.) (No. 10-10751) (submitted at Sugarman Dec. Ex. X).

a. The Residence Restrictions are a Preempted Regulation of Immigration

The Fremont Ordinance's residence restrictions, which exclude persons identified at given a point in time as being "not lawfully present in the United States," constitute an impermissible, preempted regulation of immigration.

The Constitution gives the federal government sole and exclusive power to regulate immigration. *DeCanas*, 424 U.S. at 354; *Truax v. Raich*, 239 U.S. 33, 42 (1915). State or local law that regulates immigration is "per se pre-empted." *DeCanas*, 424 U.S. at 355.

The exclusive federal power to regulate immigration is based on the Constitution's grant of "entire control of international relations" to the federal government, along "with all the powers of government necessary to maintain that control, and to make it effective." *Ting v. United States*, 149 U.S. 698, 711 (1893). The Supreme Court has explained that there are powers within the compass of Congress's power to regulate commerce with foreign nations that are "exclusive in Congress," and "that whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Henderson v. Mayor of City of N.Y.*, 92 U.S. 259, 272-73 (1875) (internal punctuation omitted).

Accordingly, the federal government has sole and exclusive authority to enact regulations concerning which noncitizens to "exclude," "expel," or to "permit . . . to remain," *Ting*, 149 U.S. at 713, 714, and "the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government," *Lung v. Freeman*, 92 U.S. 275, 280 (1875); *see also Takahashi v. Fish and Game Com'n*, 334 U.S. 410, 419 (1948) (exclusive power to regulate immigration includes "determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and

conditions of their naturalization"); *Yo v. United States*, 185 U.S. 296, 302-03 (1902) (exclusive authority encompasses power over "the privilege of transit" of noncitizens across the United States); *see also DeCanas*, 424 U.S. at 355 ("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.").

Thus, the Supreme Court has recognized that states enjoy no power to deny aliens "entrance and abode," *Truax,* 239 U.S. at 42, and "no power with respect to the classification of aliens," *Plyler*, 457 U.S. at 225; *see also Toll*, 458 U.S. at 11 ("'[States] can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.'") (quoting *Takahashi*, 334 U.S. at 419).

Under these standards, Fremont's residence restriction is a preempted regulation of immigration in at least three main respects.

First, by banning "illegal aliens" from all rental housing in the City, Fremont is impermissibly regulating immigration by effectively claiming for states and localities the power to prohibit a class of noncitizens from residing in the United States based on their immigration status at a given point in time. *See Hazleton*, 620 F.3d at 219, 224; *Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *8-*10; *Farmers Branch II*, 701 F. Supp. 2d at 854-55. Indeed, this was precisely the understanding and hope of the Ordinance's proponents and sponsors. *See* SOF 15-18, 19-20, 45-51, 52-56, 126.

But the power to determine whether a given noncitizen may reside in the United States, including Fremont, lies at the very core of the power to regulate immigration. *See, e.g., Truax,* 239 U.S. at 42 (states may not deny aliens "entrance and abode"). The Fremont Ordinance

effectively determines which foreign nationals can live in the United States or where – determinations that "are in their nature national, or admit of one uniform system or plan of regulation, [and] may justly be said to be of such a nature as to require exclusive legislation by Congress." *Henderson*, 92 U.S. at 272-73 (internal quotation marks omitted); *see also Hazleton*, 620 F.3d at 221 ("To be meaningful, the federal government's exclusive control over residence in this country must extend to any political subdivision.").

Simply put, "the decision to deny an alien residence on the basis of . . . [his status under the INA] rests exclusively with the federal government." *Farmers Branch II*, 701 F. Supp. 2d at 858; *accord Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *8 ("By effectively barring undocumented immigrants from" an entire category of housing, "the statute goes to the very core of an immigrant's residency. . . . [T]his case is about an immigrant's residence, which the State has no power to regulate.").

Second, the Ordinance's residence restrictions seek to impermissibly regulate immigration by creating their own classification of noncitizens who are prohibited from residing in Fremont – i.e., persons who are "not lawfully present in the United States." Because states and localities "enjoy no power with respect to the classification of aliens," *Plyler*, 457 U.S. at 225, the Ordinance is preempted for this reason as well. *See Farmers Branch II*, 701 F. Supp. 2d at 855-56; *Farmers Branch I*, 577 F. Supp. 2d at 873-74.

Though the Ordinance purports to define "not lawfully present" by reference to the INA, *see* Ord. § 1(1)(A), the City is nonetheless creating its own "classification of aliens." There is no federal classification of noncitizens who are prohibited from obtaining rental housing. Moreover, federal law does not employ any binary classification of "lawfully present"/"not lawfully present" as being determinative of the question of who will be permitted to remain in

the United States. As discussed above, under federal law, the determination of who is in fact removable, and who will actually be removed, and when, is the product of the exercise of discretion by federal immigration officials and the application of the procedures for removal set forth in the INA. For these reasons, it is simply

> impossible for a State to determine which aliens the Federal Government will eventually deport, which the Federal Government will permit to stay, and which the Federal Government will ultimately naturalize. Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country, perhaps even as a citizen. Indeed, even the Immigration and Naturalization Service cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course.

Plyler, 457 U.S. at 241 n.6 (Powell, J., concurring); *see also id*. at 236 (Blackmun, J., concurring) ("[T]he structure of the immigration statuses makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported"); *id*. at 226 ("In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed."); Br. for the U.S. as *Amicus Curiae* in Supp. of Appellees at 18-20, *Villas at Parkside Partners v. City of Farmers Branch, Tex.* (5th Cir.) (No. 10-10751) (submitted at Sugarman Dec. Ex. X) ("Under federal law, DHS's view that an alien lacks lawful status does not trigger immediate physical removal.").

Accordingly, in denying residence to those deemed "not lawfully present," Fremont is effectively making up its own classification of noncitizens for its own regulatory purpose. *See Farmers Branch II*, 701 F. Supp. 2d at 855 ("The Court concludes that the Ordinance, though grounded in federal immigration classifications, is an invalid regulation of immigration because it uses those classifications for purposes not authorized or contemplated by federal law."); *cf. Farmers Branch I*, 577 F. Supp. 2d at 871 (holding that because City has adopted a classification

system that "is not consistent and coextensive with federal immigration standards, the city has attempted to regulate immigration in violation of the Constitution and the Supremacy Clause").

The Ordinance also impermissibly regulates immigration by ultimately requiring City officials or state judges to make determinations regarding "lawful presence," notwithstanding the Ordinance's purported incorporation of a federal "immigration status" verification into its procedures. For example, the Ordinance provides for judicial review in state courts of several issues, including "the question of whether the occupant is lawfully present in the United States." Unless there is a "conclusive determination of immigration status by the federal government," the *state* courts must determine the answer to that question. Because "determinations of immigration status by state agents amounts to immigration regulation," *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 770 (C.D. Cal. 1995), the Ordinance is preempted for this separate reason as well. *See Farmers Branch I*, 577 F. Supp. 2d at 873-74.

Third, the Ordinance is also an impermissible regulation of immigration because it regulates the "conditions under which a legal entrant may remain." *DeCanas*, 424 U.S. at 355. Under the Ordinance, noncitizens who have entered the country in compliance with federal immigration law are essentially required to register with the Fremont Police Department and prove to Fremont that they are in compliance with the INA's provisions every time they move or begin a new lease or tenancy. This is essentially a condition imposed on legal entrants for remaining in Fremont (and there is no counterpart regulation under federal law). In addition, the Ordinance would exclude legal entrants who temporarily fall out of status (such as those who overstay their visas), regardless of the legal entrant's eligibility to adjust to a lawful status, obtain relief from removal, or otherwise gain the permission of the United States to remain in the country.

In sum, Ordinance 5165 seeks to exercise a power to prohibit residency based on a person's status relative to the federal immigration laws that is clearly an exclusive federal power. The Ordinance's residence restrictions therefore constitute a preempted regulation of immigration.

b. The Residence Restrictions are Impliedly Preempted by the INA

Separate and apart from being an impermissible regulation of immigration, the Ordinance's residence restrictions are also both field preempted and conflict preempted. The Ordinance impermissibly intrudes in a field where Congress has regulated pervasively and where the federal interest is especially dominant. The Ordinance is also fundamentally incompatible with the INA and otherwise obstructs the accomplishment of Congress's purposes and objectives.

i. Field Preemption

The Ordinance's residence restrictions regulate the residence and purported "harboring" of noncitizens in the United States. As discussed, this matter is one that Congress has regulated pervasively through the INA's comprehensive scheme for immigration, including specific provisions relating to the "harboring" of aliens. *See, e.g.*, *Whiting*, 131 S Ct. at 1973 (describing the INA as a "'comprehensive federal statutory scheme'") (citation omitted); *Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *11 ("The INA reflects Congress's objective of exerting federal control over an immigrant's residency in this country.").

The pervasiveness of the federal scheme makes more than "reasonable the inference that Congress left no room for the States to supplement it." *English*, 496 U.S. at 79. Specifically, Congress has already enacted comprehensive regulations dealing with the continued residence or not of noncitizens who have violated the INA's terms or conditions and with the special case of

third parties who assist such violations by means of criminal "harboring." *See United States v. South Carolina*, No. 2:11cv2958, Order, slip op. 21-23 (D.S.C. Dec. 22, 2011) (submitted at Sugarman Dec. Ex. BB). In so doing, Congress has created classifications of removable noncitizens and classifications of what conduct constitutes criminal "harboring" under federal law, all for the purpose of establishing specific federal law obligations, prohibitions, procedures, and remedies. Thus, the courts have held that cities are precluded from enacting their own such schemes regulating the residency and harboring of noncitizens. *See United States v. South Carolina*, No. 2:11cv2958, Order, slip op. at 23 (Dist. S.C. Dec. 22, 2011) (submitted at Sugarman Dec. Ex. BB) ("It is clear to the Court . . . that Congress adopted a scheme of federal regulation regarding the harboring and transporting of unlawfully present persons *so pervasive that it left no room in this area for the state to supplement it*.") (emphasis added); *Hazleton*, 620 F.3d at 220-21 (holding that comparable law was field preempted in view of comprehensive federal regulation of immigration and naturalization); *Garrett*, 465 F. Supp. 2d at 1056-57 (concluding that comparable law was likely field preempted in view of federal regulations' occupation of the field of "harboring").

Congress's intent to have federal law exclusively occupy the field is further evidenced by the "nature of the regulated subject matter." *See DeCanas*, 424 U.S. at 356 (internal quotation marks omitted); *see also English*, 496 U.S. at 79 (preemptive intent may be inferred where federal regulation "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject") (internal punctuation omitted). "[I]mmigration, including 'regulation of aliens within our borders,' is a field in which the federal interest is dominant." *Farmers Branch II*, 701 F. Supp. 2d at 858; *see, e.g.*, *Toll*, 458 U.S. at 9 ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); *Zadvydas*, 533 U.S. at

700; *Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *13 (describing immigrant residency requirements as "a quintessentially federal domain").

Given the nature of the subject matter being regulated, it must be inferred that when Congress acted to comprehensively regulate immigration as it has done, it intended to preclude the possibility that some or all of the 50 states and their political subdivisions would be able to enact their own "harboring" law schemes to exclude particular classes of noncitizens from residence.

In sum, the Ordinance's noncitizen residence restrictions are field preempted.

ii. Conflict Preemption

Federal courts have consistently concluded that state and local laws conditioning the right to housing on having a lawful status under the immigration laws are conflict-preempted. *See Hazleton*, 620 F.3d at 221-24; *Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *10-13; *United States v. Alabama*, 2011 WL 4469941, at *41-*45 (rental exclusion and state harboring crime); *Farmers Branch II,* 701 F. Supp. 2d at 857-58; *Garrett*, 465 F. Supp. 2d at 1056-57; *see also Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp.2d 1317, 1333-36 (N.D. Ga. 2011) (state harboring law), *appeal pending*. Notably, the United States has repeatedly taken the position in the federal courts that local housing exclusion and harboring laws enacted by cities and states are conflict preempted. *See* Br. for the U.S. as *Amicus Curiae* in Supp. of Appellees at 10-29, *Villas at Parkside Partners v. City of Farmers Branch, Tex.* (5th Cir.) (No. 10-10751) (submitted at Sugarman Dec. Ex. X); *see also* Sugarman Dec. Exs. T, U, V, W.[12]

[12] The federal government has also taken the position that local laws are preempted when, as here, they impose sanctions due to suspected violation of federal immigration law, they mandate that local law enforcement officers inquire into a person's status under the immigration laws, and they penalize persons for being present in the country without lawful status. *See* DHS, Guidance

Consistent with the above, the Ordinance's rental provision is conflict preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *DeCanas*, 424 U.S. at 363 (internal quotation marks omitted). In assessing "obstacle" conflict preemption, the courts have explained that "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *see also DeCanas*, 424 U.S. at 363 (describing conflict preemption question as "whether . . . [the state law] can be enforced without impairing the federal superintendence of the field covered by the INA") (internal punctuation omitted).

The residence restrictions are conflict preempted because they interfere with Congress's intent that the federal government retain and exercise discretion in immigration decisions, leaving it the flexibility to pursue not only removal, but also other equally important objectives reflected in the INA, including humanitarian concerns, sensitive foreign relations considerations, and special individualized circumstances. *See* Declaration of William J. Burns, *United States of America v. State of Alabama*, No,. 11-J-2746-S (N.D. Ala. Aug. 1, 2011) ("Burns Dec."), ¶¶ 5-6, 9-11, 16, 19-27, 31, 34 (submitted at Sugarman Dec. Ex. AA); Declaration of Daniel H. Ragsdale, *United States of America v. State of Alabama*, No,. 11-J-2746-S (N.D. Ala. Aug. 1, 2011) ("Ragsdale Dec."), ¶¶ 9, 16, 20, 40-42, 49-50 (submitted at Sugarman Dec. Ex. Z). The residence restrictions are similarly conflict preempted because they interfere with Congress's objective to have determinations relating to removability and removal made through a multi-faceted federal administrative and adjudicatory process. Simply put, Congress did not provide or intend for the INA to be an engine for the summary removal of all persons determined to be

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on State and Local Governments' Assistance in Immigration Enforcement and Related Matters, at 14 (submitted at Sugarman Dec. Ex. CC).

"illegal aliens" at one point in time. Enforcing federal immigration law includes not just executing removals, but also determining removability under specified procedures, as well as effecting the other outcomes besides removal for which the INA expressly provides (including, e.g., waiver of removability, adjustment of status, and other permanent or temporary relief from removal).

As reviewed above, under the INA, federal officers charged with immigration enforcement are granted significant discretion in determining who to place in removal proceedings and who, if removable, will in fact be removed. *See supra* Part I.A.1.a. The INA does not employ any binary classification such as "lawfully present"/"unlawfully present" to control these determinations. Rather, the INA carves out room for discretionary relief and other forms of relief at numerous points in the immigration process. The federal government's discretion includes the authority to permit a noncitizen who is inadmissible nonetheless to enter the United States; the authority to adjust an individual's immigration status to a lawful one; the authority to decline to initiate removal proceedings against a noncitizen who is removable; and the authority to initiate removal proceedings but grant a variety of forms of relief from removal. *See* Ragsdale Dec. ¶ 18 (submitted at Sugarman Dec. Ex. Z) ("ICE exercises prosecutorial discretion throughout all stages of the removal process—investigations, initiating and pursuing administrative removal proceedings, deciding which removability charges to lodge, seeking termination of proceedings, administrative closing of cases, releasing from detention, declining to appeal the decision of an immigration judge, and/or declining to execute a removal order."). The federal government's determination whether to grant relief from removal may take into account humanitarian concerns, a noncitizen's relationship to a United States citizen or permanent resident and the hardship that the noncitizen's removal might impose, a noncitizen's

good moral character, and other factors. *See supra* Part I.A.1.a.; *see also* Ragsdale Dec. ¶¶ 40-41 (submitted at Sugarman Dec. Ex. Z) ("ICE [may] deliberately decide[] for humanitarian or discretionary reasons not to pursue removal proceedings … despite the fact that the alien may be in the United States illegally[.]").

Thus, the federal immigration system created by Congress pursues several objectives and outcomes in addition to removal. Congress's purposes include important foreign-affairs and humanitarian objectives, such as the universal obligation under international law not to return an individual to a country where he or she will face persecution or torture. *See* 8 U.S.C. § 1231(b)(3) (restricting removal of individuals subject to persecution); 8 C.F.R. §§ 208.16-18 (deferral of removal under U.N. Convention Against Torture); *see also, e.g.*, Pls.' Motion for Preliminary Injunction at 1, 2, 4, 5-7, *United States v. Alabama*, (N.D. Ala.) (No. 11-J-2746-S) (submitted at Sugarman Dec. Ex. T); Burns Dec. ¶¶ 5-6, 9-11, 16, 19-27, 31, 34 (submitted at Sugarman Dec. Ex. AA); Ragsdale Dec. ¶¶ 9, 49-50 (submitted at Sugarman Dec. Ex. Z). These are no less congressional objectives than seeking and effectuating removal in other, appropriate cases.

In stark contrast to the federal system, the Ordinance imposes per se banishment of any immigrant who currently lacks express permission to remain in the United States. At its core, the Ordinance attempts an end-run around the discretionary, adjudicatory, and multi-faceted system of immigration enforcement that Congress has carefully crafted by summarily excluding certain noncitizens from the borders of the City.[13] The Ordinance thereby reflects Fremont's markedly

[13] It is apparent from the regulatory scheme that Congress intended to leave without controls a noncitizen's ability to secure housing during the time when the federal government has not effectuated his or her removal. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, then the pre-emptive inference can be drawn-not

different immigration policy preference. Fremont's Ordinance fundamentally conflicts with the federal scheme by imposing its removal sanction indiscriminately against all noncitizens who, at a particular moment in time, are identified from federal government records as having an "immigration status" that renders them "not lawfully present" within the meaning of the Ordinance. *See Hazleton*, 620 F.3d at 221 (explaining that Hazleton's housing restrictions "attempt to effectively 'remove' persons from Hazleton based on a snapshot of their current immigration status . . . . This is fundamentally inconsistent with the INA."). The Ordinance thus requires the removal of many persons who, though they fall into Fremont's "not lawfully present" classification at the time the Ordinance's sanction applies, have not been placed in removal proceedings by the federal government, might never be placed in such proceedings, and might never be removed by the federal government even if they are placed in proceedings.

In sum, by pursuing a local version of a mandatory removal regime, Fremont is impermissibly interfering with the accomplishment and execution of Congress's purposes and objectives. *Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *11 ("The mandatory denial of a mobile-home permit [effectively prohibiting affected noncitizens from residing in Alabama] . . . ignores the INA's careful balancing of executive discretion, administrative process, and judicial review."); *see Hazleton*, 620 F.3d at 221-22 (finding housing provision similar to Fremont's preempted); *Georgia Latino Alliance*, 793 F. Supp.2d at 1334-36 (finding that state harboring provision that did not include rental provision was likely preempted because state enforcement and interpretation would undermine discretionary federal enforcement).

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from federal inaction alone, but from inaction joined with action."); *cf. United States v. Arizona*, 641 F.3d 339, 357-60 (9th Cir. 2011) (comprehensive federal scheme relating to employment of "unauthorized aliens" and legislative history evidenced that Congress's purpose was to supercede state authority to sanction work by unauthorized aliens), (same) *cert. granted*; *United States v. Alabama*, 2011 WL 4469941, at *19-*25.

The Ordinance also obstructs Congress's goals because it uses a procedure for determining removability from residency in Fremont that is vastly different from and fundamentally irreconcilable with the federal removal process. Among other incompatibilities, individuals are not afforded meaningful procedural protections such as a hearing before a federal immigration judge, the opportunity to cross-examine federal government witnesses, or the right not to be removed in the absence of a final order of removal from a federal immigration judge. *See* 8 U.S.C. § 1229a. Instead, the Ordinance provides a vaguely defined opportunity to persuade some federal line immigration employee(s) that the information the government has in its databases or other files is incorrect, and the right to a trial before a state judge who is not authorized or trained to make immigration status decisions, *see, e.g.*, *Farmers Branch II*, 701 F. Supp.2d at 858 n.30, and who is required to "defer" to any "conclusive ascertainment of immigration status by the federal government," Ord. § 1(4)(F)(4), which may well not be the kind of final determination by a federal immigration judge or federal court, which is what federal law requires for its purposes. *See also Alabama*, 2011 WL 4469941, at *43-*45 (finding similar rental residence prohibition preempted because, among other reasons, it "removes any federal discretion and impermissibly places the entire operation [of regulating 'harboring'] . . . squarely in the State's purview); *cf*. *Georgia Latino Alliance*, 793 F. Supp.2d at 1334-36.

To conclude, the Ordinance's rental exclusion is preempted by federal law as an impermissible regulation of immigration, as well as being field and conflict preempted by the federal immigration laws.

B. The Residence Restrictions are Void for Vagueness

The Ordinance is vague on its face, in violation of due process, because it fails to clearly define the persons subject to the occupancy license requirement at the heart of its residence

scheme, and because its uncertain terms allow too much discretion on the part of City officers to arbitrarily enforce its provisions. The Ordinance's vagueness implicates a number of liberty interests,[14] but in particular it impermissibly chills Tenant Plaintiffs' freedom to host family members and other guests in their homes, thus impinging on their right to association under the First Amendment. In so doing, the Ordinance implicates a substantial amount of constitutionally protected conduct.

A law is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment if: (1) it punishes people for behavior that they could not have known was illegal; or (2) there is a possibility of subjective enforcement of the law based on arbitrary and discriminatory deprivation of liberty interests. *See City of Chicago v. Morales*, 527 U.S. 41, 52 (1999); *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *see also Fields v. City of Omaha*, 810 F.2d 830, 833-34 (8th Cir. 1987); *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1047 (D. Neb. 2010). A court may invalidate a statute on the basis of either prong. *Morales*, 527 U.S. at 56. Here, the Ordinance is invalid in both respects.

To pass constitutional muster, the Ordinance must meet a particularly stringent standard of clarity in this case, both because it imposes criminal penalties and because it implicates First Amendment freedoms. *See Kolender*, 461 U.S. at 358 n.8 ("Where a statute imposes criminal penalties, the standard of certainty is higher."); *Cramp v. Bd. of Public Instruction of Orange County*, 368 U.S. 278, 289 (1961) (applying more stringent standard because "[t]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates

[14] The penalties contained in the Ordinance clearly implicate liberty interests and property interests that are protected under the Constitution. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (discussing liberty interests affected by criminal statute); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) (recognizing property right to one's home).

to inhibit the exercise of individual freedoms affirmatively protected by the Constitution."); *see also Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms.") (internal punctuation omitted). The Ordinance falls far short of this stringent standard. Accordingly, the Court should grant summary judgment on Plaintiffs' claim that the Ordinance is vague on its face in violation of due process.

1. The Residence Restrictions Do Not Provide Adequate Notice of Unlawful Conduct

The Ordinance fails to adequately define two critical terms upon which the bulk of the residence restrictions depend: "occupant" and "temporary guest." Without clearly defining these key terms, the Ordinance subjects tenants and landlords to prosecution, penalties of up to $100 per day, and eviction.[15]

A clear and unambiguous definition of the term "occupant" is critical, as without it members of the public cannot know who is subject to the Ordinance's housing-related requirements or when. The Ordinance imposes numerous duties on "occupants" as well as on landlords who deal with "occupants."[16]

[15] *See* Ord. §§ 1(3)(K) (imposing a fine "upon conviction" of "[a]ny person who violates this section"); 1(3)(J) (discussing "prosecution" of landlords and their agents); 1(3)(L) (providing that each day of unauthorized leasing or rental is a separate violation); 1(3)(I) (requiring landlords to make occupancy by an unlicensed occupant a basis for default of any lease).

[16] *See, e.g.*, Ord. §§ 1(3)(A)-(B) (requiring "occupants" to apply for and obtain occupancy licenses prior to occupying any rented dwelling unit); 1(3)(C) (requiring landlords to provide notice to "prospective occupant[s]" and prohibiting rental to an "occupant" without a license); 1(3)(H) (prohibiting leasing or renting a dwelling unit to an "occupant" without obtaining and retaining a copy of his or her license); 1(3)(I) (making it a violation for a landlord to lease a dwelling unit without including in the terms of the lease a provision stating that occupancy of the premises by an unlicensed occupant constitutes default under the lease); 1(3)(J) (making it a violation for a landlord to knowingly permit occupancy of a dwelling unit by an unlicensed

The Ordinance states that "occupant" "means a person, age 18 or older, who resides at a dwelling unit. A temporary guest of an occupant is not an occupant for the purposes of this ordinance." Ord. § 1(1)(E). Pursuant to the Ordinance, any individual who is a "temporary guest" is not an "occupant," *id.*, but critically, the Ordinance entirely fails to define "temporary guest." Neither does the Ordinance define the term "reside." Without further guidance, the term "occupant" is impermissibly vague and the Ordinance provides insufficient notice to landlords, tenants, and their guests as to whether they may be violating one or more of the Ordinance's provisions, beginning with the requirement that all "occupants" must possess licenses (and the landlord's obligation to inform occupants of the requirement).

Where a challenged law fails to define a term, the Court conducting a vagueness inquiry may look to common usage of the term by the state courts. *D.C. and M.S. v. City of St. Louis*, 795 F.2d 652, 654 (8th Cir. 1986). An examination of Nebraska state case law interpreting the term "guest" or "temporary guest" perfectly illustrates the unconstitutional ambiguity in the Ordinance. *See id.* In *Leon v. Kitchen Bros. Hotel Co.*, 134 Neb. 137, 277 N.W. 823 (Neb. 1938), the Nebraska Supreme Court considered whether long-term residents of a hotel were properly deemed "guests," or instead were tenants or lessees. *Id.* at 827. The plaintiff had resided at the hotel along with his wife for nearly two years, *id.* at 824, "had no other home or domicile" other than the hotel, "and was not a traveler." *Id.* at 827. Yet, because the plaintiff had the same privileges and was provided the same accommodations as ordinary guests at the hotel, the court concluded that the relationship between the hotel and the plaintiff "was identical with that existing between the hotel and temporary guests." *Id.* Relying on cases from other jurisdictions in which individuals who had resided at hotels for as long as a year were considered

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occupant); 1(2)(A)(2) (providing that an "occupant" who is not "lawfully present" or becomes "unlawfully present" shall be deemed to have breached a condition of the lease).

"guests" rather than "roomers," the court held that the plaintiff was a "guest." *Id.* at 827-28. Thus, under *Leon*, length of stay is not controlling in determining whether an individual is a guest. *Leon* demonstrates that reasonable minds may easily differ as to whether someone is an "occupant" rather than a "temporary guest" under the Ordinance.

Without an explanation of what is meant by "temporary guest," landlords, tenants, and guests will have no way of determining whether a violation of the Ordinance occurs when a tenant's family member makes an extended visit of finite duration if he or she fails to first obtain an occupancy license. A guest may stay with a family member for several months without paying rent, receiving mail at that address, accumulating more than minimal personal belongings there, or sharing in household chores. Throughout the visit, the guest may maintain a residence in another city or state, where the guest files income tax returns. The Ordinance leaves persons of ordinary intelligence to guess at whether such a person would be deemed an "occupant," or whether such a person would constitute a "temporary guest." Likewise, the Ordinance leaves ambiguous whether an individual who has a formal arrangement to sublet an apartment for a short period of two or three weeks is required to first obtain a license. Neither does the Ordinance provide guidance as to whether a violation occurs where a boyfriend or girlfriend of a tenant who has overnight visits multiple times a week for an open-ended period lacks an occupancy license. The Ordinance simply provides no standard for determining under which circumstances a visitor would be required to obtain an occupancy license. Absent clarification of the term "temporary guest," "a person of ordinary intelligence" will have insufficient notice of "what is mandated so that he or she can act accordingly." *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1047.

The Ordinance's vagueness is exacerbated by its failure to include a scienter requirement for tenants. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) ("Because of the absence of a scienter requirement . . . the statute is little more than 'a trap for those who act in good faith'") (citation omitted). Under the Ordinance, it makes no difference if the tenant or guest makes a good faith mistake as to whether an occupancy license is required.[17]

Tenant Plaintiffs all have family members and friends who stay with them for extended periods of weeks or months or longer, and could face eviction from their homes if someone they believe to be a temporary guest is deemed an "occupant." SOF 92; *see* Ord. § 1(3)(I). Without sufficient clarity, Tenant Plaintiffs may be forced to limit visits by loved ones or friends out of fear that they may be subject to eviction and other penalties under the Ordinance. SOF 93-96. In addition, Landlord Plaintiffs Dahl and Harper risk prosecution and fines for allowing individuals they believe to be temporary guests to occupy a rental unit. SOF 103, 105. The Ordinance thus fails to provide sufficient notice of the activity it prohibits.

2. The Residence Restrictions Fail to Establish Standards that are Sufficient to Guard Against Arbitrary Deprivations of Property and Liberty Interests

While the first prong of the void-for-vagueness doctrine focuses on actual notice to citizens, the second prong is "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (internal quotation marks omitted). In *Kolender*, the Supreme Court explained that statutes lacking sufficient definiteness permit "a

[17] *See* Ord. §§ 1(3)(A) ("Prior to occupying any leased or rented dwelling unit, each occupant, age 18 or older, must obtain an occupancy license."); 1(3)(K) ("Any person who violates this section shall be subject to a fine of $100 for each such violation, upon conviction"); 1(3)(I) (making occupancy by an unlicensed occupant a basis for default of the lease without regard to intent).

standardless sweep that allows policemen, prosecutors and juries to pursue their personal predilections." *Id*. at 358 (internal punctuation omitted); *see also Fields*, 810 F.2d at 834.

Here, the Ordinance fails to establish minimal guidelines for City police officers to guard against the arbitrary deprivation of liberty interests. The Ordinance bestows on City police officers the authority to charge individuals with violations of the Ordinance, but fails to provide comprehensible guidance to them in assessing when a violation has occurred. The Ordinance simply does not establish a standard definite enough to guard against "moment-to-moment judgment [by] the policeman on his beat." *Kolender,* 461 U.S. at 360 (internal punctuation omitted).

As discussed above, the Ordinance fails to clearly define "temporary guest[s]" who are exempted from the occupancy license requirement, thus leaving Fremont police officers free to arbitrarily and discriminatorily enforce the Ordinance's requirements against persons such as Plaintiffs. The concern for arbitrary enforcement is especially grave here, for two reasons. First, there is the "potential for arbitrarily suppressing First Amendment liberties," *Id.* at 358 (internal quotation marks omitted), namely the right to freedom of association. In addition, the Ordinance itself explicitly targets an unpopular group—"illegal aliens"—whom the Ordinance's proponents assert are predominantly members of a discrete and insular minority group. *See, e.g.*, SOF 13-15, 17, 19, 31, 40, 45, 48, 52-54, 57, 63. The Ordinance thus paves the way for discriminatory enforcement by police "against particular groups deemed to merit their displeasure." *Kolender*, 461 U.S. at 359 (internal quotation marks omitted). Because the Ordinance provides unfettered discretion to local officials to determine who is an "occupant" rather than a "temporary guest," its enforcement will inevitably lead to arbitrary deprivations of liberty and property interests.

In sum, the Court should conclude that the Ordinance's residence restrictions are void for vagueness in violation of due process and grant summary judgment on that ground.

II. The Court Should Grant Summary Judgment on Plaintiffs' Claims Challenging the Ordinance's Employment Provisions

A. The Employment Provisions are Preempted by Federal Law

Section 1(5)(H) of the Ordinance provides for sanctions against a business entity that "fail[s] to register in the E-Verify Program and verify the authorization of employment in the United States of each employee hired after such registration." As explained below, Section 1(5)(H) is preempted because it conflicts with Congress's purposes and objectives by imposing consequences for failing to participate in E-Verify that are not contained in federal law.

1. Background on Federal Employment Verification Laws

The Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, prohibits the employment of persons who are not authorized to work in the United States (either as a function of their citizenship or immigration status, or because they have obtained work authorization from the federal government). IRCA makes it unlawful to knowingly hire or continue to employ an "unauthorized alien," 8 U.S.C. § 1324a(a)(1)-(2), and provides sanctions for violation of this prohibition, *id*. § 1324a(f)(1). IRCA also provides a scheme for employers to verify persons' authorization to work in the United States, *id*. § 1324a(b), commonly referred to as the "I-9 process." Under IRCA, good-faith compliance with the I-9 process provides an employer with an affirmative defense if charged with a violation of knowing employment of unauthorized aliens. *Id*. § 1324a(a)(3). IRCA expressly preempts states and localities from imposing "civil or criminal sanctions (other than through licensing and

similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." *Id.* § 1324a(h)(2).

E-Verify, an internet-based program for verifying work authorization, was created in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, 110 Stat. 3009–655. *See Whiting*, 131 S. Ct. at 1975. IIRIRA provides that private employers may elect to participate in E-Verify. IIRIRA § 402(a). If an employer participating in E-Verify obtains confirmation of work eligibility through E-Verify, the employer establishes a rebuttable presumption that it has not violated the law with respect to the knowing employment of unauthorized aliens. *Id.* § 402(b)(1). Under IIRIRA, an employer who has elected to participate in E-Verify is not prevented from establishing the good faith defense to liability contained in IRCA for complying with the I-9 process, even where the employer fails to obtain confirmation of work eligibility using E-Verify. *Id.* § 402(b)(2); *see Whiting*, 131 S. Ct. at 1985-86.

2. The Ordinance's Imposition of Sanctions is Preempted

In *Whiting*, the Supreme Court held that an Arizona law purporting to impose licensing sanctions on employers who employ unauthorized aliens was not expressly preempted by IRCA's preemption clause. *See* 131 S. Ct. at 1977-81. The Court also issued a plurality decision concluding that Arizona's licensing sanctions for employing unauthorized aliens were not conflict preempted, in which Justice Thomas concurred. 131 S. Ct. at 1981-85; *id.* 1973 & fn*. With respect to an Arizona requirement that all employers participate in E-Verify, the Court issued a majority decision concluding that nothing in the text of IIRIRA precluded the requirement. *Id.* at 1985-86. A plurality of the Court also concluded that Arizona's E-Verify

mandate did not obstruct the purposes of IIRIRA, and therefore was not impliedly preempted, with Justice Thomas concurring in the judgment. *Id.* at 1986; *id.* 1973 & fn*.

The *Whiting* Court's discussion of Arizona's E-Verify requirement is most pertinent to the instant case.[18] In holding that the Arizona E-Verify requirement was not impliedly preempted, the Court relied in part on the fact that "the consequences of not using E-Verify under the Arizona law are the same as the consequences of not using the system under federal law. In both instances, the *only* result is that the employer forfeits the otherwise rebuttable

[18] The penalties in Ordinance § 1(5)(H) appear to apply only to an employer's "failing to register in the E-Verify Program and verify the authorization of employment in the United States of each employee hired after such registration." Ord. § 1(5)(H)(1), (2). To the extent that this provision also imposes sanctions on employers directly for *hiring or employing* unauthorized aliens, IRCA expressly preempts § 1(5)(H)(2) because it provides for injunctions against business entities "*that are not required to obtain a license or permit* to conduct business in the City of Fremont." Ord. § 1(1)(G) (defining "[b]usiness entity") (emphasis added). IRCA expressly preempts the Ordinance to this extent because IRCA precludes any law "imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ . . . unauthorized aliens." 8 U.S.C. § 1324a(h)(2) (emphasis added). An injunction is a sanction. *See, e.g.*, *Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 101 (1963); *Flemming v. Florida Citrus Exchange*, 358 U.S. 153, 155 n.2 (1958); *United States v. United States Gypsum Co.*, 340 U.S. 76, 82 (1950). *Whiting* does not change this outcome because that case held that the Arizona law at issue qualified for the "licensing or similar law" exception to IRCA's express preemption clause, *see* 131 S. Ct. at 1973-75. To the extent § 1(5)(H)(2) sanctions entities that are not required to have licenses or permits issued by Fremont for employing unauthorized aliens, that provision is *not* providing for sanctions through licensing or similar laws.

Relatedly, to the extent that the Ordinance imposes sanctions for hiring or employing unauthorized aliens (as opposed to simply not using E-verify), it is further impliedly preempted because, in conflict with both IRCA and IIRIRA, it fails to provide an affirmative defense against liability for employing "unauthorized aliens" to an employer who has complied in good faith with the federal I-9 process. *See* 8 U.S.C. § 1324a(b)(3) (establishing the affirmative defense); IIRIRA, Pub. L. No. 104-208, § 402(b)(2) (providing that I-9 defense is still available to E-Verify participants). The *Whiting* plurality's conclusion that the Arizona sanction was not impliedly preempted was based in significant part on the fact that the Arizona scheme "trace[s] the federal law." 131 S. Ct. at 1982. The Court expressly relied on the fact that the Arizona law "provides employers with the same affirmative defense for good-faith compliance with the I-9 process as does federal law." *Id.* In contrast, here, the Ordinance's failure to provide an affirmative defense to employers who comply with the I-9 process stands as an obstacle to the accomplishment of Congress's full purposes and objectives in enacting the INA.

presumption [that it would enjoy if it had verified work authorization using E-Verify] that it complied with the law" prohibiting employment of an "unauthorized alien." 131 S. Ct. at 1985-86 (emphasis added).

Critically, the Court expressly left open the question whether, consistent with federal law, the state could impose an affirmative sanction for failing to participate in E-Verify, noting that "Arizona has since amended its statute to include other consequences, such as the loss of state-allocated economic development incentives. . . . *Because those provisions were not part of the statute when this suit was brought, they are not before us and we do not address their interaction with federal law.*" *Id*. at 1986 n.10 (emphasis added) (citation omitted).

In contrast to the Arizona law in *Whiting*, the Ordinance here imposes an array of harsh consequences for not registering in or using E-Verify. Under the Ordinance, the consequences include loss of licenses or permits, repayment obligations, defending against civil suits, being subject to injunctions, and being subject to sanctions for not complying with an injunction. *See* Ord. § 1(5)(H)(1)-(2). The Ordinance's imposition of these consequences is fundamentally incompatible with the scheme Congress established in IIRIRA, under which, even if employers were encouraged to participate in E-Verify, they were not *penalized* for failing to do so. Fremont's imposition of idiosyncratic sanctions obstructs Congress' purposes and objectives in imposing a calibrated liability scheme against employers and is a fatal flaw.

B. The Employment Provisions are Void for Vagueness

The Ordinance's employment provisions are fundamentally vague. The Ordinance fails to put businesses on notice of whether they are within the Ordinance's coverage and, if they are, what they must do to comply. Relatedly, the Ordinance puts businesses at risk of discriminatory enforcement. *See supra* Part I.B. (discussing legal standards for vagueness inquiry).

First. It is wholly ambiguous whether a business must have employees who physically perform work within the City to be covered. Section 5(A) states a policy against employing "unauthorized alien[s] to perform work within the city." *See also* Ord. §§ 1(5)(E) & (F) (referring to businesses or employees "performing work within the City"). Section 5(C) extends to any business "that applies for any business license or permit in the City, or is awarded a contract for work to be performed in the City, or applies for any grant or loan from the City." *See also* Ord. § 1(1)(G) (defining "business entity"). Yet the Ordinance provides no guidance as to what circumstances would constitute work "within" the City. Countless businesses provide services that do not require that any of their employees ever be present in the physical location where the customer is sited. If the ACLU of Nebraska, located in Lincoln, takes a call from a potential client in Fremont, and calls another person or entity in Fremont on that person's behalf, that activity might be considered "work within the City," but could just as easily *not* be considered "work within the City." A business located in a neighboring city could enter into a contract with Fremont to provide a consulting service to the City Council and transmit a written a report of its recommendations to the Council, without any employee or principal ever being physically present in Fremont. The same uncertainty arises in that situation. It requires time and personnel for a business to register for and use E-Verify, and sanctions can apply to businesses that do not comply with the Ordinance. Business entities require clear notice of whether they have an obligation under the law, and the Ordinance does not provide it.

Second. Even in the case of a business that does have employees considered to be performing work "within" Fremont, the Ordinance is vague and ambiguous with respect to which employees' authorization must be verified using E-Verify under the Ordinance. On the one hand, given the reference to "work within the City," it is possible that only employees who are

physically present in the City are covered. But it is also possible that employees directing work toward customers in Fremont must be verified using E-verify, even though they are never physically present working in the City.

Third. Relatedly, the Ordinance is also impermissibly vague with respect to whether a covered business must use E-Verify for *all* of its employees, or just those whose work brings them within the Ordinance's coverage. Several provisions describe the business's obligation under the Ordinance as being to use E-Verify for *all* of its employees, without any regard for where they work, or whether they perform any work related to customers in Fremont. *See, e.g.*, Ord. §§ 1(5)(D)-(F) ("verify the authorization . . . of *each* employee hired after . . . registration [in the E-Verify program]") (emphasis added). It is impossible for employers to know which employees are within the scope of their E-Verify obligations: each employee working physically in Fremont, each employee performing work related to a customer in Fremont, or each employee employed by the business no matter where located.

The enforcement of the foregoing sections should be enjoined due to their impermissible vagueness, their related failure to provide the constitutionally required notice to businesses, and the unacceptable risk that businesses will be subjected to arbitrary enforcement actions.

III. The Court Should Grant Summary Judgment on Plaintiffs' Nebraska Law Claim that the City Lacks Municipal Authority to Enact Either Part of the Ordinance

Under state law, the extent of Fremont's authority turns on the category of city to which it belongs. Fremont is a First Class City by virtue of its population, that being between 5,000 and 100,000. *See* Neb. Rev. Stat. §16-101 (defining city of the first class as a city with a population more than 5,000 and not more than 100,000); SOF 3 (indicating Fremont's population is 26,397). Fremont has not passed a "Home Rule Charter." *See* SOF 130; *In re Lincoln Electric*

System, 265 Neb. 70, 655 N.W.2d 363 (Neb. 2003). Fremont is left with only a "legislative charter," the powers found in state statutes expressly granting authority. *Id.* at 80-83, 655 N.W.2d at 372-74.

Given these undisputed facts, the Ordinance fails each of the three tests that Nebraska's courts have set forth to measure the legitimacy of challenged municipal authority. First, in passing and enforcing it, the City would act far beyond the express powers delegated to it by Nebraska statutes. Second, the general power granted to cities of the first class, like Fremont, to protect the health, safety, and welfare of the City's inhabitants does not authorize an unreasonable, extraterritorial ordinance. Third, the Ordinance unlawfully legislates on matters not of purely local concern but rather of statewide (or national) concern, and it materially conflicts with the state legislature's actions and decisions on matters of statewide concern, including employment and fair housing. Thus, Fremont's electorate enacted a law beyond the City's power and authority, and it is invalid.

A. The Ordinance is Not Authorized by Any Power Expressly Granted to Cities like Fremont

Nebraska courts have long followed "Dillon's Rule," which provides that a political subdivision (including a City of the First Class) has only the specific powers granted it by the state legislature through statutes, and those grants of expressed powers must be narrowly and strictly construed against the City, and cannot be unilaterally extended by the city or by its electorate. The Nebraska Supreme Court elaborated this principle in *Garver v. City of Humboldt*, 120 Neb. 132, 231 N.W. 699 (Neb. 1930). The Court explained:

> Unlike natural persons [municipal corporations] can exercise no power except such as has been expressly delegated to them, or such as may be inferred from some express delegated power essential to give effect to that power. Therefore the question of judicial concern, as presented by this record, is not one of legislative function, but one of power under the charter which provides for the

> creation of a city of this class. . . . Courts almost universally hold that legislative charters wherein cities are empowered to perform certain acts or functions are construed with a greater degree of strictness than ordinary civil statutes, and the rule in Nebraska is that they shall be strictly construed. Their authority to perform municipal acts will not be extended beyond the plain import of the language of the charter. . . .[T]he city council by ordinance . . . cannot operate to extend the charter.

Id. 120 Neb. 132, 231 N.W. at 700-701; *see also In re Lincoln Electric Sys*., 265 Neb. at 80-83, 655 N.W.2d at 372-74; *Manners v. City of Wahoo*, 153 Neb. 437, 442 45 N.W.2d 113, 115 (Neb. 1950); *Chicago & N.W. Ry. Co. v. City of Omaha,* 156 Neb. 705, 718, 57 N.W.2d 753, 759 (Neb. 1953).

The fact that the Ordinance was passed by popular initiative does not in any way expand Fremont's authority. The underlying source of authority for the municipal electorate to pass a law by initiative is legislative. *See* Neb. Rev. Stat. § 18-2501 through 18-2538 (reissued 2007); *see also City of North Platte v. Tilgner*, 282 Neb. 328, 344-47, 803 N.W.2d 469, 484-86 (Neb. 2011). A municipal electorate is empowered to pass only those laws, referred to throughout the local initiative authorizing statutes as "measures," that the governing body of the same municipal subdivision could pass. *See* Neb. Rev. Stat. §18-2506 ("Measure means an ordinance, charter provision, or resolution which is within the legislative authority of the governing body of a municipal subdivision to pass[.]"). In Fremont's case, the legislative authority referred to would be that of the city council (and mayor).

Thus, the Court is referred for both source and limitations on the Fremont electorate and on the Ordinance at bar, to the Nebraska statutes expressly delegating specific powers, along with one "general" power, for Cities of the First Class. Fremont's authority to pass an ordinance must be found, if it exists, within the described powers found in Nebraska Statutes Chapter 16 for cities of the First Class, §§ 16-101 – 16-1115; Chapter 18 for cities and villages: laws

applicable to all, § 18-101 – 18-3001); or Chapter 19 cities and villages: laws applicable to more than one and less than all classes, (§ 19-101 – 19-5101). This set of statutes allocating various express powers to cities between 5,000 and 100,000 in population is sometimes referred to as a "Legislative charter." They furnish the "charter" or list of powers for municipalities like Fremont which have not passed their own so-called "home rule charter." *See, e.g.*, *In re Lincoln Electric Sys.*, 265 Neb. at 80-83, 655 N.W.2d at 372-74.

Searching the aforementioned statutes discloses no grant of express power for the Ordinance's *purpose*: to regulate and exclude immigrants "unlawfully present" or unauthorized to work in the United States or in that city. Nor is there any express authorization in those laws for the *means* Fremont has deployed: employment and rental housing restrictions targeting undocumented or unauthorized immigrants. No specific powers in the statutes even come close to mentioning such a purpose or means.

In sum, Plaintiffs have been unable to identify any specific granted power in the Legislative charter (chapters 16, 18, or 19) that can or should be stretched to enable or authorize the Ordinance.

B. The City's "General Grant of Power" (or "Police Power") Does Not Authorize the Ordinance, Which Apparently Reaches Beyond the Jurisdictional Limits of the City

To the extent Defendants may assert that authority for the Ordinance comes from the general grant of power given to Cities of the First Class, Plaintiffs note that that argument would fail because (even assuming the municipal electorate enjoys the same general grant of power as the City Council) the Ordinance apparently attempts to regulate far beyond the City's jurisdictional or geographic limits.

Neb. Rev. Stat § 16-246 provides a general grant of power to Cities of the First Class as follows:

> A city of the first class may make all such ordinances, bylaws, rules, regulations, and resolutions *not inconsistent with the general law of the state* as may be necessary or expedient, in addition to the special powers otherwise granted by law, for maintaining the peace, good government, and welfare of the city and its trade, commerce, and manufactures, for preserving order and securing persons or property from violence, danger, and destruction, for protecting public and private property, and for promoting the public health, safety, convenience, comfort, and morals and the general interests and welfare of the inhabitants of the city. . . . *The jurisdiction of the city to enforce such ordinances, bylaws, rules, regulations, and resolutions shall extend over the city* and over all places within two miles of the corporate limits of the city.

Neb. Rev. Stat § 16-246.

Of critical significance here, the Ordinance appears to sweep broadly to reach businesses, employers, and employees who are not located within the City of Fremont. The terms "business entity" and "work" are broadly defined and, along with the Ordinance's operative provisions, appear to extend the Ordinance's coverage to employment activity far beyond the city's jurisdictional and physical city limits, indeed statewide or even worldwide. *See* Ord. §§ 1(1)(G) (defining "business entity"); 1(1)(H) (defining "work"); 1(5)(E)-(F) (imposing requirements on "[e]very" or "any" "business entity employing one or more employees and performing work within the City"). So long as the business has at least one employee and "perform[s]work within the City," Ord. § 1(5)(E)-(F), the Ordinance can reach any entity's "for profit or not-for profit" activity, whether "licensed or not" by the city, no matter whether a local or a foreign entity and no matter where the business entity is located or based. Covered business entities are then directed "to use the E-Verify Program to verify the authorization of employment in the United States of *each* employee hired after such registration." Ord. § 1(5)(E)-(F) (emphasis added). In other words, the Ordinance's language appears to require any business entity, no

matter where located, who performs some "work within the City" to use E-Verify to verify the work authorization of "each" employee (no matter where located) hired thereafter.

Thus, an individual proprietor, a company or a § 501(c) entity (under the federal internal revenue code), for example, that merely delivers a product or service or an educational, religious or charitable project or program from afar must use the E-verify procedures entity-wide or risk prosecution and penalties from Fremont.[19] This arbitrary, unreasonable apparent reach of the Ordinance's employment requirements, enforceable by prosecution and penalties, crosses beyond the city's physical limits and jurisdictional power. The Ordinance's reach extends beyond the jurisdictional limitation set forth in Neb. Rev. Stat § 16-246, and also breaches the state law reasonableness requirement for exercises of the general grant of power. *See, e.g.*, *Standard Oil Co. v. City of Kearney*, 106 Neb. 558, 184 N.W. 109 (1921) (rejecting local ordinance as arbitrary and unreasonable despite the broad general grant of "police power"); *City of Scottsbluff v. Winters Creek Canal Co*, 155 Neb. 723, 729-31, 53 N.W.2d 543, 547-48 (Neb. 1952) (invalidating city ordinance restricting canals as unreasonable, despite any presumption of validity of a police ordinance).

C. The Ordinance is Further Invalid Because it Legislates on a Matter that is Not of Local Concern

Under Nebraska law, no Nebraska political subdivision may validly pass or enforce laws governing matters which are of statewide concern rather than of purely local concern, especially when the local law is in conflict with the decisions of the State Legislature on those matters. Even a so-called "police power" ordinance (otherwise authorized by the general grant of power discussed in the preceding section) is invalid if it is inconsistent with the general law of the state.

[19] These problems are exacerbated by the Ordinance's vagueness, discussed above. *See supra* Part II.B.

See Neb. Rev. Stat. § 16-246 (excepting from the general grant of power lawmaking that is "inconsistent with the general law of the state"); *see also Niklaus v. Miller*, 159 Neb. 301, 308, 66 N.W. 2d 824, 829 (Neb. 1954) ("[A] provision of a city home rule charter takes precedence over state statutes only in instances where the subject matter is of strictly local municipal concern."); *State ex rel Love v. Cosgrave*, 85 Neb. 187, 122 N.W. 885 (Neb. 1909) (indicating that police powers ordinances in conflict with state statutes, unless authorized expressly or by necessary implication, are void); 2 McQuillin, Municipal Corporations, § 4:78, at p. 239; 6A McQuillin, Municipal Corporations, 24:54-55 at p. 198, 207.

This principle provides an additional reason that the Ordinance is an invalid exercise of municipal power: the Ordinance seeks to legislate on matters that are not of purely local concern, and it therefore exceeds the City's powers under Nebraska law. Put another way, the Ordinance is in effect "preempted" by and under Nebraska law. Whether one regards the subject matter of the Ordinance as regulation of immigration (which, as shown in the federal preemption sections of this brief, is not a matter of local or municipal concern), or a regulation of employment and housing, the Ordinance is invalid because these are not matters for Fremont to regulate.

The key case on local laws invading statewide concerns is *Midwest Employers Council, Inc. v. The City of Omaha*, 177 Neb. 877, 131 N.W.2d 609 (Neb. 1964). This landmark case tested whether Omaha could pass and enforce its own equal employment opportunity law against discrimination by private employers. Even though Omaha was a home rule city, the Nebraska Supreme Court held that the city was without any express authority from the State Legislature, or even within its own home rule charter "to pass legislation pertaining to fair employment practice or civil rights." *Id.* at 885-86, 131 N.W.2d at 614-15.

Of critical significance here, the Court's holding was based in prominent part on its conclusion that it is the State Legislature, not individual municipalities, that is vested with the power and responsibility for enforcing law pertaining to employment within the State. The Court surveyed the state's many statutes on labor and employment matters that the Legislature had considered or passed, including Chapter 48 of the statutes, regarding workman's compensation, employment regulations, child labor, health and safety regulations, employment agencies, employment security, and other articles related to the subject of labor, and many other statutes. *Id.* at 886, 131 N.W.2d at 615. Based on the many state employment and labor laws it reviewed, the Court concluded that "it is obvious that the Department of Labor, created by the Legislature of this state, is vested with the power and responsibility of enforcing employment regulations within the state." *Id.* at 887, 131 N.W.2d at 615.

Further, the Court's conclusion was also based on the fact that, "on three occasions, the Legislature of this State has refused to pass fair employment practices legislation [citing bills in 1959, 1961 and 1963]." *Id*. The Court stated:

> This action by the Legislature is tantamount to a declaration by it that, although it controls labor-management relations and employment relations, it does not, at least through the present time, desire to legislate with respect to discrimination because of race, creed, or color in private employment.

Id.

In *Sanitary & Improvement Dist. No. 5 of Douglas County v. City of Omaha*, 221 Neb. 272, 376 N.W.2d 767 (Neb. 1985), the Nebraska Supreme Court invalidated a local ordinance concerning the annexation process. In concluding that the ordinance was not a matter of local concern, the Court relied on fact that the ordinance would be affect persons and property *outside the boundaries of the city*. The Court explained:

> The determination of the City of Omaha to annex or not to annex outlying property is a purely municipal concern, but this is not true of *the annexation process which necessarily affects property outside the municipality and persons who are not inhabitants of the City. The protection of such persons and property is matter of State concern* and in fulfillment of its duties in this respect, the State must fix the rules and regulations pertaining to annexation procedures.

Id., 221 Neb. at 277, 376 N.W.2d at 771 (citation omitted) (emphasis supplied); *see also* 2 McQuillin, § 4:84 , at p. 283 ("if the matter is of general concern to the inhabitants of the state outside the municipality, it is a state affair").

In short, when a city arrogates authority within a field of law which is a protected preserve of the State Legislature (or is otherwise not a field for local regulation), that trespass supplies sufficient ground to invalidate the political subdivision's ordinance. The local law succumbs even more surely when it is shown to conflict with the Legislature's actual prior enactments or with its record decisions not to enact laws concerning similar matters. Those two fatal circumstances are present here—Fremont has entered prohibited fields, and, while there, has contradicted state legislative decisions, both in state enactments and in the Legislature's refusals to enact.

1. The Ordinance's Employment Provisions

The Fremont Ordinance makes into law "the policy of the City to discourage business entities from knowingly recruiting, hiring for employment, or continuing to employ any person who is an unauthorized alien to perform work within the City." Ord. § 1(5)(A). It proceeds in that subsection to mandate all business entities and all agencies of the City to register for and utilize "the E-Verify Program to verify the authorization of employment in the United States of *each* employee hired after such registration." Ord. § 1(5)(E), (F) (emphasis added). As noted, that mandate is not limited to employees located within the City of Fremont. *Id.* ("each employee").

As the Nebraska Supreme Court made plain in *Midwest Employers Council*, it is the *State*, and not any locality, that "is vested with the power and responsibility of enforcing employment regulations within the state." The employment provisions of the Ordinance unquestionably seek to regulate employment. *Midwest Employers Council* is precisely on point and controls the outcome here: Fremont may not legislate on matters concerning employment, as those matters are not of local concern. This conclusion is reinforced by the fact that the Fremont Ordinance appears to reach beyond the City's geographic limits to business entities and employees not located within the City. *See In Sanitary & Improvement Dist. No. 5 of Douglas County*, 221 Neb. at 277, 376 N.W.2d at 771.

Further, that the Ordinance attempts to regulate matters not of purely local concern is made further plain by the actions of the State Legislature in considering certain employment-related legislation. Since January 2009, the Nebraska Legislature has repeatedly considered and rejected proposed legislation to require all employers to use E-Verify. SOF 133. On January 8, 2009, Senator Ashford introduced his LB 34 calling for all private employers in the state to use E-Verify. *See* Legislative Bill 34 (submitted as Peterson Dec. Ex. A) (statement of intent providing that the bill "Mandates that all employers use E-Verify to verify the employment eligibility of all new hires after December 31, 2010"). LB 34 did not pass, but rather was modified and incorporated into LB 403, introduced also in 2009 by Senator Karpisek. *See* Legislative Bill 403 (submitted as Peterson Dec. Ex. C). LB 403 was ultimately enacted into law and is now codified at Neb. Rev. Stat. §4-114, and mandates E-Verify use by *public* (governmental) entities and their contractors—but did *not* enact a universal E-Verify mandate for all employers in the state. LB 403 shows that the Legislature expressly chose not to pass the E-verify mandate for all private employers, but rather to confine the mandate to public employers.

As to private employers generally, instead of mandatory use of E-Verify the Legislature provided only the following:

> For two years after the operative date of this act, the Department of Labor shall make available to all private employers information regarding the federal immigration verification system. The department shall report to the Legislature no later than December 1, 2011, on the use of a federal immigration verification system by Nebraska employers.

Neb. Rev. Stat. § 4-114(3) codified from LB 403, § 7 (submitted as Peterson Dec. Ex. C).

Other legislative proposals confirm that mandating E-Verify use is not a matter of purely local concern. Also in 2009, Senator Friend introduced Legislative Bill 335, which would require disallowance of certain tax advantages such as credits for newly created jobs, to employers who "fail to verify the lawful presence" of their Nebraska employees. *See* Legislative Bill 335 (submitted as Peterson Dec. Ex. B). LB 335 was incorporated also into LB 403 in major parts, and passed as part of LB 403. Finally, in 2011, the Committee considered but has not advanced (nor has the Legislature enacted) Legislative Bill 569, sponsored by Senator Coash. LB 569, like LB 34 described earlier, would have mandated use of E-Verify for all those employers in the state covered by the Workers' Compensation Act as delineated in Neb. Rev. Stat. § 48-106. *See* Legislative Bill 569 (submitted as Peterson Dec. Ex. D).[20]

The Legislature's consideration of, but refusal to adopt, a Fremont-type mandate covering all employers makes clear that this matter is a statewide (if not nationwide) concern rather than a purely local concern. Fremont cannot by itself amend Neb. Rev. Stat. §§ 4-108 to 4-119, nor can it be allowed to overrule the Legislature's decision to confine the mandatory E-Verify system to public contractors and those who seek special tax benefits, as proved by the

[20] As indicated, copies of each of these legislative bills, certified by the clerk of the Nebraska State Legislature, are included with this filing. The Court may also take judicial notice of bills proposed in the state legislature.

rejection of LB 34 in its original form, and LB 569 to date. It is almost exactly the same situation as the Nebraska Supreme Court decried in *Midwest Employers Council*, where the Legislature's refusal to pass a state anti-discrimination law despite having multiple bills that would have so provided, made plain that Omaha's local ordinance on the same topic was invalid.

In sum, the Ordinance's employment provisions are invalid under state law because they seek to regulate employment and labor practices, which the Nebraska Supreme Court has held to be a matter of statewide concern, and because they conflict with the State Legislature's decision *not* to mandate the use of E-Verify by private employers.

2. The Ordinance's Residence Restrictions

Similarly, the Ordinance's residence restrictions are in excess of the City's authority. First, in effectively requiring the verification of "lawful presence" in order to qualify for rental housing in Fremont, the Ordinance intrudes upon an area that is not of purely local concern. *See* Argument Part I.A.2. As shown in the discussion of federal preemption issues, that is an area of national concern. But even if it were not an area of nationwide concern, it is at least an area of statewide concern. In LB 403, the State Legislature proposed and ultimately enacted a bill to require the checking of "lawful presence" in the United States as a condition to obtaining governmental benefits, including a "public or assisted housing benefit." *See* Legislative Bill 403 (submitted as Peterson Dec. Ex. C). Significantly, the State Legislature's action does not extend to all rental housing, as Fremont's would. The Ordinance thus intrudes in an area that is not of purely local concern, and in so doing, is inconsistent with the State Legislature's enactments.[21]

The Ordinance's residence restrictions further conflict with state law, namely Nebraska's Fair Housing Act, Neb. Rev. Stat. §§ 20-301 – 20-344, and specifically § 20-318(5). The

[21] To be clear, a Nebraska state version of Fremont's Ordinance would be preempted by federal law for all the same reasons that Ordinance 5165 is preempted.

Ordinance requires that applicants for occupancy licenses must indicate "Occupant's country or citizenship." Ord. § 1(3)(E)(7). Thus, the Ordinance explicitly inquires into each housing applicant's "national origin," which is specifically forbidden under the state fair housing law. *See* Neb. Rev. Stat. § 20-318(5) (making it unlawful to "Cause to be made any written or oral *inquiry or record* concerning the race, color, religion, *national origin*, handicap, familial status, or sex of a person seeking to purchase, rent, or lease any housing[.]" (Emphasis supplied.) The Ordinance "require[s]" that applicant's "country or citizenship" be provided, Ord. § 1(3)(E), and provides that occupancy licenses shall only be issued upon receipt of a "complete signed application," *id*. § 1(3)(F).[22]

So the Ordinance is in conflict with state law and cannot trump that proscription in state law. Because the occupancy license application is the fundamental, key part, thoroughly interwoven throughout the residence restrictions, the whole lot is infected and invalid.

In sum, Ordinance No. 5165 is invalid because it exceeds the City's authority under Nebraska law.

IV. The Court Should Grant Summary Judgment on Plaintiffs' Discrimination Claims

A. The Entire Ordinance Violates Equal Protection

Plaintiffs are entitled to summary judgment because the passage of the Ordinance was motivated by impermissible discrimination against Latinos, in violation of Equal Protection.[23] As shown below, and as described more fully in the Summary of Facts, *supra*, the

[22] The Ordinance contains a single exception to the requirement that the application be "complete:" applicants who do "not know of any [] number" establishing their lawful presence in the United States may so declare, in lieu of providing such a number. Ord. § 1(3)(E)(9)(b). The fact that the Ordinance contains this single exception further reinforces that all other application information not excepted is "require[d]." Ord. § 1(3)(E).

[23] As individuals of Latino background, Plaintiffs Mario Martinez, Paula Mercado, Martin Mercado, and Jane Doe are all members of the protected race and national origin group. SOF 88.

disproportionate impact of the Ordinance, the context of the Ordinance, and the history of the initiative process, including voter education materials and public statements by the Ordinance's sponsors and supporters, all demand the conclusion that the passage of the Ordinance was motivated, at least in part, by discrimination against Latinos.

As the Supreme Court held in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), a plaintiff need not prove that the challenged governmental action "rested solely on racially discriminatory purposes" in order to succeed on an Equal Protection claim. *Id.* at 265. Instead, the plaintiff need only show that a discriminatory purpose was "a motivating factor in the decision." *See id.* at 265-66 (" Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. . . . When there is proof that a discriminatory purpose has been a motivating factor in the decision, [] judicial deference is no longer justified."); *United States v. Sch. Dist. Of Omaha*, 565 F.2d 127, 127-28 (8th Cir. 1977) (applying *Arlington Heights* and concluding that a discriminatory purpose was a motivating factor in the school district's challenged actions).

Arlington Heights identified several nonexclusive considerations to guide a court's inquiry into whether discriminatory purpose was a "motivating factor" in a government decision. *See* 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). Those considerations include

> discriminatory impact, historical background, specific events leading up to the challenged decision, departures from the normal procedural sequence, substantive departures from the normal decision-making process, legislative or administrative history, and any other direct or circumstantial evidence relevant to intent.

Perkins v. City of West Helena, 675 F.2d 201, 209 (8th Cir. 1982) (citing *Arlington Heights*); *see also Arlington Heights*, 429 U.S. at 266-67; *Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *14-*15.

In particular, "the legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 268. Where, as here, the challenged law was enacted by a public vote, the relevant history includes direct and indirect evidence in the form of statements and conduct by the drafters, lawmakers, or sponsors, pamphlets prepared for voters, advertisements produced by supporters, as well as the ballot language and the words of the enacted law itself. *See Jones v. Gale*, 470 F.3d 1261, 1268-70 (8th Cir. 2006) (discussing relevant sources in determining whether a voter initiative was adopted with discriminatory intent in violation of the Commerce Clause); *see also, e.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (relying on statements made by voter initiative's sponsors and proponents in concluding that it was enacted for a discriminatory purpose); *Arlington Heights*, 429 U.S. at 268 ("In some extraordinary instances, the members might be called to the stand at trial to testify concerning the purpose of the official action").

Courts consider all the circumstances in determining whether discriminatory intent was a motivating factor, and a plaintiff need not establish or rely on each factor in order to prevail. *See Perkins*, 675 F.2d at 209 (*Arlington Heights* factors are not dispositive, and the court "must consider the totality of the circumstances" in determining whether a discriminatory purpose existed); *accord Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 580 (2d Cir. 2003).

Here, the undisputed facts concerning the historical context, discriminatory impact, and enactment history of the Ordinance compel a conclusion that discrimination against Latinos was a motivating factor in the passage of the Ordinance.

1. The Historical Background Reveals Discriminatory Intent

First, the historical context of the Ordinance, specifically the stark pattern of demographic change in Fremont preceding the proposal and passage of the Ordinance, indicates that the Ordinance was enacted in response to the fast-growing population of Hispanic individuals residing in Fremont. In 1990, the population was almost entirely white, with only 165 persons (0.7% of the total Fremont population) who were Hispanic or Latino. SOF 1. In 2000, that number had jumped to 1,085, or 4.3% of the population. SOF 2. By 2010, there were 3,149 Hispanic or Latino persons in Fremont, comprising 11.9% of the total Fremont population. SOF 3. Thus, the number of Latinos or Hispanics residing in Fremont in 2010 was nearly 20 times the number that had been residing in Fremont in 1990.

Ordinance sponsors were well aware of the growth of the Latino population in Fremont. *See, e.g.*, SOF 12, 13 (Warner was concerned that the Latino population had "more than tripled over five years, in our public schools"); SOF 43, 44, 58, 59, 64. During the public debate preceding the vote on the Ordinance, local newspaper articles discussed the rapid growth of the Hispanic population in Fremont. SOF 135.

Moreover, Ordinance proponents have directly acknowledged that the growth in the Latino population motivated their support for the Ordinance. Bob Warner, who first introduced the Ordinance in City Council and then actively supported the Ordinance petition admitted that the "problem" he was trying to work on was "the Hispanic influx into Fremont." SOF 13. *see also* SOF 43, 44 (John Wiegert's support for Ordinance explained by the boost in the Hispanic

population in Fremont); SOF 6-9 (complaints about growing numbers of Hispanic workers and workers with little knowledge of English at the Hormel plant were one reason Warner wanted to introduce the employment portion of the Ordinance); SOF 61 ("Hart said he joined the petition drive because Fremont residents were growing more concerned about the changes they were seeing in their city," referring to concerns that individuals in Fremont were speaking Spanish rather than English).

As the Court in *Central Alabama Fair Housing Center.* emphasized, "[L]egislation that comes on the heels of a substantial immigrant influx—in particular, where the legislation . . . has a disproportionate impact on these immigrants—should be eyed carefully." *Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *20.

2. The Ordinance has a Predictably Discriminatory Impact of Which its Sponsors Were Aware

Here, the Ordinance is very likely to have a disproportionate impact on Latino individuals residing in or seeking housing in Fremont. To begin with, persons of Latino background are a minority in Fremont. While Latinos made up 4.3 percent of Fremont's population in 2000, Whites (non-Hispanic) made up over 95 percent of the population. SOF 2. In 2010, Latinos were 11.9 percent of the population, while Whites (non-Hispanic) comprised 85.3 percent. SOF 3. Yet, critically, although Latinos are a *minority* of the overall Fremont population, they make up an overwhelming *majority* of the City's foreign-born population: 79.9 percent of the City's foreign-born population is from Latin America. SOF 3. Thus, the impact of the Ordinance – which specifically regulates the residence of non-citizens – falls most heavily on Latinos, who comprise the majority of Fremont's foreign-born population. *See Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *17 (reasoning that because "Latinos make up a disproportionate share of the State's foreign born population and constitute a large majority of the State's non-

citizen population," a state law prohibiting undocumented individuals from residing in mobile homes "has the greatest impact on this community").

Notably, the Ordinance's sponsors and proponents specifically understood and believed that the Ordinance would disproportionately impact Latinos. As Jerry Hart, one of the three named sponsors of the initiative petition, admitted during his deposition, he believed that all or the vast majority of illegal aliens in Fremont are Hispanic, and that a natural consequence of enforcing the Ordinance would be to reduce the number of Hispanics in Fremont. SOF 57, 63. Similarly, John Wiegert acknowledged his belief that undocumented immigrants in Fremont are "just . . . from Hispanic countries," stating "I haven't heard of anybody coming over here from France or Germany or Denmark." SOF 40.

3. The Ordinance's Enactment History Reveals Discriminatory Intent Against Latinos

An examination of public statements by Ordinance sponsors and proponents, pro-Ordinance advertisements and flyers that were circulated to the public, as well as local newspaper articles, commentary, and opinion pieces demonstrate that the only reasonable inference is that the Ordinance was motivated by discriminatory intent.

First, as noted above, Bob Warner (the City Council member who first proposed the Ordinance and was an active supporter) and sponsors Wiegert and Hart have all acknowledged that their support for the Ordinance was motivated by the growing Latino population in Fremont and/or complaints about Latinos, Hispanics, or Spanish speakers related to that growth. SOF 6-9, 10, 12, 13, 43, 61, 65. This evidence demonstrates directly that the Ordinance was motivated, at least in part, by discriminatory intent. Other Ordinance supporters, including signature-gatherer Wanda Kotas and Andy Schnatz, also expressed animus toward Latinos or Spanish

speakers during the public discussion surrounding the Ordinance. SOF 31, 32, 58, 60, 68-74, 76, 84-86, 98, 99.

Second, and equally critically, the public debate over the Ordinance was characterized by widespread and pervasive stereotyping of Hispanics as "illegal aliens." While the Ordinance on its face targeted "illegal aliens," the Ordinance's sponsors and proponents repeatedly conflated undocumented immigration status with Hispanic ethnicity. Significantly, in postcards and advertisements created by the sponsors and circulated to voters, in local newspaper opinion pieces authored by the sponsors, and local newspaper articles about the Ordinance, proponents repeatedly pointed to information regarding costs purportedly attributable to Hispanics or Spanish speakers as a basis for speculating that undocumented immigrants were causing a negative impact on the City.[24] Similarly, Warner's motivation for introducing the Ordinance in City Council was citizen complaints about unpaid hospital bills and about growing numbers of Spanish-speaking students in Fremont schools. SOF 10; *see also* SOF 14. Proponents widely assumed that Hispanics were "illegal" and "illegals" were Hispanic.[25] For example, John

[24] *See, e.g.*, SOF 77 (pro-Ordinance postcard and advertisement created by Wiegert and Hart and published in *Fremont Tribune*, citing money sent to Mexico from the U.S., unpaid hospital bills attributable to Hispanic patients, and costs of Limited English Proficiency programs in the public schools as evidence of costs of illegal immigration in Fremont); SOF 36 (May 18, 2010 *Fremont Tribune* opinion piece by John Wiegert, pointing to unpaid hospital bills "attributable to Hispanic patients"); SOF 37 (May 25, 2010 letter to the editor by John Wiegert, published in *Fremont Tribune* pointing to the same regarding Hispanic patients and stating, "No, we don't know how many of these were illegal, but on the other hand, we don't know how many are legal"); SOF 39 (Wiegert's letter to the editor, equating funds spent on Limited English Proficient programs in the public schools with "cost[s] these illegal aliens have on our school system in Fremont"); SOF 43 (reporting Wiegert's statement that Hispanics are "not all illegal. . . . But I would say the vast majority of them are"); SOF 42 (6/12/2010 *Fremont Tribune* article quoting Wiegert as saying, "We've got to hire interpreters to interpret for these people. . . . That's putting a strain on the legal system"); *see also* SOF 24-26, 38, 41, 42, 78.

[25] *See, e.g.*, SOF 31 (When a reporter asked Kotas how she knew a Hispanic family she had referred to was illegal, Kotas responded, "How do you know they're not"?); SOF 37 (Wiegert's

Wiegert expressly acknowledged that his support for the Ordinance was explained by the growth of Fremont's Hispanic population, stating: "Now, granted, they're not all illegal . . . I want to make that clear. But I would say the vast majority of them are . . . ." SOF 43. See also, e.g., 64-65.

Courts have warned against the lack of objective basis for such rampant stereotyping of Latinos as "illegal." As the Supreme Court has emphasized, "Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens." *United States v. Brignoni Ponce*, 422 U.S. 873, 886 (1975); *see also, e.g.*, *United States v. Manzo-Jurado*, 457 F.3d 928, 937 (9th Cir. 2006) (emphasizing that "[a] characteristic common to both legal and illegal immigrants does little" to provide a factual basis for believing that someone is out of status); *id.* at 937 (9th Cir. 2006) (stating that the inability speak English – a proxy for national origin or ethnicity – is not probative of lack of immigration status because "the same characteristic applies to a sizeable portion of individuals lawfully present in this country").

Moreover, the courts have made clear that this type of racial or ethnic stereotyping provides strong evidence of illegal discriminatory intent. Thus, in *Central Alabama Fair Housing Center*, the court pointed to similar evidence that state legislators conflated illegal immigration status with Hispanic ethnicity as support for the conclusion that the challenged state statute was motivated by a discriminatory purpose. *See* 2011 WL 6182334, at *20-21.

May 25, 2010, letter published in the *Fremont Tribune,* stating with respect to unpaid hospital bills attributable to Hispanic patients, "No, we don't know how many of these were illegal, but on the other hand, we don't know how many are legal"); SOF 57 ("I'm saying the only group that we have in Fremont of immigrants are Hispanic. If there are any illegal aliens, they would – there's no other place for them to come from, other group, period."); SOF 6 (Warner inferred that complaints mentioning employees with very little knowledge of English must be about Latino illegal aliens); SOF 64-65.

Similarly, in *Williams v. Lindenwood University*, 288 F.3d 349 (8th Cir. 2002), the Eighth Circuit held that defendants' "repeated use of racial terms interchangeably with references to criminality" raised an inference of discriminatory intent. *Id*. at 356; *see also id.* ("[O]ne could infer racially discriminatory intent merely by showing that the *defendant* assumed or implied that all gang bangers are black, because it is the intent and attitude of the defendant that is relevant."); *Lewis v. Heartland Inns of America, LLC*, 591 F.3d 1033, 1038-39 (8th Cir. 2010) (discussing gender stereotyping as evidence of unlawful discrimination); *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1283-84 (11th Cir. 2000) (explaining that even where racial hostility or animus are absent, a defendant who makes decisions based on racial stereotypes can be held liable for intentional discrimination) (citing *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 (11th Cir. 1999)).

The record is also replete with evidence of animus by Ordinance proponents against Spanish speakers and non-English speakers.[26] Notably, the overwhelming majority of persons in Fremont who speak a language other than English at home are Spanish speakers. SOF 3. The Ordinance proponents' widespread animus against Spanish speakers, expressed in connection

[26] *See, e.g.*, SOF 10 (Warner introduced Ordinance in part because of complaints about growing numbers of Spanish speakers in Fremont schools); SOF 32 (Kotas explaining that the Ordinance was partially a response to concerns about the school system being dragged down as a result of school children being forced to learn Spanish); SOF 35 (Wiegert expressing view that "When you go into Wal-Mart or Food 4 Less, you see signs that are in Spanish. We should make immigrants adapt to us at their expense. . . . If they don't want to learn our culture, they should be sent back"); SOF 61 (Hart joined petition drive because of concerns about changes in Fremont, including customers at Walmart speaking Spanish); SOF 62 (Hart "would prefer, since we are a country of English, to hear English."); SOF 76 ("Former City Councilman Bob Warner said he is suspicious of the number of adults in Fremont who seem to have no knowledge of English"); SOF 26 (Warner stating, "Am I racist? Absolutely not. I will say this though, if I had my choice; the house next door to me came up for sale would I rather have someone who can speak English and is a citizen in there than somebody who had no knowledge of English and I don't know who they are, well absolutely I'll take the one that does."); SOF 65, 66.

with their support for the Ordinance, provides strong evidence of discriminatory intent based on national origin. Numerous courts have recognized that language is used as a proxy for national origin and that discrimination based on language characteristics can amount to discrimination based on national origin. Because "language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment." *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947-48 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 43 (1997); *see also, e.g. Hernandez v. New York*, 500 U.S. 352, 371 (1991) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis"); *id.* at 371-72; *Farm Labor Organizing Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 540 (6th Cir. 2002) (noting that because language ability is often closely associated with race or ethnicity, decisions based on inability to speak English must be carefully scrutinized to determine whether they are a pretext for discrimination).[27]

Finally, the lack of objective facts supporting the need for the Ordinance also necessitates a conclusion that discriminatory intent was a motivating factor. Although the Ordinance contains several "Whereas" clauses purporting to justify the need for the Ordinance, the Ordinance sponsors were unable to point to any factual basis for those clauses. For example,

[27] *See also Fragrante v. City and County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989) ("Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem, but the candidate's" language skills); *Hernandez v. Erlenbusch*, 368 F. Supp. 752, 755 (D. Or. 1973) (concluding that "it is obvious" that tavern's prohibition on speaking Spanish at the bar "amounts to patent racial discrimination against Mexican Americans"); *cf. Yu Cong Eng v. Trinidad*, 271 U.S. 500, 528 (1926) (holding that statute prohibiting use of any language other than English or Spanish in business records denied Chinese merchants equal protection of the laws).

Wanda Kotas did not know what the basis was for including in the ballot measure the "whereas" clause stating that the presence of illegal aliens places a fiscal burden on the City, increasing the demand for, and cost of, public benefits and services, and did not know why the statement was included. SOF 30. She also did not know the basis for including the statement that crimes committed by illegal aliens in the City harm the health, safety and welfare of U.S. citizens and aliens lawfully present in the United States. SOF 30. Kotas did not know why any of the "whereas" clauses were included in the Ordinance. SOF 30. Similarly, Wiegert did not check the facts in the whereas clauses. SOF 34.

Neither Warner nor any of the three sponsors ever asked the Fremont Police Department for information about criminal activity involving "illegal aliens." SOF 79. The City's media relations representative indicated on several occasions that there are "no strong indicators that illegal immigration is having a significant negative impact" in Fremont, and the chief of police agreed with this assessment. SOF 80, 83; *see also* SOF 81 (Hart did not know whether any gang crimes he had supposedly read about were being committed by "illegal aliens"). Further, while the Ordinance sponsors claimed that illegal immigration was a serious problem in Fremont, local newspapers reported to the public that authorities lacked information regarding the actual number of undocumented immigrants residing or working in Fremont. SOF 136.

Instead, as discussed above, the Ordinance sponsors and other supporters publicly and repeatedly pointed to alleged problems relating to Latinos or Spanish speakers, rather than undocumented immigrants, to justify the need for the Ordinance. Though more than 20 percent of Fremont's foreign-born population is other than Latino, SOF 3, the record contains no evidence of any of the Ordinance's sponsors or supporters trying to gather or extrapolate facts about "illegal aliens" from any other population than the City's Latino population. The

Ordinance proponents' lack of racially neutral factual support for the asserted need for the Ordinance indicates that the concern regarding illegal immigration was a pretext for invidious discrimination against Latinos in Fremont.

Taken together, the only conclusion that can be drawn from the undisputed facts is that unlawful discrimination against Latinos was, at a minimum, one motivating factor in the enactment of the Ordinance. The Ordinance's introduction followed on the heels of a dramatic increase in the City's Latino population. Ordinance proponents acknowledged that the Ordinance was motivated by concern over the fast-growing Latino population. Ordinance proponents were aware that the Ordinance would have a disproportionate impact on Latinos, and intended that impact. Ordinance proponents repeatedly stereotyped Hispanics as being "illegal and conflated "illegal aliens" with Hispanics and Spanish speakers. Ordinance proponents repeatedly expressed hostility toward and concern over the growing numbers of Spanish speakers in the City. The Ordinance sponsors cited purported problems allegedly attributable to Hispanics and Spanish speakers as justification for the Ordinance. The Ordinance sponsors had little factual support for their assertions that illegal immigration was a serious problem in Fremont, other than information relating to Hispanics or Spanish speakers, rather than undocumented immigrants. *See Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *16-*22 (concluding, at preliminary injunction stage, that challenged law was motivated by discriminatory intent against Latinos).

In sum, even if concern for illegal immigration were one genuine motivation behind the Ordinance, the undisputed facts make clear that the Ordinance was also motivated in part by discriminatory intent against Latinos.

4. Defendants Cannot Show that, Absent Discrimination Against Latinos, the Ordinance Would Have Been Enacted

Once the plaintiffs in an Equal Protection case have succeeded in showing that unlawful discrimination was a motivating factor in the challenged decision, the burden shifts to the defendants to prove that the same decision would have been reached had discrimination not played any role. *See Arlington Heights*, 429 U.S. at 270 & n.21. Thus, here, it is Defendants' burden to prove that the voters would have enacted the Ordinance anyway, even if discrimination were removed from the calculus. However, based on the undisputed facts discussed above, a reasonable factfinder simply could not conclude that the Fremont voters would have reached the same decision if discrimination against Latinos were not a factor. As demonstrated above, the public debate preceding the vote on the Ordinance was permeated by rampant racial and ethnic stereotyping of Latinos, with "illegal alien" repeatedly used as thinly-veiled proxy for such persons.

B. The Residence Restrictions Violate the Fair Housing Act

For substantially the same reasons as discussed in the preceding Equal Protection analysis, Plaintiffs are entitled to summary judgment on their claim under the Fair Housing Act, 42 U.S.C. § 3601 et seq ("FHA"), that the Ordinance impermissibly restricts housing to Latinos based on their race and national origin.[28]

First, the Ordinance constitutes a restriction on housing cognizable under both § 3604(a) and § 3604(b) of the statute. Section 3604(a) makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of" race or national origin. Here,

[28] Tenant Plaintiffs Mario Martinez, Paula Mercado, Martin Mercado, and Jane Doe are all members of a protected race or national origin group, that of Latinos. SOF 88. In addition, Plaintiff Maria Roe's husband, whom she resides with, is a member of a protected race or national origin group, that of Latinos. SOF 88.

the Ordinance makes housing "unavailable" by prohibiting rental without an occupancy license, and then revoking the occupancy license for a specific category of renters deemed "not lawfully present in the United States." Ord. § (1)(3)(A); *id.* § 1(4)(D).. The Ordinance makes housing "unavailable" because such persons would no longer have access to their dwelling.[29]

Section 3604(b) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith" because of race or national origin. By effectively denying City occupancy licenses to persons deemed "not lawfully present" in the United States, the Ordinance discriminates against such persons as well as against persons desiring to live with them, in the terms, conditions, or privileges of the rental and in the provision of services. *See, e.g.*, 24 C.F.R. § 100.65(b)(4) (prohibited actions include "limiting the use of privileges, services, or facilities associated with a dwelling because of" race or national origin); 24 C.F.R. § 100.70(d)(4) (stating that § 3604(b) prohibits "[r]efusing to provide municipal services . . . or providing such services differently because of" race or national origin); *cf. id.* § 100.70(d)(4) (stating that § 3604(b) prohibits "[d]enying … an application made by a . . . renter or refusing to approve such person for occupancy in a cooperative or condominium dwelling" because of race or national origin).

Second, the same evidence that intentional discrimination was a motivating factor that Plaintiffs reviewed in their Equal Protection discussion also establishes a violation of the FHA's prohibition of race or national origin discrimination. As in the Equal Protection context,

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[29] *See, e.g.*, *Ventura Village, Inc. v City of Minneapolis*, 419 F.3d 725, 727 (8th Cir. 2005) (noting that courts have entertained an array of challenges to municipal action that have the effect of making housing "unavailable" under § 3604(a), including "refusal to grant a special use permit; enforcement of a spacing restriction; [and] denial of government funding for a housing project") (internal footnotes and citations omitted); *Evans v. Tubbe*, 657 F.2d 661, 662 & n.3 (5th Cir. 1981) (where plaintiff was prevented from entering his property, claim was cognizable under § 3604(a)); *Housing Rights Ctr. v. Sterling*, 404 F. Supp. 2d 1179, 1190-92 (C.D. Cal. 2004) (actions that make housing "effectively . . . unavailable" violate § 3604(a)).

Plaintiffs need only show that race or national origin was one motivating factor in the enactment of the Ordinance. *See, e.g.*, *Sofarelli v. Pinellas County*, 931 F.2d 718, 722 (11th Cir. 1991) ("In order to prevail under the [Fair Housing] Act, [plaintiff] has to establish that race played some role" in the challenged actions); *Moore v. Townsend*, 525 F.3d 482, 485 (5th Cir. 1975) ("Race is an impermissible consideration in a real estate transaction, and it need only be established that race played some part in the refusal to deal."). In FHA cases as in Equal Protection cases, the Courts apply the *Arlington Heights* analysis. *See, e.g.*, *Tsombanidis*, 352 F.3d at 579-80 (applying *Arlington Heights* factors in FHA case and affirming district court's finding of discriminatory intent); *United States v. City of Birmingham*, 727 F.2d 560, 565 (6th Cir. 1984) (applying *Arlington Heights* factors in FHA case).

As detailed in the preceding section, the Ordinance was motivated at least in large part by discriminatory intent against Latinos, and a reasonable factfinder simply could not conclude, on these facts, that the Ordinance would have been enacted absent that motivation. *See supra* Part IV.A; *see also Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *14-*22 (applying *Arlington Heights* factors to conclude that state alienage-based housing restriction was motivated by discriminatory purpose).

In addition, Plaintiffs can also succeed on a disparate impact theory.[30] As discussed above, the burden of the Ordinance falls heavily and disproportionately on persons of Latino background. *See supra* Part IV.A (explaining that Ordinance regulates residence of noncitizens, and that Latinos comprise a minority of the Fremont population but make up an overwhelming majority (79.9%) of Fremont's foreign-born population according to 2000 Census data).

[30] In a case arising out of the Eighth Circuit, the Supreme Court has granted a petition for writ of certiorari on the question whether a violation of the Fair Housing Act can be established by showing disparate impact. *See Magner v. Gallagher*, --- S.Ct. ---, 2011 WL 531692 (Nov. 7, 2011).

In sum, the Court should grant summary judgment in favor of Plaintiffs on their FHA claim.[31]

CONCLUSION

For the reasons set forth above, the Court should grant summary judgment for Plaintiffs and enjoin Defendants from enforcing City of Fremont Ordinance 5165.

Dated this 3rd day of January, 2012.

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[31] Plaintiffs have challenged the entire Ordinance as invalid for the reasons asserted in their complaint and in this brief. But if for any reason the Court finds any portion of the Ordinance not to be invalidated, Plaintiffs assert that such portion cannot be saved by severance, pursuant to the Nebraska "severability" analysis for initiated laws, as laid out in *Duggan v. Beermann*, 249 Neb. 411, 427-33, 544 N.W.2d 68, 78-81 (Neb. 1996). Fremont's Ordinance must be found non-severable and entirely invalid. The Ordinance has common definitions throughout; there is intertwining of purpose and means of seeking that purpose (excluding persons unlawfully present in the United States from Fremont); there is no way to determine the intent of the signers of the petition or voters as to the residence and employment provisions in the sense of whether there was inducement of one or the other portions that infected the remainder, and the purported "severability clause" was not on the ballot for the election. SOF 134. No part of the Ordinance can be saved by severance of the parts.

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2012, I electronically filed the foregoing Memorandum in Support of Martinez Plaintiffs' Motion for Summary Judgment with the Clerk of the Court for the United States District Court for the District of Nebraska using the CM/ECF system. All participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/Kenneth J. Sugarman
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