No. 12-1705

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARIO MARTINEZ, JR. ET AL.,
Plaintiffs-Appellants

v.

CITY OF FREMONT, ET AL.,
Defendants-Appellees

On Appeal from the United States District Court
for the District of Nebraska

OPENING BRIEF OF *MARTINEZ* PLAINTIFFS-APPELLANTS

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SUMMARY OF THE CASE

This appeal concerns the validity of the Fremont, Nebraska immigration ordinance, which prohibits harboring of and denies residency to unlawfully present aliens and mandates that all employers participate in E-Verify, a federal electronic employment verification program. The district court held that the heart of the Ordinance – its harboring prohibition and provisions directly revoking occupancy licenses – were preempted because they conflict with the comprehensive federal system regulating the presence, harboring, and removal of noncitizens. This appeal asserts that the district court's decision declining to enjoin the remainder of the Ordinance must be reversed because (1) the Ordinance cannot be severed under Nebraska law; (2) the remaining residency-related portions of the Ordinance are unconstitutional and preempted by federal immigration law; and (3) the entirety of the Ordinance must be struck down as an invalid exercise of Fremont's municipal authority under Nebraska law. Finally, this appeal asserts (4) that the district court erred in holding that Plaintiffs did not adequately plead a Fair Housing Act claim based on a disparate impact discrimination theory.

Oral argument (15 minutes) is necessary because this case involves several complex issues, including an issue of first impression in this Circuit regarding the constitutionality under the Supremacy Clause of a municipal ordinance conditioning residency on immigration status.

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INTRODUCTION

This case concerns the validity of the City of Fremont, Nebraska's local immigration law, Ordinance No. 5165 (hereinafter "Ordinance").[1] The Ordinance prohibits "harboring" of and residency by unlawfully present aliens in rental housing, and establishes a process for denying residency to noncitizens found to be unlawfully present in the United States by denying them "occupancy licenses" for rental housing. The Ordinance also mandates that employers participate in E-Verify, the federal employment authorization verification program. The district court correctly held that the heart of the Ordinance – its prohibitions on harboring and residency, and its provisions directly revoking occupancy licenses – were preempted because they conflict with the comprehensive federal immigration system.

The district court erred, however, in preserving the Ordinance's sections mandating that noncitizens report their immigration status information to local police in order to reside in rental housing, and setting forth procedures for determining which noncitizens' occupancy licenses should be revoked based on unlawful presence (even though the City has no power to actually revoke). This ruling must be reversed for at least three independent reasons.

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[1] The full text of Ordinance No. 5165 is included in the Addendum to this brief. *See also* JA 473-81.

First, these portions of the Ordinance cannot be severed from the provisions properly found invalid by the district court. *See infra* Part I.

Second, and more fundamentally, whether considered as part of the City's impermissible scheme to regulate residence based on immigration status, or as stand alone provisions, these provisions are preempted by federal immigration law. In particular, as the Fifth and Third Circuits have held, local residency-based immigration ordinances like Fremont's are preempted in their entirety. *See infra* Part II.

Third, the unenjoined provisions cannot stand because the entire Ordinance is an invalid exercise of Fremont's municipal authority under Nebraska law. *See infra* Part III.

Finally, the district court also erred in holding that Plaintiffs did not plead a Fair Housing Act claim based on disparate impact discrimination. *See infra* Part IV.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. On February 20, 2012, the district court issued its summary judgment decision and judgment. Plaintiffs timely filed a notice of appeal on March 21, 2012. After the district court issued a decision and order on March 28, 2012, denying Plaintiffs'

post-judgment motion, Plaintiffs filed an amended notice of appeal on April 5, 2012. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Ordinance §§ 1.3 and 1.4 are severable, under Nebraska law, from the Ordinance's unconstitutional provisions prohibiting harboring and requiring denial of residency to noncitizens found to be unlawfully present, particularly when §§ 1.3 and 1.4 were expressly intended to enforce those invalidated provisions. *Duggan v. Beermann*, 249 Neb. 411 (Neb. 1996).

2. Whether §§ 1.3 and 1.4, requiring noncitizens to report to local police and provide immigration status information in order to reside in rental housing and providing procedures for determining which occupancy licenses should be revoked due to unlawful presence, are preempted under the Supremacy Clause, U.S. Const. art. VI, cl. 2. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802 (5th Cir. 2012), *petition for reh'g pending*; *Lozano v. City of Hazleton*, 620 F.3d 170, 197 (3d Cir. 2010), *vacated and remanded at* 131 S. Ct. 2958 (2011).

3. Whether the entire Ordinance is an invalid exercise of Fremont's municipal authority under Nebraska law, when the Ordinance is inconsistent with state law and legislative decisions, does not involve a matter of local concern, and legislates

beyond the City's territorial jurisdiction. *Midwest Employers Council, Inc. v. City of Omaha*, 177 Neb. 877, 131 N.W.2d 609 (Neb. 1964); Neb. Rev. Stat. § 16-246.

4. Whether Plaintiffs pleaded a federal Fair Housing Act discrimination claim based on a disparate impact theory, or whether Plaintiffs should be deemed to have done so. Fed. R. Civ. P. 8; Fed. R. Civ. P. 15(b).

STATEMENT OF THE CASE

Plaintiff tenants, landlords, and employers commenced this litigation (the "*Martinez*" case) seeking declaratory and injunctive relief against the Fremont Immigration Ordinance, Ordinance No. 5165, on July 21, 2010. Doc. #1 (Compl.).[2] After Plaintiffs amended the complaint to add a plaintiff and substitute new official defendants, the operative complaint is the Third Amended Complaint. JA 303-34. Plaintiffs alleged that the Ordinance violated the Supremacy Clause and the federal Fair Housing Act, 42 U.S.C. § 3601 et seq., and that it exceeded the City's municipal authority under Nebraska law. Plaintiffs also raised Equal Protection and Due Process claims.

On September 9, 2010, the district court certified a question to the Nebraska Supreme Court:

[2] The same day, another set of Plaintiffs ("*Keller* Plaintiffs") also filed suit challenging the Ordinance. The two cases have been consolidated on appeal and cross-appeal (Nos. 12-1702, 12-1705, 12-1708). Unless otherwise specified, references to "Plaintiff" in this brief refer to *Martinez* Plaintiffs.

> May a Nebraska city of the first class, that is not a "home rule" city under Article XI of the Nebraska Constitution and has not passed a home rule charter, promulgate an ordinance placing conditions on persons' eligibility to occupy dwellings, landlords' ability to rent dwellings, or business owners' authority to hire and employ workers, consistent with Chapter s 16, 18, and 19 of the Revised Statutes of Nebraska?

JA 132. On November 5, 2010, the Nebraska Supreme Court "decline[d] to accept the federal district court's certified question." JA 144.

On cross-motions for summary judgment, on February 20, 2012, the district court issued a decision holding that the Plaintiffs had standing to sue, and that portions of the Ordinance were preempted under the Supremacy Clause and constituted disparate impact discrimination in violation of the Fair Housing Act. *Keller v. City of Fremont*, Nos. 8:10CV270, 4:10CV3140, 2012 WL 537527 (D. Neb. Feb. 20, 2012) (reproduced in Addendum and JA 91-127).

In particular, the court held that the City's attempt to prohibit harboring of unlawfully present aliens and to deny housing to such aliens based on immigration status conflicted with federal immigration law and was therefore preempted. *Id.*, 2012 WL 537527, at *9. Accordingly, the Court held that § 1(2), prohibiting harboring and prohibiting unlawfully present aliens from residing in rental housing, and §§ 1(4)(D) and 1(3)(L), specific subsections revoking occupancy permits for unlawfully present aliens and imposing related fines, were preempted. *Id.* at *10. However, the court held that the remainder of §§ 1(3) and 1(4),

conditioning residence on provision of immigration status information and establishing a process for determining which noncitizens' occupancy permits would need to be revoked based on immigration status, were not preempted. *Id.* The court also held that § 1(5), mandating employer participation in E-Verify, was not preempted. *Id.* at *7-8.

The court dismissed Plaintiffs' municipal authority, Equal Protection, and Due Process claims. *Id.* at *17, 11-12. The court also held that the invalid portions of the Ordinance were severable under Nebraska law. *Id.* at *10. The same day, the court entered a permanent injunction and declaratory judgment against §§ 1(2), 1(3)(L), and 1(4)(D) of the Ordinance. JA 91-127, 128-29.

Plaintiffs filed a post-judgment motion asking the court to clarify or correct its decision to reflect that not only *Keller* Plaintiffs but *Martinez* Plaintiffs had alleged a Fair Housing Act claim based on a disparate impact discrimination theory and therefore prevailed on that theory. JA 711-17. On March 28, 2012, the district court denied the motion. JA 148-50.

STATEMENT OF FACTS

Background

Fremont is a Nebraska city with a population of approximately 26,000.[3] Fremont's Latino[4] population has increased dramatically in recent years, rising

[3] JA 504, 510, 515.

from less than 1 percent of the population in 1990 to 11.9 percent by 2010.[5] Latinos comprised 79.9 percent of the City's foreign-born population in 2000,[6] and Spanish-speakers comprise the majority of persons in Fremont who speak a language other than English.[7]

The Ordinance was originally proposed as a City Council measure in response to the growing number of Latinos in Fremont, according to its original sponsor.[8] After the proposal failed, a petition drive to enact the Ordinance by public vote was begun. Two of the petition's sponsors, Weigert and Hart, believe that the vast majority of illegal aliens in Fremont are Latino.[9] Hart acknowledged that a natural consequence of the Ordinance would be to reduce the number of Hispanics in Fremont.[10] Advertisements and voter education materials supporting

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[4] Plaintiffs use the term "Latino" to connote both "Latino" and "Hispanic," except where the term "Hispanic" is specifically used in evidentiary materials or testimony.

[5] JA 434-36, 450-52, 516-17; *Martinez* Doc. #163-2. Hereinafter, all docket numbers ("Doc. #") will refer to the *Martinez* docket.

[6] JA 443-45.

[7] *Id.*

[8] Doc. #163-2 (Sugarman Dec. Ex. E (Warner Dep. 54:9-24, 76:9-77:4, 47:22-49:25, 51:3-52:20, 52:10-53:4, 53:5-10, 120:1-121:24 & Ex. 31, 120:1-122:17, 76:20-77:7)).

[9] JA 484-93; Doc. #164-4 (Ranahan Dec. Ex. D).

[10] JA 494.

the Ordinance featured purported problems caused by Hispanics or Spanish-speakers as a proxy for information concerning undocumented immigrants.[11]

The Ordinance was passed by voters on June 21, 2010. Doc. #163-2 (Sugarman Dec. Ex. S).[12]

Provisions of Ordinance No. 5165

Residency

The Ordinance prohibits "harboring" in any rental unit of persons deemed "unlawfully present" in the United States, and prohibits such persons from entering into a lease to reside in rental housing in Fremont. Ord. §§ 1(2)(A)(1)-(2). The Ordinance defines "harboring" to include "rent[ing] … to an illegal alien" with knowledge or in reckless disregard of the alien's unlawful status. Ord. § 1(2)(A)(1).

Section 1(2)(A)(4) expressly provides that the procedures in §§ 1(3) and 1(4) are intended to enforce the prohibitions in § 1(2). Section 1(3) enforces those

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[11] JA 454-64; Doc. #163-1 (Sugarman Dec. Ex. B (Hart Dep. 55:15-57:17 & Exs. 40 & 41)); Doc. #163-2 (Sugarman Dec. Ex. F (Wiegert Dep. 158:1-15 & Exs. 13 & 14)).

[12] Prior to this litigation, on March 11, 2009, the City filed a state court declaratory judgment action alleging in part 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." Doc. # 163-2 (Sugarman Dec. Ex. H). The 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 certain claims nonjusticiable pre-election and holding that the measure addressed the single subject of "regulating illegal aliens in Fremont").

prohibitions through an occupancy licensing scheme that requires prospective renters to report to the Fremont Police Department and provide immigration status information in order to reside in a rental unit.[13] Ord. § 1(3). Each prospective tenant is required to obtain an "occupancy license." Ord. § 1(3)(A). To obtain a license, prospective tenants must provide their "country or citizenship," Ord. § 1(3)(E), and noncitizens must provide their immigration status information. Ord.§ 1(3)(E)(9)(b). Upon receipt of a completed application and payment of a $5 fee, the City issues a license. Ord. § 1(3)(F).

Landlords are required to notify prospective occupants of the license requirement and are prohibited from permitting occupancy without a license. . Ord. § 1(3)(C).

A landlord or renter who fails to comply with the Ordinance is subject upon conviction to fines of $100.00 per violation. *See* Ord. §§ 1(3)(A), (C), (H), (I)-(K). The lease or rental of a dwelling unit without obtaining and retaining a copy of the occupancy license of every occupant is a separate violation. Ord. § 1(3)(L).

To further enforce the prohibitions on harboring and residence of unlawfully present aliens, § 1(4) sets out a process to determine which occupancy licenses should be revoked based on unlawful presence. The Police Department contacts

[13] Prior to the Ordinance, Fremont did not have any occupancy license requirement. Doc. #163-1 (Sugarman Dec. Ex. D (Mullen Dep. 111:9-22).

the federal government to ascertain the "immigration status" of each noncitizen holder of an occupancy license. *Id*. § 1(4)(A). The Ordinance permits revocation of the licenses of individuals whom the City deems "unlawfully present" based on information received from the federal government. Ord. §§ 1(4)(B), (D), (F).

Employment

The Ordinance requires every business entity in the City that employs at least one employee who performs "work within" the City to register in and use the E-Verify Program to verify the employment authorization of every employee hired thereafter. Ord. §§ 1(5)(E)-(F). The City Attorney may bring a civil action seeking injunctive relief against business entities suspected of non-compliance. Ord. § 1(5)(H)(2).

STANDARDS OF REVIEW

The issues of preemption, severability, and municipal authority are questions of law reviewed *de novo*. *See Noe v. Henderson*, 456 F.3d 868, 869-70 (8th Cir. 2006) (preemption is a legal question that the court reviews de novo); *see also Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (noting, in case raising severability of a state law, that "courts of appeals owe no deference to district court adjudications of state law"); *Salve Regina College v. Russell*, 499 U.S. 225, 235-40 (1991) (federal appellate courts review determinations of state law *de novo*).

Sufficiency of the pleadings is also reviewed *de novo*. *Abels v. Farmers Commodities Corp*., 259 F.3d 910, 916 (8th Cir. 2001).

SUMMARY OF ARGUMENT

The district court properly held that Fremont was preempted from denying noncitizens the ability to reside in the City based on immigration status, and from prohibiting the harboring of unlawfully present aliens. The court erred, however, in preserving the Ordinance's sections conditioning residence on reporting immigration status information to local police (Ord. § 1(3)) and establishing procedures for determining *which* noncitizens should be denied the ability to reside in the City based on unlawful presence (Ord. § 1(4)) – even though the City has no right to deny them residence.

First, regardless of whether the district court rightly or wrongly found §§ 1(3) and 1(4) unpreempted, the court's ruling must be reversed because these provisions are not severable from the Ordinance's invalid portions. The residency-related provisions of the Ordinance operate as one unified whole designed to carry out a common purpose, which the district court correctly held invalid: the prohibition of harboring and residency of unlawfully present aliens and, relatedly, the removal of unlawfully present aliens from rental housing. Section 1(2) of the Ordinance prohibits landlords from "harboring" unlawfully present aliens in rental housing and prohibits such aliens from entering into leases. Sections 1(3) and 1(4)

work to enforce these prohibitions by requiring renters to provide immigration status information to local police and obtain occupancy licenses (Ord. § 1(3)) and by providing a process to identify which occupancy licenses should be revoked based on unlawful presence (Ord. § 1(4)). Once the provisions containing the ultimate objectives of the Ordinance are struck, the unenjoined provisions of §§ 1(3) and 1(4) are not independently enforceable because, as the text of the Ordinance makes clear, they are intended merely as the procedures for effectuating those objectives. They were never intended to stand on their own.

Second, and more fundamentally, §§ 1(3) and 1(4) cannot be upheld because they are preempted by federal immigration law. As every other court to consider an analogous local immigration ordinance has held, such provisions are preempted as integral components of an impermissible local scheme to condition residence on immigration status. Further, even when considered apart from the rest of Fremont's scheme, the requirements that noncitizens provide immigration status information to local police as a condition of residence in rental housing, and be punished for failure to do so, are similar in character, function, and effect to an alien registration scheme. But as the Supreme Court held long ago, the comprehensive federal alien registration scheme preempts states from enacting their own independent alien reporting requirements. *See Hines v. Davidowitz*, 312 U.S. 52, 73-74 (1941) (striking down Pennsylvania alien registration scheme).

Because they condition noncitizens' residence on provision and verification of immigration status information, §§ 1(3) and 1(4) are preempted as an impermissible regulation of immigration. In addition, they are impliedly preempted by the comprehensive federal immigration laws, including the federal alien registration scheme.

Third, the Ordinance must be struck down in its entirety as an invalid exercise of Fremont's municipal authority. The Ordinance's enactment exceeded the City's police powers because the Ordinance is inconsistent with state law, does not regulate a matter of local concern, and regulates beyond the City's territorial jurisdiction.

Finally, the court erred in denying *Martinez* Plaintiffs relief on their Fair Housing Act claim based on a disparate impact theory, because Plaintiffs properly pleaded it. Moreover, Defendants actually litigated *Martinez* Plaintiffs' disparate impact theory. Accordingly, if necessary this Court can and should treat the issue as if it were raised in the pleadings and hold that *Martinez* Plaintiffs are prevailing parties on that issue.

ARGUMENT

I. THE ORDINANCE'S INVALID PORTIONS CANNOT BE SEVERED

The district court erred as a matter of law in concluding that the Ordinance's unconstitutional prohibition on harboring and residency and two provisions

concerning revocation of the occupancy licenses of persons deemed not lawfully present (§§ 1(2), 1(3)(L), and 1(4)(D) of the Ordinance) could be severed from the remainder. To the contrary, the voters enacted a completely integrated and interdependent scheme for prohibiting the harboring of unlawfully present aliens.

Both the Nebraska Supreme Court and the Eighth Circuit have addressed the test for severability of Nebraska laws enacted by initiative petition. *See Duggan v. Beermann*, 249 Neb. 411, 427-33 (Neb. 1996) (citing *Jaksha v. State*, 241 Neb. 106, 129 (Neb. 1992)); *Jones v. Gale*, 470 F.3d 1261, 1270-71 (8th Cir. 2006) (citing *Duggan*, 249 Neb. at 430, and *Jaksha*, 241 Neb. at 129). Under *Duggan*, courts are to consider five factors:

> (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the [voters]; and (5) whether a declaration of separability indicating that the [voters] would have enacted the bill absent the invalid portion is included in the act.

249 Neb. at 427-28 (citing *Jaksha*, 241 Neb. at 129); *see also Jones*, 470 F.3d at 1271; JA 733-40 (Def. Resp. to Pl. MSJ), at 115 (citing *Jones* and *Jaksha*). With respect to the fifth factor, the inclusion of a severability clause is not determinative,

especially in the case of an initiated law where the clause was not included on the ballot itself. *Duggan*, 249 Neb. at 432.[14]

Applying these factors, it is clear that invalid parts of the Ordinance cannot be severed from the remainder.

WORKABLE AND INDEPENDENTLY ENFORCEABLE PLAN, AND VOTER INTENT

The Nebraska Supreme Court has long emphasized that in determining whether "the valid and invalid parts can be separated in such a way as to leave an independent statute capable of enforcement," the Court must consider whether the remaining law continues to express "[t]he intention of the Legislature." *State ex rel. Ragan v. Junkin*, 85 Neb. 1, 122 N.W. 473, 476 (Neb. 1909); *see also, e.g.*, *Fitzgerald v. Kuppinger*, 163 Neb. 286, 295 (Neb. 1956) (citing *Ragan*). "[W]hat remains must express the legislative will, independently of the void part, since the court has no power to legislate." *Ragan*, 122 N.W. at 476. Thus, it is not enough that the remaining statutory provisions could stand alone in a literal sense; unless the remaining provisions continue to carry out the legislative (or, as here, the voters') purpose, the remainder cannot be found independently enforceable.

[14] The district court's decision contained an abbreviated discussion of the severability test. *See* 2012 WL 537527, at *10. The factors applied in *Duggan*, and relied upon by this Court in *Jones*, are controlling, however, because *Duggan* provided a fuller analysis of the issue and specifically involved Nebraska laws enacted by initiative petition. Indeed, Defendants's briefing below cited and discussed *Jones* as well as *Jaksha*, the case relied upon in *Duggan*. In any event, as shown in the text, the Ordinance is not severable under any test.

Here, the residency-related provisions of the Ordinance operate as one inseparable whole designed to carry out a common purpose: prohibiting the harboring and residency of unlawfully present aliens and, relatedly, removing such aliens from rental housing by revoking their "occupancy licenses." Section 1(2) prohibits landlords from "harboring" unlawfully present aliens in rental housing and prohibits such aliens from entering into leases for rental housing. Sections 1(3) and 1(4) work to enforce those prohibitions by requiring renters to provide immigration status information to local police and obtain occupancy licenses (Ord. § 1(3)) and by providing a process to identify which occupancy licenses should be revoked based on unlawful presence (Ord. § 1(4)). The unenjoined provisions of §§ 1(3) and 1(4) are not independently enforceable because they are completely interdependent on the invalidated provisions.

Critically, § 1(2) makes explicit that the interrelated occupancy license and revocation procedures in §§ 1(3) and 1(4) provide the mechanism for enforcing § 1(2)'s prohibitions on harboring and residence of unlawfully present aliens: § 1(2) states that "[t]he legal obligations imposed by this Section shall be enforced through the process described in Provisions 3 and 4 of this Ordinance, below." § 1(2)(A)(4). *See also, e.g.*, Ord. § 1(4) ("Enforcement of Harboring and Occupancy Provisions"). Once the "legal obligations" of § 1(2) are struck, §§ 1(3) and 1(4) no

longer serve the function expressly intended by the voters as stated in the Ordinance.

The lack of an independently workable scheme is reinforced by the text of § 1(4), which, similarly, explicitly states that its provisions are intended to "enforce the requirements of the Ordinance." Yet once the provision for revocation of occupancy licenses and the prohibition on harboring are removed, nothing remains in the Ordinance that is enforced through § 1(4). The only remaining obligations imposed by the Ordinance involve the requirement that all occupants obtain occupancy licenses prior to rental, and the prohibition on renting to anyone without an occupancy license. What remains in § 1(4) is a process for identifying which occupancy licenses should be revoked. That process does not "enforce" either of those obligations. Similarly, significant portions of the judicial review provisions in § 1(4)(F) no longer further any obligation remaining in the Ordinance. Thus, the express intent of § 1(4) – that it "enforce the requirements of the Ordinance" – is no longer possible once the provisions invalidated by the district court are struck.

Other considerations underscore that the remainder is not a complete ordinance. For example, severance left the Ordinance without a coherent judicial review procedure. Even though the revocation provision has been invalidated, § 1(4)(F) continues to provide for judicial review for "[a]ny … revocation notice" (Ord. § 1(4)(F)(1)), and provides for a stay of revocation pending judicial review

(Ord. § 1(4)(F)(2)). Further, § 1(4)(F)(3) provides that "[t]he landlord … may seek judicial review of … the question whether the occupant is an alien not lawfully present in the United States," but given the invalidity of the prohibition on harboring, no landlord would ever be in a position to seek review of that question.

Further, although the district court concluded that specific revocation-related provisions in §§ 1(3)(L) and 1(4)(D) could be severed, other provisions relating to revocation remain and are dependent on the stricken provisions, including the judicial review provisions discussed above. Also, § 1(4)(B) mandates the issuance of a "deficiency notice" to unlawfully present aliens, presumably for a deficiency in the occupancy license, but, as the court properly held, the City may not condition an occupancy license on lawful immigration status.

In addition, before it was struck, § 1(2)(A)(3) provided for "Prospective Application Only." But because § 1(2) was held invalid, the Ordinance is now left without that key subsection.

The Nebraska Supreme Court's decision in *Finocchiaro, Inc. v. Nebraska Liquor Control Comm'n*, 217 Neb. 487, 492 (Neb. 1984), confirms the conclusion that because the express purpose of §§ 1(3) and 1(4) of the Ordinance is to enforce and implement the invalid harboring and residency prohibitions, all the provisions must fall together. *Finocchiaro* considered whether certain statutory provisions involving the posting of liquor prices (known as "post and hold laws") were

severable from another statutory provision prohibiting liquor wholesalers from giving quantity discounts. The Court noted that an express purpose of the post and hold laws was to implement the prohibition on quantity discounts. *Id.* at 492. As a result, the Court concluded that "[t]he statutory scheme is so intertwined that the post and hold laws would not be severable from the … prohibition" on quantity discounts. *Id.* In *Finocchiaro,* as in this case, because the challenged enactment is "a comprehensive and integrated statutory scheme designed" to promote a single purpose, the provisions "must stand or fall in unison." *Id.*

Ragan likewise supports a finding of non-severability. In that case, the Nebraska Supreme Court considered whether a law "mak[ing] provision for nominating candidates for judicial and educational offices by petition or certificate of nomination" could stand, given that one subsection limiting the number of persons who could sign the nominating certificate of a "candidate by petition" was declared unlawful. 122 N.W. at 476. The remainder was still enforceable in the literal sense, because the statute would simply set out the nominating procedures without the invalid numerical limitation. But the Court nonetheless concluded that the remainder was non-severable because "[t]here is no lawful way to separate the valid and invalid portions so as to leave an enforceable statute *expressing the will of the Legislature*." *Id.* (emphasis added). Similarly here, once the harboring prohibition and revocation provisions are stricken, the remaining parts no longer

express the will of the voters. Under these circumstances, the Ordinance cannot be severed.

INDUCEMENT

Even if the Court were inclined to conclude that severance of the invalid portions of the Ordinance would leave a workable and independently enforceable remainder, the Ordinance cannot be severed if the invalid portions were an inducement to the passage of the whole. *See Jones*, 470 F.3d at 1271.

Inducement is found, and severance impossible, where the invalid provisions are part of a statutory scheme with a common purpose, or where the invalid portions reflect a main purpose of the law. *See, e.g., Bahensky v. State*, 241 Neb. 147, 150-51 (Neb. 1992). Thus, *Duggan* emphasized that where the "dominant purpose" of a law "was defeated in its substantial entirety, the entire act had to fall." 249 Neb. at 431. *See also Laverty v. Cochran*, 132 Neb. 118, 271 N.W. 354, 359 (Neb. 1937) (concluding that where a statutory provision reflecting the main purpose of a statute was invalid, "that provision was the inducement for the passage of the act, [and] the entire act must fall"); *Fitzgerald v. Kuppinger*, 163 Neb. 286, 294-95 (Neb. 1956) (holding that because there was a single purpose for the entire law, "it does not appear that the inducement could be any less than entire," and entire law had to be invalidated).

Here, the Ordinance had a dominant purpose that was held invalid: to prohibit harboring and residence of unlawfully present aliens in rental housing. The purpose of the Ordinance is thus summarized in its preamble as "[a]n Ordinance … to Prohibit the Harboring of Illegal Aliens." Ord. No. 5165. Likewise, the title of the new section to be added to the Fremont Municipal Code is "*Harboring* or Hiring Illegal Aliens, Prohibited." *See* Ord. § 1 (emphasis added). In addition, the Ordinance's preamble declares that "[t]his Ordinance is in harmony with the congressional objectives of prohibiting the knowing harboring of illegal aliens," and that "[t]he provision of housing to illegal aliens is a fundamental component of the federal immigration crime of harboring." *See also, e.g.*, *id.* ("WHEREAS, Federal law requires that certain conditions be met before an alien may be authorized to be lawfully present in the United States"); *Keller v. Fremont*, 2012 WL 537527, at *1 (The Ordinance's "stated purpose was 'to prohibit the harboring of illegal aliens'"). As further demonstrated above, §§ 1(2), 1(3), and 1(4) comprise an integrated scheme; and specifically, §§ 1(3) and 1(4) serve to enforce and implement the harboring and residency prohibitions in § 1(2).

Under these circumstances, the Ordinance reflects "one total concept," *Duggan*, 249 Neb. at 431, and, at minimum, the provisions prohibiting harboring and the residence of unlawfully present aliens, and authorizing revocation of occupancy licenses for such aliens, constitute an inducement to

the passage of the remainder of the residency provisions. Once the core provisions on harboring and revocation of occupancy licenses were struck, the Ordinance's "promoters would have regarded it much as they would have regarded the play of Hamlet with Hamlet left out.'" *State ex rel. Taylor v. Hall*, 129 Neb. 669, 262 N.W. 835, 849 (Neb. 1935) (quoting *Redell v. Moores*, 63 Neb. 219, 246 (Neb. 1901)).

SEVERABILITY CLAUSE

The inclusion of a severability clause does not change the conclusion that the invalid portions of the Ordinance cannot be severed. *Duggan* held that even where an initiated law contains a severability clause, that clause is not "determinative." 249 Neb. at 432. The Court reasoned in part that a severability clause in an initiated law should not be controlling when "the severability clause was not printed on the ballots and so was not directly before the voters[.] . . . Unless a voter had read the full text of the proposed amendments in a newspaper or had reviewed one of the petitions, that voter was probably unaware of the severability clause." *Id.*

Duggan's reasoning applies equally to this case, because the severability clause was not included in the ballots. *See* JA 624.1-24.2. The Court therefore cannot assume that the severability clause reflects the voters' intent.

Moreover, "[w]here sections constituting an inducement for the passage of an act are unconstitutional, the entire act must fall, notwithstanding the saving clause." *Laverty v. Cochran*, 132 Neb. 118, 271 N.W. at 359.

* * *

In sum, the invalid provisions are not severable from the remaining residency provisions. In addition, because "every provision within the [Ordinance] was part of its one general subject" of "regulating illegal aliens in Fremont," *City of Fremont v. Kotas*, 279 Neb. 720, 728 (Neb. 2010), the employment provisions are not severable from the housing provisions and the entire act must fall together.

II. SECTIONS 1(3) AND 1(4) ARE PREEMPTED

Whether considered as part of an entire scheme to regulate residence based on immigration status, or as standalone provisions conditioning noncitizens' ability to reside in Fremont on reporting immigration status information, Ordinance §§ 1(3) and 1(4) are preempted by federal immigration law. Every other federal court to consider preemption of a local scheme to condition residency on lawful immigration status has struck it down in its entirety, including provisions identical or closely analogous to §§ 1(3) and 1(4). *See Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802 (5th Cir. 2012), *petition for reh'g pending*; *Lozano v. City of Hazleton*, 620 F.3d 170, 210 (3d Cir. 2010), *vacated and remanded at*

131 S. Ct. 2958 (2011); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 701 F. Supp. 2d 835 (N.D. Tex. 2010); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007). Even viewed apart from the rest of Fremont's impermissible scheme, § 1(3)'s requirements that noncitizens report to local police, provide immigration status information, and be penalized for failure to do so are akin to alien registration reporting requirements, and are accordingly preempted under multiple preemption theories.

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, either express or implied. Implied preemption can take one or both of two forms. First, "there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause." *Id.* at 356. Such "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,'" *id.* (citation omitted), 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); *Heart of Am. Grain Inspection Serv. v. Mo. Dep't of Agric.*, 123 F.3d 1098, 1103 (8th Cir. 1997).

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 Congress," *DeCanas*, 424 U.S. at 363 (internal punctuation and citations omitted); *see also, e.g.*, *Heart of Am. Grain Inspection Serv.*, 123 F.3d at 1103.

Sections 1(3) and 1(4) are preempted in multiple respects.

A. SECTIONS 1(3) AND 1(4) ARE PREEMPTED AS PART OF AN IMPERMISSIBLE LOCAL IMMIGRATION SCHEME

Sections 1(3) and 1(4) are two essential components of Fremont's impermissible scheme to condition residency on lawful immigration status, and are preempted as part of that scheme.

The district court correctly recognized that the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101, et seq., along with its implementing regulations, is "a 'complex scheme' for adjudicating an individual's right to remain in this country." *Keller v. City of Fremont*, Nos. 8:10CV270, 4:10CV3140, 2012 WL 537527, at *8 (D. Neb. Feb. 20, 2012). This scheme includes regulation of the conditions under which noncitizens can be admitted, the status and presence of

noncitizens, and when they can be removed. *See, e.g.*, *Farmers Branch*, 675 F.3d at 811; *Hazleton*, 620 F.3d at 196-98, 220. As the district court further recognized, under that federal scheme,

> those who have entered illegally, or who have remained unlawfully, often are allowed to remain pending full adjudication of their status—which adjudication may take many years and may ultimately lead to lawful status or even full citizenship.

Fremont, 2012 WL 537527, at *8. Federal law "provide[s] the structure for [a noncitizens'] classification and/or removal," *id.* at *9, and noncitizens who currently lack status may be granted permission to remain under that structure. *Accord Hazleton*, 620 F.3d at 197-98, 221-22. Further, the federal immigration laws "include[] penalties for the harboring of aliens who have entered or remained in the U.S. in violation of law. (8 U.S.C. § 1324)." *Fremont*, 2012 WL 537527, at *8.

Accordingly, the district court reasoned, "states or political subdivisions" may not "take independent action to remove aliens from their jurisdiction, essentially forcing them from one state or community to another[.]" *Id.*, at *9. The court explained that allowing Fremont to impose penalties on harboring of unlawfully present aliens or prohibit or deny residency to unlawfully present aliens would "impair[]" "the structure Congress has established for the classification, adjudication, and potential removal of aliens." *Id.* The court therefore concluded that the provisions of the Ordinance prohibiting harboring, prohibiting residency of

unlawfully present aliens, and authorizing revocation of occupancy licenses conflict with the INA and present an obstacle to congressional objectives. *Id.*

The district court's analysis correctly shows that the Ordinance's scheme in its entirety overstepped Fremont's authority. The court erred in failing to apprehend that the same preemption concerns invalidate the Ordinance's requirement that noncitizens to report their immigration status information to local police as a prerequisite to renting (§ 1(3)), and its procedures for identifying noncitizens whose ability to reside in Fremont would be denied (§ 1(4)), if the City had the power to deny it.

Thus, both the Fifth and Third Circuits have invalidated nearly identical schemes in their entirety. In *Farmers Branch*, for example, the Court struck down an Ordinance that required tenants to provide immigration status information and obtain occupancy licenses prior to rental, and that established procedures for determining which licenses should be revoked based on immigration status. *See Farmers Branch*, 675 F.3d at 817 (holding nearly identical ordinance unconstitutional in its entirety "[b]ecause the sole purpose and effect of this ordinance is to target the presence of illegal aliens within the City … and to cause their removal"); *see also Hazleton*, 620 F.3d at 224 (finding analogous residency ordinance preempted in its entirety because "power to effectively prohibit residency based on immigration status … is ... the exclusive domain of the federal

government"). These decisions recognize that because localities have no authority to prohibit residency or harboring of unlawfully present aliens, localities likewise have no authority to establish schemes to carry out those functions. Neither may they condition residence on reporting immigration status information to local police – as the district court acknowledged, localities may not restrict noncitizens' residence based on immigration status. Indeed, §§ 1(3) and 1(4) have the same effect on immigrants as the provisions the court found unlawful: they "forc[e] them from one state or community to another." *Fremont*, 2012 WL 537527, at *9.

Nothing in the Supreme Court's decision in *Chamber of Comm. of the U.S. v. Whiting*, 131 S. Ct. 1968, 1985-86 & n.10 (2011), changes the conclusion that §§ 1(3) and 1(4) are preempted. *Whiting* held that an Arizona law imposing licensing sanctions on employers of unauthorized aliens was expressly authorized by a saving clause in the Immigration Reform and Control Act. 131 S. Ct. at 1977-81. A plurality also concluded that neither the employment licensing sanctions, nor the state's requirement that employers participate in E-Verify, were conflict preempted. *See id.* at 1981-85, 1986; *id.* 1973 & fn*. The plurality reasoned in part that "Arizona's procedures simply implement the [employer] sanctions that Congress expressly allowed Arizona to pursue through licensing laws. *Given that Congress specifically preserved such authority for the States*, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to

exercise that authority." *Id.* at 1981 (emphasis added). In contrast, here, there is no express saving clause preserving any role for the states in regulating or conditioning noncitizens' residence. *Whiting*'s analysis was specific to the employment provisions before it and did not provide guidance on preemption of local residence-related immigration ordinances. *See, e.g.*, *DelRio-Mocci v. Connolly Properties Inc.*, 672 F.3d 241, 246 n.3 (3d Cir. 2012) (*Whiting* involved employer sanctions, and did not disturb *Hazleton*'s reasoning on other points); *accord Farmers Branch*, 675 F.3d at 810 n.35; *Fremont*, 2012 WL 537527, at *9 n.8; *Central Ala. Fair Housing Ctr. v. Magee*, No. 2:11CV982-MHT, 2011 WL 6182334, at *5 n.7 (M.D. Ala. Dec. 12, 2011).[15]

B. STANDING ALONE, §§ 1(3) AND 1(4) ARE AKIN TO A LOCAL ALIEN REGISTRATION SCHEME, AND ARE EQUALLY PREEMPTED

Even when considered separately from the rest of the Ordinance's immigration scheme (and putting aside the fatal workability problems identified in the severability discussion, *supra*), §§ 1(3) and 1(4) are equally preempted. As explained below, the new law fashioned by the district court functions much like a local alien registration scheme. But Congress, in the exercise of its exclusive power to regulate immigration, has already established a "complete system for

[15] These same decisions recognized that although the Third Circuit's *Hazleton* decision has been vacated and remanded for reconsideration in light of *Whiting*, *Whiting* did not disturb *Hazleton*'s reasoning with respect to residency provisions.

alien registration." *Hines*, 312 U.S. at 70. By imposing conditions on aliens' presence in the United States, §§ 1(3) and 1(4) constitute an impermissible regulation of immigration. Further, in frustrating the congressional objectives animating the federal alien registration scheme, and in intruding on exclusively federal fields such as that of alien registration, these provisions are also impliedly preempted.

1. Fremont's Scheme is Similar in Character, Operation, and Effect to an Alien Registration Law

Although § 1(3) it speaks in terms of "occupancy licenses" and is not identical to the federal alien registration law, it nonetheless operates in similar ways, impinges on the same territory, and has similar effects. The federal alien registration law regulates the circumstances under which noncitizens must report their presence to federal law enforcement authorities and provide required information. In its present form, it governs everything from which noncitizens must register and when, *see* 8 U.S.C. §§ 1201(b), 1302-03; 8 C.F.R. § 264.1, to the content of those registration forms, *see* 8 U.S.C. § 1304, to when registrants must report changes of address, *see* § 1305, penalties for failing to register, *see* § 1306, penalties for failing to carry registration documents, *see* § 1304(e), and penalties for fraudulent statements and counterfeiting, *see* §§ 1306(c)-(d).

Here, § 1(3) obtains alien information by requiring every person over age 18 wishing to reside in rental housing to pay a $5 fee and provide immigration status

information to the Fremont Police Department. Ord. § 1(3)(A),(B), (E). Like the federal law, § 1(3) dictates who must register and when (Ord. § 1(3)(A)), what information must be provided (Ord. § 1(3)(E)), and the content of the registration forms (*id.)*, and it requires noncitizens to inform the police when they wish to move to another Fremont address, triggering the registration process anew (Ord. § 1(3)(D)). Also like the federal scheme, § 1(3) imposes penalties for failure to comply with registration requirements (Ord. § 1(3)(K)). Because § 1(3) both requires that every tenant over age 18 be registered (Ord. § 1(3)(A)) and penalizes failure to do so (Ord. § 1(3)(K)), the Fremont scheme also means that tenants are subject to producing their registration papers ("occupancy license") upon request.

Indeed, § 1(3) is quite similar to a Pennsylvania registration scheme that, as will be discussed further below, was invalidated by the Supreme Court in *Hines*. Pennsylvania's law required "every alien 18 years or over … to register once each year, provide such information as is required by the statute," "pay $1 as an annual registration fee," "show the [registration] card whenever it may be demanded by any police officer," and "exhibit the [registration] card as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one." *Hines*, 312 U.S. at 56. The Pennsylvania registration law also penalized failure to comply. *Id.* Like the Pennsylvania law in *Hines*, the Fremont Ordinance imposes a new set of registration obligations on top of the federal scheme.

The fact that the Ordinance nominally requires citizens as well as noncitizens to register does not change its intrinsic character as an immigration control measure. The Ordinance is plainly directed at noncitizens, as the district court recognized. *See, e.g.*, *Fremont*, 2012 WL 537527, at *16 (recognizing that the Ordinance is a "means for the Defendants to *identify* who is residing within the City's boundaries and their immigration status"). Further, the Ordinance serves to obtain alien information, only noncitizens are required to provide information purporting to indicate their lawful presence in the United States under § 1(3)(E), and only noncitizens will have their information sent to the federal government under § 1(4). Indeed, other than basic identifying information about the applicant and the rental unit, the only information required by the Ordinance is immigration status information. *See* § 1(3)(E). *See also Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *13 (finding inconsequential that state mobile home registration requirement was technically of "universal" applicability, because "[t]he provision is directed at a specific group: aliens who cannot establish their lawful residency").

Relatedly, although the rental transaction provides the excuse for obtaining alien information, the City does not request any information concerning one's qualifications to be a tenant (such as rental history, references, credit or employment history). *See, e.g.*, *Farmers Branch*, 675 F.3d at 810 (noting that the "real target" of the Farmers Branch Ordinance and occupancy license requirement

was "the ferreting out … of undesirable illegal immigrants"). In addition, rental housing is a basic need that most individuals could not forgo, making the occupancy license requirement effectively a mandatory reporting requirement for a large swath of the population. *See, e.g.*, *Hazleton*, 620 F.3d at 220-21.

In sum, the law crafted by the district court is akin to an alien registration law. As explained below, Fremont is preempted on multiple independent grounds from enacting such a law.

2. §§ 1(3) and 1(4) Are Preempted as an Impermissible Regulation of Immigration

Sections 1(3) and 1(4) are preempted because they constitute an impermissible regulation of immigration. Fremont's requirements that noncitizens seeking to reside in rental housing register with local police, provide immigration status information, and be penalized for failure to do so constitute a regulation of immigration because they impose conditions on aliens' presence in the United States.

The Supreme Court has explained that "[t]he Federal Government [possesses] broad constitutional powers in 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." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948). In contrast, "[u]nder the Constitution the states are granted no such powers." *Id*. States and

localities enjoy no power to deny aliens "entrance and abode," *Truax v. Raich*, 239 U.S. 33, 42 (1915) and "no power with respect to the classification of aliens," *Plyler v. Doe*, 457 U.S. 202, 225 (1982). States and localities "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." *Toll v. Moreno*, 458 U.S. 1, 11 (1982) (emphasis added) (quoting *Takahashi*, 334 U.S. at 419).

Here, §§ 1(3) and 1(4) constitute a regulation of immigration because they "add to . . . the conditions lawfully imposed by Congress upon . . . residence of aliens in the United States or the several states," *Toll*, 458 U.S. at 11. *See also, e.g.*, *DeCanas*, 424 U.S. at 355 ("a regulation of immigration" includes laws that regulate "the conditions under which a legal entrant may remain."). These provisions effectively condition the ability to reside in Fremont on registering with local police and providing immigration status information. Unless a noncitizen does so, he is denied the ability to reside in Fremont rental housing. *See* Ord. § 1(3)(A) (every occupant of a rental unit must obtain an occupancy license); Ord. § 1(3)(C) (landlords "shall not permit occupancy of a dwelling unit unless the occupant first obtains an occupancy license); Ord. § 1(3)(E)(7) (requiring applicants to indicate "country or citizenship"); Ord. § 1(3)(E)(9)(b) (requiring applicants to provide information establishing "lawful presence in the United

States"). Thus, the Fifth Circuit held that a nearly identical city housing ordinance was an impermissible regulation of immigration because, inter alia, "the Ordinance requires illegal aliens to declare themselves to the City Building Inspector, denies them the ability to enter private contracts for shelter, and subjects them to criminal sanctions, all in an effort to exclude them from the City." *Farmers Branch*, 675 F.3d at 813. *Accord Hazleton*, 620 F.3d at 220 (similar ordinance was preempted because it was an "attempt[] to regulate residence based solely on immigration status"); *see also Hines*, 312 U.S. at 59-60, 65-66 (imposing registration requirements on aliens implicates the welfare and tranquility of all the states, and raises questions in the fields of international affairs and naturalization entrusted to Congress); *Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *8 ([T]his case is about an immigrant's residence, which the State has no power to regulate.").

Indeed, not only do §§ 1(3) and 1(4) condition residence on providing immigration status information to local police, they have the same unlawful effect as the provisions held invalid by the district court: they drive unlawfully present aliens out of Fremont. Rather than undergo the certainty of being reported to the federal government under § 1(4), unlawfully present aliens (and their U.S. citizen or other family members) will be forced to reside elsewhere.

In sum, § 1(3) and 1(4) are intrinsically immigration control measures. As conditions on noncitizens' presence and residence in Fremont that have the effect

of forcing unlawfully present aliens out of the City, these provisions are preempted as a regulation of immigration.

3. §§ 1(3) and 1(4) are Impliedly Preempted

Sections 1(3) and 1(4) are also impliedly preempted because they conflict with and frustrate the objectives of the immigration laws, including the federal alien registration scheme, and because they intrude in fields fully occupied by federal immigration law, such as the registration of noncitizens.

a. §§ 1(3) and 1(4) are Conflict Preempted

The Supreme Court's decision in *Hines*, striking down a state alien registration scheme on preemption grounds, makes plain that § 1(3) is preempted. *Hines* held that a Pennsylvania alien registration scheme, which was independent from the federal registration law (a precursor to the INA), was impliedly preempted. *Hines*, 312 U.S. at 73-74. As the Supreme Court explained, "where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." 312 U.S. at 66-67; *see also id.* at 63 ("No state can add to or take from the force and effect of such … statute[.]").

Hines thus "long ago made clear that States cannot require the registration of aliens." *Central Ala. Fair Housing Ctr.*, 2011 WL 6182334, at *13.

Hines reasoned that in creating the federal registration scheme, Congress "was trying to steer a middle path" by establishing a "single integrated and all-embracing system" that would obtain the needed information while "leav[ing] [aliens] free from the possibility of inquisitorial practices and police surveillance." *Hines*, 312 U.S. at 74. Congress "plainly manifested a purpose [to obtain alien information] in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system[.]" *Id.*

Fremont's scheme is preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Critically, Congress chose a method to register aliens that would obtain the information it deemed necessary, while at the same time protecting noncitizens from burdens and harassment. Permitting new obligations such as Fremont's upends congressional objectives by demanding additional alien information at the expense of Congress's other goal – protecting noncitizens from inquisitorial practices. *Cf. Nat'l City Lines v. L.L.C. Corp.*, 687 F.2d 1122, 1129 (8th Cir. 1982) (holding state requirements preempted where they upset the federal policy choice between competing goals).

In several respects, permitting Fremont's scheme would subject noncitizens to the "indiscriminate and repeated interception and interrogation by public officials." *Hines*, 312 U.S. at 66; *see also id.* at 71. *Cf. Minn. Pub. Util. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (holding state regulation preempted where federal scheme sought to allow the regulated parties to "'burgeon and flourish . . . without the need for and possible burden of rules, regulations and licensing requirements'") (citation omitted). The Ordinance's imposition of penalties for failure to obtain an occupancy license means that noncitizens residing in rental housing must be able to show proof of compliance upon demand by the police. Further, nothing in the district court's reasoning would limit a locality's ability to require reporting of immigration status information to the rental housing context. Fremont would be free to require noncitizens to report their immigration status (and obtain a license) for buying a sandwich, using a public utility, or breathing the City's air. Moreover, if Fremont has the power to craft its own scheme obligating noncitizens to report to local authorities, with its preferred requirements, then every state and locality would have the same power. *See, e.g.*, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (considering the "prospect" of action by "all 50 States" in evaluating preemption); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (same); *Hazleton*, 620 F.3d at 221 ("[I]t is not only Hazleton's ordinance that we must

consider. If Hazleton can regulate as it has here, then so could every other state or locality."). Thus, permitting Fremont's scheme would lead to exactly the type of inquisitorial practices that Congress aimed to avoid in crafting a uniform national scheme.

Relatedly, §§ 1(3) and 1(4) are conflict preempted because they subject noncitizens to a differing set of registration obligations when Congress intended that there be one set of requirements with one set of consequences. As *Hines* made clear, Fremont may not "enforce additional or auxiliary regulations." 312 U.S. at 66-67. Specifically, under the Ordinance, noncitizens who have already registered in full compliance with federal law may nonetheless be criminally prosecuted for failure to register with Fremont police. *See* Ord. § 1(3)(K) (imposing fine upon conviction for violations of the Ordinance); *see also United States v. South Carolina*, Nos. 2:11-CV-2958, 2:11-CV-2779, 2011 WL 6973241 (D. S.C. Dec. 22, 2011), at *15 (holding that state alien registration provisions were likely conflict preempted); *United States v. Arizona*, 641 F.3d at 355-56. Further, while Fremont punishes mere failure to comply with its reporting requirements, federal law requires *willful* failure to register before penalties are imposed. *Compare* Ord. § 1(3)(A), (K) (requiring every occupant to obtain an occupancy license and imposing fines upon "[a]ny person who violates this section") *with* 8 U.S.C. § 1306(a) (punishing individual who "willfully fails or refuses" to register).

Significantly, § 1(3) goes even further than state registration laws that have recently been held preempted by other courts at the preliminary injunction stage. While these recent state laws impose state penalties based on failure to comply with the federal registration law, Fremont's Ordinance raises even greater preemption concerns because it imposes a wholly independent set of local reporting requirements, processes, and penalties, distinct from the federal registration system. *See United States v. Alabama*, 443 F. App'x 411 (11th Cir. Oct. 14, 2011) (unpublished) (granting the "extraordinary remedy of an injunction pending appeal" against § 10 of Alabama law, creating state law crime for failure to comply with federal registration laws, because plaintiffs had shown substantial likelihood that they will prevail on merits of the appeal); *Arizona*, 641 F.3d 339, 355-56; *South Carolina*, 2011 WL 6973241, at *14-15. *See also United States v. Alabama*, 813 F. Supp. 2d 1282, 1304 (N.D. Ala. 2011) (distinguishing Alabama penalty for failure to comply with federal registration requirements from the law invalidated in *Hines* because in *Hines*, "the Pennsylvania Act established a separate, state-specific alien registration scheme that was independent from the federal Act").

Here, in holding that §§ 1(3) and 1(4) were not preempted, the district court reasoned that the requirements that noncitizens provide immigration status information and that the information be communicated to the federal government

are "in harmony with [the] INA's *objective* of facilitating cooperation between officers and employees of states and political subdivisions and federal immigration authorities regarding the identification of individuals who may be in the United States lawfully." *Keller v. Fremont*, 2012 WL 537527, at *9 (citing 8 U.S.C. § 1357(g)(10)) (emphasis added). But both this Court and the Supreme Court have made clear that, contrary to the district court's understanding, "[i]n determining whether state law 'stands as an obstacle' to the full implementation of the a federal law, 'it is not enough to say that the ultimate goal of both federal and state law' is the same." *Forest Park v. Hadley*, 336 F.3d 724, 733 (8th Cir. 2003) (quoting *Int'l Paper Co v. Oullette*, 479 U.S. 481, 494 (1987). Rather, even if the state law attempts to achieve the same goal as federal law, the state law "is pre-empted ifit interferes with the methods by which the federal statute was designed to reach th[at] goal." *Id.* (quoting *Int'l Paper Co.*, 479 U.S. at 494). *See also, e.g.*, *Hines*, 312 U.S. at 66-67 (emphasizing that "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873-74 (2000) (relying on *Hines*). The district court erred as a matter of law in ending its preemption inquiry upon a finding of "harmony" with federal goals.

Further, contrary to the district court's suggestion, the INA nowhere authorizes or invites states or localities to establish their own alien reporting schemes to help the federal government identify unlawfully present aliens. Rather, Congress has authorized state or local assistance in immigration enforcement in only four circumstances, none of which justify Fremont's Ordinance. *See* 8 U.S.C. § 1324(c) (authorizing state and local arrests for federal immigration crimes of transporting, smuggling, or harboring certain aliens); 8 U.S.C. § 1252c (providing that "State and local law enforcement officials" may arrest and detain noncitizens for federal crime of illegal reentry by a deported felon if certain prerequisites are met); 8 U.S.C. § 1103(a)(10) (providing that Attorney General may authorize "any State or local enforcement officer" to enforce immigration laws upon certification of "an actual or imminent mass influx of aliens"); 8 U.S.C. § 1357(g) (permitting state or local officers to perform certain immigration officer functions *if* Attorney General enters into written agreement with state or local government). Section 1357(g)(10), cited by the district court, merely provides that no written agreement is needed for state and localities to "cooperate" with federal immigration authorities. It does not grant any authority for local immigration enforcement.

b. §§ 1(3) and 1(4) are Field Preempted

Sections 1(3) and 1(4) are also field preempted. The INA is a "'comprehensive federal statutory scheme for regulation of immigration and

naturalization.'" *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). The "'comprehensiveness of the INA scheme for regulation of immigration and naturalization[]' plainly precludes states efforts, whether harmonious or conflicting, to regulate residence in this country based on immigration status." *Hazleton*, 620 F.3d at 220. Accordingly, §§ 1(3) and 1(4) are field preempted by the detailed federal immigration scheme.

More specifically, Congress intended "one uniform national registration system." *Hines*, 312 U.S. at 74. That "single integrated and all-embracing system," *id*., fully occupies the field of alien registration. *See also id.* at 66-67 & n.17 (citing cases applying field preemption principles). The pervasiveness of the federal registration scheme makes more than "reasonable the inference that Congress left no room for the States to supplement it." *English*, 496 U.S. at 79. Further, Congress's intent to have federal law exclusively occupy the field is evidenced by the "nature of the regulated subject matter." *DeCanas*, 424 U.S. at 356 (internal quotation marks omitted); *see, e.g*., *Toll*, 458 U.S. at 10 ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.").

Thus, "[t]here is little doubt that alien registration is a field under the exclusive control of the federal government." *South Carolina*, 2011 WL 6973241,

at *14. *See also id.*, at *15; *Arizona*, 641 F.3d 339, 355-56 (9th Cir. 2011) (describing federal registration laws as "a comprehensive scheme for immigration registration"). Here, because § 1(3)'s reporting requirements are so similar in character, function, and effect to an alien registration scheme, it is plainly field preempted.

The conclusion of field preemption is reinforced by the fact that Congress's registration provisions contain no saving clauses or other indications that Congress intended for states to have a role in supplementing the federal registration scheme, while in other contexts, Congress has explicitly permitted such state regulation. *See* 8 U.S.C. § 1324a(h) (states may sanction employers for the knowing employment of "unauthorized aliens" through state licensing laws). Nor is there any indication that Congress intended for state or local officers to have any role in enforcing federal alien registration. *See Arizona*, 641 F.3d at 355 (recognizing that the federal registration "provisions include no mention of state participation in the registration scheme"). To the contrary, Congress has omitted such provisions while elsewhere specifying in the INA the limited circumstances in which state and local officers may act. *See supra* at 42 (citing 8 U.S.C. §§ 1324(c), 1252c, 1103(a)(10), and 1357(g)).

Finally, §§ 1(3) and 1(4) are field preempted regardless of whether they are purportedly complementary to federal law. *See, e.g.*, *Hines*, 312 U.S. at 66-67

("states cannot . . . curtail or *complement*[] the federal law" if doing so would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *Hazleton*, 620 F.3d at 223 ("[E]ven if Hazleton's housing provisions did concurrently enforce federal law, this would not save them; even harmonious regulation is pre-empted here").

C. NO PRESUMPTION AGAINST PREEMPTION APPLIES

The Ordinance is clearly preempted on multiple grounds regardless of whether any presumption against preemption applies. Plaintiffs note that in any event, no presumption against preemption is applicable in this case. The Supreme Court has made clear that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). Accordingly, there is no presumption against preemption here because regulation of the residence or registration of noncitizens is not an area the states have traditionally occupied. *See, e.g., Farmers Branch*, 675 F.3d at 811 (holding that analogous City housing ordinance "does not regulate in an area historically occupied by the states, and therefore declining to apply any presumption against preemption); *Hazleton*, 620 F.3d at 220 (holding that no presumption against preemption applies where City "attempts to regulate residence based solely on immigration status"); *see also South Carolina*, 2011 WL 6973241, at *10.

III. The Ordinance Exceeds Fremont's Municipal Authority

A. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE NEBRASKA COURT MADE ANY DETERMINATION ON THE MERITS OF THE MUNICIPAL AUTHORITY CLAIM

It is indisputable that the Nebraska Supreme Court declined to accept the district court's certified question concerning municipal authority, and therefore did not issue any binding ruling purporting to decide whether the Ordinance was within the City's municipal authority. In declining to accept the question, the Court observed that the district court's single-sentence certified question "does not specify the plaintiffs' challenge to the ordinance on state law grounds. Nor does it identify any state statutes or state constitutional provisions that were allegedly violated . . . . These omissions require us to make assumptions about the plaintiffs' state law challenge[.]" JA 143. Although the Court quoted some general language regarding the breadth of a city's police power, the Court nowhere purported to decide Plaintiffs' municipal authority claim on the merits.

The district court nonetheless appeared to conclude that the Nebraska Supreme Court conclusively decided the question. *See Keller v. Fremont*, 2012 WL 537527, at *17. The district court stated:

> [T]his Court understands the Nebraska Supreme Court's decision to indicate that . . . the absence of a home rule charter does not affect a municipality's exercise of its police powers generally delegated to municipalities by Nebraska statute.

> Accordingly, the Plaintiffs' claim that the Ordinance is void as a matter of state law will be denied.

Id. (internal footnotes omitted).

Even assuming the court's supposition was correct – i.e. that the absence of a home rule charter does not affect a city's exercise of police powers – there remains the separate question whether the City's action, whether undertaken by a home rule city or not, was in fact justified by the police power statute, Neb. Rev. Stat. § 16-246. The district court erred as a matter of law in simply concluding, without analysis, that the Ordinance did not exceed Fremont's police power.

As shown below, the Ordinance in fact exceeded well-established limits on the authority granted in Neb. Rev. Stat. § 16-246.

B. THE ORDINANCE IS NOT JUSTIFIED BY POLICE POWER

Fremont is a First Class City without a home rule charter.[16] The authority for its actions must either be found in the express legislative grants of power to cities of the first class,[17] or it must be within the general police powers provided in Neb. Rev. Stat. § 16-246. Because no specific grant of power provides authority, this brief focuses on demonstrating that the police power does not justify Fremont's action.

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[16] *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); JA 504, 510, 515.

[17] *See Garver v. City of Humboldt*, 120 Neb. 132, 231 N.W. 699, 700-701 (Neb. 1930).

Enactments pursuant to the police power are subject to certain limitations, including the related requirements that the ordinance must not be "inconsistent with the general laws of the state," Neb. Rev. Stat. § 16-246, that the subject of the ordinance be a matter of local, as opposed to statewide, concern, and that the ordinance must not extend beyond a city's territorial boundaries. As shown below, Fremont's Ordinance exceeds these limits on the police power.

1. The Ordinance Exceeds the Police Power Because it is Inconsistent with State Law and Does Not Involve a Matter of Purely Local Concern

By its express terms, the police power statute, Neb. Rev. Stat. §16-246, only provides authority for an ordinance that is "not inconsistent with the general laws of the state." *See, e.g., State ex rel. Love v. Cosgrave*, 85 Neb. 187, 122 N.W. 885, 887 (Neb. 1909) (indicating that police powers ordinances in conflict with state statutes, unless authorized expressly or by necessary implication, are void). In addition to conflict with positive state law, inconsistency can be shown where the local ordinance is contrary to the state legislature's decision *not* to pass such a law. *See Midwest Employers Council, Inc. v. City of Omaha*, 177 Neb. 877, 887, 131 N.W.2d 609, 615 (Neb. 1964). In invalidating a city ordinance concerning fair employment, *Midwest Employers Council* relied 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

explained that "it is apparent that the state, through its Legislature, has entered the field relating to labor relations and practices, and civil rights, and has not delegated to the city [] any power to legislate … the aforesaid matters." *Id.* A city may not override the state legislature's decision not to act on a particular subject or in a particular manner.

Relatedly, the Nebraska Supreme Court has made clear that where the State Legislature has considered the issue and acted or chosen not to act, the matter is considered not to be one of local concern, and therefore is not a proper subject of municipal legislation. *See Midwest Employers Council*, 131 N.W.2d at 615-16 (invalidating City ordinance because it involved a matter of statewide concern where on multiple occasions the state legislature declined to pass similar state proposals); *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"); *Jacobberger v. Terry*, 211 Neb. 878, 884, 320 N.W.2d 903, 906-07 (Neb. 1982); *City of Omaha Human Relations Dept. v. City Wide Rock & Excavating Co.*, 201 Neb. 405, 408, 268 N.W.2d 98, 101 (Neb. 1978); *Niklaus v. Miller*, 159 Neb. 301, 308-09, 66 N.W. 2d 824, 829 (Neb. 1954).

a. E-Verify Mandate

The Ordinance's employment provisions cannot be justified by the police power because they are inconsistent with the state legislature's decision *not* to

mandate the use of E-Verify by all employers, and because, as the state legislature's enactments make plain, they involve a matter of statewide concern rather than local concern.

Since January 2009, the Nebraska Legislature has repeatedly considered and rejected proposed legislation to require all employers to use E-Verify. Significantly, Legislative Bill ("LB") 34 would have required all private employers in Nebraska to use E-Verify, but the legislature declined to pass it. *See* JA 386-99 (LB 34, with 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"). Instead, in 2009 the legislature chose to enact a far more limited provision that mandates E-Verify use by *public* (governmental) entities and their contractors—but does *not* require E-Verify for all employers in the state. *See* JA 408-14 (LB 403) (codified at Neb. Rev. Stat. §4-114). Subsequently, the legislature considered (in committee) LB 569, which would have mandated use of E-Verify for all those employers in the state covered by the Workers' Compensation Act, but declined to pass it. *See* JA 416-20. *See also* JA 401-06 (LB 335, proposing 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).

These state bills show that the legislature specifically considered whether to require all private employers to use E-Verify, but declined to do so. Further, the state legislature's action in this area demonstrates that E-Verify mandates are not a matter of purely local concern. Fremont lacks authority to overrule the Legislature's decision to enact a more limited E-Verify mandate applicable only to certain employers. *See Midwest Employers Council*, 131 N.W.2d at 615-16.

b. Rental Licensing

With respect to its residency provisions, the Ordinance is not justified by the police power because it is inconsistent with state law and likewise involves a matter that is not purely of local concern.

Significantly, Ordinance § 1.3 directly conflicts with Nebraska's Fair Housing Act, Neb. Rev. Stat. §§ 20-301 et seq.. The Ordinance requires that applicants for occupancy licenses must indicate the "Occupant's *country* or citizenship." Ord. § 1.3.E(7) (emphasis added). Thus, the Ordinance explicitly inquires into each applicant's "national origin," which is specifically forbidden under the state 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 … national origin …of a person seeking to purchase, rent, or lease any housing").

In requiring noncitizens to provide immigration status information in order to qualify for rental housing, the Ordinance also involves a matter that is not of

local concern. As part of LB 403, the state legislature proposed and ultimately enacted a provision 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* JA 408-14. The state legislature chose to require verification of "lawful presence" for public or assisted housing benefits, but not for all rental housing, as Fremont's Ordinance would. The Ordinance thus intrudes in an area that the state has claimed as one of statewide concern, and that is not of purely local concern. In so doing, the Ordinance is also inconsistent with the state enactment.

2. The Ordinance Impermissibly Reaches Beyond Fremont's Territorial Jurisdiction.

The Ordinance is also an invalid exercise of police power because the E-Verify mandate reaches businesses located outside the City's boundaries. The police powers statute expressly provides that "the jurisdiction of the city to enforce such ordinances … shall extend over the city and over all places within two miles of the corporate limits of the city," and no further. Neb. Rev. Stat § 16-246. Similarly, the Nebraska courts have held that "matters are of local concern only when they do not extend beyond the limits of the municipality." *Sanitary & Improvement District No. 95 of Douglas County v. City of Omaha*, 219 Neb. 564, 572, 365 N.W.2d 398, 403 (Neb. 1985). *See also, e.g. Sanitary & Improvement District No. 95 of Douglas County v.*

City of Omaha, 221 Neb. 272, 278, 376 N.W.2d 767, 771 (Neb. 1985) (invalidating City ordinance that "affects property outside the municipality and persons who are not inhabitants of the City. The protection of such persons and property is a matter of State concern[.]"); *City of Millard v. City of Omaha*, 185 Neb. 617, 621, 177 N.W.2d 576, 579 (Neb. 1970).

The Ordinance requires any employer wherever located to enroll in and use E-Verify as to all employees, if even just one employee should deliver a product or service and set foot in Fremont to do so. The E-Verify mandate in Ord. § 1.5 applies to all business entities, whether situated in Omaha, Kansas City, New York, or Shanghai, and E-Verify must be used for all workers as long as one worker performs activities qualifying as "work" in Fremont. The mere traversing of the City's border by an on-duty employee subjects the employer either to the risk of prosecution before the city council, or the burdens of complying with the "E-Verify" procedures dictated in § 1.5. Thus, the Ordinance's extraterritorial reach provides an additional basis for concluding that it is an invalid exercise of the police power.

* * *

In sum, this Court should hold that the Ordinance is an invalid exercise of Fremont's municipal authority. In the alternative, the Court should remand this

case to give the district court an opportunity to consider the merits of the question whether the Ordinance exceeded the police power.

IV. PLAINTIFFS PLEADED AND PREVAILED ON A FAIR HOUSING ACT DISPARATE IMPACT THEORY

A. THE *MARTINEZ* PLAINTIFFS PLEADED A DISPARATE IMPACT THEORY

The district court erred as a matter of law in concluding that the *Martinez* plaintiffs "did not plead" a Fair Housing Act claim based on a theory of disparate impact discrimination "and are not prevailing parties on that claim." JA 150. Plaintiffs pleaded more than sufficient facts to support a disparate impact theory. Moreover, Defendants indisputably litigated *Martinez* Plaintiffs' disparate impact theory on the merits in the cross-motions for summary judgment. The district court therefore erred in not holding that Plaintiffs' pleading was sufficient, or at minimum in not treating the issue as if it had been raised in the pleadings. In any event, if necessary, this court can and should deem the *Martinez* Plaintiffs' complaint constructively amended to include the disparate impact theory, because the issue was actually litigated with the parties' consent.

1. Plaintiffs were not required to use magic words

The district court erred in apparently concluding that *Martinez* Plaintiffs were required to use the words "disparate impact" or their equivalent in their complaint. In general, a plaintiff is not required to use magic words to make out a

claim. *See* Fed. R. Civ. P. 8(a)(2) (a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); *Vanguard Recovery Assistance v. U.S.*, 99 Fed. Cl. 81, 95 (Fed. Cir. 2011) ("[T]he legal sufficiency of a complaint does not depend upon whether or not the plaintiff invoked the right 'magic words,' but instead whether the facts as alleged may plausibly be construed to state a claim."); *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 434 (5th Cir. 2000) (stating that the "form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim") (internal quotation marks omitted); *see also Parkhill v. Minnesota Mut. Life Ins. Co.*, 286 F.3d 1051, 1057-58 (8th Cir. 2002) ("The well-pleaded facts alleged in the complaint, not the legal theories of recovery or legal conclusions identified therein, must be viewed to determine whether the pleading party . . . stated a claim.").

Rather than invoking particular words, the purpose of a complaint is to provide a defendant with adequate notice of the claims. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (Rule 8's pleading requirement is meant to "give the defendant fair notice of what the claim is and the grounds upon which it rests") (internal quotation marks and alterations omitted); *Parkhill*, 286 F.3d at 1057 ("essential function of a complaint … is to give the opposing party fair

notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved") (quotation marks omitted).

Thus, cases addressing the adequacy of federal discrimination claims make clear that the pertinent inquiry is whether the facts alleged are sufficient, rather than the presence of specific words. In *Steele v. Schafer*, 535 F.3d 689, 694 (D.C. Cir. 2008), for example, the court rejected the argument that the plaintiff had failed to plead a discrimination claim based on a hostile work environment where "[t]he complaint allege[d] 'discrimination.'" The Court reasoned that the word "discrimination" "in principle includes a hostile work environment theory," and that the allegation of discrimination coupled with the facts in the complaint supporting the theory was sufficient. *Id.*[18]

Furthermore, the language used by Plaintiffs, namely that the ordinance "discriminates on the basis of race and/or national origin," has been interpreted by courts to prohibit *both* intentional and disparate impact discrimination. *See e.g.*,

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[18] In *Gambill v. Duke Energy Corp.*, 456 Fed. App'x 578, 587 (6th Cir. Jan. 25, 2012) (unpublished), cited by the district court, the Sixth Circuit concluded that disparate impact was insufficiently pleaded because the complaint lacked any *factual allegations* making out a disparate impact claim. Although *Gambill* noted that the words "disparate" or "impact" did not appear in the complaint, this consideration was not determinative. Rather, the Court went on to consider whether the complaint alleged facts that would have supported a disparate impact theory; because the Court found that the complaint *did not* contain such fact allegations, it concluded that the pleading was insufficient. *See id*. (stating that "at most these factual allegations support a disparate treatment claim and not a disparate impact claim").

Gallagher v. Magner, 619 F.3d 823, 831 (8th Cir. 2010) (stating that FHA prohibits discrimination "on the basis of" race, national origin, or other enumerated criteria, and turning to consideration of plaintiffs' disparate treatment and disparate impact theories); *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 539 (7th Cir. 2011) (to defeat motion for summary judgment on FHA claim that defendants discriminated "'on the basis of her race,'" plaintiff had to provide evidence of either disparate impact or discriminatory intent). Disparate impact and disparate treatment are two alternative legal theories to establish a claim that the statute has been violated. *See, e.g., Wright v. Nat'l Archives and Records Serv.*, 609 F.2d 702, 711 (4th Cir. 1979) (en banc) (citing *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978) for the rule that disparate impact and disparate treatment under Title VII are "alternative theories and not separate claims"); *cf. Maresco v. Evans Chemetics*, 964 F.2d 106, 115 (2d Cir. 1992) (disparate impact and disparate treatment "are simply alternative doctrinal premises for a statutory violation"). Plaintiffs' use of the language "discriminates on the basis of race and/or national origin" thus cannot be read as choosing one theory of discrimination over another. Rather, the complaint provided clear notice that Plaintiffs were raising a discrimination claim under the FHA, which encompasses both theories.

2. The facts pleaded were sufficient to allege a discrimination claim based on disparate impact

Plaintiffs' complaint adequately pleaded a claim of discrimination based on a disparate impact theory, because the facts alleged sufficed to put defendants on notice that Plaintiffs would pursue such a theory.

The complaint alleged the following facts supporting a disparate impact theory of discrimination. It alleged that the population in Fremont consisted of a minority of Hispanic residents, JA 315 (Third Amended Complaint) (¶¶ 48-49), but that in the years preceding the enactment of the Ordinance the Hispanic population had increased about eight times, *id.* (¶ 49), and that the majority of foreign-born individuals in Fremont were from Latin America and Asia, *id.* (¶ 50). The complaint alleged facts demonstrating that the Ordinance's proponents believed that most immigrants in Fremont were Hispanic and that the Ordinance would address the problems they saw as stemming from the increasing numbers of Spanish-speakers in Fremont. *See* JA 316 (¶ 52) (alleging that Council Member Warner introduced the Ordinance in response to "growing numbers of Spanish-speaking students enrolled in Fremont schools"); JA 317 (¶ 55) (alleging that Hart's support for the Ordinance was in response to "increasing numbers of Spanish-speaking residents in Fremont"). The complaint also alleged facts indicating that Hispanics would be singled out as a result of the Ordinance. *See* JA 317 (¶ 55 n.16) (Fremont business owner stating that "she knows not all Hispanics

are illegal immigrants, but that it's hard not to think that way. She said she scrutinizes her Hispanic customers."); JA 317-18 (¶ 56) (alleging that after the introduction of the Ordinance, Latino Plaintiffs and their relatives were told that there were "no restrooms for Mexicans," and to "Go back to Mexico"); *id.* (¶ 56 n.17) (giving example of "Latino business owner who was screamed at to '[g]o back to Mexico!'"); JA 305 (¶ 5) (Ordinance would cause discrimination and profiling against those who are deemed to look or sound foreign). The complaint also contained detailed allegations about the Ordinance's housing provisions, including the provisions revoking occupancy licenses. *See* JA 307-08 (¶¶ 16-20). Such allegations were more than enough to put defendants on notice that plaintiffs would pursue a discrimination claim based on the theory of a disparate impact on Hispanic residents in Fremont.

B. DEFENDANTS LITIGATED THE ISSUE ON THE MERITS

Regardless of any pleading issues, it is indisputable that Defendants actually litigated *Martinez* Plaintiffs' disparate impact theory on the merits on the cross-motions for summary judgment. By waiting until after the summary judgment motions were adjudicated to raise their objections to Plaintiffs' pleading, Defendants waived the issue. *See* Fed. R. Civ. P. 12(h)(2); *Brooks v. Monroe Systems for Business, Inc.*, 873 F.2d 202, 205 (8th Cir. 1989) (holding that "the defense of failure to state a claim must be raised at the latest at trial on the

merits"); Wright & Miller, 5C Federal Practice & Procedure § 1392 (defense "waived if … not presented before the close of trial").

Defendants had ample notice and opportunity to raise the issue of any pleading deficiency. In Defendants' merits briefing on their own motion for summary judgment as well as in opposition to Plaintiffs' motion for summary judgment, Defendants expressly addressed *Martinez* Plaintiffs' arguments concerning disparate impact, yet failed to raise any pleading objection. *See, e.g.*, JA 745-46 (Def. Reply ISO Def. MSJ) ("Plaintiffs argue that simply the fact that Hispanic individuals comprise a majority of aliens is enough to make out a claim for disparate impact in this case. *Martinez* Resp. Br. 69-70, 90; *see also* Keller Resp. Br. 28-31. That analysis is incorrect."); JA 737 (Def. Resp. to MSJ) ("*Martinez* Plaintiffs fall back to a disparate impact claim under the FHA. *Martinez* Br. 74."); JA 738 (Def. Resp. to MSJ) (citing *Martinez* Plaintiffs' summary judgment brief and responding to *Martinez* Plaintiffs' argument); JA 740, at n.11 (Def. Resp. to MSJ) (same, responding to authority cited by *Martinez* Plaintiffs); JA 361-63, 371-76, 625-36, 700-10 (Martinez Plaintiffs' MSJ briefing).

In *Steele*, the D.C. Circuit found that, where the defendant had defended against the plaintiff's hostile work environment claim at the summary judgment stage, it was too late for the defendant to raise any objection to the adequacy of the pleading on appeal because of "the absence of any apparent prejudice" and because

the defendant had "both sought summary judgment on that claim and responded to it." 535 F.3d at 694.

Defendants cannot point to any prejudice they suffered by any purported pleading deficiency. First, they have been on notice since the start of litigation, at minimum from the *Keller* Plaintiffs' complaint, that they would be defending against a disparate impact theory. Second, there would have been no change in the manner of conducting discovery or litigating the case. Lastly, the *Martinez* Plaintiffs presented evidence of disparate impact in their summary judgment motion and both parties litigated the issue on the merits. Under these circumstances, the district court erred in dismissing *Martinez* Plaintiffs' claim based on a disparate impact theory, and in failing to hold that Defendants waived the issue of failure to state a claim.

C. ALTERNATIVELY, THIS COURT SHOULD TREAT THE DISPARATE IMPACT THEORY AS IF IT WERE RAISED IN THE PLEADINGS BECAUSE IT WAS LITIGATED WITH DEFENDANTS' CONSENT

In any event, if necessary, this court should deem Plaintiffs' complaint to be constructively amended to include a disparate impact theory because it was litigated with Defendants' consent. In *Triple Five of Minnesota, Inc. v. Simon*, 404 F.3d 1088, 1095 (8th Cir. 2005), this Court recognized that appellate courts have the power to constructively amend pleadings. The Court explained that "courts of appeals may grant motions to amend pleadings to conform to the evidence and use

[Fed. R. Civ. P.] 15(b) by analogy." *Id*. (granting leave to amend on appeal, where issue was litigated by parties' implied consent) (citing Wright & Miller, 6A Federal Practice and Procedure § 1494). Rule 15(b)(2) provides that "[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings."[19] *See also Cates v. Morgan Portable Bldg. Corp.*, 780 F.2d 683, 690 (7th Cir. 1985) (noting that "[s]ince a complaint can be amended at any time, even in the court of appeals, to conform to the evidence, we could simply deem the complaint so amended") (citations omitted); *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1087 (2d Cir. 1993) (same).

[19] Rule 15(b)(2) also provides that "[a] party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue."

CONCLUSION

For the reasons set forth above, the Court should hold that the Ordinance is invalid in its entirety. In addition, the Court should reverse the district court's holding that Plaintiffs failed to plead a Fair Housing Act claim based on a disparate impact theory and/or the Court should deem Plaintiffs' complaint to be constructively amended to reflect a disparate impact theory and hold that *Martinez* Plaintiffs prevailed on that issue.

Dated this 23rd day of May, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P 28.1(e)(2) and 32(a)(7)(B), I, Jennifer Chang Newell, certify on May 23, 2012, that this brief complies with the type-volume limitation because it contains fewer than 13,750 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(A)(7)(B)(iii). I also certify that this brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. Times New Roman.

s/Jennifer Chang Newell

ANTI-VIRUS CERTIFICATION

Pursuant to Eighth Circuit Local Rule 28A(h)(2), I, Jennifer Chang Newell, hereby certify on May 23, 2012, that the brief and addendum have been scanned for viruses and both files are virus-free.

s/Jennifer Chang Newell

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Jennifer Chang Newell