IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FRED H. KELLER, JR., et al.,
Plaintiffs-Appellants/Cross-Appellees,

v.

CITY OF FREMONT, et al.,
Defendants-Appellees/Cross-Appellants,

MARIO MARTINEZ, JR., et al.,
Plaintiffs-Appellants/Cross-Appellees,

v.

CITY OF FREMONT, et al.,
Defendants-Appellees/Cross-Appellants.

Nos. 12-1702,
12-1705, 12-1708

UNITED STATES' MOTION FOR LEAVE TO FILE A CONSOLIDATED AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(e), the United States of America respectfully moves for leave to file a single consolidated *amicus* brief that supports the plaintiffs as both appellants and as cross-appellees.

1. This case involves a municipal ordinance ("the Ordinance") enacted by the City of Fremont, Nebraska ("the City"). Among other things, the Ordinance requires individuals to obtain "occupancy licenses" before they may occupy rental housing in the City. Individuals who apply for these licenses provide the City with information

about their immigration status, and if an individual indicates that he is not a U.S. citizen or national, the City contacts the federal Department of Homeland Security (DHS) and attempts to ascertain if that individual is an alien "unlawfully present" in the country. Ultimately, if the City interprets DHS's response to mean that the individual is not lawfully present, and a follow-up inquiry to DHS yields the same conclusion, the City prohibits the individual from having an occupancy license.

A number of landlords and renters in the City elected to challenge the Ordinance in federal court. Among other things, these plaintiffs sought to enjoin the City from enforcing its Ordinance on the theory that its housing-related provisions were preempted by federal law, including the comprehensive regulatory regime created by the Immigration and Nationality Act.

The district court partially agreed with the plaintiffs, and it found the City's Ordinance preempted to the extent it attempted to revoke occupancy licenses, and otherwise attempted to prohibit the "harboring" of illegal aliens. However, the court severed other housing-related provisions from the Ordinance and concluded that they were not preempted. Thus, the court refused to enjoin the Ordinance's creation of the occupancy license scheme, as well as the Ordinance's requirement that the City contact the federal government in order to gain information about occupants' immigration status. Plaintiffs appealed, and the City cross-appealed.

2. Plaintiffs filed their initial briefs in this Court between May 23, 2012 and May 25, 2012. Among others things, plaintiffs argued as appellants that the district court had erred in refusing to enjoin all of the Ordinance's housing-related provisions.

The City filed its initial brief in this Court on July 10, 2012. Among other things, the City argued as cross-appellant that the district court should not have found that *any* of the Ordinance's housing-related provisions were preempted.

Plaintiffs' second briefs (*i.e.*, their combined reply briefs as appellants and response briefs as cross-appellees) were filed between August 27, 2012 and August 29, 2012. The City's final brief is due on September 17, 2012.

3. The preemption issues discussed in the parties' briefs raise an issue of considerable importance to the United States. As the government explains in the attached *amicus* brief, the Constitution and the Immigration and Nationality Act vest the National Government with the exclusive authority to regulate immigration and determine which aliens will be permitted to reside in the United States and which will be removed from the country. In the government's view, the Ordinance's housing-related provisions intrude on this authority and are preempted. Accordingly, the government has tendered this Court with an *amicus* brief that supports the plaintiffs in their role as appellants, as well as in their role as cross-appellees. The United States is involved in several cases raising similar issues, some of which have already resulted in decisions relevant to the questions presented here. *See Arizona v. United States*, 132 S.

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Ct. 2492 (2012); *United States v. Alabama,* --- F.3d ---, 2012 WL 3553503 (11th Cir. Aug. 20, 2012).

4. An *amicus* brief filed solely in support of plaintiffs as appellants in these cross-appeals would have been due seven days after the filing of plaintiffs' initial briefs as appellants. Although the government's brief is being filed within seven days of the filing of the plaintiffs' response briefs as cross-appellees, it is being filed more than seven days after the plaintiffs filed their initial briefs as appellants. Accordingly, the United States seeks leave of the Court pursuant to Rule 29(e) to file a combined *amicus* brief that supports the plaintiffs in both of their roles.

The brief is within the 7,000 word limit that applies to a single *amicus* brief; filing a single brief on this schedule has avoided substantial repetition as well as an additional filing. The City will be able to respond to the arguments in its reply brief and will not be prejudiced by permitting a single filing.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2012, I filed the foregoing motion by causing a digital version to be filed electronically via the CM/ECF system. The following counsel will be automatically served by the CM/ECF system:

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING THE PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

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INTRODUCTION AND INTEREST OF THE UNITED STATES

The Constitution and the Immigration and Nationality Act vest the National Government with the exclusive authority to regulate immigration and determine which aliens will be permitted to reside in the United States and which will be removed from the country. The City of Fremont, dissatisfied with the federal government's enforcement of the immigration laws, has enacted its own scheme to halt the "harbor[ing]" of persons "unlawfully present" in the United States. Ordinance §§ 1(1.B), 1(2.A). Its comprehensive regulations seek to make it difficult for aliens without proper documentation "to remain in Fremont" and to impel them to "go back to their country of origin." JA 866, 885 (statement of Initiative Sponsor Jerry Hart).[1] The scheme requires all renters to register with the City; precludes persons "unlawfully present" from obtaining accommodations; and imposes criminal penalties on landlords who rent to such persons while knowing or recklessly disregarding the fact that they are "unlawfully present" in the country.

The district court correctly concluded that the City's ordinance infringes on the federal government's authority to regulate immigration, and the Supreme Court's decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012), confirms the correctness of that ruling. *Arizona* makes clear that a State or locality may not attempt to "achieve its own immigration policy," *Arizona*, 132 S. Ct. at 2506, even when it does so by purportedly regulating in an area of traditional local concern. In *Arizona*, the

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[1] Citations to pages in the Joint Appendix will be abbreviated "JA __."

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immigration policy was affected by measures that included employment regulation. In this case, the policy is achieved by leveraging the City's power to regulate housing. The Supreme Court similarly made clear that restrictions on aliens are not saved from preemption because the State or locality relies on a federal determination of immigration status. Stressing the crucial role of federal discretion in the enforcement of immigration laws, the Court left no doubt that a State or locality does not "cooperate" with federal enforcement efforts when its officials take unilateral action against an alien that intrudes on the ability of federal officials to make discretionary determinations about the treatment of foreign nationals. *See* 132 S. Ct. at 2507.

Congress has not barred persons in this country who lack proper documentation from renting a room or obtaining other necessities of day-to-day existence. Such a scheme would create a host of foreign policy and humanitarian concerns and would undermine the orderly proceedings in which federal officials determine whether an alien may remain in this country. Instead, Congress has enacted specific, comprehensive anti-harboring provisions that would be undermined by divergent state and local sanctions that operate without regard to the exercise of federal discretion. *See United States v. Alabama*, --- F.3d ---, 2012 WL 3553503, at *10 (11th Cir. Aug. 20, 2012) (Congress has provided a "'full set of standards' to govern the unlawful transport and movement of aliens").

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The Ordinance is also premised on a critical misapprehension of the workings of federal law. The INA provides for inquiries to federal authorities in order to verify immigration status for a lawful purpose. 8 U.S.C. § 1373(c). But responses to these inquiries rarely reflect a federal determination to place an alien in removal proceedings—much less a determination that the alien is actually subject to removal. Fremont's ordinance would deny housing even to aliens who may ultimately be allowed to remain in the United States, even though federal law contemplates that aliens may remain in the country pending the conclusion of removal proceedings.

The district court erred insofar as it believed that the City's "occupancy license" scheme could be sustained if it severed the immediate penalties imposed by the Ordinance. The Ordinance will continue to exercise its intended *in terrorem* effect and will serve no legitimate local purpose. The Ordinance does not, as the district court believed, constitute permissible "cooperation" with the federal government. Although inquiries to federal immigration authorities may have the incidental effect of providing those authorities with information, that byproduct does nothing to change the Ordinance's character as an anti-harboring scheme preempted by federal law.

STATEMENT OF FACTS

I. Statutory Background

1. "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 132 S. Ct.

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2492, 2498 (2012). Pursuant to that power, Congress enacted the Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952), as amended, 8 U.S.C. §§ 1101 *et seq.*, which comprises "a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set[s] 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *DeCanas v. Bica*, 424 U.S. 351, 353, 359 (1976)). The INA establishes the grounds on which an alien is removable from the country, and also provides for administrative proceedings, subject to judicial review, that generally constitute the "sole and exclusive procedure for determining whether an alien may be . . . removed from the United States." 8 U.S.C. §§ 1229a(a)(3), 1252. In such proceedings, aliens may seek relief from removal, including relief that allows the alien to remain in the United States, such as asylum, *id.* § 1158; cancellation of removal, *id.* § 1229b; and adjustment of status, *id.* § 1255. A "principal feature" of this system is that it vests "broad discretion" in federal immigration officials to determine whether to grant discretionary relief, or even whether to "pursue removal at all." *Arizona*, 132 S. Ct. at 2499. In addition, some claims to relief from removal are based on international treaty obligations of the United States. *See, e.g.*, 8 U.S.C. § 1231(b)(3) (withholding of removal); 8 C.F.R. § 208.16(c) (withholding of removal for aliens with claims under the UN Convention Against Torture).

The comprehensive federal immigration scheme includes criminal sanctions for facilitating the unlawful entry, residence, or movement of aliens within the United States. *See United States v. Alabama*, --- F.3d ---, 2012 WL 3553503, at *10 (11th Cir. Aug. 20, 2012) (Congress has provided a "'full set of standards' to govern the unlawful transport and movement of aliens"); *see also* 8 U.S.C. § 1323 (penalizing persons for unlawfully bringing aliens into the United States); *id.* § 1324 (penalizing persons for bringing in, transporting, or harboring certain aliens within the United States); *id.* § 1327 (penalizing persons who assist certain inadmissible aliens to enter the country); *id.* § 1328 (penalizing those who import aliens for immoral purposes). Aliens themselves may be criminally prosecuted for unlawful entry or unauthorized re-entry into the United States. *See id.* § 1325 (penalizing unlawful entry); *id.* § 1326 (penalizing unauthorized re-entry following removal).

2. The federal government responds to inquiries from state and local officials regarding an individual's immigration status "for any purpose authorized by law." 8 U.S.C. § 1373(c). The Department of Homeland Security (DHS) has established several programs tailored to particular kinds of inquiries, including one known as Systematic Alien Verification for Entitlements ("SAVE").[2] Under SAVE, DHS

[2] By contrast, certain law enforcement-related queries, for example, are sent to a different part of DHS, the Law Enforcement Support Center ("LESC"). *See* U.S. Immigration and Customs Enforcement, Fact Sheet: Law Enforcement Support Center (May 29, 2012), http://www.ice.gov/news/library/factsheets/lesc.htm.

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responds to inquiries from government agencies attempting to verify the immigration status of individuals seeking particular government benefits. *See* 76 Fed. Reg. 58525, 58526 (Sept. 21, 2011). DHS's responses provide information about an individual's immigration status—whether, for example, the alien is a "parolee," a lawful permanent resident, or currently seeking asylum. Typically, these responses do not, and cannot, provide a definitive answer as to whether an alien is removable, or whether an alien is entitled to relief from removal. Such issues are generally subject to adjudication before an immigration judge in proceedings under 8 U.S.C. § 1229a.

II. Factual Background

1. The City of Fremont is a Nebraska municipality. In 2008, several members of the Fremont City Council unsuccessfully sought to pass an ordinance that would preclude illegal aliens from obtaining rental housing in the city. JA 787, 792-93. Although that ordinance was voted down, *see* JA 792-93, a group of Fremont citizens successfully petitioned to have a similar ordinance ("the Ordinance") submitted to public vote as an initiative. Jerry Hart, one of the three Fremont residents who spearheaded the initiative drive, declared that "there's a federal law on the books that's not being enforced" and that "we need to, as a city, protect ourselves." JA 861. The purpose of the Ordinance, he explained, was to make it sufficiently difficult for illegal aliens "to remain in Fremont" that they would "go back to their country of origin." JA 866, 885. Another of the sponsors, John Wiegert, similarly explained that

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the "main justification" for the Ordinance was to ensure that no illegal aliens would be "coming into our city." JA 832. The Ordinance passed in June 2010. JA 158, 1184.

The Ordinance declares that federal law "requires that certain conditions be met before an alien may be authorized to be lawfully present in the United States," JA 474, and that the "provision of housing to illegal aliens is a fundamental component of the federal immigration crime of harboring" codified in 8 U.S.C. § 1324(a)(1)(A). *Id.* The Ordinance makes it "unlawful," as a matter of local law, for any dwelling owner in the City to "harbor" an illegal alien. Ordinance § 1(2.A). The Ordinance deems "harboring" to include a landlord's decision to lease to, or otherwise "suffer or permit the occupancy of" a dwelling unit by, an alien "not lawfully present in the United States." Ordinance §§ 1(1.A), 1(2.A).

The Ordinance provides that no individual may obtain or reside in rental housing unless they have a City-issued "occupancy license." Ordinance § 1(3.A); *see also* Ordinance § 1(3.H-3.J).[3] License applicants must pay a $5 fee and provide the City Police Department with contact and other personal information. Ordinance § 1(3.B, 3.E). Those applicants who claim U.S. citizenship or nationality must sign a declaration to that effect, under threat of criminal penalties for providing false

[3] The Ordinance carves out an exception for rental contracts and tenancies that preceded the Ordinance's effective date. Ordinance § 1(2.A(3)).

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information. Ordinance § 1(3.E). Other applicants must provide "an identification number assigned by the federal government that the occupant believes establishes his lawful presence in the United States." *Id.* Applicants unaware of such a number may indicate as much. *Id.*

All individuals who submit completed applications are given an occupancy license. Ordinance § 1(3.F). If an applicant has not declared himself to be a U.S. citizen or national, however, the Police Department must "[p]romptly" take action under 8 U.S.C. § 1373(c) to "request the federal government to ascertain whether the occupant is an alien lawfully present in the United States." Ordinance § 1(4.A).

If the federal government reports that the occupant is "not lawfully present in the United States," the Police Department notifies the occupant of this deficiency. Ordinance § 1(4.B). The Ordinance provides the occupant 60 days to correct his federal records or provide additional information establishing his lawful presence in the country. *Id.* At the end of that period, the Police Department must make a second inquiry to DHS. If the response indicates the applicant is "an alien who is not lawfully present in the United States," the occupancy license is revoked, effective 45 days from when the City provides notice of revocation. Ordinance § 1(4.D).

A landlord or occupant who receives a deficiency notice, or a revocation notice, may seek a stay and "judicial review of the notice by filing suit against the City in a court of competent jurisdiction." Ordinance § 1(4.F). The court adjudicating the suit

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may attempt to use the provisions of 8 U.S.C. § 1373(c) to ask DHS for "a new ascertainment of [the occupant's] immigration status," and it may decide "the question of whether the occupant is an alien not lawfully present in the United States." *Id.* The answer to that last question is assertedly "determined under federal law," with the court instructed to "defer to any conclusive ascertainment of immigration status by the federal government." *Id.* The federal government's most recent determination of the individual's immigration status under section 1373, however, is merely given "a rebuttable presumption" that such status is accurate. *Id.*

The Ordinance imposes criminal penalties on landlords who violate its provisions.[4] Ordinance § 1(3.H-3.K). Persons found liable are subject to a $100 fine for each violation, and a separate violation occurs on each day that a landlord rents an apartment to an individual occupant without a valid license. Ordinance § 1(3.K-3.L).

3. Plaintiffs include a number of tenants and landlords who rent or own property in Fremont. *See, e.g.*, JA 643, 651, 1233, 1237-38. After plaintiffs sought preliminary injunctive relief, the City agreed to suspend enforcement of the Ordinance pending further judicial review. The parties ultimately proceeded to

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[4] The Ordinance is less clear as to whether it imposes any criminal penalties on occupants. The Ordinance mandates that "each occupant, age 18 or older, must obtain an occupancy license," Ordinance § 1(3.A), and provides that "[*a*]*ny person* who violates this section shall be subject to a fine of $100 for each such violation," Ordinance § 1(3.K) (emphasis added); *see also* Ordinance § 1(3.L). The City asserts in its brief, however, that criminal penalties are only imposed on landlords. *See* City Br. 5.

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discovery, and after they filed cross-motions for summary judgment, the district court permanently enjoined portions of the Ordinance, while simultaneously sustaining the remainder.

As particularly relevant here, the district court invalidated the portions of the Ordinance that provide "penalties for the harboring" of illegal aliens, or that provide "for the revocation of occupancy licenses and penalties for the lease or rental [of] dwelling units following the revocation of occupancy licenses." JA 108. The court explained that these provisions are preempted by federal law because they interfere with the INA's carefully calibrated removal system. *Id.*

The court concluded, however, that the Ordinance's other housing-related provisions were not preempted. The court observed that the INA "reflects Congress's intent that state and local authorities" communicate with the federal government, and thus it concluded that "to the extent that the Ordinance requires persons seeking residential occupancy permits to provide certain information concerning their immigration status, or lack thereof, and requires [the City]" to communicate that information to the federal government, the Ordinance was simply a cooperative effort in harmony with federal law.[5] JA 107-08.

[5] In other portions of its opinion, the court upheld various employment-related provisions of the Ordinance, while also concluding that certain housing-related provisions violated the Fair Housing Act. Additionally, the court rejected plaintiffs' contentions that the Ordinance violated the Equal Protection, Commerce, and Due

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ARGUMENT

The Ordinance's "Harboring" and Related Provisions Are Preempted by Federal Law

A. The INA Establishes a Comprehensive Framework for Regulating Immigration

"The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 132 S. Ct. at 2498. The "power to restrict, limit, [and] regulate . . . aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation[;] . . . whatever power a state may have is subordinate to supreme national law." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

This exclusive allocation of constitutional authority to the National Government reflects in part the extent to which immigration regulation is intertwined with the conduct of foreign policy and with the paramount importance of preserving the National Government's ability to speak "with one voice" in dealing with other nations. *Arizona*, 132 S. Ct. at 2506-07; *see also American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000). "Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this

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Process Clauses, 42 U.S.C. § 1981, and Nebraska state law, and further held that the invalid portions of the Ordinance were severable from those portions that the court upheld. *See* JA 102-06, 109-26. The United States takes no position on these issues.

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country who seek the full protection of its laws." *Arizona*, 132 S. Ct. at 2498. And "[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad." *Id.*

Cognizant of these significant national interests, Congress in the INA has "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Whiting*, 131 S. Ct. at 1973 (quoting *DeCanas*, 424 U.S. at 353, 359). The INA does not preempt "every state enactment which in any way deals with aliens," and "local regulation[s]" affecting aliens do not exceed state authority based on "some purely speculative and indirect impact on immigration." *DeCanas*, 424 U.S. at 355. Equally clearly, however, even a regulation in an area of traditional state authority is preempted if it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 132 S. Ct. at 2501 (quoting *Hines*, 312 U.S. at 67).

Of particular relevance here, federal law "provides a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens." *Alabama*, 2012 WL 3553503, at *9 (internal quotation marks omitted). For example, the INA imposes criminal penalties on an individual who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection . . . such

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alien." 8 U.S.C. § 1324(a)(1)(A)(iii). As the City points out, *see* City Br. 35, 51, Section 1324(c) permits local law enforcement officers to make arrests for violations of the anti-harboring provisions. *See* 8 U.S.C. § 1324(c). But, "[r]ather than authorizing states to prosecute for these crimes, Congress chose to allow state officials to arrest for § 1324 crimes, subject to federal prosecution in federal court." *Alabama*, 2012 WL 3553503, at *9 (internal quotation marks omitted).

B. Fremont's Ordinance Stands As an Obstacle to the Operation of Federal Law

1. The City of Fremont adopted the challenged "anti-harboring" provisions to address what it believes are deficiencies in the federal government's enforcement of federal immigration laws and to deter immigrants without proper documentation from entering or remaining in the city. In furtherance of these goals, the Ordinance conditions the right to rent housing in Fremont on issuance of an "occupancy license," which will be revoked only if the City concludes that the license holder "is not lawfully present in the United States." Ordinance § 1(4.D). The Ordinance thus purports to preclude aliens from renting a place to live based on the City's understanding of their immigration status.

The Supreme Court's decision in *Arizona v. United States* makes clear that the Ordinance impermissibly infringes on the federal scheme of immigration regulation, and that it would do so even if it faithfully implemented the substantive standards of

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federal law, which it does not. In *Arizona*, the Supreme Court addressed a state statute that, like the Fremont Ordinance, sought to compensate for asserted failures in federal enforcement of the immigration laws. Among other things, the statute made noncompliance with federal registration requirements a state misdemeanor. The Court explained that "[p]ermitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted." *Arizona*, 132 S. Ct. at 2502-03 (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) (States may not impose their own punishment for fraud on the Food and Drug Administration); *Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 288 (1986) (States may not impose their own punishment for repeat violations of the National Labor Relations Act)). The Supreme Court emphasized that the Arizona registration statute would have given the State "the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Id.* at 2503.

This reasoning applies equally to state and local efforts to supplement the federal anti-harboring laws, as the Eleventh Circuit recently explained in striking down provisions of an Alabama statute criminalizing the harboring of unlawfully present aliens—a term defined to include "entering into a rental agreement with [an] alien." *Alabama*, 2012 WL 3553503, at *9. "Like the federal registration scheme addressed in

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Arizona, Congress has provided a 'full set of standards' to govern the unlawful transport and movement of aliens," including "criminal penalties for these actions undertaken within the borders of the United States," and thus "a state's attempt to intrude into this area is prohibited." *Id.* at *10 (internal quotation marks and citation omitted).

The Fremont ordinance, like the Arizona and Alabama schemes, operates without regard to the scope of sanctions deemed appropriate by Congress and without regard to the exercise of federal discretion in enforcing the immigration laws. Congress did not make it a crime for aliens without proper documentation to rent an apartment. On the contrary, under federal law, aliens generally may be released on bond and remain in the United States during the pendency of removal proceedings, *see* 8 U.S.C. § 1226(a), and the INA specifically contemplates that aliens in removal proceedings will have an address at which federal immigration authorities will be able to contact them, *see id.* § 1229(a)(1)(F). A provision such as that enacted by Fremont would undermine the orderly operation of federal removal proceedings by depriving aliens of shelter while federal officials determine whether to institute removal proceedings, and while such proceedings take place.

Moreover, as the Eleventh Circuit explained in *Alabama*, the federal anti-harboring provision, "[b]y confining the prosecution of federal immigration crimes to federal court . . . limit[s] the power to pursue those cases to the appropriate United

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States Attorney." *Alabama*, 2012 WL 3553503, at *10 (internal quotation marks omitted; first alteration in original); *see* 8 U.S.C. § 1329. But, like the provision at issue in *Arizona*, the Ordinance leaves no room for the exercise of federal discretion.

2. Even apart from these fundamental defects of the City's scheme, the Ordinance is premised on a serious misunderstanding of the process by which the federal government determines whether an alien without proper documentation may nevertheless remain in the country. The assumption underlying the Ordinance is that City police can determine if an individual is or will be permitted to remain in the United States by making an inquiry to DHS under 8 U.S.C. § 1373(c). In this way, according to the City, the local police can verify if a renter is "not lawfully present" in the United States and revoke his authority to rent an apartment in Fremont.

A federal response to an inquiry under 8 U.S.C. § 1373(c) does not, however, reflect a determination as to whether an alien will be permitted to remain in the United States or even a determination as to whether the alien will, or should be, placed in removal proceedings. Although information in DHS records may indicate that an individual appears to be subject to removal proceedings, "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499. In some cases, DHS declines to initiate removal proceedings because the evidence is likely insufficient to demonstrate the alien's removability, or the alien is likely to secure some form of relief such that the alien

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would not be removed. In other circumstances, DHS may decline to pursue removal in the exercise of discretion, after consideration of a range of foreign-policy, humanitarian, and resource-allocation interests.

The "broad discretion" exercised by federal immigration officials constitutes a "principal feature of the removal system" designed by Congress. *Arizona*, 132 S. Ct. at 2499. The Supreme Court stressed in *Arizona* that "[d]iscretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service." *Id.*; *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-87 (1999) (recognizing the importance of the exercise of discretion in removal proceedings, as confirmed by enactment of 8 U.S.C. § 1252(g)).

"If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal." *Arizona*, 132 S. Ct. at 2499.[6] Aliens may prevail on such grounds

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[6] For example, certain otherwise unlawfully present aliens who have been in the United States continuously for more than 10 years are eligible to seek cancellation of removal at the discretion of the Attorney General. *See* 8 U.S.C. § 1229b. Aliens

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even if federal officials believe that removal proceedings are warranted. Indeed, in 14% of cases decided by immigration judges in Fiscal Year 2011, the alien was granted some form of relief from removal. Executive Office for Immigration Review, *FY 2011 Statistical Year Book*, at D2.[7] In another 12% of cases, the immigration judge terminated the proceeding on other grounds, including DHS's failure to establish removability. *Id.*

The Ordinance thus seeks to expel from the municipality individuals who may be permitted to remain in the United States and short-circuits the comprehensive removal procedures established by Congress. The Ordinance's provision for judicial review further underscores the extent to which the City's parallel enforcement scheme is incompatible with federal law by purporting to vest state courts with the power to decide "the question of whether the occupant is an alien not lawfully present in the United States." Ordinance § 1(4.F). A state court reviewing a decision of the City's Police Department has neither the capacity nor the authority to determine whether an alien can properly remain in the country.

In short, Fremont's Ordinance rests on the unsound assumption that the Police Department and state courts will be able to determine who can lawfully remain in the

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who were admitted as nonimmigrants may be eligible, again at the discretion of the Attorney General, for adjustment to lawful permanent resident status. *See id.* § 1255.

[7] *Available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf.

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country in advance of and without regard to determinations in a federal removal proceeding.

C. The District Court Erred in Concluding that Housing-Related Portions of the Ordinance Survived Preemption

Although the district court properly concluded that portions of the Ordinance were preempted, it declined to invalidate all of its housing-related provisions. Instead, it severed and upheld those portions of the Ordinance that require renters to obtain occupancy licenses, and that require the City to submit status inquiries to the federal government based on information gleaned from applications for those licenses. In the district court's view, these portions did not conflict with federal law because they helped facilitate "cooperation" between federal and local officials. JA 107-08 (citing 8 U.S.C. § 1357(g)(10)).

The fundamental defects in the municipal scheme cannot be remedied by severing its penalties and disabilities. The purpose of the Ordinance, as its sponsors explained, is to impel aliens without proper documentation to "go back to their country of origin," JA 885, and discourage them from "coming into our city" in the first place, JA 832. *See also* JA 1021-22 (statement of Council Member Warner) (explaining that the Ordinance would make illegal immigrants know that they were "not welcome" in Fremont).

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Even divested of its immediate local penalties, the purpose and effect of the Ordinance will be to subject all renters to a quasi-registration scheme with the desired *in terrorem* effect of discouraging aliens without proper documentation from entering or remaining in Fremont. As discussed, the impact of the Ordinance would be felt not only by individuals who might ultimately be subject to removal, but by individuals who may be entitled or permitted to remain in the United States. Its impact would be felt, as well, by families with even one member whose status is open to question. The Ordinance thus threatens to defeat the longstanding goal of federal immigration law, as well as U.S. foreign policy, to "leave [aliens] free from the possibility of inquisitorial practices and police surveillance that might . . . affect our international relations." *Hines*, 312 U.S. at 73-74.

A scheme that deters aliens without proper documentation from remaining in a particular locality does not in any sense constitute "cooperation" with the federal government. The INA contemplates that state and local officers will "cooperate with [the Secretary of Homeland Security] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10). But as the Supreme Court recognized in *Arizona*, cooperation does not exist when state officials take unilateral action against an alien that is not subject to federal direction. *See* 132 S. Ct. at 2507; *see also id.* (looking to DHS guidance to determine the meaning of "cooperation"). The purpose of the Ordinance is not to provide

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information to the federal government, but to obtain information for use in deterring the presence of aliens in Fremont. Indeed, section 1373(c), on which the City places principal reliance, applies only to communications from a government entity seeking to "*verify or ascertain* the citizenship or immigration status" for a legally authorized purpose. 8 U.S.C. § 1373(c) (emphasis added). That the requests from Fremont may incidentally provide information to the federal government—without regard to federal enforcement priorities or direction—does not transform the character of the Ordinance.

The City further mischaracterizes the Ordinance by attempting to analogize it to a provision of Arizona law, Section 2(B), which was sustained by the Supreme Court in *Arizona*. *See* City Br. 46. The inquiries contemplated by the Fremont Ordinance are of a different nature than the inquiries authorized by the Arizona statute, which required "state officers to make a 'reasonable attempt . . . to determine the immigration status' of any person they stop, detain, or arrest on some other legitimate basis if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.'" *Arizona*, 132 S. Ct. at 2507 (quoting Ariz. Rev. Stat. Ann. § 11-1051(B)). Officers discharge this duty by contacting the federal government's Law Enforcement Support Center, which was established to field such calls from state law-enforcement personnel. The Supreme Court stressed that on its face, Section 2(B) concerned only the types of communication between federal and

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state officials authorized by federal statute and which might, indeed, occur in the absence of the new Arizona provision. The Court observed that Congress had "done nothing to suggest it is inappropriate to communicate with ICE in these situations." *Id.* at 2508. The Fremont ordinance, in contrast, establishes a scheme to determine immigration status and deter the presence of illegal aliens that is untethered to any legitimate state activity. Instead, like the provisions at issue in *Arizona* that were held to be preempted, it constitutes an attempt to unilaterally attach consequences to a person's immigration status without regard to federal priorities or the operation of the federal scheme.

Nor can the full extent of a scheme of this kind be determined by viewing the Ordinance in isolation. In the City's view, all states and municipalities may adopt similar schemes with the purpose and result of deterring aliens "not lawfully present" in the United States from remaining in their jurisdictions and of impelling them to "go back to their country of origin," JA 885, without regard to the INA's processes for removal of an alien. That result would undermine the calibrated uniformity of federal law, potentially disrupt the free movement of persons throughout the Nation, and open the door to harassment of aliens, international controversy, and possible retaliation against United States citizens in foreign countries. Fremont has no greater authority to impose its own immigration policy or redirect federal resources than any other city or State. The Constitution does not contemplate a patchwork of

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immigration regulations across the country, which would have a cumulative impact of driving unlawfully present aliens from the country without regard to the removal process required by federal law. *See North Dakota v. United States*, 495 U.S. 423, 458 (1990) (Brennan, J., concurring in the judgment in part and dissenting in part) (considering that the difficulties presented by a state requirement would "increase exponentially if additional States adopt[ed] equivalent rules," and noting that such a nationwide consideration was "dispositive" in *Public Utilities Commission v. United States*, 355 U.S. 534, 546 (1958)).

D. The City Misunderstands the Preemption Principles Set Forth in ***Arizona***, ***Whiting***, and ***DeCanas***

1. Disregarding the basic teachings of *Arizona*, the City mistakenly relies on *DeCanas* and *Whiting* to urge that it has "wide latitude" to impose all manner of restrictions and penalties on persons not lawfully in the country so long as it uses the tools available to local regulators. City Br. 42-43. Because the Ordinance regulates the availability of housing, the City contends, the enactment does not interfere with federal law and is entitled to a presumption against preemption.

This argument fails in all respects. *Arizona* made clear that even a state statute purportedly directed to a matter of core state responsibility cannot withstand preemption if it has the effect of interfering with a comprehensive federal regulatory scheme. *See* 132 S. Ct. at 2504-05 (striking down state employment statute that

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"interfere[d] with the careful balance struck by Congress" in its "comprehensive framework" governing the unauthorized employment of aliens). That ruling is entirely consistent with its earlier decision in *DeCanas*, which had rejected a preemption challenge in the context of employment law because, at that time, "Congress *intended* that the States be allowed, 'to the extent consistent with federal law, [to] regulate the employment of illegal aliens.'" *Toll v. Moreno*, 458 U.S. 1, 13 n.18 (1982) (quoting *DeCanas*, 424 U.S. at 361) (emphasis and alteration in original). The Court observed that it had "never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se" preempted, and that "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, . . . even if such local regulation has some purely speculative and indirect impact on immigration." *DeCanas*, 424 U.S. at 355-56. As *Arizona* confirms, *DeCanas* did not hold that States or municipalities have free rein to enact their own policies concerning illegal immigration under the guise of regulating an area of traditional local concern.

Whiting likewise offers no support for the City's circumscribed understanding of preemption analysis. In that decision, the Court examined the 1986 amendments to the INA, enacted after *DeCanas*. Those amendments imposed sanctions on employers who knowingly hire illegal aliens, but expressly preserved state and local authority to impose employment-related sanctions "through licensing and similar

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laws[.]" 8 U.S.C. § 1324a(h)(2). *Whiting* held that an Arizona licensing scheme fell within the express scope of this savings clause, *see* 131 S. Ct. at 1978-81, and the Court's plurality relied heavily on that carve-out in its implied preemption analysis, concluding that Congress had specifically contemplated and authorized the resulting disuniformity and state sanction. *See id.* at 1979-80, 1981, 1984. *Whiting* did not remotely suggest that a state may bar any transaction by or with illegal aliens without triggering preemption concerns, and *Arizona* precludes the City's attempt to read *Whiting* in this manner.

Applying the principles articulated by the Supreme Court, the Eleventh Circuit in *Alabama* invalidated a state law that prohibited its courts from recognizing the validity of any contracts entered into by aliens not lawfully present in the United States. *Alabama*, 2012 WL 3553503, at *16-19. The Eleventh Circuit explained that the Supreme Court has repeatedly invalidated state statutes that purport to legislate in areas of traditional state concern and are not subject to field preemption. Thus, in *Crosby*, the Supreme Court unanimously invalidated a Massachusetts statute that restricted the ability of state agencies to buy goods and services from companies that conducted business with Burma, finding that the statute constituted an impermissible obstacle to the effective operation of federal foreign policy. Similarly, in *Gould*, the Court held that a State may not add to the remedies provided by the National Labor Relations Act by refusing to contract with employers who commit multiple unfair

labor practices. The Eleventh Circuit quoted the reasoning in *Gould*, observing that "even though the state purported to govern in an area of traditional state concern, it could not 'enforce the requirements' of federal regulations through its own statutory scheme." *Id.* at *19 (quoting *Gould*, 475 U.S. at 291). And it noted that in *Buckman*, the Supreme Court likewise "found that a state tort cause of action—an area of traditional state concern—was preempted by federal law where the underlying allegations concerned fraud against a federal agency." *Id.* (citing *Buckman*, 531 U.S. at 347).

For reasons already discussed, the Fremont ordinance cannot, moreover, plausibly be characterized a regulation of "residential rental units" within the City's traditional sphere of authority. City Br. 23. The Ordinance makes it "unlawful," as a matter of local law, for any dwelling owner in the City to "harbor" an alien "not lawfully present in the United States" by "suffer[ing] or permit[ting] their occupancy of" a dwelling unit. Ordinance §§ 1(1.A), 1(2.A). The Ordinance is thus manifestly focused on federal immigration law, not on local problems. *See Buckman*, 531 U.S. at 347-48 (no presumption against preemption when a State enmeshed itself in the relationship between a federal agency and the entities it regulates); *United States v. Locke*, 529 U.S. 89, 108 (2000) (no presumption when a State "regulates in an area where there has been a history of significant federal presence" and little traditional role for the states).

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2. The City fares no better in suggesting that the Ordinance is authorized by 8 U.S.C. § 1621, which provides that certain aliens who are not "qualified aliens," "nonimmigrants," or paroled aliens within the meaning of 8 U.S.C. § 1621(a), are ineligible for specified types of state and local public benefits. *See* City Br. 40-41, 49. Section 1621 applies to a "grant, contract, loan, professional license, or commercial license provided by . . . a State or local government," 8 U.S.C. § 1621(c)(1)(A), or to a "retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by . . . a State or local government," *id.* § 1621(c)(1)(B).

Section 1621 does *not* require States to prohibit private rentals to any aliens, and the statute's text makes plain that while it applies to a "professional license" and a "commercial license," it has no application to an "occupancy license" of the type at issue here. Indeed, nothing in the statute or legislative history suggests that Congress intended through this provision to authorize States and localities to circumvent the exclusive federal removal procedures by enacting "licensing" regimes that effectively deprive an alien of shelter in a given location and to pursue a policy of alien exclusion

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or legislated homelessness. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.").[8]

[8] The statute defines the categories of "qualified alien," "nonimmigrant," or paroled alien, that are used in determining the application of 8 U.S.C. § 1621. The statute contains no category or definition of "not lawfully present."

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CONCLUSION

For the foregoing reasons, the district court's order should be affirmed insofar as it granted an injunction regarding the Ordinance's housing provisions, and reversed insofar as it denied an injunction regarding those provisions.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2012, I filed the foregoing brief by causing a digital version to be filed electronically via the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(c)-(d) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using Microsoft Word and complies with the type and volume limitations set forth in Rules 29 and 32 of the Federal Rules of Appellate Procedure. I further certify that the font used is 14 point Garamond, for text and footnotes, and that the computerized word count for the foregoing brief is 6,764 words.

Pursuant to 8th Cir. R. 28A(h)(2), I hereby certify that the foregoing brief has been scanned by Microsoft Forefront Endpoint Protection 2010, version 1.135.230.0 (last updated August 31, 2012), and that no viruses were detected.

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