

No. 10-10751

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VILLAS AT PARKSIDE PARTNERS, ET AL.,
Plaintiffs-Appellees,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF APPELLEES**

THOMAS E. PEREZ
Assistant Attorney General

MARK L. GROSS
ROSCOE JONES, JR.
Attorneys
Civil Rights Division
U.S. Department of Justice

TONY WEST
Assistant Attorney General

SARAH R. SALDAÑA
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
MICHAEL P. ABATE
BENJAMIN M. SHULTZ
DANIEL TENNY
(202) 514-3518
Attorneys, Appellate Staff
Civil Division, Room 7211
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530

CERTIFICATE OF INTERESTED PERSONS

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

In accordance with Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, in addition to the persons and entities already identified in the other briefs. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Counsel for the United States of America, Amicus Curiae:

Michael P. Abate, U.S. Department of Justice
Beth S. Brinkmann, U.S. Department of Justice
Mark L. Gross, U.S. Department of Justice
Roscoe Jones Jr., U.S. Department of Justice
Thomas E. Perez, U.S. Department of Justice
Sarah R. Saldaña, U.S. Department of Justice
Benjamin M. Shultz, U.S. Department of Justice
Mark B. Stern, U.S. Department of Justice
Daniel Tenny, U.S. Department of Justice
Tony West, U.S. Department of Justice

/s/ Benjamin M. Shultz
Benjamin M. Shultz
Counsel for the United States

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INTRODUCTION AND INTEREST OF THE UNITED STATES

The United States respectfully files this brief in response to the Court's invitation to participate as amicus curiae. The Constitution and the Immigration and Nationality Act vest in the National Government 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 United States's view, the City's ordinance impermissibly intrudes on that authority, and the district court's judgment should be affirmed.

STATEMENT OF FACTS

I. Statutory Background

The “[p]ower to regulate immigration is unquestionably exclusively a federal power,” and only the federal government may determine “who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *DeCanas v. Bica*, 424 U.S. 351, 354, 355 (1976). Pursuant to that power, Congress has enacted the Immigration and Nationality Act (INA), 66 Stat. 163, 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*, 424 U.S. at 353, 359).

The INA establishes the grounds on which an alien is removable from the country, and also provides a scheme of administrative and judicial review that generally constitutes the “sole and exclusive procedure for determining whether an alien may be . . . removed from the United States.” *Id.* § 1229a(a)(3).¹ In these proceedings, aliens may seek relief from removal, including relief that allows the alien

¹ In specific circumstances, there are other federal proceedings for determining whether the federal government should enter a final order of removal and remove an alien from the United States. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(A) (expedited removal for aliens arriving at a port of entry and certain other aliens); *id.* § 1228(b) (administrative removal of certain aliens who have been convicted of aggravated felonies).

to remain in the United States, such as asylum, *id.* § 1158; cancellation of removal, *id.* § 1229b; and adjustment of status, *id.* § 1255.

Under federal law, 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). DHS has implemented this provision through programs tailored to particular kinds of inquiries. One of these is the Systematic Alien Verification for Entitlements program (the "SAVE program"), through which DHS responds to inquiries from government agencies who seek to verify whether an individual is eligible for particular government benefits. *See* 76 Fed. Reg. 58525, 58526 (Sept. 21, 2011) (describing the SAVE program).² In responding to SAVE inquiries, DHS provides information about an individual's immigration status—whether, for example, the alien is a "parolee," a "Section 245 temporary resident," or is currently seeking asylum. These responses do not, however, provide a definitive answer as to whether an alien is removable, or whether an alien is entitled to relief from removal, which will generally be adjudicated before an immigration judge in proceedings under

² By contrast, certain law enforcement-related queries, for example, are sent to a different part of DHS, the Law Enforcement Support Center ("LESC"). We discuss SAVE because the City appears to contemplate using that program, *see* City Br. 25-31, and has not contended that the Building Inspector is a law enforcement officer entitled to use LESC.

8 U.S.C. § 1229a. *See* ROA 3728³ (noting that DHS does not give a yes or no answer in response to SAVE inquiries).

II. Factual Background

1. The City of Farmers Branch is a Texas municipality. In September 2006, the City Council passed a resolution declaring that the City was “downright mad that President Bush and the Executive Branch of the United States government . . . is [sic] totally failing in the enforcement of” the INA. ROA 7467, 7469. The resolution declared that the City was prepared to “take whatever steps it legally can to respond to the legitimate concerns of our citizens” with respect to an “utter breakdown and failure of the United States government to enforce immigration laws.” ROA 7468.

Two months later, the City adopted Ordinance 2892, the first of three ordinances designed to preclude housing rentals to persons not “lawfully present” in the country. ROA 5357-5361, 5374. This first ordinance asserted that it had been adopted solely “for the purposes of assisting the United States Government in its enforcement of the Federal Immigration Laws.” ROA 5361.

In December 2006, voters petitioned for Ordinance 2892’s repeal. ROA 5391. The Council responded by scheduling a referendum. ROA 5391-5392. Before the referendum took place, however, a state court issued a temporary restraining order against Ordinance 2892, citing possible violations of a Texas open meetings law. *See*

³ Citations to the electronic Record on Appeal will be abbreviated “ROA.”

Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 851, 852 (N.D. Tex. 2008) (describing the litigation history).

The Council then repealed Ordinance 2892 and enacted Ordinance 2903. *Id.*; *see also* ROA 5376-5382. Like its predecessor, Ordinance 2903 barred landlords from renting an apartment to individuals who failed to provide sufficient documentation of citizenship or “eligible immigration status.” ROA 5377-5380.⁴ City voters approved this second ordinance in a May 2007 referendum. *Villas*, 577 F. Supp. 2d at 852.

Before the ordinance took effect, however, it was temporarily enjoined by a federal court. The court subsequently issued a permanent injunction, holding that the ordinance was preempted by federal law and violated due process. *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 866-77, 879 (N.D. Tex. 2008).

2. After the second ordinance was preliminarily enjoined, the Council approved Ordinance 2952, which was to become effective “on the 15th day after the date on which a final and appealable judgment” was rendered by the district court hearing the challenge to the second ordinance. ROA 4524.

Ordinance 2952 prohibits “occupants”—individuals 18 and older who reside at a single family residence unit—from obtaining rental housing unless they have a City-issued “occupancy license.” ROA 4513-4514. License applicants must pay a \$5 fee

⁴ The new Ordinance made exceptions for certain minors and for individuals over 62. ROA 5378.

and provide the Building Inspector with their name, mailing address, birth date, and country of citizenship, along with information about the housing they seek to rent.

ROA 4514. Applicants who claim U.S. citizenship or nationality must sign a declaration to that effect. ROA 4514. Other applicants must provide “an identification number assigned by the federal government that the occupant believes establishes his or her lawful presence in the United States.” ROA 4515. Applicants unaware of such a number may indicate as much. ROA 4515.

If an applicant has not declared himself to be a U.S. citizen or national, the Building Inspector must “[p]romptly” take action under 8 U.S.C. § 1373(c) to “verify with the federal government whether the occupant is an alien lawfully present in the United States.” ROA 4516.

If the federal government “reports the status of the occupant as an alien not lawfully present in the United States,” the Building Inspector notifies the occupant and his landlord. ROA 4516. The ordinance provides the occupant 60 days to correct his federal records and/or provide additional information establishing his lawful presence in the country. ROA 4516. At the end of that period, the Building Inspector makes 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. ROA 4517.

A landlord or occupant who receives a deficiency notice, or a revocation notice, may seek both a stay and “judicial review of the notice by filing suit against the building inspector in a court of competent jurisdiction in Dallas County, Texas.” ROA 4517. The plaintiff in such a suit may require the court to attempt to use the provisions of 8 U.S.C. § 1373(c) to ask DHS for “a new verification of . . . immigration status,” and he may also seek review of “the question of whether the occupant is lawfully present in the United States.” ROA 4518. The answer to that last question is assertedly “determined under federal law.” ROA 4518. The federal government’s most recent determination of the individual’s immigration status under section 1373 is given “a rebuttable presumption” that such status is accurate. ROA 4518.⁵

Ordinance 2952 imposes criminal penalties on occupants and landlords who violate its provisions. *See* ROA 4515-4516 (creating “offenses” for violating various provisions of the ordinance); Tex. Penal Code Ann. §§ 1.03(a), 12.02 (explaining that municipal “offenses” are subject to criminal penalties). Persons found liable for these violations are guilty of a Class C Misdemeanor, and they can be fined up to \$500 for each day they are not in compliance—the highest penalty a municipality may normally

⁵ A federal determination is “conclusive” under the ordinance only if federal law gives the determination “preclusive effect.” ROA 4518. Inquiries under section 1373(c), which do not take place in an adjudicative or adversarial setting, would not be given such preclusive effect. *See Medina v. INS*, 993 F.2d 499, 503-504 (5th Cir. 1993) (explaining when administrative proceedings are given preclusive effect).

assess under Texas law when violations are unrelated to fire safety, zoning, or public health and sanitation. ROA 4524; *see also* Tex. Penal Code Ann. § 12.23; Tex. Loc. Gov't Code Ann. § 54.001. Additionally, if a landlord rents housing to someone who lacks an occupancy license, the Building Inspector must suspend the landlord's rental license until the violation is cured to the City's satisfaction, and the landlord cannot collect rent from his tenant in the interim. ROA 4516-4517.

3. Plaintiffs in this case are tenants and landlords who rent or own property in Farmers Branch. ROA 3968, 3999, 4002, 6647, 6667, 6670. The district court entered a preliminary injunction to restrain enforcement of Ordinance 2952, *see* ROA 834, and, in the order on review, made its injunction permanent, *see* ROA 10552. The court explained that the ordinance was an impermissible attempt to regulate immigration that was preempted by federal law. The City appealed. Following briefing and argument, this Court invited the United States to participate as *amicus curiae*.

SUMMARY OF ARGUMENT

Dissatisfied with federal enforcement of immigration laws, the City has enacted a series of measures to preclude persons not lawfully present in the United States from living within its borders. Its latest enactment, Ordinance 2952, precludes rentals by and to persons that the City deems not lawfully present in the country, and establishes criminal sanctions for violations.

The City properly disclaims any authority to regulate in the sphere of immigration. It urges, however, that the ordinance merely imposes additional restrictions and penalties based on the classifications of federal immigration law and does not pose an obstacle to the operation of federal law.

The central premises of the City's argument are mistaken. First, states and localities have no general authority to impose new penalties based on federal immigration status by enacting "additional or auxiliary regulations." *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941). The comprehensive scheme enacted by Congress establishes penalties and restrictions with a view to the interests of the Nation as a whole, including our treaty commitments and the conduct of foreign policy. The Constitution and the INA do not preempt "every state enactment which in any way deals with aliens[.]" *DeCanas*, 424 U.S. at 355. But they also do not authorize states and localities to enact diverse measures to regulate immigration itself or to enforce the federal immigration laws in the manner they believe most appropriate.

Second, although the City repeatedly states that its ordinance adopts federal immigration classifications, the ordinance fundamentally misapprehends the operation of federal law. The ordinance assumes that the City Building Inspector can determine whether an individual is lawfully present in the United States by obtaining their immigration status from DHS. "Lawfully present" is not, however, a relevant classification of federal immigration law. In response to an inquiry, DHS may indicate

that an individual appears to be subject to removal proceedings. But whether an alien will, in fact, actually be removed from the country is determined in the removal proceeding itself. Congress has not made it a crime to rent accommodations pending the outcome of the federal proceedings; indeed, the INA specifically contemplates that aliens in removal proceedings will have an address at which they can be contacted. *See* 8 U.S.C. § 1229(a)(1)(F).

The City is equally wide of the mark in urging that the ordinance is authorized by various INA provisions. The ordinance does not constitute cooperation in the enforcement of federal law, leaves no room for federal discretion, and no federal statute authorizes localities to enact regulations that preclude renting to “unlawfully present” aliens.

ARGUMENT

Ordinance 2952 Is Preempted By Federal Law

A. The INA Establishes a Comprehensive Framework For Regulating Immigration.

The Supreme Court has repeatedly made clear that the “authority to control immigration . . . is vested solely in the Federal government,” *Truax v. Raich*, 239 U.S. 33, 42 (1915), and that the formulation of “[p]olicies pertaining to the entry of aliens and their right to remain here . . . is entrusted exclusively to Congress.” *Galvan v. Press*, 347 U.S. 522, 531 (1954). 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, 312 U.S. at 68.

The Constitution thus ensures that the only borders relevant to immigration policy are the Nation’s borders. *See id.* at 72-73 & n.35 (noting that the Constitution requires a uniform rule of naturalization). It leaves no room for competing state and municipal regimes that purport to enforce federal immigration law by forcing immigrants across city, state, or national borders. Rather, immigration policy is reserved for the National Government, which acts in the interest of the Nation as a whole.

The exclusive allocation of constitutional authority to the National Government also reflects the extent to which immigration regulation is intertwined with the conduct of foreign policy and foreign relations and with the paramount importance of preserving the National Government’s ability “to speak for the Nation with one voice in dealing with other governments,” *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000)). In invalidating a state scheme for the registration of aliens, the Supreme Court in *Hines* stressed that “[o]ne of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.” *Hines*, 312 U.S. at 64. If the

authority to regulate immigration were not vested exclusively in the National Government, “a single State [could], at her pleasure, embroil us in disastrous quarrels with other nations.” *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *see also Hines*, 312 U.S. at 64 (“[I]nternational controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another’s subjects inflicted, or permitted, by a government.”).

Cognizant of these sensitivities, 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.’” *Crosby*, 530 U.S. at 373 (quoting *Hines*, 312 U.S. at 67).

B. Local Laws Like Ordinance 2952 Pose an Obstacle to the Operation of Federal Law.

1. Since 2006, the City has enacted a series of ordinances to remedy what it believes are deficiencies in the federal government’s enforcement of the federal

immigration laws. The City Council presaged the first of these measures with a September 2006 declaration that the City was “downright mad that President Bush and the Executive Branch of the United States government . . . is [sic] totally failing in the enforcement of” federal immigration law. ROA 7467, 7469. That declaration further stated that, absent federal action, the City would “take whatever steps it legally can to respond to the legitimate concerns of our citizens” about what it characterized as an “utter breakdown and failure of the United States government” in the immigration arena. ROA 7468. The Council voiced similar sentiments as motivating its enactment of Ordinance 2952 in 2008. Council member Ben Robinson, for example, noted his concern about the effects on the country from what he characterized as “open borders” and expressed his dissatisfaction with federal immigration enforcement, *see* ROA 5602-5603, 5609-5610, 5613-5614, and other council members similarly linked the ordinance with a desire to increase enforcement of federal immigration law. *See, e.g.*, ROA 5796-5797 (O’Hare); ROA 6617, 6622 (Scott); ROA 6018.

In furtherance of these goals, Ordinance 2952 conditions the right to rent housing in Farmers Branch on issuance of an “occupancy license” by the City Building Inspector, and imposes criminal sanctions for violations. A completed application for an occupancy license can be denied for only one reason—a determination by the Building Inspector that an alien “is not lawfully present in the

United States.” ROA 4516-4517. The ordinance thus responds to perceived deficiencies in federal immigration enforcement by forcing persons “not lawfully present in the United States” to relocate outside the City’s borders.

2. The City argues that the ordinance uses “the terms and classifications of federal immigration law” (City Br. 10), and simply imposes additional disabilities on persons without entitlement to remain in the country. Thus, in the City’s view, local schemes of this kind, even if adopted by localities nationwide, would not pose an obstacle to the operation of federal law.

Even if the Ordinance reflected a correct understanding of “the terms and classifications of federal immigration law,” its attempt to supplement federal law with additional prohibitions and sanctions would constitute an obstacle to the INA’s operation. Congress has comprehensively regulated the treatment of aliens in the United States, and, as is generally the case in the enactment of a comprehensive scheme, Congress’s judgments are reflected both in the conduct that it has directly regulated and in the conduct it has *not* proscribed. See *P.R. Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (when Congress creates a “comprehensive federal scheme” but “intentionally leaves a portion of the regulated field without controls, . . . the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action”).

The Supreme Court has repeatedly emphasized that “conflict is imminent” when “two separate remedies are brought to bear on the same activity.” *Crosby*, 530 U.S. at 380 (quoting *Wis. Dep’t of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986)). Applying this principle, the Court invalidated the state alien registration scheme at issue in *Hines* even though the state did not purport to determine who should be admitted into the country, or to second-guess federal determinations regarding immigration status. The statute was invalid because “[t]he basic subject of the state and federal laws is identical,” and so the state could not enact “additional or auxiliary regulations.” *Hines*, 312 U.S. at 61, 66-67. Similarly, in the closely related area of foreign affairs regulation, the Court in *Crosby* unanimously invalidated a Massachusetts law that disfavored state contracts with corporations that had transacted business with Burma in light of a federal statute that imposed a separate sanctions regime. The federal and state enactments unquestionably “share[d] the same goals,” 530 U.S. at 379, and the federal statute did not explicitly indicate congressional intent to preempt pre-existing state sanctions, *id.* at 387. The Court nevertheless had no difficulty in concluding that the state contracting regulations posed an obstacle to the conduct of foreign policy.

The Supreme Court has applied the same principles even in areas not constitutionally reserved exclusively to the National Government. 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 refusal to contract, the Court concluded, “functions unambiguously as a supplemental sanction for [federal] violations,” based on conduct that the state had no authority to regulate. 475 U.S. at 288. Similarly, in *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341, 347-53 (2001), the Court held that a state could not provide a tort remedy for claims premised on fraud against the federal Food and Drug Administration, recognizing that a state could not properly alter the operation of federal law, or the federal government’s relationship with those it regulates, in this manner.

Congress created civil removal proceedings and enacted other federal penalties or consequences for specified conduct, but did not impose criminal penalties on aliens if they attempted to rent a dwelling, even if those aliens may be subject to removal proceedings. Under the City’s theory, however, every municipality would be free to enact its own version of Ordinance 2952. Indeed, in the City’s view, municipalities would be free to criminalize virtually every type of transaction involving an individual “not lawfully present” in the United States, irrespective of the INA’s formal processes for removal of an alien. That result would undermine the calibrated uniformity of federal law, potentially disrupt the free movement of goods and persons throughout the Nation, and open the door to harassment of aliens, international controversy, and possible retaliation against United States citizens in foreign countries.

This result would be particularly troubling because the impact of such ordinances would fall not only on individuals who might ultimately be subject to removal, but also on individuals entitled or permitted to remain in the United States. In the case of Ordinance 2952, for example, the City bars an entire family unit from renting an apartment together, even when some family members (such as children) are citizens or other lawful residents, simply because of one family member's perceived immigration status. Moreover, landlords operating under the ordinance would have every incentive to demand proof of lawful residence whenever they felt any uncertainty as to a renter's immigration status, so as to avoid nullification of lease arrangements by the Building Inspector. If the evidence of legal status were less than entirely clear, an economically rational landlord would likely reject the rental application in favor of other available tenants. Such measures would thus threaten 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" and undermine "our traditional policy of not treating aliens as a thing apart." *Hines*, 312 U.S. at 73-74.

The nature of the obstacle to federal law cannot, of course, be assessed solely by the impact of any single ordinance. Farmer's Branch has no greater authority to impose its own immigration policy or redirect federal resources than any other city or state. Its position thus assumes that all localities may adopt their own, varying

immigration measures without regard to federal priorities and without regard to other states' interests. The Constitution does not contemplate a patchwork of 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)).

C. The Ordinance Is Premised on a Fundamental Misunderstanding of Federal Law.

Although the City repeatedly stresses that it adopted the classifications of federal law, the ordinance seriously misperceives the INA's operation. The ordinance is premised on the notion that the City Building Inspector can determine if an individual is legally permitted to remain in the United States by making an inquiry to DHS under 8 U.S.C. § 1373. In this way, according to the City, the Building Inspector can verify if a renter is “not lawfully present” in the United States and revoke his authority to live in Farmers Branch. Thus, in the City's view, anyone who is “not lawfully present” is subject to immediate banishment.

The ordinance and federal law, however, are fundamentally misaligned. Under federal law, DHS's view that an alien lacks lawful status does not trigger immediate physical removal. When the federal government responds to inquiries regarding immigration status under 8 U.S.C. § 1373(c), its responses do not reflect a determination about whether removal proceedings should be instituted or whether an alien will ultimately be permitted to remain in the United States. Although information in DHS records may indicate that an individual appears to be subject to removal proceedings, aliens subject to removal are generally entitled to a hearing at which they have the right to retain counsel and to present evidence and cross-examine government witnesses. *Id.* § 1229a(b)(4). At the conclusion of the alien's section 1229a proceeding, a federal immigration judge determines whether the alien is removable "based only on the evidence produced at the hearing." *Id.* § 1229a(c)(1)(A). During the pendency of these proceedings, aliens may remain in the United States. Indeed, the INA specifically contemplates that aliens in removal proceedings have an address at which they can be contacted. *See id.* § 1229(a)(1)(F).

Aliens may also, in the course of removal proceedings, present evidence of eligibility for various forms of relief. For example, aliens with a well-founded fear that return to their native country would lead to persecution may seek asylum. *Id.* §§ 1158, 1101(a)(42)(A). 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. *Id.* § 1229b. Aliens who were admitted as nonimmigrants may be eligible, again at the discretion of the Attorney General, for an adjustment to permanent resident status. *Id.* § 1255.

In many cases, DHS declines to initiate removal proceedings after concluding that the evidence is likely insufficient to demonstrate the alien's removability, or after concluding that the alien is likely to secure some form of relief such that the alien would not be removed. In other circumstances, DHS may decline to pursue removal in the exercise of discretion, after consideration of a range of humanitarian, foreign-policy, and resource-allocation interests. *See 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)); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (describing immigration control as "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program") (internal citations omitted).

Moreover, even when DHS determines that the evidence warrants removal, and exercises its discretion to initiate removal proceedings, its view is by no means determinative. For example, in 14% of cases decided by immigration judges in FY 2010, the alien was granted some form of relief from removal. Executive Office for

Immigration Review, *FY 2010 Statistical Year Book*, at D2.⁶ In another 11% of cases, the immigration judge determined that DHS had not adequately established removability. *Id.*

The ordinance's provision for judicial review further underscores the extent of the conflict with federal law. An alien's ultimate immigration status and ability to remain in the country must be resolved under federal law in a federal proceeding. A state court reviewing a decision of the city Building Inspector has neither the capacity nor the authority to determine whether an alien can properly remain in the country.

In short, Ordinance 2952 rests on the unsound assumption that the Building Inspector and state courts will be able to determine who can lawfully remain in the country in advance of and without regard to determinations in a federal removal proceeding.

D. *DeCanas* and *Whiting* Do Not Suggest That Localities May Impose All Manner of Restrictions and Penalties Based on Federal Immigration Status Without Intruding on the INA's Comprehensive Regulation of Immigration.

The City mistakenly argues that the Supreme Court, in *DeCanas* and *Whiting*, established that a municipality may impose all manner of restrictions and penalties on persons not lawfully in the country without intruding into the comprehensive federal scheme of immigration regulation. Neither case announced that unlikely proposition.

⁶ Available at <http://www.justice.gov/eoir/statpub/fy10syb.pdf>.

In *DeCanas* the Supreme Court rejected a preemption challenge “because 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 in *DeCanas* 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. 424 U.S. at 355. Thus, “standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *Id.* The Court explained that “even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.” *Id.* at 355-56.

Taken together, the quoted passages stand for the proposition (which is not contested) that a state regulation is not automatically preempted solely because it deals in some way with aliens. A similar rule applies when a court determines whether a state or local regulation impermissibly interferes with the conduct of foreign affairs. Not every state or local enactment that might bear in some way on international relations is preempted as a matter of course. The Supreme Court has also made clear,

however, that a state may infringe on the conduct of foreign policy even when it uses traditional tools of regulation and fully shares the goals of the national government.

In *Crosby*, for example, the regulation took the form of a refusal to contract with persons transacting business with Burma. *See* 530 U.S. at 366-67. In *Garamendi*, California purported to regulate insurance. *See* 539 U.S. at 425-26 (noting that the State sought to justify an “ambitious disclosure requirement as protecting ‘legitimate consumer protection interests’ in knowing which insurers have failed to pay insurance claims,” although the state law “effectively single[d] out only policies issued by European companies, in Europe, to European residents, at least 55 years ago.”). In each instance, the State’s attempt to wield traditional tools to further regulatory goals outside its authority was struck down. That should equally be the case here.⁷

⁷ The district court correctly recognized that the ordinance is not entitled to a presumption against preemption, as the City was not acting to regulate local concerns and was instead attempting to aid *federal* immigration enforcement efforts. *See 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); *Buckman*, 531 U.S. at 347 (no presumption when state enmeshed itself in the relationship between a federal agency and the entities it regulates). Moreover, *Wyeth v. Levine*, 555 U.S. 555 (2009), did not sub-silently overrule *Buckman* and *Locke*, as the City mistakenly urges. *See* City Br. 12. *Wyeth* merely noted that preemption analysis “start[s] with the assumption that *the historic police powers of the States* were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.” *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (emphasis added); *see also Castro v. Collecto, Inc.*, 634 F.3d 779, 784 (5th Cir. 2011) (applying a presumption against preemption only after first examining whether states had traditionally been regulating in the area). *Accord Farina v. Nokia, Inc.*, 625 F.3d 97, 116 (3d Cir. 2010) (explaining that post-*Wyeth*, a presumption against preemption is inappropriate in areas “where state regulation has

Had the Court in *DeCanas* meant to announce the sweeping rule advocated by the City, it would have said so, rather than engaging in the nuanced discussion that actually appears in the decision.

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 explicitly preserved state and local authority to impose employment-related sanctions "through licensing and similar 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. Nor did *Whiting* generally authorize concurrent enforcement of federal immigration law that takes place in state courts and is not subject to federal direction and discretion; rather, the state proceedings in *Whiting* were permissible only because they enforced a type of state law that Congress expressly saved from preemption.

traditionally been absent"); *cf. Elam v. Kan. City S. Ry.*, 635 F.3d 796, 804 (5th Cir. 2011) (even when applicable, presumption against preemption less forceful in areas of significant federal presence).

E. No Provision of Federal Law Authorizes the Ordinance.

The City argues that Ordinance 2952 is authorized by various provisions of federal immigration law. The City is wrong.

1. The City urges that the Ordinance is not an obstacle to the workings of the INA because the federal statute 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). *See* City Br. 54-55. As DHS has explained in recent guidance, the federal government welcomes truly *cooperative* assistance from state and local partners in these areas. *See generally* DHS, *Guidance On State And Local Governments’ Assistance In Immigration Enforcement And Related Matters*.⁸

Ordinance 2952 does not represent cooperation with federal officials in any meaningful sense of the term. Genuine cooperation, as the statute suggests, would involve assisting federal officials responsible for administering the INA in *their* identification, apprehension, detention, or removal of aliens. The ordinance, however, operates independently of the federal government and accomplishes denial of an occupancy license to live in Farmers Branch. It does not in any respect assist or cooperate in federal enforcement of the immigration laws.

⁸ Available at <http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf> (last updated Sept. 21, 2011).

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. 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 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 pursue a policy of alien exclusion or

legislated homelessness. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) (“Congress . . . does not, one might say, hide elephants in mouseholes.”).⁹

Contrary to the City’s assertion, DHS has never expressed a different understanding of section 1621. A 2007 DHS privacy statement cited by the City provided a generic background on the SAVE program and did not discuss legislative schemes like the one at issue here. *See DHS, Privacy Impact Assessment*, at 2 (April 1, 2007).¹⁰ Similarly, a 2008 privacy statement simply recognized DHS’s section 1373(c) authority to respond to inquiries when a governmental entity otherwise “has the legal authority” to ask about immigration status, and noted that this authority can extend to inquiries motivated by highly sensitive background investigations (such as for security clearances). *See* 73 Fed. Reg. 75445, 75448 (Dec. 11, 2008). Neither privacy statement purported to interpret section 1621.

3. Nor is Ordinance 2952 an authorized effort to enforce the federal anti-harboring statute, 8 U.S.C. § 1324(a)(1)(A)(iii). That statute, which is part of Congress’s comprehensive regulation of immigration, imposes federal criminal sanctions on any 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,

⁹ 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 of “not lawfully present.”

¹⁰ *Available at* www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_vis.pdf.

conceals, harbors, or shields from detection . . . such alien.” *Id.* The INA provides for arrests under this provision by federal officials designated by the Attorney General, and any other officials that enforce criminal laws, including state officials. *Id.* § 1324(c). Other than the power to arrest, no state or local cooperation is expressly contemplated by this statute.

The ordinance goes beyond any authorized federal function, and imposes a separate local scheme of restrictions and penalties. Even if the ordinance applied to precisely the same conduct as section 1324, it would impermissibly supplement the federal sanctions deemed appropriate by Congress in the regulation of immigration and usurp the discretion of the federal prosecutors charged with enforcing federal law.

Moreover, the ordinance is not in any sense congruent with the federal anti-harboring provision. The federal statute imposes penalties in cases in which an individual “knowing[ly]” or “reckless[ly] . . . conceals, harbors, or shields [aliens] from detection.” 8 U.S.C. § 1324(a)(1)(A)(iii). Application of the ordinance’s licensing scheme, by contrast, does not turn on any improper act by the landlord. The City requires all renters to provide it with evidence of immigration status in order to obtain an occupancy license, triggering the inquiries and review described in the ordinance. The City urges, in effect, that the ordinance is a prophylactic measure that ensures that landlords will never have the opportunity to harbor aliens in violation of federal law. The City cannot, in this manner, transform the ordinance into “enforcement” of

section 1324(a)(1)(A)(iii). Whether some landlords might, in the absence of the ordinance, be more likely to engage in conduct that violates federal law is entirely beside the point.¹¹

¹¹ The City's discussion of the specific violations that might be federally prosecutable thus has no bearing on the inquiry here. And this Court's decisions do not clearly define the outer bounds of conduct prohibited by federal law. *See, e.g., United States v. Varkonyi*, 645 F.2d 453, 456 (5th Cir. Unit A 1981) (indictment charging that the defendant acted to "harbor, shield, or conceal" aliens implicitly indicated that "something is being hidden from detection"); *United States v. Shum*, 496 F.3d 390, 392-93 (5th Cir. 2007) (statute requires a showing that the defendant "substantially facilitated" the aliens' ability to remain in the country illegally; showing met because defendant helped "shield [aliens'] identities from detection by the government"); *United States v. Martinez-Medina*, 2009 WL 117611, at *1 (5th Cir. Jan. 16, 2009) (defendant took actions designed to "avoid scrutiny by federal authorities"); *United States v. Gomez-Moreno*, 479 F.3d 350, 353-58 (5th Cir. 2007) (proper interpretation of harboring statute not discussed; facts indicated conspirators operated a "stash house" and used "lookouts" to stymie INS raids); *cf. United States v. Green*, 180 F.3d 216, 220 (5th Cir. 1999) (interpreting 18 U.S.C. § 1071, the bar on harboring of federal fugitives, to require that the defendant "aided the fugitive in avoiding detection and apprehension," and "intended to prevent the fugitive's discovery").

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully Submitted,

THOMAS E. PEREZ
Assistant Attorney General

TONY WEST
Assistant Attorney General

MARK L. GROSS
ROSCOE JONES, JR.
Attorneys
Civil Rights Division
U.S. Department of Justice

SARAH R. SALDAÑA
United States Attorney

BETH S. BRINKMANN
Deputy Assistant Attorney General

MARK B. STERN
MICHAEL P. ABATE
/s/ Benjamin M. Shultz
BENJAMIN M. SHULTZ
DANIEL TENNY
(202) 514-3518
Attorneys, Appellate Staff
Civil Division, Room 7211
U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2011, I filed the foregoing Brief by causing a digital version to be filed electronically via the ECF system. I also certify that I will file seven paper copies with the Court within five days after the Court requests them.

I further certify that on December 13, 2011, I caused an electronic copy to be served through the ECF system on the following counsel who are ECF participants:

Attorneys For Appellant

Kris William Kobach (kkobach@gmail.com)
Peter Michael Jung (michael.jung@strasburger.com)

Attorneys For The Reyes Appellees

Nina Perales (nperales@maldef.org)
Rebecca McNeill Couto (rcouto@maldef.org)
Ivan Enrique Espinoza-Madrigal (iespinoza@maldef.org)
Lisa S. Graybill (lgraybill@aclutx.org)
Omar C. Jadwat (ojadwat@aclu.org)
Jennifer C. Newell (jnewell@aclu.org)

Attorneys For The Villas Appellees

Charles Dunham Biles (cdb@bickelbrewer.com)
William A. Brewer III (wab@bickelbrewer.com)
James Stephen Renard (jsr@bickelbrewer.com)

/s/ Benjamin M. Shultz
Benjamin M. Shultz
Counsel for the United States

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 Corel Wordperfect X5 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 (from Introduction through Conclusion) is 6941.

/s/ Benjamin M. Shultz
Benjamin M. Shultz
Counsel for the United States

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I hereby certify:

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/s/ Benjamin M. Shultz
Benjamin M. Shultz
Counsel for the United States