DON'T YOU DARE LIVE HERE: THE CONSTITUTIONALITY OF THE ANTI-IMMIGRANT EMPLOYMENT AND HOUSING ORDINANCES AT ISSUE IN *KELLER V. CITY OF FREMONT*

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I. INTRODUCTION

In 1973, the United States Supreme Court in *Plyler v. Doe*[1] acknowledged the existence of a "shadow population" of undocumented immigrants "numbering in the millions – within our borders."[2] The Court noted:

> This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.[3]

It is, in part, because of the complexity and difficulty of this issue that comprehensive immigration reform has not yet been successful at a national level. As a result of perceived federal inactivity and discomfort with growing immigrant populations, some local governments

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1. 457 U.S. 202 (1982).
2. Plyler v. Doe, 457 U.S. 202, 218-19 (1982) (footnote omitted).
3. *Plyler*, 457 U.S. at 218-19.

have passed laws restricting immigration at the state or municipal level. One of these communities is Fremont, Nebraska, which passed Ordinance No. 5165 (the "Fremont Ordinance") in June 2010. The Fremont Ordinance restricts the employment and housing of undocumented immigrants[4] in an attempt to encourage these individuals to move elsewhere.[5]

One month after passage of the Fremont Ordinance, a lawsuit was filed in the United States District Court for the District of Nebraska against the City of Fremont and certain city officials.[6] The

4. The terminology for those persons in the United States without lawful presence ranges significantly. We acknowledge that the terminology itself is controversial. For the purposes of this Article, when discussing the language of various legislatures and courts, we will use the terminology provided in the source, including "illegal alien" and "unauthorized alien." For example, in its recent decision in *Keller v. City of Fremont*, the United States District Court for the District of Nebraska used the term "alien" and stated that, because it is found in the United States Code, it "is not a pejorative." Keller v. City of Fremont, No. 8:10CV270, No. 4:10CV3140, 2012 U.S. Dist. LEXIS 20908, at *22 n.6 (D. Neb. Feb. 20, 2012). However, when not referring to the language of a specific court, statute, or ordinance, we will use the term "undocumented immigrant." Language is important. Although "alien" is the term used in the Immigration and Nationality Act, the term "alien" is dehumanizing and should be changed in the federal law. When we legitimize dehumanizing language, it is not that far a leap to use the type of language in an e-mail sent to the plaintiff's attorneys in the Keller case, "my nation is being invaded!!!!! BY MEXICAN COCKROACHES!!!!" Evidence Index in Support of Plaintiff's Motion for Temporary Restraining Order/Preliminary Injunction at 716, Martinez v. City of Fremont, No. 4:10-cv-3140, (D. Neb. July 22, 2010), *available at* http://www.aclu.org/files/assets/martinezvfremont_evidence_20100723.pdf. For another example of how language regarding immigrants is important, see Alan Gomez, *Dictionary's Definition of 'Anchor Baby' Draws Fire*, USA TODAY, Dec. 5, 2011, http://content.usatoday.com/communities/ondeadline/post/2011/12/define-anchor-baby-american-heritage-dictionary/1#.T0BH3_HfW68 (regarding the controversial definition of "anchor babies" in the American Heritage Dictionary and how the term was ultimately recognized as "disparaging").

5. The Ordinance is part of an attrition by local enforcement policy. One of the proponents of this policy, Kris W. Kobach, is the Secretary of State of Kansas and the attorney representing the City of Fremont. *See* Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155 (2008). Kris Kobach is "of counsel" to the Immigration Reform Law Institute ("IRLI"), the legal arm of Federation for American Immigration Reform ("FAIR"). *Attorneys and Staff*, IMMIGR. REFORM L. INST., http://irli.org/about/attorneys (last visited Apr. 6, 2012). On its website, IRLI defines itself as "America's only public interest law organization working exclusively to protect the legal rights, privileges, and property of U.S. citizens and their communities from injuries and damages caused by unlawful immigration." *Homepage*, IMMIGR. REFORM L. INST., http://irli.org (last visited Apr. 6, 2012). The Southern Poverty Law Center takes a different view of the policies of the IRLI, listing it as a hate group. *Nativists*, S. POVERTY L. CENTER (Nov. 4, 2011), http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2008/spring/the-nativists?page=0,11.

6. *Keller*, 2012 U.S. Dist. LEXIS 20908; Martinez v. City of Fremont, No. 4:10-cv-3140 (D. Neb. 2010). The plaintiffs include individuals renting property in Fremont as well as owners of rental property in the city; a nonprofit organization with employees in Fremont; and a union representing both public and private employees in Dodge County, where Fremont is located. *Keller*, 2012 U.S. Dist. LEXIS 20908, at *9; First Amended Complaint ¶¶ 7-37, Martinez v. City of Fremont, No. 4:10-cv-3140 (D. Neb. July 22,

plaintiffs in *Keller v. City of Fremont*[7] claim, in part, that the Fremont Ordinance is preempted by federal law and violates the Equal Protection Clause of the United States Constitution.[8] Both parties moved for summary judgment, and on February 20, 2012, the district court granted Fremont's motion with respect to the employment provisions of the Ordinance, but partially granted the plaintiffs' motion with respect to the housing provisions.[9] Although "both sides claimed victory" after this decision,[10] the parties have appealed to the United States Court of Appeals for the Eighth Circuit.[11] On February 28, 2012, the Fremont City Council voted to implement the employment provisions of the Ordinance, but "not to implement the housing provisions . . . until the appeal is decided."[12] The implementation of the employment provisions began on March 5, 2012.[13]

2010), *available at* http://www.aclu.org/files/assets/2010-7-22-MartinezvFremont-FirstAmendedComplaint.pdf. The defendants are "the City [of Fremont]; Dale Shotkoski, the City Attorney, in his official capacity; and Timothy Mullen, the City's Chief of Police, also in his official capacity." *Keller*, 2012 U.S. Dist. LEXIS 20908, at *9.

7. No. 8:10CV270, 2010 U.S. Dist. LEXIS 120854 (D. Neb. Nov. 12, 2010).

8. First Amended Complaint, *supra* note 6, ¶¶ 3-4, 93-101.

9. *Keller*, 2012 U.S. Dist. LEXIS 20908, at *3. The district court held,

> Summary Judgment will be entered for the Plaintiffs on their challenges to Section 1, Part 2, of the Ordinance, prohibiting the harboring of illegal aliens, and Section 1, Parts 3.L. and 4.D., providing for the revocation of occupancy permits and penalties for the rental or leasing of premises following such revocations, because those provisions are conflict-preempted by the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, in general, and § 1324, specifically, with respect to 'harboring,' and violate the Fair Housing Act.

Id. at *59.

10. Leslie Reed, *Part of Fremont Immigration Law Tossed*, OMAHA WORLD-HERALD, Feb. 21, 2012, http://www.omaha.com/article/20120220/NEWS97/702209899.

11. *Fremont Moves Forward with E-Verify*, FREMONT, NE (Feb. 29, 2012), http://www.fremontne.gov/CivicAlerts.aspx?AID=187 (indicating that the Fremont City Council voted to cross-appeal the district court's ruling on the housing provisions).

12. *Id.* The press release also states, "Estimated costs for the first year of implementation and compliance are $425,000 to $450,000. The city estimate includes hiring full-time employees, training, and purchasing software and computers to execute the compliance requirements in the ordinance." *Id.*

13. The official Fremont, NE website states the following:

> On February 28, 2012, a Resolution was passed designating the starting date for implementation of the employment provisions of Fremont's Immigration Ordinance (Ordinance 5165) and continuing the suspension of the housing provisions of the Ordinance. An English and Spanish version of the Resolution is available here.
>
> NOTICE:
>
> 1. The effective date of the employment provisions of Ordinance 5165 (sections 1 and 5) is March 5, 2012. All business entities doing business in the City of Fremont that employ one or more persons must register in the E-Verify program on or before May 4, 2012. A business entity may register online. A business entity that applies for any contract, loan, grant, license, or permit from the City after March 5, 2012, must provide documentation that the business entity has registered in the E-Verify program and must execute an affidavit stating that the business entity does not knowingly employ any person who is an unauthorized alien.

In Part II of this Article, we will discuss the atmosphere that led to the passage of the Fremont Ordinance and the language of the Ordinance itself. We will also discuss the lawsuit challenging the Ordinance, which is currently on appeal to the United States Court of Appeals for the Eighth Circuit. In Part III, we will discuss the recent lawsuit challenging the Fremont Ordinance. In Part IV, we will discuss the employment provisions of the Fremont Ordinance in light of the recent case *Chamber of Commerce of the U.S. v. Whiting*[14] in which the Supreme Court upheld a similar Arizona state law restricting the employment of undocumented immigrants.[15] In Part V, we will consider the formidable constitutional challenges to the housing provisions under the preemption doctrine and equal protection as clarified in the immigration context by *Plyler*.[16]

Upon examination of these arguments, we will conclude that, although the employment provisions are potentially constitutional under *Whiting*, the housing provisions are neither constitutional nor good public policy. In Part VI, we will discuss how the housing provisions are not severable from the Ordinance as a whole, thereby rendering the entire Fremont Ordinance invalid. As a result, we will recommend that the Eighth Circuit strike down the Ordinance in its entirety. In Part VII, we will discuss the policy implications of the Fremont Ordinance, which support repeal. Finally, we will discuss how we as a nation need to find a better solution to fix our immigration system.

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2. The housing provisions of Ordinance 5165 (sections 2, 3, and 4) are not in effect and will not be enforced until there is a decision of the U.S. Court of Appeals for the Eighth Circuit permitting the enforcement of all, or a portion of, those provisions.

3. No landlords or tenants have any obligations under Ordinance 5165 at this time.

Immigration Ordinance News, FREMONT, NE, http://www.fremontne.gov/index.aspx?nid=450 (last visited Apr. 5, 2012).

14. 131 S. Ct. 1968 (2011).

15. Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1970 (2011). The Arizona law at issue in *Whiting* (Legal Arizona Workers Act) was an employment-focused law. It was not the Arizona law (S.B. 1070) allowing the police to check immigration status when they have a "reasonable suspicion" that a person is undocumented. *See Legal Arizona Workers Act*, ARIZ. ATT'Y GEN.'S WEBPAGE, http://www.azag.gov/LegalAZWorkersAct/ (last visited Apr. 5, 2012).

16. The Plaintiffs in *Keller* also argue that the Fremont Ordinance violates the Due Process clause and the Fair Housing Act. First Amended Complaint, *supra* note 6, ¶¶ 4, 102-05. The United States District Court for the District of Nebraska denied the Due Process claim but determined that parts of the housing provisions in the Ordinance violated the Fair Housing Act. *Keller*, 2012 LEXIS 20908, at *37-49. Although we briefly address these arguments, a full discussion of these arguments is beyond the scope of this Article.

II. THE FREMONT ORDINANCE

On June 21, 2010, the voters of the City of Fremont, Nebraska, approved Ordinance No. 5165 (the "Fremont Ordinance") "to prohibit the harboring of illegal aliens or hiring of unauthorized aliens."[17] The Fremont Ordinance requires agencies of the city and organizations conducting business with the city to register with the federal E-Verify program and to execute affidavits stating that they do not "knowingly" hire unauthorized aliens.[18] The Ordinance also

> makes it unlawful for any person or business entity in Fremont to knowingly or recklessly lease or rent property to an illegal alien unless expressly permitted by federal law; requires tenants and occupants to obtain an occupancy license from the Fremont Police Department prior to occupying any leased or rented dwelling unit; [and] requires the Fremont Police Department to contact the federal government to determine whether each potential occupant is lawfully present in the country . . . .[19]

A. BACKGROUND

According to United States Census data, Nebraska's overall population increased by 6.7% between 2000 and 2010,[20] while its Latino population increased by 77.3%.[21] In Fremont, Nebraska, the increase in the Latino population has been even more dramatic. Fremont's total population increased by 4.9% between 2000 and 2010.[22] Its Latino

17. Fremont, Neb., Ordinance 5165 (June 21, 2010); Chris Zavadil, *Fremont Voters Say Yes to Immigration Ordinance*, FREMONT TRIB., June 22, 2010, http://fremont-tribune.com/news/local/article_abf359d6-7d86-11df-928c-001cc4c002e0.html.

18. Fremont, Neb., Ordinance 5165 § 1 (5)(C). According to the United States Citizenship and Immigration Service ("USCIS"), E-Verify is a national "[i]nternet-based system that allows businesses to determine the eligibility of their employees to work in the United States." *E-Verify*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 17, 2011), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD; *see also E-Verify State Map*, LAWLOGIX (Nov. 4, 2011), http://www.lawlogix.com/i-9-and-e-verify-compliance/state-map (illustrating different state requirements regarding E-Verify).

19. Keller v. City of Fremont, No. 8:10-CV-0270-LSC-FG3, No. 4:10-CV-3140-LSC-FG3, 2011 U.S. Dist. LEXIS 2733, at *1-2 (D. Neb. Jan. 5, 2011) (citing Fremont, Neb., Ordinance 5165).

20. The Most Populous Counties and Incorporated Places in 2010 in Nebraska: 2000 and 2010, at tbl. 1, U.S. Consenus Bureau (spreadsheet 2010), *available at* http://2010.census.gov/news/xls/cb11cn57_ne_2010redistr.xls.

21. A Population by Race Alone or in Combination and Hispanic or Latino Origin, for All Ages and for 18 Years and Over, for Nebraska: 2000 and 2010, at tbl. 3, U.S. Consenus Bureau (spreadsheet 2010), *available at* http://2010.census.gov/news/xls/cb11cn57_ne_2010redistr.xls. The Latino population increased from 5.5% to 9.2%, the most of any racial group. *Id.*

22. The Most Populous Counties and Incorporated Places in 2010 in Nebraska: 2000 and 2010, *supra* note 20, at tbl. 1.

population increased by 190.2% during that time.[23] This change was based on a small overall Latino population in Fremont, so the total number of Latino residents is still quite small (3,149) and the total non-Hispanic white population is still over 88%. The change, however, has had a significant impact in a small city that had not experienced substantial new immigration in many decades.

Specifically, this increase in the Latino population paralleled the perception of problems allegedly caused by illegal immigration in the community. There are two meatpacking plants just outside the city limits, which rely on immigrant workers.[24] At one of those plants, Fremont Beef, "17 workers were arrested in March [2010] on federal charges of identity theft, document fraud and false claims of U.S. citizenship."[25] It is unclear how many undocumented immigrants are working in Fremont. According to a news report from the Omaha World-Herald, "Ordinance opponents, extrapolating estimates from the Pew Hispanic Center, estimate fewer than 350 people. Ordinance supporters think the problem is far more widespread and costly."[26]

In 2010, some voices in the community were "angry over the problems they say are caused by illegal immigration and over the government's failure to take action."[27] They had concerns about "illegal immigrants . . . using the hospital system without paying; overtaxing the school system with English classes for their children; and committing crimes."[28] With respect to crime, the city attorney stated that crime had risen over time, but knew of "no data compiled [in Fremont] on crimes by ethnicity or national origin."[29]

Other members of the community, however, were opposed to legislative action locally restricting immigration. Opponents to such ac-

23. *Compare* Race and Hispanic or Latino: 2000, U.S. CENSUS BUREAU (2000), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_GCTP6.ST10&prodType=table (stating Fremont's 2000 Latino population was 1,082), *with* The Most Populous Counties and Incorporated Places by Race and Hispanic or Latino Origin in Nebraska: 2010, at tbl. 5 (spreadsheet 2010), *available at* http://2010.census.gov/news/xls/cb11cn57_ne_2010redistr.xls (stating Fremont's 2010 Latino population was 3,149). Its Latino population consisted of 4.3% of the population in 2000 and 11.9% in 2010. Race and Hispanic or Latino: 2000, *supra*; The Most Populous Counties and Incorporated Places by Race and Hispanic or Latino Origin in Nebraska: 2010, *supra*.

24. Leslie Reed, *City Torn by Immigration Proposal*, OMAHA WORLD-HERALD, June 10, 2010, http://www.omaha.com/article/20100610/NEWS01/706109891. The Hormel Foods Corp. processing plant was the community's largest employer. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* Other concerns were "the loss of good jobs for local residents and a shift in the culture." Monica Davey, *City in Nebraska Torn as Immigration Vote Nears*, N.Y. TIMES, June 17, 2010, http://www.nytimes.com/2010/06/18/us/18nebraska.html?pagewanted=all.

29. Davey, *supra* note 28.

tion argued that it would "lead to discrimination and racial profiling, further driving a wedge between Hispanics and the rest of the community, even though the majority of the Hispanics in Fremont are in this country legally."[30] They argued that "the concerns [regarding undocumented immigrants] are misplaced and exaggerated,"[31] and that any anti-immigrant legislation would cost the community money.[32]

In this conflicted atmosphere, Former City Councilman Bob Warner proposed an ordinance in 2008, which would have restricted employment and housing of undocumented immigrants. Mr. Warner stated that he introduced the ordinance "because of citizen complaints about unpaid hospital bills at the Fremont hospital and about growing numbers of Spanish-speaking students enrolled in Fremont schools."[33] Warner is quoted as saying "he is suspicious of the number of adults in Fremont who seem to have no knowledge of English."[34] A divided city council defeated the ordinance in July 2008.[35]

In 2009, three private citizens circulated a city initiative petition to bring the ordinance regulating immigration to a citywide vote.[36] One of these citizens stated that he joined the petition drive "because Fremont residents were growing more concerned about the changes they were seeing in Fremont."[37] He said that when he "worked out at the YMCA, he heard people griping about visitors struggling with the weight machines who didn't speak English. At the Fremont Wal-mart [sic], he heard other customers speaking in Spanish."[38] On February

30. Erickson & Sederstrom, P.C., *Fremont Voters Approve Restrictions on Illegal Immigrants*, 15 NEB. EMP. L. LETTER, no. 9, July 2010, at 1.

31. Reed, *supra* note 24.

32. *See* Immigration Ordinance Fact Sheet, City of Fremont (June 2, 2010), *available at* http://www.fremontne.gov/DocumentView.aspx?DID=708 (discussing the various monetary liabilities of the Fremont ordinance). The City indicated that it was aware of the litigation surrounding the ordinances in Hazleton, Pennsylvania, and Farmers Branch, Texas, and the potential expenses associated with passing this type of ordinance. *Id.*

33. Reed, *supra* note 24.

34. *Id.*

35. Davey, *supra* note 28. An article about the city council vote stated,

> By July 2008, a second hearing on the City Council's proposal drew such a crowd that the meeting was moved to the high school auditorium (for the first time in memory) and the large crowd (under the watch of the police) voiced pointed views on all sides. The City Council waived plans for another hearing and instead voted, 4 to 4. Donald B. Edwards, the longtime mayor, gave an emotional speech, then voted no, to cheers and hoots.

Id.; *see also* Reed, *supra* note 24.

36. City of Fremont v. Kotas, 279 Neb. 720, 720, 781 N.W.2d 456, 458 (2010), *abrogated by* City of North Platte v. Tilgner, 282 Neb. 328, 803 N.W.2d 469 (2011).

37. Reed, *supra* note 24.

38. *Id.* He also stated, "The area's meatpacking plants – including Hormel, the largest employer and a presence since 1947 – look different . . . ." Davey, *supra* note 28.

23, 2009, the citizens filed complete petitions in support of the measure with the Fremont city clerk.[39]

On March 11, 2009, Fremont filed for declaratory relief with the Dodge County District Court on the grounds that the measure was unconstitutional because it was preempted by federal law.[40] The district court held that "substantive constitutional challenges are not justiciable before an initiative is approved by the voters" and dismissed Fremont's constitutionality argument.[41] The Nebraska Supreme Court affirmed, holding that Fremont's request for a determination of the constitutionality of the Ordinance was a request for an advisory opinion and outside of the jurisdiction of the courts.[42] Therefore, the measure was cleared for a vote.[43]

On June 21, 2010, a special election was held in the City of Fremont, Nebraska. The voters were asked whether to "enact proposed Ordinance No. 5165, amending the Fremont Municipal Code to prohibit the harboring of illegal aliens or hiring of unauthorized aliens . . . ."[44] The initiative passed by a vote of 3,906 to 2,908 with

39. *Kotas*, 279 Neb. at 721, 781 N.W.2d at 459.

40. *Id.*

41. *Id.* Fremont also argued that the initiative contained two subjects and therefore violated the single-subject rule. *Id.* The court held that although the ordinance addressed both employment and housing, it only contained one general subject – the restriction of illegal immigration. *Id.* at 728, 781 N.W.2d at 463. The Nebraska Supreme Court affirmed. *Id.*

42. *Id.* at 727, 781 N.W.2d at 462.

43. *Id.* The *Omaha-World Herald* reported, "The same day the Nebraska court ordered the Fremont election to proceed, Arizona's governor signed a law compelling local police to ask for proof of residency from people they suspect of being illegal immigrants, stepping up the debate over immigration nationally." Reed, *supra* note 24. Former City Councilman Charlie Janssen, who voted for the Fremont ordinance, offered similar legislation as a state senator for Nebraska on January 6, 2011. Paul Hammel, *Bill Raises Immediate Profiling Objections*, OMAHA-WORLD HERALD, Jan. 7, 2011, http://www.omaha.com/article/20110107/NEWS01/701079839/0; *see also* L.B. 48, Neb. Unicameral, 102nd Leg., 1st Sess. (2011), *available at* http://www.nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LB48.pdf. The bill did not make it out of committee. Paul Hammel, *Nebraska Legislature: Debate on Illegal Immigrants Is Shelved*, OMAHA-WORLD HERALD, Mar. 9, 2011, http://www.omaha.com/article/20110309/NEWS01/703099756. The *World-Herald* reported,

> A debate in the Nebraska Legislature on the hot-button issue of illegal immigration has been put off until next year. Wednesday morning, a legislative committee decided to not advance an Arizona-style bill or any other immigration-related proposals and instead conduct an interim study on the issue, focusing on a law recently passed by the Utah Legislature. That law, which has been described as a common-sense, bipartisan solution, would allow Utah to issue "guest worker" permits, thus allowing illegal immigrants already living in Utah to continue working there.

Id. The legislature's judiciary committee planned to conduct a study of the Utah law over the summer and fall of 2011. *Id.*

44. Fremont Ballot Initative, *Notice of Special Election*, OMAHA-WORLD HERALD, June 20, 2010, http://www.omaha.com/article/20100620/NEWS01/100629972. The full proposal on the ballot was as follows:

approximately 45% voter turnout, which constituted adoption of the Ordinance.[45]

B. THE PROVISOS: PURPOSE AND CONSISTENCY WITH FEDERAL LAW

The Fremont Ordinance contains ten provisos,[46] three of which set forth its purpose. According to the stated purposes, the Ordinance is meant to address the following problems allegedly related to un-

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PROPOSED ORDINANCE NO. 5165
Shall the City of Fremont, Nebraska, enact proposed Ordinance No. 5165, amending the Fremont Municipal Code to prohibit the harboring of illegal aliens or hiring of unauthorized aliens, providing definitions, making provision for occupancy licenses, providing judicial process, repealing conflicting provisions, and establishing an effective date for this ordinance?
Yes in favor of proposed Ordinance No. 5165
No against proposed Ordinance No. 5165
Electors voting in favor of said proposal shall blacken the oval opposite the words "Yes in favor of proposed Ordinance No. 5165" following said proposal, and electors voting against said proposal shall blacken the oval opposite the words "No against proposed Ordinance No. 5165" following said proposal.

Id.

45. Zavadil, *supra* note 17; *Keller*, 2012 U.S. Dist. LEXIS 20908, at *3.

46. The provisos are as follow:
WHEREAS, Federal law requires that certain conditions be met before an alien may be authorized to be lawfully present in the United States. Those conditions are found principally at United States Code Title 8, Section 1101, and;
WHEREAS, United States Code Title 8, Section 1324(a)(1)(A) prohibits the harboring of illegal aliens. The provision of housing to illegal aliens is a fundamental component of the federal immigration crime of harboring, and;
WHEREAS, United States Code Title 8, Section 1324a prohibits the knowing employment of unauthorized aliens; and United States Code Title 8, Section 1324a(h)(2) permits state and local governments to suspend the business licenses [sic] of those who employ unauthorized aliens, and;
WHEREAS, The presence of illegal aliens places a fiscal burden on the City, increasing the demand for, and cost of, public benefits and services, and;
WHEREAS, Crimes committed by illegal aliens in the City harm the health, safety and welfare of U.S. citizens and aliens lawfully present in the United States, and;
WHEREAS, The employment of unauthorized aliens in the City displaces authorized United States workers and adversely affects their wages, and;
WHEREAS, In 1996 Congress amended the Immigration and Nationality Act to require the federal government to verify the immigration status of any alien upon the request of a state, county, or municipality, for any purpose authorized by law. United States Code Title 8, Section 1373(c). The federal government has established several systems to accomplish this obligation, including the Systematic Alien Verification for Entitlements (SAVE) Program and the Law Enforcement Support Center (LESC), and;
WHEREAS, This Ordinance is in harmony with the congressional objectives of prohibiting the knowing harboring of illegal aliens and prohibiting the knowing employment of unauthorized aliens, and;
WHEREAS, The Secretary of the U.S. Department of Homeland Security has specifically praised and encouraged those states and localities that require employers to participate in the E-Verify Program, and;
WHEREAS, The City of Fremont shall not construe this ordinance to prohibit the rendering of emergency medical care, emergency assistance, or legal assistance to any person.

Fremont, Neb., Ordinance 5165 (June 21, 2010).

documented immigrants: (1) "illegal aliens place[ ] a fiscal burden on the City, increasing the demand for, and cost of, public benefits and services," (2) "[c]rimes committed by illegal aliens in the City harm the health, safety and welfare of U.S. citizens and aliens lawfully present in the United States, and" (3) "[t]he employment of unauthorized aliens in the City displaces authorized United States workers and adversely affects their wages."[47]

Six of the provisos state that the Ordinance is consistent with federal law regarding the conditions that must be present for "an alien to be authorized to be lawfully present" in the United States, "the harboring of illegal aliens," "knowing employment of unauthorized aliens," and the use of E-Verify. Finally, the last proviso provides, "The City of Fremont shall not construe this ordinance to prohibit the rendering of emergency medical care, emergency assistance, or legal assistance to any person."[48]

C. The Employment Provisions: Use of E-Verify

Subsection 5 of the Fremont Ordinance, which is entitled "Business Licenses, Contracts or Grants; The E-Verify Program," states that "[i]t is the policy of the City to discourage business entities from knowingly recruiting, hiring for employment, or continuing to employ any person who is an unauthorized alien[49] to perform work within the city."[50] The Ordinance provides that agencies of the city are required to register with the E-Verify Program and use it to "verify the authorization of employment in the United States of each employee hired after such registration."[51]

In addition to city employees, subsection 5 regulates business entities. Subsection 5(C) requires the execution of an affidavit by "(a)n authorized representative" of businesses that (1) apply for licenses or permits in the city, (2) are awarded contracts to do business in the city, or (3) apply for any grant or loan from the city.[52] The affidavit must include a statement "to the effect that the business entity does

47. *Id.*

48. *Id.*

49. "Unauthorized alien" is defined as "an alien who does not have authorization of employment in the United States, as defined by United States Code Title 8, Section 1324a(h)(3)." *Id.* § 1(1)(F). The definition also states, "The City shall not conclude that an individual is an unauthorized alien unless and until an authorized representative of the City has verified with the federal government, pursuant to United States Code Title 8, Section 1373(c), such individual's lack of authorization of employment in the United States." *Id.*

50. *Id.* § 1(5)(A).

51. *Id.* § 1(5)(D).

52. *Id.* § 1(5)(C).

not knowingly employ any person who is an unauthorized alien."[53] The business entity also must provide documentation showing that it "has registered in the E-Verify Program."[54] These requirements are made a "condition" of any license, permit, contract, grant, or loan awarded by the city.[55]

The Ordinance does not apply to independent contractors hired by businesses, nor does it apply to "the intermittent hiring of casual labor for domestic tasks customarily performed by the residents of a dwelling."[56] It provides that subsection 5 "shall be interpreted to be fully consistent with United States Code title 8, Section 1324a, and with all other applicable provisions of federal law,"[57] and that no city official is to "attempt to make an independent determination of the authorization of employment . . . ."[58]

Regarding enforcement, the Ordinance provides that the city attorney "shall" enforce subsection 5 by trying the business entity in a hearing before the city council, with the business entity afforded due process and with a right of appeal to the County Court of Dodge County.[59] In such a hearing, the city could seek to "revoke the license, cancel the contract, recall the grant or accelerate the loan and institute an action to collect any sums due."[60] The Ordinance also provides, alternatively, that the city attorney may seek injunctive relief by filing a suit in the county court.[61] Business entities may initiate proceedings, and thus stay enforcement of the Ordinance provisions, "in any court of competent jurisdiction."[62]

D. The Housing Provisions: Occupancy License

The Fremont Ordinance restricts housing in subsection 2 entitled, "Harboring Illegal Aliens." This section makes it unlawful for persons or businesses that own dwelling units to

> harbor an illegal alien in the dwelling unit, 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, un-

53. *Id.*
54. *Id.* Additionally, businesses employing one or more persons must register with E-Verify within 60 days of the effective date of the ordinance or prior to commencing work if the work begins more that 60 days after the effective date of the ordinance and must use E-Verify to confirm the status of each of its workers. *Id.* § 1(5)(E)-(F).
55. *Id.* § 1(5)(C).
56. *Id.* § 1(5)(B).
57. *Id.*
58. *Id.* § 1(5)(G).
59. *Id.* § 1(5)(H)(1).
60. *Id.*
61. *Id.* § 1(5)(H)(2).
62. *Id.*

> less such harboring is otherwise expressly permitted by federal law.[63]

Subsection 2(A)(1) establishes that harboring occurs when, with the intent as stated above, a unit is let, leased, or rented to "an illegal alien," or when one "suffer[s] or permit[s] the occupancy of the dwelling unit by an illegal alien."[64]

The Fremont Ordinance then sets forth lawful presence as a requirement for housing in the city. Subsection 2(A)(2) provides, "An occupant may not enter into a contract for the rental or lease of a dwelling unit in the City unless the occupant is either a U.S. citizen or national, or an alien lawfully present in the United States according to the terms of United States Code Title 8, Section 1101 et seq."[65]

According to subsection 3 entitled, "Issuance of Occupancy Licenses," every occupant age eighteen or older is required to "obtain an occupancy license" prior to renting, letting, or leasing property.[66] The Ordinance provides that such license is to be obtained by paying five dollars to the city and submitting an application to the Fremont Police Department.[67] The application requires the following information: the full name and mailing address of the occupant,[68] address of the dwelling units,[69] name and business address of unit owner or manager,[70] the occupant's birth date, country or citizenship,[71] and the names and birth dates "of each minor dependent residing with occu-

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63. *Id.* § 1(2)(A).

64. *Id.* § 1(2)(A)(1). An "illegal alien" is defined as an "alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, Section 1101 et seq." *Id.* § 1(1)(A). The definition continues, "The City shall not conclude that an individual is an illegal alien unless and until an authorized representative of the City has verified with the federal government, pursuant to United State Code Title 8, Section 1373(c), such individual's immigration status." *Id.*

65. *Id.* § 1(2)(A)(2). This section also provides that, if an occupant is not present in the country legally at the beginning of his or her lease, or subsequent to the beginning of the lease, he or she is "deemed to have breached a condition of the lease." *Id.*

66. *Id.* § 1(3)(A). The Ordinance provides, "If there are multiple occupants seeking to occupy a single rental unit, each occupant must obtain his or her own license." *Id.* § 1(3)(B). The Ordinance also provides that a new license is required each time an occupant relocates to a different dwelling unit. *Id.* § 1(3)(D).

67. *Id.* § 1(3)(B). The Ordinance also provides,

> An applicant for an occupancy license may designate the owner or manager of the dwelling unit as his agent to collect the required information and submit the required application form(s), signed by the applicant, to the Fremont Police Department on the applicant's behalf. The City may establish a procedure whereby an applicant (or designated owner or agent) may submit the required application form(s), signed by the applicant, via facsimile or website portal.

Id.

68. *Id.* § 1(3)(E)(1-2).

69. *Id.* § 1(3)(E)(3).

70. *Id.* § 1(3)(E)(4).

71. *Id.* § 1(3)(E)(6-7).

pant."[72] Finally, the application requires information that differs depending on the occupant's legal immigration status. Subsection 3(E)(9) states the following:

> (a) *in cases in which the applicant is a United States citizen or national*, a signed declaration that the applicant is a United States citizen or national on a form provided by the City, which notifies the applicant that knowingly making any false statement or claim that he or she is, or at any time has been, a citizen or national of the United States, with the intent to obtain a state benefit or service is a crime under United State Code Title 18, Section 1015(e); or
> (b) *in cases in which the applicant is not a United States citizen or national*, an identification number assigned by the federal government that the occupant believes establishes his lawful presence in the United States (examples include, but are not limited to: resident alien card number, visa number, "A" number, I-94 registration number, employment authorization number, or any other number on a document issued by the U.S. Government). *If the alien does not know of any such number, he shall so declare. Such a declaration shall be sufficient to satisfy this requirement.*[73]

The Ordinance provides that all information obtained on the forms is to remain confidential "except that the information provided on an application may be disclosed to other government entities where authorized by law, pursuant to United States Code Title 8, Section 1373."[74] The city is directed to issue, and may not deny, an occupancy license upon the receipt of a completed signed application and fee.[75]

Owners or managers are required to notify each potential occupant of the license requirement and are prohibited from allowing occupancy without one.[76] Owners or managers violate the Ordinance by (1) leasing a unit without obtaining the necessary licenses,[77] or (2) leasing a unit "without including in the terms of the lease a provision stating that occupancy of the premises by a person, age 18 or older, who does not hold a valid occupancy license constitutes an event of default under the lease."[78] Additionally, subsection 3(J) states:

> It shall be a violation of this section for a landlord or any agent of a landlord with authority to initiate proceedings to terminate a lease or tenancy to knowingly permit an occupant to occupy a dwelling unit without a valid occupancy li-

72. *Id.* § 1(3)(E)(8).
73. *Id.* § 1(3)(E)(9)(a-b) (emphasis added).
74. *Id.* § 1(3)(G).
75. *Id.* § 1(3)(F).
76. *Id.* § 1(3)(C).
77. *Id.* § 1(3)(H).
78. *Id.* § 1(3)(I).

> cense. It is a defense to a prosecution under this paragraph that the landlord or agent has commenced and diligently pursued such steps as may be required under the applicable law and lease provisions to terminate the lease or tenancy.[79]

A separate violation of the Ordinance occurs for each occupant and each day a person fails to comply with the Ordinance[80] and each violation may result in a $100 fine upon conviction in the County Court of Dodge County.[81]

Subsection 4 entitled, "Enforcement of Harboring and Occupancy Provisions," articulates the duties of the Fremont Police Department with respect to enforcing the Ordinance. When an occupancy license is issued "to any occupant who has not declared himself or herself to be either a citizen or national of the United States," the Department is to "[p]romptly . . . pursuant to Title 8, United States code, Section 1373(c), request the federal government to ascertain whether the occupant is an alien lawfully present in the United States."[82] The Department must submit to the federal government "the identity and immigration status information contained on the application for the occupancy license, along with any other information requested by the federal government."[83] The Department may enter into agreements with the federal government to utilize processes and systems such as the Systematic Alien Verification for Entitlements ("SAVE") Program.[84]

The Department may not take further action if the federal government notifies the Department that it cannot "conclusively ascertain the immigration status of the occupant," or that its determination is "tentative."[85] The Department may not "attempt to make an independent determination of any occupant's immigration status," but, shall notify occupants if the federal government informs the Department that it (1) needs more information for a final ascertainment of

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79. *Id.* § 1(3)(J).
80. *Id.* § 1(3)(L).
81. *Id.* § 1(3)(K).
82. *Id.* § 1(4)(A).
83. *Id.*
84. *Id.* According to U.S. Citizenship and Immigration Services,

> The SAVE Program is an inter-governmental initiative designed to aid benefit-granting agencies in determining an applicant's immigration status, and thereby ensure that only entitled applicants receive federal, state, or local public benefits and licenses. The Program is an information service for benefit-issuing agencies, institutions, licensing bureaus, and other governmental entities.

Systematic Alien Verification for Entitlements Program, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 8, 2011), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=1721c2ec0c7c8110VgnVCM1000004718190aRCRD&vgnextchannel=1721c2ec0c7c8110VgnVCM100000471819v0aRCRD.

85. Fremont, Neb., Ordinance 5165 § 1 (4)(C).

immigration status or that (2) the occupant may "contest the federal government's ascertainment of status . . . ."[86]

However, "(i)f the federal government reports that the occupant is not lawfully present in the United States, the Department shall send a deficiency notice to the occupant . . ." stating "that on or before the [sixtieth] day following the date of the notice, the occupant may seek to obtain a correction of the federal government's records and/or provide additional information establishing that the occupant is lawfully present in the United States."[87] The occupant may submit such information to the federal government or to the Department, which shall "promptly" submit it to the federal government.[88] No sooner than the sixty-first day after such a deficiency notice has been sent to the occupant, the Department shall send another inquiry to the federal government asking it to ascertain the occupant's immigration status.[89] Thereafter, "[i]f the federal government reports that the occupant is an alien who is not lawfully present in the United States, the Department shall send a revocation notice," effective forty-five days after such notice, to the occupant and lessor.[90]

The Fremont Ordinance also provides for "pre-deprivation or post-deprivation judicial review" for landlords and occupants who have received deficiency or revocation notices.[91] Landlords and occupants may file suits either "pre-deprivation or post-deprivation" against the city "in a court of competent jurisdiction."[92] A revocation is automatically stayed until disposition of the court case if the suit is filed "prior to or within fifteen days after the date of the relevant revocation notice."[93] The court will decide whether the Department complied with the Ordinance, whether the Ordinance is legal, and whether the occupant is in the country legally.[94] With regard to the occupant's status, the court (1) "shall defer to any conclusive ascertainment of immigration status by the federal government,"[95] (2) "may take judicial notice of any ascertainment of the immigration status of the occupant previously provided by the federal government,"[96] and (3) may "request the federal government to provide, in automated, documentary, or testimonial form, a new ascertainment of the immigration status of the

86. *Id.*
87. *Id.* § 1(4)(B).
88. *Id.*
89. *Id.* § 1(4)(D).
90. *Id.*
91. *Id.* § 1(4)(F)(1).
92. *Id.*
93. *Id.* § 1(4)(F)(2).
94. *Id.* § 1(4)(F)(3).
95. *Id.* § 1(4)(F)(4).
96. *Id.* § 1(4)(F)(5).

occupant pursuant to United States Code Title 8, Section 1371(c)."[97] Finally, the Fremont Ordinance provides, "The most recent ascertainment of the immigration status of an individual by the federal government shall create a rebuttable presumption as to the individual's immigration status."[98]

E. Anti-discrimination, Construction, and Severability Provisions: Attempts to Safeguard Against Unconstitutional Provisions

As a safeguard against Equal Protection challenges, the Fremont Ordinance includes an anti-discrimination provision. This provision states: "The terms of this section shall be applied uniformly, and enforcement procedures shall not differ based on a person's race, ethnicity, religion, or national origin."[99]

The Fremont Ordinance also includes a section entitled, "Construction and Severability." The section provides that "[t]he requirements and obligations of this section shall be implemented in a manner fully consistent with federal law regulating immigration and protecting the civil rights of all citizens, nationals, and aliens."[100] It also provides,

> If any part or provision of this Ordinance is in conflict or inconsistent with applicable provisions of federal or state statutes, or is otherwise held to be invalid or unenforceable by any court of competent jurisdiction, such part of provision shall be suspended and superseded by such applicable laws or regulations, and the remainder of this Chapter shall not be affected thereby.[101]

III. THE LAWSUIT

Approved by voters on June 21, 2010, Ordinance No. 5165 (the "Fremont Ordinance") "was scheduled to take effect on July 29, 2010."[102] Two lawsuits challenging the Ordinance were filed on July 21, 2010,[103] "promptly followed by the Plaintiff's Motions for Tempo-

97. *Id.*

98. *Id.*

99. Fremont, Neb. Ordinance 5165 § 1(4)(E) (June 21, 2010).

100. *Id.* § 1(2)(A).

101. *Id.* § 1(2)(B).

102. Keller v. City of Fremont, No. 8:10CV270, No. 4:10CV3140, 2010 U.S. Dist. LEXIS 120854, at *3 (D. Neb. Nov. 12, 2010).

103. *Martinez v. Fremont*, ACLU (July 27, 2010), http://www.aclu.org/immigrants-rights/martinez-v-fremont.

rary Restraining Orders and Motions for Preliminary Injunctions."[104] The cases were consolidated "for purposes of the pending motions as well as discovery."[105] On July 27, 2010, the Fremont City Council "resolved that the Ordinance would not be enforced until 14 days after the issuance of final decisions in each of the cases."[106] In light of this stay, the district court denied the Temporary Restraining Orders.[107]

The lawsuit was brought by various plaintiffs against the City of Fremont, the City Attorney for the City of Fremont, and the Chief of Police for the City of Fremont.[108] The plaintiffs claim that federal law preempts the Ordinance.[109] The plaintiffs argue that "the power to regulate immigration is an exclusively federal power that is inherent in the nation's sovereignty and derives from the Constitution's grant to the federal government of the power to 'establish a uniform Rule of Naturalization,' . . . and to 'regulate Commerce with foreign Nations.'"[110] The plaintiffs also brought claims under the Due Process and Equal Protection Clauses of the United States Constitution and under the Fair Housing Act,[111] "because [the Fremont Ordinance] discriminates on the basis of race and/or national origin."[112] Both par-

104. *Keller*, 2010 U.S. Dist. LEXIS 120854, at *3.The two cases are Keller v. City of Fremont, Case No. 8:10CV270, and Martinez v. City of Fremont, Case No. 4:10CV3140. *Id.* The Court designated *Keller* as the lead case. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at *2-3. The district court held that "the Defendants [should have] an opportunity to respond to the Plaintiffs' Briefs and Indexes of Evidence on the pending Motions for Preliminary Injunctions." *Id.*

108. First Amended Complaint, *supra* note 6, ¶¶ 38-40.

109. *Id.* at 2, 25-26.

110. *Id.* at 25; *see* U.S. CONST. art. I, § 8, cl. 3-4. The Plaintiffs argue that the federal government has a comprehensive system of laws relating to immigration at 8 U.S.C. §§ 1101-1537. First Amended Complaint, *supra* note 6, ¶¶ 96-97.

111. 42 U.S.C. § 3601-3631.

112. First Amended Complaint, *supra* note 6, ¶ 101. The Plaintiffs also claim that the Fremont Ordinance violates Nebraska law by exceeding the powers granted to municipalities. *Id.* ¶ 108. Regarding this state law issue, the United States District Court for the District of Nebraska certified the following question to the Nebraska Supreme Court:

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

Keller v. City of Fremont, No. 8:10CV270, No. 4:10CV3140, 2010 U.S. Dist. LEXIS 89638, at *6-7 (D. Neb. Aug. 25, 2010), *cert. denied* 280 Neb. 788, 790 N.W.2d 711 (Neb. 2010). Although the Nebraska Supreme Court declined to answer the question, it stated,

> [I]n the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised. . . . But because the request does not

ties moved for summary judgment, and on February 20, 2012, the United States District Court for the District of Nebraska granted Fremont's motion with respect to the employment provisions of the Ordinance and the portion of the housing ordinance requiring a residential occupancy license.[113] The court granted the plaintiffs' motion with respect to the portion of the housing provision providing penalties for "harboring of persons who have entered or remained in the United States in violation of law, or provid[ing] for the revocation of occupancy licenses and penalties for the lease or rental or dwelling units following the revocation of occupancy licenses."[114] The lawsuit is now on appeal to the United States Court of Appeals for the Eighth Circuit.

IV. LEGAL ANALYSIS OF THE EMPLOYMENT PROVISIONS

The primary argument against the constitutionality of the employment provisions of Ordinance No. 5165 (the "Fremont Ordinance") derives from the Supremacy Clause of the United States Constitution,[115] which provides:

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identify any state constitutional provision implicated by the controversy that is unique to Nebraska, we assume the plaintiffs' state constitutional challenge coincides with federal constitutional provisions.

Keller, 280 Neb. at 790-91, 790 N.W.2d at 713 (internal quotation marks omitted) (footnote omitted).

On November 12, 2010, the United States District Court for the District of Nebraska found,

> [B]ecause Article XI of the Nebraska Constitution, governing Nebraska municipal corporations, *is* unique to Nebraska, this Court understands the Nebraska Supreme Court's decision to indicate that Article XI is not 'implicated' by the provisions of the Ordinance – that is, the absence of a home rule charter does not affect the municipality's exercise of its police powers delegated by Nebraska statute.

Keller, 2010 U.S. Dist. LEXIS 120854, at *5. The district court reiterated this in its most recent decision, holding that "the Plaintiff's claim that the Ordinance is void as a matter of state law will be denied." Keller v. City of Fremont, No. 8:10CV270, No. 4:10CV3140, 2012 U.S. Dist. LEXIS 20908, at *51-53 (D. Neb. Feb. 20, 2012). A full discussion of the implications of this holding on the state law issues involved in this case are beyond the scope of this article.

113. *Keller*, 2012 U.S. Dist. LEXIS 20908, at *3, *59.

114. *Id.*; *see also* Leslie Reed, *Part of Fremont Immigration Law Tossed*, OMAHA WORLD-HERALD, Feb. 21, 2012, http://www.omaha.com/article/20120220/NEWS97/702209899 (indicating that although portions of the ordinance were struck down, "both sides claimed victory").

115. *See* Sosa Thomas, Comment, *"Mi Casa No Es Su Casa:" How Far Is Too Far When States and Localities Take Immigration Matters into Their Own Hands?*, 29 CHICANO-LATINO L. REV. 103 (2010) (providing an historical perspective on the federal government's regulation of immigration and discussing preemption of local immigration ordinances); *see also* Mark S. Grube, Note, *Preemption of Local Regulations Beyond* Lozano v. City of Hazleton*: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391 (2010) (discussing the background of federal control of immigration and the three forms of preemption set forth in *De Canas v. Bica*, 424 U.S. 351 (1976), both in the context of employer-based restrictions and housing-based restric-

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[116]

This preemption argument is based on the United States Supreme Court's holding that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."[117] Specifically, the Supreme Court has held that the power to admit or exclude foreigners and to establish conditions for admittance is "vested in the national government" of the United States by the United States Constitution.[118] Therefore, since the 1800s, the federal government has used this authority to regulate immigration by restricting immigration, making unauthorized entry into United States a crime, and deporting persons who enter illegally.[119]

This power to regulate immigration, however, does not preclude all legislation by states and local governments affecting immigrants. In *De Canas v. Bica*,[120] the Supreme Court rejected a preemption challenge to California legislation prohibiting the knowing employment of aliens "who have no federal right to employment" in the United States.[121] In so doing, the Court stated 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 by this constitutional power, whether latent or exercised."[122]

Most recently, in *Chamber of Commerce of the U.S. v. Whiting*,[123] the Supreme Court again rejected a preemption challenge to a state law restricting the employment of illegal aliens.[124] This case involved an Arizona statutory scheme, "The Legal Arizona Workers Act of

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tions). Both of these articles were written before the U.S. Supreme Court's decision in *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

116. U.S. CONST. art. VI, cl. 2.

117. *De Canas*, 424 U.S. at 354.

118. Ekiu v. United States, 142 U.S. 651, 659 (1892). This power may be exercised by treaties executed by the President "with the Advice and Consent of the Senate," U.S. CONST. art. II, §2, cl. 2, or by Acts of Congress "[t]o establish an uniform Rule of Naturalization." U.S. CONST. art. I, §8, cl. 4.

119. Plyler v. Doe, 457 U.S. 202, 205 (1982) (citing 8 U.S.C. §§ 1251, 1252, 1325 (1976 & Supp. 1980)).

120. 424 U.S. 351 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1975 (2011).

121. *De Canas*, 424 U.S. at 355.

122. *Id.* (emphasis in original).

123. 131 S. Ct. 1968 (2011).

124. *Whiting*, 131 S. Ct. at 1973.

2007," which imposes sanctions on employers knowingly or intentionally hiring unauthorized aliens.[125] The statute provides that individuals can file a complaint alleging that an employer hired an unauthorized alien and that upon the receipt of such a complaint, the attorney general or county attorney is required to seek verification of the employee's work authorization status with the federal government.[126] If the inquiry reveals that the employee is an unauthorized alien, the attorney general or the county attorney is then required to notify local law enforcement and officials of United States Immigration and Customs Enforcement ("ICE"), in addition to bringing an action against the employer.[127]

The Arizona statute prohibits state, county, or local officials from determining an employee's immigration or work status independent from the federal government, requires the courts to consider only federal determinations regarding an employee's status, and provides employers with an affirmative defense upon good faith compliance with the federal I-9 process.[128] Employers are also required to use the federal E-Verify program and, upon proof of doing so, have a "rebuttable presumption" that they did not knowingly hire an unauthorized alien.[129] Penalties for first and second "knowing" and "intentional" violations include and, in some instances, require the state courts to suspend or revoke the offending employers' business licenses.[130]

The *Whiting* Court first addressed whether the Immigration Reform and Control Act of 1986[131] ("IRCA") expressly preempted the state law provisions allowing or requiring suspension or revocation of business licenses. The Court stated, "IRCA expressly preempts States from imposing 'civil or criminal sanctions' on those who employ unauthorized aliens, 'other than through licensing and similar laws.'"[132] The Court found that laws, such as Arizona's, "regulating articles of incorporation, partnerships certificate, and the like"[133] are "comforta-

125. ARIZ. REV. STAT. ANN. §§ 23-211, 212, 212.01 (2010); *Whiting*, 131 S. Ct. at 1974-75.

126. *Whiting*, 131 S. Ct. at 1976 (citing ARIZ. REV. STAT. ANN. § 23-212(B)).

127. *Id.* (citing ARIZ. REV. STAT. ANN. § 23-212(C)(1)-(3), (D)).

128. *Id.* (citing ARIZ. REV. STAT. ANN. § 23-212(B), (H), (J)). The I-9 process is found in the federal Immigration Reform and Control Act ("IRCA"), which makes unlawful the "knowing" hiring of an "unauthorized alien" as that term is defined in the IRCA. *Id.* at 1974 (citing 8 U.S.C. § 1324a(a)(1)(A), a(h)(3) (2006)). Employers are required under the IRCA to check specified documents and on the Department of Homeland Security Form I-9 attest under penalty of perjury, that by reviewing those documents the employer has verified that the employee is not an unauthorized alien. *Id.* (citing § 1324a(b)(1)(A)).

129. *Id.* at 1976-77 (citing ARIZ. REV. STAT. ANN. § 23-212(I)).

130. *Id.* at 1976.

131. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §§ 1101-1537).

132. *Whiting*, 131 S. Ct. at 1977 (citing 8 U.S.C. § 1324a(h)(2)).

133. *Id.* at 1978.

bly within the savings clause"[134] as a licensing law or, "at the very least 'similar'"[135] to a licensing law. The Court then rejected arguments that Congress sought uniformity in the enforcement of immigration requirements, stating:

> [C]ongress expressly preserved the ability of the States to impose their own sanctions through licensing; that—like our federal system in general—necessarily entails the prospect of some departure from homogeneity. And as for "separate prohibition[s]," it is worth recalling that the Arizona licensing law is based exclusively on the federal prohibition—a court reviewing a complaint under the Arizona law may "consider only the federal government's determination" with respect to "whether an employee is an unauthorized alien."[136]

Therefore, the Court ruled that the Arizona law fell within IRCA's savings clause and was not, therefore, expressly preempted.[137]

The Court then determined that federal law did not impliedly preempt the Arizona statute. The Court held that the Arizona statutory scheme "simply implement[s] the sanctions that Congress expressly allowed Arizona to pursue through licensing laws."[138] The Court noted that Arizona "went the extra mile"[139] and implemented its sanctions in a way that "ensur[es] that its law closely tracks IRCA's provisions in all material respects."[140] Further, the Court rejected the argument that the state statute upset a balance that Congress sought to strike when enacting IRCA. In fact, the Court noted:

> [C]ongress did indeed seek to strike a balance among a variety of interests when it enacted IRCA. Part of that balance, however, involved allocating authority between the Federal Government and the States. The principle that Congress adopted in doing so was not that the Federal Government can impose large sanctions, and the States only small ones. IRCA instead preserved state authority over a particular category of sanctions—those imposed "through licensing and similar laws."[141]

Based on this analysis, the Court found that the licensing provisions of the Arizona statute were not impliedly preempted.[142]

The Court separately addressed the question whether the provisions of the Arizona statute requiring employers to use the federal E-

134. *Id.*
135. *Id.*
136. *Id.* at 1979-80 (citing ARIZ.REV.STAT.ANN. § 23-212(H).
137. *Id.* at 1981.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 1984.
142. *Id.* at 1985.

Verify system were impliedly preempted. Again, the Court held that the Arizona provision requiring employers to use E-Verify did not conflict with federal intent and that "the Federal Government has consistently expanded and encouraged the use of E-Verify."[143]

In order to determine whether the Fremont Ordinance is expressly preempted according to the Court's analysis in *Whiting*, we must determine if its holding applies to municipal ordinances as well as state laws. The *Whiting* holding was based upon IRCA's savings clause, which otherwise expressly preempted local attempts to sanction employers hiring unauthorized employees. The IRCA provision, which includes the savings clause, refers to "[s]tate or local law."[144] Local laws would be something other than state laws and, presumably, would include ordinances passed by cities.[145] Under the *Whiting* analysis, IRCA's savings clause would apply to the Fremont Ordinance, and therefore, the Ordinance would not be expressly preempted.

The next question is whether the Fremont Ordinance is impliedly preempted because it conflicts with federal law. In its recent decision granting summary judgment on this issue, the United States District Court for the District of Nebraska found that the employment provisions of the Ordinance were not preempted in this way.[146] After discussing the *Whiting* decision, the district court found:

> Like the Arizona law at issue in *Whiting*, the employment provisions in the Fremont Ordinance are essentially "licensing" or "similar" laws, falling within IRCA's savings clause. The Ordinance provides conditions for the granting of business licenses, permits, contracts, grants and loans, and a process for the revocation of licenses, cancellation of contracts, recall of grants, and acceleration of loans, if those conditions are violated. While it purports to impose conditions on any employer "performing work within the City," the Ordinance does not provide for any fines or other penalties for non-compliance, but anticipates discretionary action by the City At-

143. *Id.* at 1986. Justice Breyer's dissenting opinion in *Whiting*, joined by Justice Ginsburg, disputes the majority holding that Arizona simply implements a federal law. *Id.* at 1987 (Breyer, J., dissenting). Justice Breyer states, instead, that the Arizona law "threatens the federal Act's antidiscriminatory objectives by radically skewing the relevant penalties" and "subjects lawful employers to increased burdens and risks of erroneous prosecution." *Id.* at 1990. Justice Breyer was also concerned about the 18% error rate of E-Verify. *Id.* at 1991.

144. 8 U.S.C. § 1324a(h)(2).

145. *See Keller*, 2012 U.S. Dist. LEXIS 20908, at *18 ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes. Also, for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.") (citing Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 712-713 (1985)).

146. *Id.* at *24-26.

> torney, seeking "injunctive relief." The Fremont Ordinance does not provide for immediate suspension of licenses, or any other adverse consequences for an employer, prior to full procedural due process, including judicial review.[147]

The court continued without further analysis:

> Because the Fremont Ordinance is not "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain," it is not preempted by the United States Constitution. *De Canas v. Bica*, 424 U.S. at 355. Because the Ordinance is essentially a licensing or similar law, falling within the savings clause of IRCA, it is not directly preempted, nor field preempted, by IRCA and/or IRIRA. *Whiting*, 131 S. Ct. at 1987. Because it is possible for employers to comply with both federal law and the Ordinance's provisions, the Court cannot conclude that a conflict "will necessarily arise." See *Goldstein v. California*, 412 U.S. 546, 554, 93 S.Ct. 2303, 37 L.Ed. 2d 163 (1973).[148]

Although the United States Court of Appeals for the Eighth Circuit may ultimately agree with the district court's holding on this issue, a more detailed analysis of the Court's decision in *Whiting* is necessary to determine whether the employment provisions of the Fremont Ordinance are impliedly preempted. The *Whiting* Court, in rejecting an argument that the Arizona law conflicted with federal law, stated that the Arizona law "simply implement[s] the sanctions that Congress expressly allowed Arizona to pursue through licensing laws."[149] The Court based this decision on the steps Arizona took to go "the extra mile"[150] by tracking congressional language "in all material respects."[151] In discussing these parallel "material" provisions, the *Whiting* Court found significant Arizona's (1) use of IRCA's definition of "unauthorized alien," (2) requirement that state investigators verify a worker's status with the federal government and not make an independent determination of a worker's status, (3) requirement that only the federal determination of a worker's status could be used in state proceedings, (4) requirement that violations be committed "knowingly," (5) definition of "knowingly" referencing federal laws and regulations, (6) provision, as in federal law, of a good faith defense for compliance with the I-9 process, and, finally, (7) provision, as in

147. *Id.* at *24-25.
148. *Id.* at *25-26.
149. *Whiting*, 131 S. Ct. at 1981 (majority opinion).
150. *Id.*
151. *Id.*

federal law, of a rebuttable presumption of compliance by using E-Verify.[152]

The question then becomes whether the Fremont Ordinance "simply implements" the federal scheme or whether it conflicts with it such that the Ordinance would be deemed impliedly preempted. With respect to the first two factors above, the Fremont Ordinance parallels federal law. The remaining factors, however, are not structured in the completely parallel way that impressed the Supreme Court in *Whiting*.

With respect to the first factor, the Fremont Ordinance adopts a federal definition of "unauthorized alien" contained in 8 U.S.C. § 1324a(h)(3) of IRCA.[153] This is the same definition adopted by Arizona and mirrors federal law.[154]

The second factor regarding the determination of a worker's status is slightly more complicated, but in the final analysis does not conflict with federal law. In subsection 1(F), the Ordinance provides that city officials shall not attempt to make an independent determination regarding the employee's work status "unless and until an authorized representative of the City has verified with the federal government, pursuant to United States Code Title 8, Section 1373(c), such individual's lack of authorization of employment in the United States." The plain wording of this latter provision can be read as restricting only the timing, not the substance of "an independent determination;"[155] that is to say, city officials must wait for a city representative to verify with the federal government an "individual's lack of authorization of employment in the United States."[156]

Subsection 5(H) states, however, that city officials "at no point" make "an independent determination of the authorization of employment in the United States of any individual employed by a private business entity in the City." The *Whiting* Court read the Arizona statutes to clearly provide that the state officials could not make an independent determination of a worker's status and state courts could only consider federal determination of status. Therefore, the Court noted that "there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage."[157] Read together, subsections 1(F) and 5(H) align the

152. *Id.* at 1981-82.
153. Fremont, Neb., Ordinance 5165 § 1(F) (June 21, 2010).
154. *Whiting*, 131 S. Ct. at 1981.
155. Fremont, Neb., Ordinance 5165 § 5(G).
156. *Id.* § 1(F).
157. *Whiting*, 131 S. Ct. at 1981. The Supreme Court compared the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 402(b), 110 Stat. 3009, with ARIZ. REV. STAT. ANN. § 23-212(I). *Id.* at 1982-83.

Fremont Ordinance with the *Whiting* decision and seem to disallow independent determinations of worker status by city officials.

It is unclear, however, under portions of subsection 5 of the Fremont law, whether the state courts could make an independent determination of immigration status. Subsections 5(H) and (I) provide for appeal from a city council hearing or civil actions by the city attorney in the County Court of Dodge County, or "judicial review" for business entities in the County Court of Dodge County or "any court of competent jurisdiction." The language that state courts could not make independent determinations of worker status present in the Arizona statue is clearly missing in the Fremont Ordinance with respect to court proceedings.

Similarly, the definition of "knowingly" is missing from the Fremont statute. The *Whiting* Court noted that the Arizona statute, like federal law, proscribed employers from "knowingly" hiring unauthorized aliens and tied the definition of that proscription to federal statutory language, specifically 8 U.S.C. § 1324a.[158] The Fremont Ordinance, as indicated above, states that the city "discourage[s]" employers doing business with the city, or requiring licenses, permits, contracts, or loans from the city, from "knowingly" hiring "unauthorized alien[s]" and requires the business entity to (1) execute an affidavit "to the effect" that it does not "knowingly" hire unauthorized aliens and (2) provide documents "confirming" that the business has registered with the E-Verify program.[159] Yet the term "knowingly" is not defined in the Fremont Ordinance, nor is it tied to any specific federal statute, as was the Arizona law.[160]

Finally, the Arizona statutory scheme, like the federal law, provided employers a good-faith affirmative defense for complying with the I-9 procedure[161] and a rebuttable presumption of compliance with the law when using the E-Verify system to verify employment eligibility.[162] The employment provisions of the Fremont Ordinance provide neither an affirmative defense nor a rebuttable presumption. Indeed, without a clear definition of "knowingly" in the Fremont Ordinance and without the affirmative defense and rebuttable presumption akin to those in the federal statutes, the language of subsection 5(H)(1)

158. *Id.* at 1982.

159. Fremont, Neb., Ordinance 5165 § 1(5)(A), (C).

160. *See generally id.* Again, subsection (5)(B), which deals with independent contractors and "casual labor for domestic tasks," refers to 8 U.S.C. § 1324a, but it does not tie the term "'[k]nowingly employ an unauthorized alien'" to the definition in § 1324a, which the Supreme Court approvingly noted the Arizona statute did. *See id.* at § 1(5)(B).

161. The Supreme Court compared ARIZ. REV. STAT. ANN. § 23-212(J) with 8 U.S.C. § 1324a(a)(3). *Whiting*, 131 S. Ct. at 1982.

162. *Id.*

could be read as imposing almost strict liability on the employer for failing to register and use E-Verify.

The question, then, is whether the compilation of the non-parallel factors in Fremont's employment provisions would be enough to find that the provisions conflict with federal law and are, therefore, impliedly preempted. The threshold for finding federal preemption of an employment provision is high. As the Court stated in *Whiting*:

> Implied preemption analysis does not justify a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor "would undercut the principle that it is Congress rather than the courts that preempts state law." Our precedents "establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act."[163]

An argument can certainly be made that the employment provisions impose burdens on employers, including increased liability, and would result in a holding that it is impliedly preempted. The standard to determine whether a state or local law is impliedly preempted, however, is a stringent one and the employment provisions as written will most likely withstand the challenge.[164] Even if they did not, lawmakers could ultimately rewrite the provisions to more closely reflect the Arizona statute thereby assuring their constitutionality.[165]

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163. *Id.* at 1985 (citation omitted).

164. Although it is beyond the scope of this article, it is worth noting that there are potential due process claims based on the Fremont Ordinance's provisions governing proceedings before the city council and the courts. An employer is subject to being "tried at a public hearing before the City Council" where its business license, permit, contract, loan, or grant can be revoked. Fremont, Neb., Ordinance 5165 § 1(5)(H)(1). This subsection states that "[d]ue process, including notice, the opportunity to present evidence and to be heard, and the right to appeal to the District Court of Dodge County, shall be accorded to all parties." *Id.* What due process will be accorded, however, and what type or amount of evidence will be admitted is not clearly defined.

165. Assuming *arguendo* that the employment provisions are found to be constitutional, the practical implications of the employment provision in Dodge County are not necessarily wide-spread. According to an article by local employment law firm, Erickson & Sederstrom, P.C., "many local experts believe the Fremont ordinance will not actually create a significant change for local employers" because most of the companies already use E-Verify. Erickson & Sederstrom, P.C., *supra* note 30. Furthermore, some employers argue that the mandatory use of E-Verify will not accomplish the goal of stemming the tide of illegal workers. For example, Les Leech, the president of the Fremont Beef Company, told the New York Times that "plants here already use E-Verify, but that does not stop those using stolen Social Security numbers." Davey, *supra* note 28. He continued, "This ordinance will not change the complexion of this county one bit . . . because E-Verify doesn't work." *Id.* The New York Times also noted, "Oddly enough, the meatpacking plants, including Hormel, are just outside city limits, and would not be subject to the new law." *Id.*

V. LEGAL ANALYSIS OF THE HOUSING PROVISIONS

Unlike the employment provisions of Ordinance No. 5165 (the "Fremont Ordinance"), there are strong arguments that the housing provisions are unconstitutional. The two main arguments discussed in this Article are based on the Supremacy Clause and the Equal Protection Clause of the Fourteenth Amendment. It is unlikely that the housing provisions will survive either of these constitutional challenges upon appeal.[166]

A. PREEMPTION ARGUMENT

As stated above, the United States Supreme Court's recent decision in *Chamber of Commerce of the U.S. v. Whiting*[167] sets forth the standard for preemption of state laws regulating the employment of undocumented immigrants.[168] The Court in *Whiting*, however, does not clarify the constitutionality of provisions that restrict undocu-

166. The Plaintiffs in *Keller* also argue that the Fremont Ordinance violates the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-3617. First Amended Complaint, supra note 6, ¶ 4. The FHA prohibits, among other things, discrimination based upon race, color, or national origin in the sale or rental of housing. While "[n]ational origin is a protected characteristic under the FHA . . . neither alienage (whether or not a person is a United States citizen) nor legal status (whether or not a noncitizen is legally present in the United States, and, if so, under what type of status) are specified in the statute." Regal Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 83 (2009). Assuming the distinctions made in local ordinances are not based upon prohibited classifications, however, concerns regarding discrimination remain. For example, disparate treatment of persons based upon their national origin resulting from the application and enforcement of the ordinance may be challenged under the FHA. *See id.* at 93-97 (discussing municipalities' liability and the tests used by courts to determine that liability). Oliveri also discusses the predicaments and potential liability faced by landlords in attempting to follow the demands of various ordinances. *See id.* at 87-93. While some of Oliveri's concerns, such as who makes the determination of "status," may be facially alleviated by the language and structure of the Fremont Ordinance, the discussion illustrates the types of actions that can be brought under the various provisions of the FHA. *See id.* Furthermore, another author suggests that because Equal Protection challenges require proof of discriminatory intent, but courts have interpreted the FHA "more broadly," the FHA may be a more practical avenue for challenging the discriminatory effect of housing restrictions. *See* Todd D. Batson, Note, *No Vacancy: Why Immigrant Housing Ordinances Violate FHA and Section 1981*, 74 BROOK. L. REV. 131 (2008). It is important to note, however, that the Equal Protection analysis based on Plyler v. Doe, 457 U.S. 202 (1982), discussed below, does not require a showing of intent. Regarding the Fair Housing Act argument, the district court in *Keller* found that the enforcement of the portions of the Ordinance "prohibiting the harboring of illegal aliens, providing for the revocation of occupancy licenses, and providing for certain penalties following the revocation of occupancy licenses, violated the Fair Housing Act because of its disparate impact on Hispanic/Latino residents." *Keller*, 2012 LEXIS 20908, at *49.

167. 131 S. Ct. 1968 (2011).

168. Daniel Eduardo Guzmán, Note, *"There Be No Shelter Here:"Anti-Immigrant Housing Ordinances and Comprehensive Reform*, 20 CORNELL J.L. & PUB. POL'Y 399 (2010) (arguing that housing ordinances regulating immigration are preempted by federal law).

mented immigrants' access to housing. As stated above, *Whiting* primarily involved statutory interpretation of the savings clause of the Immigration Control and Reform Act of 1986[169] ("IRCA").[170] In the housing context, there is no such savings clause permitting state licensing or similar laws. In the absence of such a clause, the possible preemption of the housing provision must be analyzed according to the *De Canas v. Bica*[171] standards.

As stated above, the *De Canas* Court recognized that there is no *per se* preemption against state statutes where undocumented immigrants are the subject matter of the legislation.[172] The Court stated, "[S]tanding 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."[173] Instead, the Supreme Court in *De Canas*

> established three ways in which a state ordinance may be preempted by federal law: 1) where the local law attempts to regulate immigration; 2) where the local law attempts to operate in an area occupied by federal law; and 3) where implementation of the local law is an obstacle or "burdens or conflicts in any manner with any federal laws or treaties."[174]

1. *Regulation of Immigration*

In order to determine whether federal law preempts Fremont's housing provision, we will first explore whether it is an improper regulation of immigration.[175] In *Villas at Parkside Partners v. City of Farmers Branch*,[176] the District Court for the Northern District of Texas held that an ordinance mandating a citizenship certificate re-

169. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §§ 1101-1537) (1986).

170. *See* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1973 (2011).

171. 424 U.S. 351 (1976).

172. *See* De Canas v. Bica, 424 U.S. 351, 354-355 (1976).

173. *De Canas*, 424 U.S. at 355.

174. Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1055 (S.D. Cal. 2006) (citing *De Canas*, 424 U.S. at 354).

175. In the recent decision granting partial summary judgment on this issue, the United States District Court for the District of Nebraska found, "Because the housing provisions in the Ordinance are not 'essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain,' they are not preempted by the federal Constitution itself." Keller v. City of Fremont, No. 8:10CV270, No. 4:10CV3140, 2012 U.S. Dist. LEXIS 20908, *26 (Feb. 20, 2012) (citing *De Canas*, 424 U.S. at 355). Although the court impliedly ruled that the ordinance did not regulate immigration, there was no reasoning stated in the opinion to support this holding. Instead, the court's main reasoning focused on conflict preemption, which will be discussed below.

176. 496 F. Supp. 2d 757 (N.D. Tex. 2007).

quirement to rent apartments was preempted by federal law because it was a regulation of immigration.[177] Quoting *De Canas v. Bica*,[178] the court in *Villas* stated that a regulation of immigration essentially is a question of whether the ordinance is "'a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.'"[179] The court held that federal law preempted the ordinance as a regulation of immigration because the ordinance adopted Housing and Urban Development ("HUD") regulations rather than federal immigration requirements to define a person's status.[180] Furthermore, the ordinance was preempted because landlords were expected to verify immigration status.[181]

Additionally, in *Lozano v. City of Hazleton*,[182] the United States Court of Appeals for the Third Circuit held that federal law preempted an ordinance restricting housing for undocumented immigrants, in part, because it regulated immigration.[183] In *Lozano*, the housing provisions did not refer to HUD regulations to determine immigration status. Instead, the ordinance defined "illegal alien" as "an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq."[184] The ordinance also indicated that the city must verify "the legality of the tenant's immigration status with the federal government, pursuant to 8 U.S.C. § 1373(c)."[185] Despite this mirroring of federal law, the court held that the housing provisions still regulated immigration.[186]

As a preliminary matter, the Third Circuit found that in the housing area, unlike in employment, there is not a "presumption against pre-emption."[187] The court noted that the employment provisions "fall within the states' historic police powers," but "the housing provi-

177. Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007).

178. 424 U.S. 351 (1976).

179. *Villas*, 496 F. Supp. 2d at 766 (quoting *De Canas*, 424 U.S. at 355).

180. *Id.* at 766-69. The ordinance at issue in *Villas* incorporated the definitions used in 24 C.F.R § 5.504, regulations issued by the United States Department of Housing and Urban Development outlining restrictions on federal housing subsidies to noncitizens.

181. *Id.* at 770-72.

182. 620 F.3d 170, 219-24 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

183. Lozano v. City of Hazelton, 620 F.3d 170, 219-24 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011). Although this decision has been vacated and remanded due to the analysis of the employment provision in light of Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011), its detailed holding with respect to the housing provisions is instructive here.

184. *Lozano*, 620 F.3d at 179 n.9.

185. *Id.* at 179.

186. *See id.* at 219-21.

187. *Id.* at 219-20.

sions . . . raise a very different issue."[188] The court found that "'[l]ocal regulation that conditions the ability to enter private contract for shelter on federal immigration status is of a fundamentally different nature than . . . restrictions on employment.'"[189] The court found:

> Although we realize that a state certainly can, and presumably should, regulate rental accommodations to ensure the health and safety of its residents, and that such regulation may permissibly affect the rights of persons in the country unlawfully, . . . we cannot bury our heads in the sand ostrich-like ignoring the reality of what these ordinances accomplish. Through its housing provisions, Hazleton attempts to regulate residence based solely on immigration status. Deciding which aliens may live in the United States has always been the prerogative of the federal government. Hazleton purposefully chose to enter this area of "significant federal presence."[190]

The court concluded that it would not presume non-preemption for the restrictive housing ordinance and that federal law preempted the ordinance as a regulation of immigration.[191]

In contrast, in *Garrett v. City of Escondido*,[192] the United States District Court for the Southern District of California found that the housing ordinance at issue was not an impermissible attempt to regulate immigration.[193] The ordinance in *Garrett* defined "illegal alien"

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188. *Id.* at 219.

189. *Id.* at 219-20 (quoting *Villas*, 701 F. Supp. 2d at 835).

190. *Id.* at 220 (citation omitted).

191. *Id.* The court also stated,

> We also recognize that Hazleton's housing provisions regulate presence only within its city limits, not the entire country. This does not change the analysis. To be meaningful, the federal government's exclusive control over residence in this country must extend to any political subdivision. Again, it is not only Hazleton's ordinance that we must consider. If Hazleton can regulate as it has here, then so could every other state or locality. As the District Court for the Northern District of Texas reasoned: "we can imagine the slippery slope . . . if every local and state government enacted laws purporting to determine that . . . [certain persons] could not stay in their bounds. If every city and state enacted and enforced such laws . . . the federal government's control over decisions relating to immigration would be effectively eviscerated." Indeed, the record strongly suggests that Hazleton's mayor intended these provisions to be at the forefront of exactly such an evisceration.

Id. at 221 (citation omitted).

192. 465 F. Supp. 2d 1043 (S.D. Cal. 2006).

193. Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1055-56 (S.D. Cal. 2006). The ordinance at issue in *Garrett* penalized "'any person or business that owns a dwelling unit'" in the city that "'harbor[s] an illegal alien in the dwelling unit, 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, unless such harboring is otherwise expressly permitted by federal law.'" *Garrett*, 465 F. Supp. 2d at 1047-48 (citation omitted).

in the exact same manner as in *Lozano*.[194] The ordinance also provided,

> The City shall not conclude that a person is an illegal alien unless and until an authorized representative of the City has verified with the federal government, pursuant to United States Code Title 8, subsection 1373(c), that the person is an alien who is not lawfully present in the United States.[195]

As opposed to the Third Circuit in *Lozano*, the district court in *Garrett* found that the housing provision did not impermissibly regulate immigration because "[t]he Ordinance [did] not determine the condition under which an individual may remain in the country, relying solely on federal agencies and authorities to make that determination for the City."[196]

Based on the case law above, it is possible that the housing provision of the Fremont Ordinance would be considered a regulation of immigration. Although Fremont avoids the pitfalls of the ordinance at issue in *Villas*,[197] the Fremont Ordinance could be determined to be a regulation of immigration solely because it restricts housing based on immigration status. This is a gray area in the district courts. As stated above, the district court in *Garrett* held that a housing ordinance, which defines immigration status solely according to federal immigration law, does not regulate immigration.[198] On the other hand, the Third Circuit in *Lozano* found that the act of restricting housing in this way was enough to be preempted as a regulation of immigration because it determines "which aliens may live in the United States."[199] Furthermore, as will be discussed more fully in the conflict preemption section, the Third Circuit held that even though Hazleton relied on a federal system to determine immigration status,

194. "Illegal alien" is defined as "an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq." *Id* at 1048.

195. *Id.*

196. *Id.* at 1055. The court in *Garrett* also noted a possible due process violation. *Id* at 1057-58. The court found that the Garretts, who owned multiple rental units in the city, "have a legitimate property interest in collecting rent under its leases, as well as the incursion of costs associated with any eviction procedures that the Ordinance requires a landlord to undertake if a tenant is found to be an illegal alien." *Id* at 1058. Accordingly, the court found that the Plaintiffs "have legitimate property interests that require Defendant to provide adequate process before the landlords are deprived of that property interest." *Id.* The court then held, "Because the Ordinance fails to provide for notice or hearing of any kind prior to the deprivation of an illegal alien's tenancy interest, this Court has serious concerns regarding the constitutionality of the Ordinance under the Due Process clause." *Id.* at 1059.

197. The Fremont Ordinance does not refer to HUD regulations, nor does it require landlords to make independent determinations of immigration status.

198. *Garrett*, 465 F. Supp. 2d at 1055-56.

199. *Lozano*, 620 F.3d at 220.

it relied on a current snapshot of this status rather than on a final order of removal.[200] Therefore, the ordinance arguably regulated the "condition under which a legal entrant may remain" in the country.[201] Like Hazleton, Fremont also does not rely on a final order of deportation to determine status, but on Systematic Alien Verification or Entitlements Program ("SAVE"), a public benefits system.[202] In this way, the Fremont Ordinance may regulate the conditions under which a legal entrant can remain in the United States, and therefore, regulates immigration in violation of the first preemption test in *De Canas*.

On balance, although Fremont avoids the main mistakes in *Villas*, there is a strong argument to be made that the provision restricting housing *by its very nature* regulates "which aliens may live in the United States."[203] Additionally, by not relying on final orders of deportation to determine status, the housing provision also regulates the "conditions under which a legal entrant may remain" in the United States.[204] Therefore, it is possible that the court would determine that the housing provision is an improper regulation of immigration.

2. *Field Preemption*

Although preemption as a regulation of immigration is possible, the more likely basis for preemption in this situation would be field preemption. In *Garrett v. City of Escondido*,[205] although the court found the housing provision did not regulate immigration, it determined that the provision was most likely preempted because it occupied a field regulated by the federal government.[206] The plaintiffs in *Garrett* argued that the ordinance was invalid because "the federal government has comprehensively legislated generally in the field of immigration and specifically with respect to the harboring of undocumented immigrants."[207] The plaintiffs "specifically point[ed] to 8 U.S.C. § 1324 as support that the federal government has already addressed the legality of 'harboring individuals who have violated immigration laws,' and accordingly well occupies this field."[208] In response,

200. *Id.* at 221.
201. *Id.* at 220.
202. Fremont, Neb., Ordinance 5165 § 1 (1)(J), (4)(A-C).
203. *See Lozano*, 620 F.3d at 220.
204. *Id.*
205. 465 F. Supp. 2d 1043 (S.D. Cal. 2006).
206. Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1056 (S.D. Cal. 2006). The plaintiffs in *Garrett* were seeking a temporary restraining order ("TRO"). *Garrett*, 465 F. Supp. 2d at 1047. The court granted the TRO, finding that the plaintiffs could show a likelihood of success on the merits, in part, because the housing provision was likely preempted by federal law. *Id.* at 1055-57.
207. *Id.* at 1056.
208. *Id.*

the city argued that the "ordinance regulates only the landlord-tenant relationship, an area of law not completely occupied by the [Immigration and Nationality Act]."[209] The court found that "federal statutes specifically provide for fines and criminal penalties for the harboring of illegal aliens,"[210] and that "[i]t appears that Federal law, therefore, may occupy the same field in which the Ordinance attempts to legislate."[211] The court found further support for this conclusion "in the language of the Ordinance itself, which states that the act of housing that the Ordinance seeks to regulate is within the definition of 'harboring.'"[212] Specifically, the language of the ordinance provided, "United States Code Title 8, subsection 1324(a)(1)(A) prohibits the harboring of illegal aliens. The provision of housing to illegal aliens is a fundamental component of harboring."[213] Based on those reasons, the court in *Garrett* held that it had "serious concerns in regards to the field preemption of the Ordinance by existing federal statutes."[214]

In *Lozano v. City of Hazelton*,[215] the United States Court of Appeals for the Third Circuit also found that the housing provision of the Hazleton ordinance was field-preempted by the Immigration and Nationality Act ("INA").[216] The court found that "'the comprehensiveness of the INA scheme for regulation of immigration and naturalization' plainly precludes state efforts, whether harmonious or conflicting, to regulate residence in this country based on immigration status."[217] The court also stated, "We recognize, of course, that Hazleton's housing provisions neither control actual physical entry into the City, nor physically expel persons from it. Nonetheless, '[i]n essence,'

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209. *Id.*

210. *Id.* The court cited to 8 U.S.C. § 1324 and stated that this section

> provides for criminal penalties where a person
>
> > (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation,
>
> in addition to where a person
>
> > (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.

Id. (citing 8 U.S.C. § 1324(a)(1)(A)(iii)-(iv)).

211. *Id.* at 1056.

212. *Id.*

213. *Id.*

214. *Id.*

215. 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

216. Lozano v. City of Hazelton, 620 F.3d 170, 219 (2010), *vacated*, 131 S. Ct. 2958 (2011). It does not appear that the Hazleton ordinance referred to the federal harboring regulations.

217. *Lozano*, 620 F.3d at 220.

that is precisely what they attempt to do."[218] The court continued, "'It is difficult to conceive of a more effective method' of ensuring that persons do not enter or remain in a locality than by precluding their ability to live in it."[219] The court stated:

> Although the federal government does not intend for aliens here unlawfully to be harbored, it has never evidenced an intent for them to go homeless. Common sense, of course, suggests that Hazleton has absolutely no interest in reducing aliens without legal status to homelessness either. No municipality would benefit from forcing any group of residents ("legal" or "illegal") onto its streets. Rather, it appears plain that the purpose of these housing provisions is to ensure that aliens lacking legal immigration status reside somewhere other than Hazleton. It is this power to effectively prohibit residency based on immigration status that is so clearly within the exclusive domain of the federal government.[220]

Considering this consistent case law, it is very likely that the housing provision of the Fremont Ordinance will be field preempted. One of the provisos in the Fremont Ordinance acknowledges the existence of the federal anti-harboring provisions of 8 U.S.C. § 1324(a). It then provides, "The provision of housing to illegal aliens is a fundamental component of the federal immigration crime of harboring."[221] Unlike the employment provision addressed in *Chamber of Commerce of the U.S. v. Whiting*,[222] there is no savings clause for legislation by the states and local governments in the federal harboring law. Therefore, as held in *Garrett*, regulating housing in this manner is exclusively a function of the federal government and the Fremont housing provision is likely preempted under this test.

Consistent with this analysis, the district court in *Keller v. City of Fremont*[223] found that the parts of the Fremont Ordinance's housing provision "prohibiting the harboring of illegal aliens . . . are preempted by federal law."[224] In so doing, the district court acknowledged that "Congress's complex immigration scheme also includes penalties for the harboring of aliens who have entered or remained in the United States in violation of law."[225]

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218. *Id.* (citing Bonito Boats, Inc v. Thunder Craft Boats, Inc., 489 U.S. 141, 160 (1989)).

219. *Id.* (citing *Bonito Boats*, 489 U.S. at 160).

220. *Id.* at 224 (citation omitted).

221. Fremont, Neb., Ordinance 5165 (June 21, 2010).

222. 131 S. Ct. 1968 (2011).

223. No. 8:10CV270, No. 4:10CV3140, 2010 U.S. Dist. LEXIS 120854 (D. Neb. Nov. 12, 2010).

224. Keller v. City of Fremont, No. 8:10CV270, No. 4:10CV3140, 2012 U.S. Dist. LEXIS 20908, at *31 (D. Neb. Feb. 20, 2012).

225. *Keller*, 2012 LEXIS 20908, at *27.

3. Conflict Preemption

Finally, the housing provisions of the Fremont Ordinance are most likely unconstitutional due to conflict preemption. In *Garrett v. City of Escondido*,[226] the court found that the housing provisions placed a burden on the federal government because of the potential overuse of the Systematic Alien Verification for Entitlements ("SAVE") program.[227] The court found the following:

> Because of the purpose of the SAVE program as a query for public benefit uses, . . . this Court has serious concerns regarding Defendant's use of federal resources and procedures for a private benefit, and the burden that it would cause to the federal government for the latter to conduct a formal hearing to make the requisite finding of fact and conclusions of law for the Defendant.[228]

The court concluded that it had "serious concerns regarding the burden this Ordinance will place on federal regulations and resources."[229]

Unlike in *Garrett*, it is unlikely that a court would determine that the Fremont Ordinance is conflict preempted because it would pose a burden to the federal system. The Fremont Ordinance requires the use of SAVE to determine a person's legal status in the country.[230] According to the court's analysis in *Garrett*, overuse of the SAVE system could burden the federal government.[231] If this were true, the Ordinance would be conflict preempted. An analogy, however, could be made to United States Supreme Court's analysis in *Chamber of Commerce of the U.S. v. Whiting*[232] of E-Verify. The plaintiffs in *Whiting* argued that the employment provision at issue was conflict preempted because it would overuse that system.[233] Despite evidence to the contrary,[234] the Court accepted the defendant's argument that E-

226. 465 F. Supp. 2d 1043 (S.D. Cal. 2006).

227. Garrett v. City of Escondido, 465 F.Supp.2d 1043, 1057-58 (S.D. Cal. 2006).

228. *Garrett*, 465 F. Supp. 2d at 1057.

229. *Id.*

230. Fremont, Neb., Ordinance 5165 § 1(4)(A).

231. *Garrett*, 465 F. Supp. 2d at 1057-58.

232. 131 S. Ct. 1968 (2011).

233. Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

234. Serious concerns about the burden to the federal government do exist. These were expressed in a 2008 Government Accountability Report noting the lack of thorough cost and resource analysis of the expanded use of E-Verify. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-895T, EMPLOYMENT VERIFICATION: CHALLENGES EXIST IN IMPLEMENTING A MANDATORY ELECTRONIC EMPLOYMENT VERIFICATION SYSTEM (2008), *available at* http://www.gao.gov/assets/90/82341.pdf; *see also What Social Security Isn't Meant to Do*, N.Y. TIMES, May 12, 2008, http://www.nytimes.com/2008/05/12/opinion/12mon1.html (discussing E-Verify's potential burden on Social Security).

Verify could handle the additional load.[235] Thus, the burden analysis comes down to a factual argument about the ability of SAVE to handle state inquiries into immigration status. There are some reports about the numerous data glitches possible with the SAVE program.[236] It is likely, however, that, due to the Court's bias toward the government on this issue, the Fremont Ordinance would not be conflict preempted for this reason.

The Fremont Ordinance, however, is most likely conflict preempted for the reason set forth in *Lozano v. City of Hazelton*.[237] In *Lozano*, the United States Court of Appeals for the Third Circuit found that the housing provisions "attempt to effectively 'remove' persons from Hazleton based on a snapshot of their current immigration status, rather than based on a federal order of removal. This is fundamentally inconsistent with the [Immigration and Nationality Act]."[238] Citing *Plyler v. Doe*,[239] the Third Circuit stated that because of the federal government's discretion to initiate removal proceedings, "it [is] impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported."[240] The court found that Hazleton's housing ordinance showed "either a lack of understanding or a refusal to recognize the complexities of federal immigration law" because it "would effectively remove from its City an alien college student the federal government has purposefully declined to initiate removal proceedings against."[241] The court found that "in every single instance in which Hazleton would deny residence to an alien based on immigration status rather than on a federal order of removal, Hazleton would act directly in opposition to federal law."[242]

Like Hazleton, Fremont does not rely on a federal order of deportation to determine immigration status, but rather on SAVE, a public benefits system.[243] As noted in *Lozano*, the federal government has

235. *Whiting*, 131 S. Ct. at 1986. In the *Whiting* dissent, Justice Breyer indicated that he was concerned about the eighteen percent error rate of E-Verify. *Id* at 1991 (Breyer, J., dissenting).

236. See *Applying for a Driver's License or State Identification Card*, ICE (last updated Jan. 17, 2012), http://www.ice.gov/doclib/sevis/pdf/dmv_factsheet.pdf (discussing SAVE in the context of issuing a driver's license).

237. 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

238. Lozano v. City of Hazelton, 620 F.3d 170, 221 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

239. 457 U.S. 202 (1982).

240. *Lozano*, 620 F.3d at 221 (citing Plyler v. Doe, 457 U.S. 202, 236 (1982) (Blackmun, J., concurring)).

241. *Id.* at 222. It would also remove "an alien battered spouse, currently unlawfully present, but eligible for adjustment of status to lawful permanent resident under the special protections Congress has afforded to battered spouses and children." *See* 8 U.S.C. § 1229b(b)(2).

242. *Lozano*, 620 F.3d. at 222.

243. Fremont, Neb., Ordinance 5165 § 1(1)(J), (4)(A-C).

considerable discretion regarding whom it is going to remove from the country.[244] This is particularly true in light of the Obama Administration's decision to suspend deportations for "low-priority" undocumented immigrants, including those who are eligible for the Development, Relief, and Education for Alien Minors Act ("DREAM Act"),[245] and possibly grant work permits.[246] Accordingly, many of the immigrants targeted by the Ordinance because of their current immigration status will be allowed to remain here and possibly to work legally. Therefore, the Fremont Ordinance makes local enforcement decisions at odds with enforcement decisions made at the federal level. Due to this conflict with federal immigration policy, there is a strong argument that the Fremont Ordinance is conflict preempted.

The district court in *Keller v. City of Fremont*[247] was persuaded by this argument, stating the following:

> Congress has developed a "complex scheme" for adjudicating an individual's right to remain in this country (*see* Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*), and those who have entered illegally, or who have remained unlawfully, often are allowed to remain pending full adjudication of their status – which adjudication may take many years and may ultimately lead to lawful status or even full citizenship. *See, e.g.*, 8 U.S.C. § 1229b(b) (providing for cancellation of removal and adjustment of status for certain aliens), and 8 U.S.C. § 1255 et seq. (providing for adjustment of status of certain aliens). Fifty-seven U.S. immigration courts process over 300,000 cases each year, the great majority of which are removal matters. (Department of Justice Ex-

244. *Lozano*, 620 F.3d. at 221-22.

245. S. 952, 112th Cong. (2011).

246. Paloma Esquivel, *Dream Act Students Won't Be Deportation Targets, Official Say*, L.A. TIMES, Aug. 18, 2011, http://latimesblogs.latimes.com/lanow/2011/08/dream-act-students-not-targeted-for-deportatiom.html; Memorandum from John Morton, Director of ICE, to Field Office Directors, Special Agents in Charge, and Chief Counsel of ICE (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. The DREAM Act is a bipartisan legislation sponsored by Sen. Richard Durbin (D-IL). It provides a path to citizenship for undocumented youth who (1) arrived in the United States as children (under 15 years old), (2) have been in the United States continuously for at least 5 years, (3) have good moral character, (4) graduate from high school or obtain a GED, and (5) complete two years of college or military service in good standing. Proponents argue that it would benefit the U.S. military and stimulate the economy. The DREAM Act legislation has not been passed. *See Passing the Dream Act*, DICK DURBIN (June 28, 2011), http://durbin.senate.gov/public/index.cfm/hot-topics?ContentRecord_id=43eaa136-a3de-4d72-bc1b-12c3000f0ae9; *The Dream Act: A Resource Page*, IMMIGR. POL'Y CENTER (Sept. 16, 2010), http://www.immigrationpolicy.org/just-facts/dream-act-resource-page; *The Dream Act Portal*, DREAM ACT, http://dreamact.info (last visited Apr. 6, 2012).

247. No. 8:10CV270, No. 4:10CV3140, 2010 U.S. Dist. LEXIS 120854 (D. Neb. Nov. 12, 2010).

> ecutive Office for Immigration Review, 2010 Statistical Year Book.)[248]

Based on that information, the district court found that the housing provision providing "for the revocation of occupancy licenses and penalties for the lease or rental or dwelling units following the revocation of occupancy licenses" were conflict preempted.[249] The court found that those provisions "conflict[ed] with the INA, presenting 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[250]

The district court also found, however, that solely requiring a residential occupancy license was consistent with federal objectives.[251] Thus, the court upheld the housing provisions that require such a license.[252] To support this holding, the court noted that states have "authority to enact laws and ordinances that are in harmony with federal objectives."[253] The court stated,

> The INA reflects Congress's intent that state and local authorities "communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States" and "otherwise . . . cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."[254]

The court further stated,

> 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 police department] to communicate such information to federal authorities, the Ordinance is in harmony with INA's objective of facilitating cooperation between officers and employees of states and political subdivisions and federal

248. Keller v. City of Fremont, No. 8:10CV270, No. 4:10CV3140, 2012 U.S. Dist. LEXIS 20908, at *26-27 (D. Neb. Nov. 12, 2010).

249. *Keller*, 2012 U.S. Dist. LEXIS 20908, at *29.

250. *Id.* (citing Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985)). The court also stated, "If states or political subdivisions take independent action to remove aliens from their jurisdiction, essentially forcing them from one state or community to another where their identity and whereabouts may be obscured, the structure Congress has established for the classification, adjudication, and potential removal of aliens will be impaired." *Id.* at 30 (citing *Lozano*, 620 F.3d at 219-224; Villas at Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835, 860 (N.D. Tex. 2010); *Garrett*, 465 F. Supp.2d at 1056-57).

251. *Keller*, 2012 U.S. Dist. LEXIS 20908, at *29.

252. *Id.*

253. *Id.* at *28.

254. *Id.* (citing 8 U.S.C. § 1357(g)(10) (2006)).

immigration authorities regarding the identification of individuals who may be in the United States unlawfully.[255]

The court failed to consider, however, the practical effect of severing the housing provisions requiring a residential occupancy license from the other conflict preempted provisions. Essentially, requiring an occupancy license in and of itself will have a chilling effect on undocumented immigrants living in Fremont, and will encourage them to live just outside the Fremont city limits. Therefore, although this part of the Ordinance may not be conflict preempted because it is in "harmony" with federal law, it remains field preempted. As the Third Circuit stated in *Lozano*, "[T]he comprehensiveness of the INA scheme for regulation of immigration and naturalization' plainly precludes state efforts, *whether harmonious or conflicting*, to regulate residence in this country based on immigration status."[256] The Third Circuit also noted, "[I]t appears plain that the purpose of these housing provisions is to ensure that aliens lacking legal immigration status reside somewhere other than Hazleton. It is this power to effectively prohibit residency based on immigration status that is so clearly within the exclusive domain of the federal government."[257] Forcing undocumented immigrants to obtain an occupancy license in order to rent "effectively prohibit[s] residency based on immigration status," and even without the revocation provisions, should be considered preempted by federal immigration law.

In sum, applying the preemption tests set forth in *De Canas v. Bica*,[258] and considering the case law discussed above, it is likely that federal law preempts all the housing provisions of the Fremont Ordinance. The provisions as a whole may be considered a "regulation of immigration," and most likely regulate a field occupied by the federal government and conflict with federal law.

B. Equal Protection

Another argument against the constitutionality of the housing provision of the Fremont Ordinance is that it violates the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment provides that "[no] State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."[259] In this

255. *Id.* at *28-29.
256. *Lozano*, 620 F.3d at 220 (emphasis added).
257. *Id.* at 224 (citation omitted).
258. 424 U.S. 351 (1976).
259. U.S.Const. amend. XIV. Equal protection applies to local as well as state governments. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (holding that a housing ordinance violated the Fourteenth Amendment).

section, we will first examine the United States Supreme Court's decision in *Plyler v. Doe*,[260] in which the Court found an equal protection violation when a state refused to provide free public education to undocumented children. We will also argue that *Plyler* is appropriate as a guide for analyzing the constitutionality of ordinances restricting housing for undocumented immigrants. Second, we will determine which level of scrutiny would be appropriate in this situation. Finally, we will examine the probable outcome of that test.[261]

1. Plyler v. Doe

In *Plyler v. Doe*,[262] the plaintiffs, a class of all undocumented school-age children of Mexican origin, brought a lawsuit against the State of Texas after it refused to reimburse local school boards for the "education of children who cannot demonstrate that their presence within the United States is lawful."[263] The plaintiffs argued that this refusal amounted to a violation of the Equal Protection Clause of the Fourteenth Amendment.[264]

As a preliminary matter, Texas argued that an undocumented immigrant was not a "person within its jurisdiction," and therefore, had no right to the equal protection of Texas law.[265] The court rejected this argument, stating "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."[266] The Court cited *Yick Wo v. Hopkins*,[267] in which the Court held that the provisions of the Fourteenth Amendment are "*universal*

260. 457 U.S. 202 (2005).

261. The United States District Court for the District of Nebraska found in *Keller* that there was no equal protection violation using the rational basis test. Keller v. City of Fremont, No. 8:10CV270, No. 4:10CV3140, 2012 U.S. Dist. LEXIS 20908, at *32-37 (D. Neb. Feb. 20, 2012). The court found that adults that are here unlawfully were not similarly situated to U.S. citizens "for the purpose of occupying leased or rented dwelling units" and that "the City articulated a rational basis for the different treatment afforded to the two classes." *Keller*, 2012 U.S. Dist. LEXIS 20908, at *35. Upon closer analysis, the Court in *Plyler* applied a heightened form of the rational basis test, which is the appropriate test to be used in *Keller* and other cases involving housing restrictions based on immigration status. Therefore, as discussed below, the analysis under the heightened test would have a different outcome.

262. 457 U.S. 202 (2005).

263. Plyler v. Doe, 457 U.S. 202, 205-06, 209-10, 215-16 (2005).

264. *Plyler*, 457 U.S. at 209-10.

265. *Id.* at 210.

266. *Id.* The Court also stated, "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Id.* (citing Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953)); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)); *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976) (holding that the Fifth Amendment protects undocumented immigrants from invidious discrimination by the federal government).

267. 118 U.S. 356 (1886).

in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws."[268] The Court continued, "The Equal Protection clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection."[269]

Having determined that the equal protection clause applied to undocumented immigrants, the Court then considered which level of scrutiny to apply. The Court stated, "In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose."[270] The Court continued, "But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. . . . Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class' or that impinge upon the exercise of a 'fundamental right.'"[271] Under this strict scrutiny test, the government must "demonstrate that its classification has been precisely tailored to serve a compelling government interest."[272] The Court then acknowledged a middle-tier scrutiny applicable to "certain forms of legislative classification, [which] while not facially invidious, nonetheless give rise to recurring constitutional difficulties."[273] In this intermediate scrutiny, the classification must "fairly be viewed as furthering a substantial interest of the State."[274]

The *Plyler* Court determined that strict scrutiny was not appropriate for two reasons. First, the Court stated that "[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'"[275] Second, the Court acknowledged that education was not a fundamental right.[276]

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268. *Plyler*, 457 U.S. at 212 (citing *Yick Wo*, 118 U.S. at 369) (emphasis added).

269. *Id.* at 213. The Court cited the legislative history of the Fourteenth Amendment indicating that the intent was that it would apply to "citizens" and "strangers" alike. *Id.* at 214.

270. *Id.* at 216.

271. *Id.* at 216-17.

272. *Id.* at 217.

273. *Id.*

274. *Id.* at 217-18.

275. *Id.* at 223.

276. *Id.* at 221 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)).

After determining that strict scrutiny did not apply, the Court applied a heightened form of the rational basis test. In determining how to apply this test, the Court recognized the existence of a "shadow population" of undocumented immigrants in this country.[277] The Court focused on undocumented children as "special members of this underclass" who "can neither affect their parents' conduct or their own status."[278] The Court stated that "[i]t is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States."[279]

The Court also acknowledged the "supreme importance" of education even though it is not a fundamental right.[280] The Court explained,

> In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.[281]

Because of the special status of undocumented children and the importance of education, the Court clarified that in "determining the rationality" of the statute, it would consider the "countervailing costs" to the nation.[282] The Court concluded, "In light of these countervailing costs, the discrimination contained in . . . [the statute] . . . can hardly

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277. *Id.* at 218.

278. *Id.* at 219-20.

279. *Id.* at 220.

280. *Id.* at 221 (citing Meyer v. Nebraska, 262 U.S. 390, 400 (1923)).

281. *Id.* at 221-22. The Court also stated, "[M]ore directly, 'education prepares individuals to be self-reliant and self-sufficient participants in society.'" *Id.* at 222 (citing Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)). The Court continued,

> Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.

Id.

282. *Id.* at 223-24. The court stated,

> [M]ore is involved in these cases than the abstract question whether [the statute at issue] discriminates against a suspect class, or whether education is a fundamental right. [The statue] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the statute], we may appropriately take into account its costs to the nation and to the innocent children who are its victims.

Id.

be considered rational unless it furthers some substantial goal of the state."[283] This analysis differs from the traditional rational basis review in which "challenged statutory classifications are accorded a strong presumption of validity, which is overcome only if the party challenging them negates 'every conceivable basis which might support it.'"[284] The Court in *Plyler* also did not require a showing of intent as is typically required under rational basis review.[285]

The Court then analyzed the various goals of the state under this heightened analysis.[286] The Court rejected the argument that the illegal status of the children provided a rational basis for the law in and of itself.[287] Furthermore, the Court found that there was no identified congressional policy in the immigration scheme to justify denying undocumented children an education.[288] The Court maintained that although these children were subject to deportation, "[i]n light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have

283. *Id.* at 224.

284. True v. Nebraska, 612 F.3d 676 (8th Cir. 2010) (quoting FCC v. Beach Comm'n, 508 U.S. 307, 315 (1993)) (citing Indep. Charities of Am., Inc. v. Minnesota, 82 F.3d 791, 797 (8th Cir. 1996)).

285. See the typical test for rational basis review set forth in Srail v. Vill. of Lisle, 588 F.3d 940, 943 (7th Cir. 2009). The court in *Srail* indicated,

> Rational basis review requires the plaintiff to prove that (1) the state actor intentionally treated plaintiffs differently from others similarly situated; (2) this difference in treatment was caused by the plaintiffs' membership in the class to which they belong; and (3) this different treatment was not rationally related to a legitimate state interest.

Srail, 588 F.3d at 943 (citing Smith v. City of Chicago, 457 F.3d 643, 650-51 (7th Cir. 2006)).

The dissent in *Plyler* disagreed with the Court's "result-oriented approach" and argued that traditional rational basis review should have been used in this situation. *Plyler*, 457 U.S. at 244 (Burger, C.J., dissenting). The dissent stated "it is simply not 'irrational' for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is illegal as it does to provide for persons lawfully present." *Id.* at 250. It is important to note that on June 15, 1982, current Chief Justice John Roberts, while an attorney with the Department of Justice, wrote a memo disagreeing with the outcome in *Plyler*. R. Jeffrey Smith, Jo Becker, & Amy Goldstein, *Documents Show Roberts Influence in Reagan Era*, WASH. POST, June 25, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/07/26/AR2005072602070.html. Roberts argued that if the solicitor general's office had taken a position in the case supporting the state of Texas "and the values of judicial restraint," it could have "altered the outcome of the case." *Id.* Roberts wrote, "In sum, this is a case in which our supposed litigation program to encourage judicial restraint did not get off the ground, and should have." *Id.*

286. *Plyler*, 457 U.S. at 227-30 (majority opinion).

287. *Id.* at 224-25.

288. *Id.* The Court found that there was no basis to the State's argument that congressional disapproval of the presence of these children within the United States supported a congressional policy to deny them an education. *Id.*

been completed."[289] The Court continued, "We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a basic education."[290]

The Court also found that the classification did not support the other state purposes: (1) preservation of the state's resources, (2) protection of the state from an influx of immigrants, (3) maintenance of a high quality education, and (4) preservation of educational resources for children more likely to remain in the state.[291] The Court analyzed each of these purposes and indicated that the facts did not support the argument that denying undocumented children an education was reasonably adapted to achieve these purposes.[292] The Court concluded, "It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."[293] The Court held that denying a "discrete group of innocent children the free public education that it offers to other children residing within its borders" was not "justified by a showing that it further[ed] some substantial state interest."[294]

The decision in *Plyler* has had "fundamental significance," according to one scholar, "partly for the majority's ruling on education, and partly for the more general proposition—adopted by all nine Justices—that the Constitution protects noncitizens as persons even if they are in the United States unlawfully."[295] Perhaps because of its heavy reliance on children as innocent parties, however, *Plyler*'s "constitutional holding has been confined to public education, kindergarten through twelfth grade."[296] Although its constitutional holding has been limited thus far, the *Plyler* Court's equal protection analysis

289. *Id.* at 226. This is especially true in light of the new administrative policy to focus on the deportation of criminals. *See* Memorandum from John Morton, *supra* note 246. This memorandum indicates that several factors should be included in determining whether to prosecute an undocumented immigrant, including the age of the person when he or she entered the country and whether the person is pursuing an education. *Id.*

290. *Plyler*, 457 U.S. at 226.

291. *Id.* at 227-30.

292. *Id.*

293. *Id.* at 230.

294. *Id.*

295. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2043 (2008). In his article, Motomura provides an extensive treatment of *Plyler v. Doe* and its effect on the current immigration debate. *Id.*

296. *Id.* at 2043; *see also* Bill Ong Hing, *Reason Over Hysteria – Keynote Essay*, 12 LOY. J. PUB. INT. L. 275, 278-79 (2011) (citing the importance of *Plyler* as "the authority relied upon by the federal district court in repudiating the education restrictions of California's Proposition 187 in the 1990s").

should control the treatment of ordinances that restrict the housing of undocumented immigrants.[297]

Cases restricting undocumented immigrants' access to housing involve important issues affecting immigrants. Although housing is not a fundamental right,[298] housing is arguably more fundamental than education. In fact, the importance of housing was acknowledged by the dissent in *Plyler* in order to distinguish education from even more basic human rights.[299] Specifically, the dissent stated that "the Court points to no meaningful way to distinguish between education and other governmental benefits in this context. Is the Court suggesting that education is more 'fundamental' than food, shelter, or medical care?"[300] Like the education of undocumented children, removing shelter "poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[301] In other words, if a person's basic needs are not met, it will not be possible to advance legitimately in our society. Furthermore, the housing provision at issue in the Fremont Ordinance affects children as well as adults. The Ordinance may even affect United States citizens who are underage because children born in the United States to undocumented immigrants have birthright citizenship.[302] Therefore, the rationale given in *Plyler* should apply in this case.

2. *Level of Scrutiny*

As stated above, in order for strict scrutiny to apply, the law must affect a suspect class or must infringe upon a fundamental right.[303] If strict scrutiny is applied, the law is unconstitutional unless it is "narrowly tailored" to serve a "compelling" government interest.[304] In ad-

297. *See generally* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723 (2010).

298. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (holding that there is no fundamental right at issue when a local zoning law prohibited a group of people from living together because they were not family members); Linsday v. Normet, 405 U.S. 56, 73 (1972) (holding that the "need for decent shelter" and the "right to retain peaceful possession of one's home" were not fundamental interests); Wilkerson v. Coralville, 478 F.2d 709, 712 (8th Cir. 1973) (no right of annexation).

299. *Plyler*, 457 U.S. at 247-48 (Burger, J., dissenting).

300. *Id.* The dissent also indicates that housing is an "important governmental benefit." *Id.* at 248.

301. *Id.* at 221-22 (majority opinion).

302. Birthright citizenship has its origin in the citizenship clause of the Fourteenth Amendment, which provides, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV.

303. Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that a state statute prohibiting interracial marriages was a violation of equal protection).

304. Fischer v. Ellegood, 238 F. App'x 428, 434 (11th Cir. 2007).

dition, there cannot be a "less restrictive" alternative available to achieve that compelling interest.[305]

In this case, there is a strong argument that strict scrutiny would apply at least to part of the class. Although, as stated above, housing is not a fundamental right, there is a potential suspect class involved here: underage United States citizens with undocumented parents. Although the Fremont Ordinance provides that only those who are eighteen or older are required to obtain a certificate to qualify for housing, as part of the application, they must provide the names and birth dates "of each minor dependent residing with occupant."[306] Furthermore, there is no exception allowing an undocumented immigrant with a United States citizen child to qualify for housing. This could result in citizen children becoming homeless without an eligible parent to house them. When this class of United States citizen children is considered, it is clear that the only thing that separates them from other children is the immigration status of their parents. This legislative punishment for the "sins of the parents" is exactly the type of legislation that the United States Supreme Court in *Plyler v. Doe*[307] found unconstitutional. As one scholar noted, "None of the Housing Ordinances carve out exceptions for those immigrants who are parents of citizen children [in effect denying housing to underaged citizens, which] raises grave equal protection concerns."[308] The scholar also stated:

> To date, litigation has not explored this consequence of the Housing Ordinances, but depriving citizen children of access to housing is a fatal flaw that renders the ordinances flatly unconstitutional. Even if a municipality can justifiably pass legislation that addresses the concern of illegal immigration, that legislation may not trample on guaranteed constitutional rights of citizens, whether they are at the age of majority or not.[309]

With respect to the remainder of the class, undocumented immigrant adults and children, the heightened rational basis test used in *Plyler* would be appropriate. As established in *Plyler*, undocumented immigrants are not a suspect class.[310] Furthermore, as stated above, housing is not a fundamental right. The circumstances, however, that led to heightened scrutiny in *Plyler* are also present here. First, this class includes children who "can affect neither their parent's conduct

305. Reno v. ACLU, 521 U.S. 844, 874-75 (1997).
306. Fremont, Neb., Ordinance 5165 § 1(3)(E)(8) (June 21, 2010).
307. 457 U.S. 202 (1982).
308. Laura A. Hernandez, *Anchor Babies: Something Less than Equal Under the Equal Protection Clause*, 19 S. CAL. REV. L. & SOC. JUST. 331, 331-32 (2010).
309. *Id.* at 332.
310. Plyler v. Doe, 457 U.S. 202, 220-21 (1982).

nor their own status."[311] Even though the class also consists of adults, its practical effects are to discourage the housing of all undocumented immigrants regardless of whether they have reached the age of majority. Second, as the dissent in *Plyler* suggested, housing is perhaps even more important than education.[312] Shelter is basic to our survival as human beings, and a housing restriction of this type could lead to an increase in homelessness. Therefore, the "countervailing costs" of this type of ordinance are similar to *Plyler* and its equal protection test is appropriate here.[313]

3. Outcome of the Equal Protection Test

As an introductory matter, in *Plyler v. Doe*,[314] the United States Supreme Court established that undocumented immigrants are afforded equal protection under the Fourteenth Amendment.[315] Therefore, the plaintiffs in the *Keller v. City of Fremont*[316] have standing to make an equal protection argument. As stated above, there are two possible tests that could be used to analyze the housing provisions of the Fremont Ordinance: strict scrutiny and *Plyler*'s heightened rational basis review. Because the plaintiffs could likely prove an equal protection claim under either test, we will examine the facts under the heightened rational basis review—the test with the higher burden for the plaintiffs.

Under *Plyler*'s heightened rational basis test, the government must show that its classification furthers a "substantial goal of the State."[317] Fremont's goals as related to the housing provisions are set forth in the provisos to the Ordinance. Essentially, the provisos state that the housing provisions were enacted in order to combat two problems allegedly caused by undocumented immigrants: an increased fiscal burden on the city and increased crime.[318] We will analyze each of these in turn.

With respect to the fiscal burden on the city, the Court in *Plyler* rejected a similar economic argument due to lack of evidence.[319] The Court stated, "There is no evidence in the record suggesting that illegal entrants impose any significant burden on the state's economy. To the contrary, the available evidence suggests that illegal aliens un-

311. *Plyler*, 457 U.S. at 220 (citing Trimble v. Gordon, 430 U.S. 762, 770 (1977)).
312. *Id.* at 247-48 (Breyer, J., dissenting).
313. *Id.* at 223-24 (majority opinion).
314. 457 U.S. 202, 220-21 (1982).
315. Plyler v. Doe, 457 U.S. 202, 210-15 (1982).
316. No. 8:10CV270, No. 4:10CV3140, 2010 U.S. Dist. LEXIS 120854 (D. Neb. Nov. 12, 2010).
317. *Plyler*, 457 U.S. at 224.
318. *See* Fremont, Neb., Ordinance 5165 (June 21, 2010).
319. *Plyler*, 457 U.S. at 228.

derutilize public services, while contributing their labor to the local economy and tax money to the state . . . ."[320] Similarly, there was no contemporary evidence supporting the allegation that illegal immigration burdened Fremont's finances.[321] Additionally, there is no evidence that the alleged increase in the hospital and school services[322] are being used by illegal immigrants and not by legal permanent residents.

One scholar noted that the argument that illegal immigration costs local governments money is supported by a 2007 congressional report. The scholar noted, "[A]lthough policy makers generally believe that tax revenues received from unauthorized immigrants exceed their use of government services in the aggregate, research indicates that local and state governments spend more on services for unauthorized immigrants than they receive from those immigrants in state and local tax revenue."[323] The results of a recent nonpartisan economic impact study, however, indicated that jurisdictions that enacted restrictive immigration laws at the local level experienced a small, but negative economic impact from the laws.[324] Specifically, the researchers found that the "laws had a 1 to 2% negative effect on employment; for the average U.S. county, this translates to about 337 to 675 jobs (40 to 80 jobs for the median county). Consistent with the effect on employment, payroll was also negatively affected."[325] The researchers also stated:

> [W]e emphasize that the employment decrease we find is likely to include authorized, as well as unauthorized workers. Because our economic data draws from tax records (among other sources), the majority of workers on these payrolls, even in high immigrant industries, are likely to be author-

320. *Id.* at 228-29; *see also* Darrell M. West, *Seven Myths That Cloud the Immigration Debate*, USA TODAY, Sept. 1, 2010 (discussing the myth that illegal immigrants do not pay taxes).

321. It should be noted that Fremont has opted not to brief these issues in the *Keller* case. Therefore, there is no evidence of increased fiscal burden on the city readily available.

322. Reed, *supra* note 24.

323. Grube, *supra* note 115, at 395 (citing CONGRESSIONAL BUDGET OFFICE, PUB. NO. 2500, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS (2007), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/87xx/doc8711/12-6-immigration.pdf); *see also* Kris Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459 (2008) (citing *The Fiscal Cost of Low-Skill Immigrants to State and Local Taxpayers: Hearing Before the Subcomm. on Immigr., H. Comm. on the Judiciary*, 110th Cong. 10 (2007) (statement of Robert Rector, Heritage Foundation), *available at* http://judiciary.house.gov/hearings/May2007/Rector070501.pdf) (discussing the cost of illegal immigration to state governments).

324. Huyen Pham & Pham Hoang Van, *The Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 32 CARDOZO L. REV 485, 488 (2010).

325. *Id.*

> ized. Thus, the negative effects that the restrictive laws have on employment, through the channels that we described above, have likely spilled over into the market for authorized workers. Moreover, higher labor costs could also force employers to reduce hiring of authorized workers. Reduction in demand for goods and services from unauthorized workers could also affect the employment of authorized workers.[326]

In addition to this slight negative effect on businesses, there are significant legal costs associated with the Fremont Ordinance. There is evidence that Fremont officials knew that the legislation would cost the community money in legal fees.[327] This could be one reason that the city tried to prevent the legislation from being placed on the ballot for a public vote.[328] Additionally, Fremont city officials approved $750,000 for the 2011 budget to cover the continuing legal fees in the *Keller* case, which entailed "an average tax increase of $116 per year on a $200,000 home."[329] This evidence not only contradicts Fremont's assertion that illegal immigration has a negative effect on its economy, but also indicates that enacting the Ordinance actually cost the city a significant amount of money.[330]

Another stated goal of Fremont's housing provision is to decrease crime. The only contemporary evidence that there had been an increase in crime is Fremont's city attorney's statement that crime has risen over time.[331] The attorney, however, acknowledged that, when

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326. *Id.* at 517.

327. The city indicated that it was aware of the litigation surrounding the ordinances in Hazleton, New Jersey, and Farmers Branch, Texas, and the potential expenses associated with passing this type of ordinance. Immigration Ordinance Fact Sheet, *supra* note 32.

328. City of Fremont v. Kotas, 279 Neb. 720, 721, 781 N.W.2d 456, 459 (2010).

329. *City Budget for Immigration Ordinance Cost*, FREMONT, NE (Aug. 17, 2010), http://www.fremontne.gov/CivicAlerts.aspx?AID=91. The website provides the following:

> While Kris Kobach, the attorney representing the City of Fremont, has agreed to represent the city at reduced cost, the city anticipates other substantial costs relating to the lawsuit(s). Excluding plaintiff's fees, costs have averaged around $800,000 per year in Farmers Branch, and $1,250,000 per year in Hazleton. Both cities use Kris Kobach as their attorney, also at reduced costs. . . . Additional costs the City is planning for include fees to Kris Kobach including travel, lodging, and outside assistance as needed; depositions, document redaction, expert witnesses, and discovery costs; ancillary lawsuits and potential plaintiffs' fees; and technology, personnel, and other related costs.

Id.; *see also* Cindy Gonzalez, *City Weighs Tax Hike to Defend Law*, OMAHA WORLD-HERALD, Aug. 23, 2010; Chris Zavadil, *Council Adopts New 2010-11 Budget*, FREMONT TRIB., Sept. 15, 2010; Chris Zavadil, *Immigration Ordinance Continues to Be the Subject of Litigation*, FREMONT TRIBUNE, Jan. 2, 2011.

330. *See* Gebe Martinez, *Unconstitutional and Costly: The High Price of Local Immigration Enforcement*, CENTER FOR AM. PROGRESS (Jan. 24, 2011), http://www.americanprogress.org/issues/2011/01/unconstitutional_and_costly.html.

331. Davey, *supra* note 28. The city attorney at that time was Dean Skokan, who has since retired. When asked about his retirement, Mr. Skokan told a reporter at the

the Ordinance was passed, he had no knowledge of "data compiled [in Fremont] on crimes by ethnicity or national origin."[332] On the national level, although the number of undocumented immigrants has been increasing in the past ten years,[333] data from the Bureau of Justice Statistics indicates that the rate of violent crime and property victimization in the United States has steadily declined during that time period.[334] In fact, an annual report entitled, "Criminal Victimization," provides that the average annual decrease in violent crime observed from 2001 through 2009 was 4% each year, and the average annual decrease in property victimization was 3% each year during the same time period.[335] The decrease in crime in 2010 was even greater: the violent crime rate declined by 13% in 2010 and the property victimization rate fell by 6%.[336]

In the absence of evidence that undocumented immigrants cost the city money and increase crime, it is unlikely that depriving human beings of housing serves the interests set forth in the Ordinance's provisos. To the contrary, contemporary statements from the Ordinance's supporters indicate that there may be other motivations behind the law. The Fremont Ordinance was originally proposed by a former city councilman who stated that he introduced the Ordinance, in part, because of "growing numbers of Spanish-speaking students enrolled in Fremont schools" and because "he is suspicious of the number of adults in Fremont who seem to have no knowledge of English."[337] Additionally, one of the private citizens who helped bring the Ordinance to a citywide vote indicated that he joined the petition drive "because Fremont residents were growing more concerned about

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Fremont Tribune, "It's not that I'm going to stop working here tomorrow, but I sent a letter to the mayor indicating that I would resign formally, and that I would stay until they found somebody else, but that I wouldn't have anything to do with the immigration lawsuit." Chris Zavadil, *Skokan Announces Retirement Plans*, FREMONT TRIB., Aug. 5, 2010, http://fremonttribune.com/news/local/article_413cf588-a0aa-11df-9c33-001cc4c002e0.html?mode=story.

332. Davey, *supra* note 28.

333. *287(g) History*, ASU SCH. CRIMINOLOGY & CRIM. JUST., http://ccj.asu.edu/aboutus/research/immigration-research-section/history-of-287-g (last visited Apr. 6, 2011). In 2007, the number of undocumented immigrants was estimated at twelve million. *Id.*

334. JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2010 (2011), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2224.

335. *Id.*

336. *Id.*; *see also From Anecdotes to Evidence: Setting the Record Straight on Immigrants and Crime*, IMMIGR. POL'Y CENTER (Sept. 2, 2008), http://immigrationpolicy.org/just-facts/anecdotes-evidence-setting-record-straight-immigrants-and-crime; *Immigrants and Crime: Are They Connected? A Century of Research Finds That Crime Rates for Immigrants Are Lower than the Native Born*, IMMIGR. POL'Y CENTER (Oct. 25 2008), http://immigrationpolicy.org/just-facts/immigrants-and-crime-are-they-connected-century-research-finds-crime-rates-immigrants-are.

337. Reed, *supra* note 24.

the changes they were seeing in Fremont."[338] He said he "worked out at the YMCA, he heard people griping about visitors struggling with the weight machines who did not speak English. At the Fremont Walmart [sic], he heard other customers speaking in Spanish."[339] He also stated that the area's meatpacking plants, including Hormel, "look different."[340]

These comments undermine the credibility of the stated substantial interests set forth by the city in the Ordinance's provisos. First, there is no evidence that these Spanish speakers are undocumented. Assuming *arguendo* that some of these individuals are undocumented immigrants, it is unclear how the encounters at YMCA and Wal-Mart support an argument that these undocumented immigrants have a negative economic or criminal impact on the community. On the contrary, these activities imply that the Spanish speakers are participating in constructive community activities and spending money at local businesses. Therefore, rather than supporting the city's stated substantial interests, these comments imply a discomfort with the cultural shift in the community. Denying housing to certain individuals in an attempt to reverse a cultural shift (i.e. on the basis of national origin and/or ethnicity) is not a legitimate way to serve a substantial state goal. In fact, this kind of classification is exactly what the equal protection clause was established to prevent.

For the above reasons, it is likely that the restrictions on undocumented immigrants in the Fremont housing provision do not serve a substantial state goal and are a violation of equal protection.[341] It may be advisable for Fremont to follow the example of Valley Park,

338. *Id.*

339. *Id.*

340. Davey, *supra* note 28.

341. It would also be possible to bring an Equal Protection claim under Nebraska's constitution. NEB. CONST. art. I, § 3. Also, in addition to the Equal Protection clause, Nebraska's constitution contains a clause prohibiting discrimination by the state based upon "race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." NEB. CONST., art. 1, § 30. The unicameral has also passed, among other legislation addressing discrimination, the Nebraska Fair Employment Practice Act, NEB. REV. STAT. §§ 48-1101 to -1126 (2007), and the Nebraska Fair Housing Act, NEB. REV. STAT. §§ 20-301 to -344. Although arguments under these state provisions are beyond the scope of this article, they could provide alternative bases to challenge the constitutionality of the provisions. Additionally, as a safeguard against Equal Protection challenges, the Fremont Ordinance includes an anti-discrimination provision. This provision states, "The terms of this section shall be applied uniformly, and enforcement procedures shall not differ based on a person's race, ethnicity, religion, or national origin." Fremont, Neb., Ordinance 5165 § 1(4)(E). This provision alone, however, would not be sufficient to ward off a successful equal protection challenge.

Missouri,[342] and Riverside, New Jersey,[343] and repeal the housing provisions, saving the taxpayers the expense of continued litigation.

VI. SEVERABILITY

As stated above, according to the United States Supreme Court's analysis in *Chamber of Commerce of the U.S. v. Whiting*,[344] it is likely that the employment provision of Ordinance No. 5165 (the "Fremont Ordinance") will ultimately be found to be constitutional. The housing provisions, however, will most likely be unconstitutional under the preemption and equal protection doctrines. This raises a severability question—whether the employment provisions could and should be enforced without the housing provisions. According to the law set forth below, it is likely that the United States Court of Appeals for the Eighth Circuit will find that the entire Fremont Ordinance is invalid.[345]

The Nebraska Supreme Court set forth the factors for determining severability in *Jaksha v. State*,[346] stating:

> This court has identified several factors for consideration in determining whether an unconstitutional provision is severable from the remainder of a statute: (1) whether, absent the

342. Gray v. City of Valley Park, 567 F.3d 976 (8th Cir. 2009) (holding that the employment provision was not preempted, but noting that the housing ordinance had been repealed).

343. The ordinance in Riverside, New Jersey was repealed in 2007. *See State and Local Law Enforcement*, LEGAL ACTION CENTER AM. IMMIGR. COUNCIL (Nov. 13, 2011), http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/state-and-local-law-enforcement; *see also Businesses Sue Riverside, New Jersey over Vague, Discriminatory Anti-immigrant Ordinance*, ACLU (Oct. 18, 2006), http://www.aclu.org/immigrants-rights/businesses-sue-riverside-nj-over-vague-discriminatory-anti-immigrant-ordinance.

344. 131 S. Ct. 1968 (2011).

345. The Supreme Court has held that severability is a matter of state law. Leavitt v. Jane L., 518 U.S. 137, 139 (1996). In *Keller*, the United States District Court for the District of Nebraska severed the employment and remaining housing provisions from the potentially unconstitutional housing provisions. Keller v. City of Fremont, No. 8:10CV270, No. 4:10CV3140, 2012 U.S. Dist. LEXIS 20908, at *31-32 (D. Neb. Feb. 20, 2012). The court stated,

> Generally, the partial invalidity of an ordinance does not necessarily make the remaining provisions of the ordinance ineffective. If a city ordinance contains valid and invalid provisions, the valid portion will be upheld if it is a complete law, capable of enforcement, and is not dependent upon that which is invalid. In other words, the valid part may be carried into effect if what remains after the invalid part is eliminated contains the essential elements of a complete ordinance. *Sarpy v. City of Papillion*, 277 Neb. 829, 765 N.W.2d 456, 466 (Neb. 2009) (citations omitted). Because the essential elements of a complete ordinance remain when Section 1, Parts 2, 3.L., and 4.D., are stricken, the Court finds those provisions to be severable.

Id. The court did not consider the other factors in Jaksha v. State, including inducement.

346. 241 Neb. 106, 486 N.W.2d 858 (1992).

> invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the valid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act.[347]

In *Jaksha*, the court addressed a challenge to a state property tax provision enacted by the state legislature.[348] The court held that the provisions were severable because of the existence of a severability clause, a remaining enforceable section, and lack of contrary legislative history.[349] The court found "nothing to indicate that" one section would not have passed absent the other section "or that severance of the two provisions would do violence to the intent of the Legislature."[350]

The court has distinguished cases involving provisions enacted by the state legislature, as in *Jaksha*, and provisions enacted by the voters, as is the case with the Fremont Ordinance. In *Duggan v. Beermann*,[351] the Nebraska Supreme Court held that part of a constitutional amendment passed by voter initiative was not severable from the unconstitutional portion of the amendment.[352] The court applied three of the factors set forth in *Jaksha* in its analysis.[353] The court found that the first and second factors in *Jaksha*—a workable and independently enforceable plan—involve a determination of whether the constitutional and unconstitutional provisions are "interwoven"[354] or "can be separated . . . leaving the remaining portion or portions independently enforceable."[355] Using that standard, the court found the unconstitutional provisions were incorporated by reference into the remaining provisions and while, if they were stricken the whole thing made more sense, "severability analysis has not been used to revise careless drafting or correct clerical errors."[356]

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347. Jaksha v. State, 241 Neb. 106, 129, 486 N.W.2d. 858, 873 (1992) (citing State *ex rel.* Spire v. Strawberries Inc., 239 Neb. 1, 8, 473 N.W.2d 428, 434-35 (1991)).

348. *Jaksha*, 241 Neb. at 129, 486 N.W.2d at 873.

349. *Id.*

350. *Id.*

351. 249 Neb. 411, 544 N.W.2d 68 (1996).

352. Duggan v. Beermann, 249 Neb. 411, 432, 544 N.W.2d 68, 81 (1996).

353. *Duggan*, 544 N.W.2d at 79-81.

354. *Id.* (quoting State *ex rel.* Douglas v. Herrington, 206 Neb. 516, 523, 294 N.W.2d 330, 334 (1980)).

355. *Id.* (quoting Fitzgerald v. Kuppinger, 163 Neb. 286, 295, 79 N.W.2d 547, 554 (1956)).

356. *Id.* at 79.

With respect to the third factor in *Jaksha*—inducement—the *Duggan* court stated that portions of a constitutional amendment "may be saved only if it appears that the unconstitutional part did not constitute an inducement to the passage of the remaining amendments."[357] The *Duggan* court noted, "There is no meaningful way to determine the intent which motivates voters to sign a petition for the submission of an enactment, nor is there any real way to determine the intent of those voters who vote for the adoption of an enactment."[358] The court found that it is left to "guess" why the voters voted the way they did.[359] The court stated that if there were a method to prove the intent of voters, "that method might be defeated" by the plain language of the enactment.[360] That court further held that voters' intent cannot be determined if the enactment is confusing and that a court "may use historical or operative facts in connection with the adoption of a constitutional amendment in order to interpret the language of the Constitution."[361]

The court in *Duggan* also found that the inclusion of a severability clause may be considered in determining the inducement of voters, but it is not "determinative."[362] In *Duggan*, the severability clause was not included on the ballot seen by voters.[363] The court also found the severability clause unclear.[364] Thus, the severability clause did not require the portions to be severed "because the unconstitutional provisions were a substantial inducement to the enactment of the whole measure" and the provisions were "intertwined."[365] As a result, the court ruled the entire enactment unconstitutional.[366]

Following the analysis in *Duggan*, the Fremont Ordinance may pass the first two factors of *Jaksha*, but will most likely fail the third. The employment and housing sections of the Fremont Ordinance are not as closely intertwined as the constitutional amendment provisions reviewed in *Duggan*. The arguably unconstitutional housing provisions are not cross-referenced into the remaining employment provisions. Although both these sections may depend upon definitions contained in section 1(1) of the Ordinance, because the provisions do not cross reference, they may be independently enforceable.

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357. *Id.* at 79-80.
358. *Id.* at 80 (citing Omaha Nat'l Bank v. Spire, 223 Neb. 209, 224, 389 N.W.2d 269, 279 (1986)).
359. *Id.* at 78.
360. *Id.* at 80.
361. *Id.*
362. *Id.* at 81.
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*

The inducement test is more troubling for Fremont. Because of the ballot language presented to the voters,[367] it is possible that the unconstitutional housing provisions induced the voters to vote "yes" to the entire Ordinance. Furthermore, although there is a severability clause in the Ordinance, it was not on the ballot before the voters. This is a fatal flaw. As stated in *Duggan*, courts in Nebraska appear reluctant to "guess" the intent of the voters.[368] A court reluctant to infer the reasoning of voters will not assume that voters would want one portion of the law to stand while wishing another to fail. As a result, the Fremont Ordinance will not likely withstand a severability challenge.

VII. POLICY CONSIDERATIONS

In addition to the legal arguments regarding the unconstitutionality of Ordinance No. 5165 (the "Fremont Ordinance"), it may be wise to repeal the Ordinance for policy purposes. Although the housing provision in the Ordinance, like the ordinances in *Villas at Parkside Partners v. City of Farmers Branch*,[369] *Lozano v. City of Hazelton*,[370] and *Garrett v. City of Escondido*[371] are allegedly justified on the basis of the economics and crime prevention, the facts indicate something else going on here. These ordinances seem to be based not on legitimate issues, but on a fear of an encroaching culture. As a result, by creating a fear-based, hostile environment for people who speak a language other than English, these ordinances become not only anti-illegal immigrant, but also anti-immigrant.

It is important to note the chilling effect that this law, and others around the country, are having on the legal immigrant community.

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367. The full proposal on the ballot was as follows:

> PROPOSED ORDINANCE NO. 5165
> Shall the City of Fremont, Nebraska, enact proposed Ordinance No. 5165, amending the Fremont Municipal Code to prohibit the harboring of illegal aliens or hiring of unauthorized aliens, providing definitions, making provision for occupancy licenses, providing judicial process, repealing conflicting provisions, and establishing an effective date for this ordinance?
> Yes in favor of proposed Ordinance No. 5165
> No against proposed Ordinance No. 5165
> Electors voting in favor of said proposal shall blacken the oval opposite the words "Yes in favor of proposed Ordinance No. 5165" following said proposal, and electors voting against said proposal shall blacken the oval opposite the words "No against proposed Ordinance No. 5165" following said proposal.

Fremont Ballot Initiative, *supra* note 44.

368. *See* Jones v. Gale, 470 F.3d 1261, 1271 (8th Cir. 2006) (holding that it could not conclude that invalid portion was not an inducement for the rest of the initiative); *Duggan*, 249 Neb. at 426, 544 N.W.2d at 78.

369. 496 F. Supp. 2d 757 (N.D. Tex. 2007).

370. 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

371. 465 F. Supp. 2d 1043 (S.D. Cal. 2006).

An exhibit entitled, "Voices from Fremont," presented the following quotes from Fremont residents of all backgrounds, including many Latinos:

> Before the ordinance the people didn't show so much hate. Now they feel free to say, "go back to Mexico, we don't want illegals in Fremont."
>
> It is too sad. Somebody told us "go back to Mexico," but we are from El Salvador. Anyway now with the ordinance we are planning to move to another state. We are legal permanent residents.
>
> No one in Fremont or Nebraska knows how many illegals are here, that I am aware of. But people are already being profiled by the mere fact they speak Spanish and the color of their skin. They are good people and need to be respected like any members of the community.
>
> I want you to know that they treat us very badly. People yell offensive things at us. I have a 10-year-old daughter and she told me that she doesn't want to live in Fremont because they treat us very badly. She doesn't want to go outside and play anymore. She spends her time shut inside. They treat us badly [when we're shopping] too.
>
> The truth is I don't know how to explain to my daughter when she asks, "Why do those people shout at you F—— Mexican go back to your country," but I was born here.[372]

These quotes indicate the hostile environment created by this Ordinance, which affects legal as well as undocumented immigrants. Forming community rifts based on ethnicity is not good public policy. Repealing the Ordinance would go a long way to repairing these rifts.

VIII. CONCLUSION

In an effort to restrict illegal immigration in their community, the citizens of Fremont passed Ordinance No. 5165 (the "Fremont Ordinance") in June 2010. The Ordinance restricts the employment and housing of undocumented immigrants within Fremont. As discussed above, based on the test set forth in *Chamber of Commerce of the U.S. v. Whiting*,[373] there is a good chance that the employment provisions in the Ordinance are not preempted by federal immigration law. The housing provisions, however, are very likely unconstitutional because they are preempted by federal law and because they violate equal pro-

372. *Voices from Fremont*, NEB. APPLESEED (July 30, 2010), http://neappleseed.org/blog/1991; *Voices from Fremont – Week Two*, NEB. APPLESEED (Aug. 6, 2010), http://neappleseed.org/blog/2075; *Voices from Fremont - Week Three*, NEB. APPLESEED (Aug. 13, 2010), http://neappleseed.org/blog/2173.

373. 131 S. Ct. 1968 (2011).

tection.[374] Additionally, because the employment provisions are likely not severable from the housing provisions, the United States Court of Appeals for the Eighth Circuit will likely find that the entire Ordinance is invalid.

On an ethical level, the Fremont Ordinance, particularly the housing provision, creates severe problems. Proponents of the restrictive housing provisions indicate that they merely reinforce the federal government's preference that undocumented immigrants leave the country. The practical effect, however, is either inhumane (the creation of homelessness) or ineffective (moving an undocumented worker from Fremont to another community or perhaps right outside Fremont's city limits).

Additionally, like other ordinances restricting housing around the country, this Ordinance seems to be based on fear of an encroaching culture, and thus, becomes anti-immigrant. As one scholar noted,

> The anti-immigrant lobby has used the politics of fear to generate much of the hysteria over immigration today. They advance the image of hordes of immigrants coming from Asia and Latin America to take our jobs and commit crimes, all the while not wanting to speak English. Through fear and intimidation, comprehensive immigration reform has been stalled. Fear makes us lose our conscience; fear paralyzes us; we lose our sense of analysis and reflection.[375]

This local anti-immigrant approach is dividing communities while preventing legitimate discussion of immigration reform on the national level.

We, as a nation, need to move beyond fear and toward integration. The Obama Administration has taken a small step in that direction with its memorandums and announcements regarding prosecutorial discretion.[376] In recent years, there have been several substantial federal proposals that would provide a workable and humane solution

374. It is interesting to note the legal action surrounding Alabama's recent immigration law, the strictest state law affecting immigration. *See* Campbell Robertson, *Alabama Wins in Ruling on Its Immigration Law*, N.Y. TIMES, Sept. 28, 2011, http://www.nytimes.com/2011/09/29/us/alabama-immigration-law-upheld.html. In September 2011, the judge of the federal district court in Birmingham, Alabama temporarily enjoined sections of the law but allowed other provisions go into effect. *Id.* The provision of the Alabama statute restricting housing was enjoined. *Id.*; *see also State and Local Law Enforcement*, LEGAL ACTION CENTER (Nov. 13, 2011), http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/state-and-local-law-enforcement#AL.

375. Bill Ong Hing, *Reason Over Hysteria – Keynote Essay*, 12 LOY. J. PUB. INT. L. 275, 297 (2011).

376. Esquivel, *supra* note 246; *see also* Memorandum from John Morton, *supra* note 246.

at the national level.[377] Although the "politics of fear" have prevented their passage, polling consistently shows that a majority of Americans support immigration reform that allows people who are paying taxes and learning English to have a meaningful way to apply for legal status.[378] For example, a 2010 poll from the Pew Research Center indicated that 68% of Americans support "providing a way for illegal immigrants currently in the country to gain legal citizenship if they pass background checks, pay fines and have jobs."[379]

There are voices in Nebraska who also support this direction on the federal level. In reaction to an attempt in 2011 to pass a statewide anti-immigrant bill,[380] Senator Brenda Council recommended LR 39, which stated that immigration is a federal policy and urged Nebraska's United States congressional delegation to take action to implement a "workable immigration system that upholds our values and moves us forward."[381] LR 39 also states:

> Immigration is an important part of our past and future. As in the past, immigrants are integrated into communities across Nebraska. We must adopt a humane approach to this reality, reflecting our values, history, and spirit of inclusion. The way we treat immigrants will say more about us as a society and less about our immigrant neighbors. Nebraska should always be a place that welcomes people of goodwill. Our communities and our future will be best served by doing so.[382]

The Fremont Ordinance, like many other local restrictive immigration measures, is not in line with these values. Legally, as dis-

377. Besides the DREAM Act legislation mentioned above, there are several other plans for comprehensive immigration reform including the Comprehensive Immigration Reform Act of 2010. *See Just the Facts*, IMMIGR. POL'Y CENTER (Nov. 9, 2011), http://www.immigrationpolicy.org/just-facts/comprehensive-immigration-reform-act-2010-summary. Past efforts at immigration reform include the Hagel-Dashle bill in 2004, the SOLVE Act in the same year, and the McCain-Kennedy bill in 2007. *See* Rick Klein, *Kennedy McCain Try Again on Immigration*, BOSTON GLOBE, Feb. 28, 2007, http://www.boston.com/news/nation/washington/articles/2007/02/28/kennedy_mccain_try_again_on_immigration/; *Immigration Law & Policy: Obtaining Lawful Permanent Resident Status*, NAT'L IMMIGR. L. CENTER (May 20, 2004), http://www.nilc.org/immlawpolicy/obtainlpr/oblpr101.htm.

378. *See Research Center*, NAT'L IMMIGR. FORUM (Nov. 13, 2011), http://www.immigrationforum.org/research/public-opinion (providing a list of the public opinion polls on immigration from the last seven years).

379. This same poll indicated that 64% of Americans supported Arizona's reasonable suspicion law. *See Obama's Ratings Little Affected by Recent Turmoil*, PEW RES. CENTER (June 24, 2010), http://www.people-press.org/2010/06/24/obamas-ratings-little-affected-by-recent-turmoil/.

380. *See supra* note 43 and accompanying text (discussing the proposed bill).

381. L.R. 39, Neb. Unicameral, 102nd Leg., 1st Sess. (2011), *available at* http://nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LR39.pdf.

382. *Id.*

cussed above, the entire Ordinance is most likely invalid. Ethically, especially with respect to the housing provisions, it is divisive and inhumane and should be repealed.