

THE SHROUDED BORDERLAND BETWEEN PREEMPTION AND DISCRIMINATION: A FRAMEWORK FOR THE ANALYSIS OF CITY ORDINANCES THAT REQUIRE PROOF OF CITIZENSHIP OR LEGAL RESIDENCY AS A CONDITION TO RENT A DWELLING PLACE

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In the absence of a comprehensive reform of the federal immigration system, numerous cities, counties, and local governments have passed various local laws and ordinances aimed at addressing the externalities of a growing influx of undocumented immigrants. Recently, there has been a proliferation of local ordinances that establish licensing schemes intended to prohibit a landlord from leasing his property to individuals who lack proof of citizenship or legal immigration status. Three federal circuit courts have addressed potential preemption issues that arise from such ordinances. Due to the lack of clarity in the U.S. Supreme Court’s preemption jurisprudence within the context of immigration law, the three circuits have split over the validity of these local efforts to deny undocumented immigrants the right to basic housing. While one of the federal circuit courts examined in this Note has found such ordinances to not be preempted by federal immigration law, the other two courts to consider the issue have reached the opposite conclusion. In so doing, each federal circuit court decision has relied on the ambiguities of the doctrine of preemption to advance or hinder local laws that discriminate against undocumented foreigners. In light of this background, this Note analyzes the discriminatory implications of such local immigration laws. More importantly, this Note proposes an analytical framework that will offer a unified, non-discriminatory federal answer concerning the authority of state and local governments to adopt laws that encumber undocumented immigrants’ rights to housing.

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I. INTRODUCTION

From *Hines v. Davidowitz*¹ to *Chamber of Commerce v. Whiting*² to *Arizona v. U.S.*,³ the federal Supreme Court has alternated between requiring express and implicit modes of Congressional preemption when examining the validity of state statutes and local ordinances that encroach upon the field of immigration law. With very few clear demarcations, such as undocumented immigrant⁴ registration schemes, the imposition of

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¹ *Hines v. Davidowitz*, 312 U.S. 52 (1941).

² *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

³ *Arizona v. U.S.*, 132 S. Ct. 2492 (2012).

⁴ Throughout this Note we will abstain from referring to undocumented immigrants or non-citizens as “aliens”. This is based on our understanding that immigration scholarship, legislation and jurisprudence imprudently rely on the term “alien” when referring to immigrants. See Kevin Johnson, “*Aliens and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*,” 28 U. MIAMI INTER-AM. L. REV. 263, 264 (1997). This term is a social and legal construction that institutionalizes the immigrant as an “outsider of the national community.” *Id.* As such, it rationalizes and legitimizes discrimination, by justifying a social, legal and political subordination of foreigners, and by employing alienage as a proxy for race. *Id.* at 269. From a social vantage point, “[e]ven if they have lived in this country for many years, have had children here, and work and have deep community ties in the United States, noncitizens remain aliens, an institutionalized “other,” different and apart from ‘us.’” *Id.* at 264. As such, the term strengthens “nativist

civil or criminal penalties against the unauthorized employment of non-citizens, and the mandatory consultation of federal immigration sources, the doctrine of preemption in the immigration context is in a condition of unending flux, leaving the state and local political actors in a position of doctrinal uncertainty. The contours of the doctrine remain muddled even after the Court's most recent pronouncement addressing this subject in *Arizona v. U.S.* There, the Court seemed to suggest that removal procedures constitute federally preempted legislative subjects, but did not provide any clarity as to the actual extent of federal preemption in the immigration context.

Against the backdrop of this legal grey area, numerous cities and municipalities across the United States have undertaken efforts to curtail the effects of undocumented immigration and in light of the federal government's failure to legislate comprehensive immigration reform. This Note looks at the recent proliferation of local ordinances that establish licensing schemes aimed at prohibiting a landlord from leasing his property to individuals who lack proof of citizenship or legal immigration status.⁵ This new trend in local governance has initiated a new chapter in the enactment of legal structures that discriminate against foreigners and has contributed to a heated debate concerning the enactment of local laws and ordinances that venture into federally preempted legal fields.

Three federal circuit courts have addressed this growing problem by examining different city ordinances that prohibit a person from renting a house without first obtaining an occupancy license conditioned upon the occupant's citizenship or documented immigration status.⁶ If an individual does not comply with these requirements, criminal sanctions potentially follow. The first court to examine this issue was the Eighth Circuit in *Keller v. City of Fremont*.⁷ In said opinion, the Eighth Circuit held that federal immigration laws—specifically, the Immigration Reform and Control Act of 1986⁸—and regulations did not preempt a city

sentiments" which stigmatize the immigrant as someone "who does not belong" or is "too different" to be part of the American polity. *Id.* at 265.

The use of the term "alien" also has profound legal and political consequences. Concretely, the word entails a bifurcation of rights amongst citizens and foreigners, whereby the latter have less constitutional and legal guarantees in comparison to the former. *Id.*, at 264. Moreover, it also forecloses the immigrant's access to the political and electoral sphere, by prohibiting the immigrant to vote or run for office. *Id.* It also justifies unequal treatment between citizens and foreigners, legitimizing the deportation of immigrants when they have committed certain crimes, but not enforcing such a punishment against citizens who engage in the same conduct, for obvious reasons. *Id.* at 270-71.

Finally, the term "alien" is pejorative in nature. Popular culture has informed its content with rich imagery that synonymizes the word with terms such as "stranger, intruder, interloper, outsider, and barbarian, all terms that suggest the need for harsh treatment and self-preservation." *Id.* at 270-71. "In effect, the term alien serves to dehumanize persons." *Id.* Members of the federal Supreme Court have affirmed this conclusion. Particularly, Justice Sonia Sotomayor, when questioned about her practice of using the term "undocumented immigrants" instead of "illegal alien," explained that the latter leads people to "paint those individuals as something less than worthy human beings." *Sotomayor: Labeling Illegal Immigrants Criminals Is Insulting*, CBS-DC, <http://washington.cbslocal.com/2014/02/04/sotomayor-labeling-illegal-immigrants-criminals-is-insulting/> (last visited Feb. 24, 2015).

⁵ Y. C. Garcia, G. Ortiz, & V. Neave, *Where Are the Courts Drawing the Line? The Contours of Preemption and Other Constitutional Bases for the Enjoinment of Modern State-Propounded Immigration-Related Statutes and Ordinances*, 37 T. MARSHALL L. REV. 81, 96 (2011) (noting that Farmers Branch, Texas; Hazleton, Pennsylvania; Fremont, Nebraska; Escondido, California; Valley Park, Missouri; and Cherokee County, Georgia have enacted housing ordinances designed to prevent undocumented immigrants from renting or living within their borders.); Rigel C. Oliveri, *Between A Rock and A Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 60 (2009) (indicating that 105 localities in twenty-nine states have enacted laws of this nature.)

⁶ See *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013) (*cert. denied*, *City of Hazleton v. Lozano*, Pa. v. Lozano, 134 S. Ct. 1491 (2014)); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. July 22, 2013) (*cert. denied*, *City of Farmers Branch, Texas v. Villas at Parkside Partners*, 134 S. Ct. 1491 (2014)); *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013) (*cert. denied*, *Keller v. City of Fremont, Nebraska*, 134 S. Ct. 2140 (2014)).

⁷ *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013).

⁸ Pub. L. No. 99-603, 100 Stat. (codified as enacted in scattered sections of 8 U.S.C. [hereinafter "IRCA" or "The Act"]).

ordinance that made it unlawful for an undocumented immigrant to rent a property without possessing an occupancy license, which is only granted to U.S. citizens or documented immigrants.⁹ The court arrived at its conclusion after examining basic principles of the federal preemption doctrine, as well as the latest pronouncements of the U.S. Supreme Court in *Arizona v. United States*,¹⁰ an opinion that addressed the federal preemption of certain sections of an Arizona law, commonly referred to as S.B. 1070, which affected undocumented immigrants.

Shortly after the Eighth Circuit issued its opinion, the Fifth and Third Circuits took an opposite approach, holding city ordinances similar in nature to the one examined in *Keller* preempted by federal immigration law.¹¹ These opinions also analyzed the scope and implications of *Arizona v. United States* for new state and city laws aimed at discriminating against undocumented immigrants through criminalizing efforts that affect their basic human needs, such as housing and employment.

Part I of this Note will survey the U.S. Supreme Court's jurisprudence regarding preemption, extracting general principles about the doctrine. Within this section, this Note will examine these general principles in the context of immigration law. The basis of this Note's analysis will be the U.S. Supreme Court's decision in *Arizona v. United States*, a case that holds significant implications for the demarcation of the boundaries between permissible state regulations of undocumented immigrant issues affecting their communities and the constitutional authority of Congress to regulate immigration matters.

Part II of this Note will then examine the three circuit court opinions that have analyzed the specific problem of city ordinances that prohibit undocumented immigrants from renting a dwelling place. The examination of these decisions will focus on the similarities and differences between the reasoning employed by the federal circuit courts in their vertical relationship with the U.S. Supreme Court's pronouncements in *Arizona v. U.S.* and previous preemption case law, as well as their horizontal relationship with the other two circuit court opinions.

Finally, Part III of this Note will propose an analytical framework that will offer a unified federal answer concerning the authority of state and local governments to adopt laws that encumber undocumented immigrants' rights to housing. This task will be approached from a doctrinal vantage point. Accordingly, this Note proffers a solution limited to the specific context of the field of immigration law by focusing on the principles of preemption grounded in the U.S. Constitution's Supremacy Clause case law.

II. THE PREEMPTION DOCTRINE AND STATE OR LOCAL ORDINANCES REGULATING IMMIGRATION

In order to understand if federal immigration legislation preempts local housing ordinances impeding undocumented immigrants from renting a house, it is imperative to understand the basic principles embodied by the doctrine of preemption as applied and developed in the immigration field. This Part will offer a general explanation of these basic principles, followed by a more specific description of how they have been applied by the U.S. Supreme Court in the context of local ordinances impinging upon the field of immigration law. This Part's doctrinal analysis will finish with the Supreme Court's most recent expression on this subject: *Arizona v. U.S.*

A. General Principles Concerning The Doctrine Of Preemption

Article VI of the federal Constitution establishes that the "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

⁹ *Keller*, 719 F.3d at 938.

¹⁰ *Arizona*, 132 S. Ct. 2492.

¹¹ See *supra* note 5.

authority of the United States, shall be the supreme law of the land.”¹² This constitutional provision, better known in legal scholarship as the Supremacy Clause, provides the basis for the doctrine of preemption. In general terms, the doctrine mandates that a state law or regulation—despite being a valid exercise of a sovereign state’s legislative competence—must give way to federal law when it interferes with, or is contrary to, federal law.¹³

Although the general notion holds that federal law controls over state law in the event of a conflict between the two,¹⁴ preemption doctrine remains a murky and confusing field of American constitutional law due to the Supreme Court’s failure to articulate a coherent framework for determining when federal law and state law conflict.¹⁵ The Supreme Court itself has acknowledged that its pronouncements in the field of preemption are embroiled in a certain degree of uncertainty. By its own admission, the Court’s precedential approach to the doctrine of preemption does not provide “an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.”¹⁶

Despite this apparent doctrinal unintelligibility, the U.S. Supreme Court has provided the basic contours of an analytical framework to assist lower courts in the task of determining if a state law has been federally preempted. The starting point of its analysis rests in the settled understanding that “[c]ongressional purpose is the ‘ultimate touchstone’ of [the Court’s] inquiry.”¹⁷ Moreover, federalism principles have led the Court to establish a presumption that in a field traditionally occupied by the states, their historic police powers are not to be understood as superseded by federal legislation unless Congress’s purpose is clear and manifest.¹⁸ Such a clear and manifest intent, in turn, can be demonstrated in one of two ways: expressly or impliedly.¹⁹

Congress expressly manifests its preemptive intention with respect to a federal statute when it utilizes express statutory language to articulate its purpose of trumping any state legislative action that impinges on the field or area addressed by the proposed legislation.²⁰ Absent an express statutory provision indicating

¹² U.S. CONST. art. VI, cl. 2.

¹³ *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993); *Grade v. Nat’l. Solid Waste Mgmt. Ass’n.*, 505 U.S. 88, 108 (1992); *Fid. Fed. Sav. & Loan Ass’n. v. de la Cuesta*, 458 U.S. 141, 152 (1982).

¹⁴ CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE: A REFERENCE TO THE UNITED STATES CONSTITUTION* 90 (2004).

¹⁵ *Id.* (citing S. Candice Hoke, *Preemption Pathologies and Civic Republican Virtues*, 71 B.U. L. REV. 685, 687 (1991)); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085 (2000); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 178 (2000); Martin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C.-DAVID L. REV. 1, 7 (2001).

¹⁶ *Hines*, 312 U.S. at 67.

¹⁷ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). See also *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

¹⁸ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

¹⁹ *Grade*, 505 U.S. at 98; *Fid. Fed. Sav. & Loan Ass’n.*, 458 U.S. at 152-53. A note of caution is merited. As professor Erwin Chemerinsky has stated, “Congress’s intent, especially as to the scope of preemption, is rarely expressed or clear. Therefore, although the Court purports to be finding congressional intent, it often is left to make guesses about purpose based on fragments of statutory language, random statement in the legislative history, and the degree of detail of the federal regulation.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 403 (4TH ED. 2011).

²⁰ See *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

As expressed by Professor Lauren Gilbert, in express preemption cases, “the court still must determine the scope of what has been preempted. In so doing, the court focuses principally ‘on the plain wording of the [express preemption] clause,’ which is deemed to contain the ‘best evidence’ of Congress’ pre-emptive intent.’ In express preemption cases where the wording is ambiguous, the court has also considered the ‘structure and purpose of the statute as a whole . . . as revealed not only in the text, but through [the court’s] reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to [operate].’” Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153, 159 (2012) (internal citations omitted).

Congress's intent to preempt state law in a determined field, the possibility still exists that such an intention can be implied from Congress's legislative exercise.²¹

As provided by the Supreme Court in *Grade v. Nat'l. Solid Waste Mgmt. Ass'n.*, implied preemption can be broken down into two general categories: field preemption and conflict preemption.²² A state law will be field preempted when

it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a 'scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject'.²³

Once again, the Court's standard lacks "clear criteria for courts to decide [if field preemption is present] . . . inevitably [forcing judges to] make a judgment call based on whether the interest behind the federal law will be best served by the law being exclusive in a field."²⁴ Nevertheless, in an effort to offer guidance as to when there is field preemption, Professor Erwin Chemerinsky has interpreted Supreme Court precedents to formulate four criteria that suggest that a federal statute preempts a homologous state regulation. Accordingly, an individual must ask: (1) if the area in controversy is one where the federal government traditionally has played a unique role; (2) if Congress has expressed an intent in the text of the law or in the legislative history to have federal law be exclusive in said area; (3) if allowing state and local regulations in the area risk interfering with comprehensive federal regulatory efforts; and (4) if there is an important traditional state or local interest served by the law.²⁵ Although providing an answer to these questions is a task fraught with difficulty, these criteria provide assistance in establishing the conditions for field preemption.

The final category of the doctrine of preemption is conflict preemption. This category, which constitutes the second manifestation of the implied preemption doctrine, can itself take two different forms. In the first, conflict preemption is established when "compliance with both federal and state regulation is a physical impossibility."²⁶ As with previous preemption categories, conflict preemption also poses difficult application ambiguities which require judges to exercise judgment in determining if the state law has been superseded by the federal legislation in controversy.

An example of an express congressional intent to preempt is found in the Employee Retirement Income Security Act of 1974 ("ERISA"). Section 514(a) of ERISA provides that the federal statute "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" covered by the statute. 29 U.S.C. § 1144(a). The Supreme Court has interpreted that this language constitutes an express intent to federally preempt any analogous state legislation. *See* *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). For other examples of such express preemption, *see* *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (holding that the Medical Devices Act preempts state tort liability suits); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (holding that the Federal Meat Inspection Act expressly preempted state law). Despite what appears to constitute an express preemptive provision, however, thousands of judicial opinions have been written in relation to the preemptive force of Section 514(a) of ERISA in varying contexts. *See* CHEMERINSKY, *supra* note 19, at 410-11. Such a laborious volume of judicial interpretation evinces the difficulty of ascertaining an express congressional intent to preempt, even when Congress has statutorily manifested its interest to do so.

²¹ THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* 51 (2008).

²² *Grade*, 505 U.S. at 98.

²³ *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990), *citing* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

²⁴ CHEMERINSKY, *supra* note 19, at 412.

²⁵ *Id.* at 419.

²⁶ *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 64 (2002).

Concretely, conflict preemption is clearly present when the federal law and the state law are mutually exclusive, leading the federal law to trump the state law because Congress has manifested an implied intent that the federal standard be exclusive in reference to state or local laws.²⁷ The fact that state law and federal law are different, however, does not necessarily mean that the two legislative pieces cannot coexist.²⁸ When the federal law is interpreted to only set the minimum standard—the floor, but not the ceiling—state laws can affect the federally legislated area by establishing stricter standards.²⁹ Distinguishing between congressional intent for the federal standard to be the exclusive criteria or only the minimum standard is no easy task. Once more, judges will have to draw upon the potentially ambiguous text and legislative history of the statute, as well as their judicial experience, to decipher Congress’s “clear and manifest” intent.³⁰

The second form conflict preemption can take provides that a state law is superseded by federal legislation if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³¹ This type of preemption, which is generally catalogued by legal scholars as *obstacle preemption*, calls “for a more elastic inquiry into the purposes underlying a federal statute and whether a state law interferes with the accomplishment of those purposes.”³²

As every other category of preemption, this inquiry is brimming with subjectivity and lax discretion, since “[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”³³ In light of such dangers, the Supreme Court has begun to curtail its use of implied categories of preemption, manifested in cases such as *Wyeth v. Levine*³⁴ and *Chamber of Commerce v. Whiting*,³⁵ both of which demonstrate “an increasing reluctance of the Court to find implied obstacle preemption.”³⁶

B. The Doctrine Of Preemption In The Context Of Immigration Law

The federal government has traditionally been recognized as having a preeminent role and a broad power to regulate the field of immigration and the status of undocumented immigrants in the United States.³⁷ This power has been understood to emanate from a comprehensive reading of the federal government’s express constitutional powers to establish “a uniform rule of naturalization”,³⁸ and “[t]o regulate commerce with

²⁷ CHEMERINSKY, *supra* note 19, at 420.

²⁸ *Id.*

²⁹ See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1983); *Midalantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000).

³⁰ CHEMERINSKY, *supra* note 19, at 423.

³¹ *Sprietsma*, 537 U.S. at 54.

³² Gilbert, *supra* note 20, at 160.

Professor Chemerinsky highlights that judicial discretion is a key element in the identification or not of obstacle preemption. As noted by the professor, “preemption based on state laws interfering with a federal goal turns on how the court characterizes federal purpose. If a court wants to avoid preemption, it can narrowly construe the federal objective and interpret the state goal as different from or consistent with the federal purpose. But if a court wants to find preemption, it can broadly view the federal purpose and preempt a vast array of state laws” CHEMERINSKY, *supra* note 19, at 427.

³³ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

³⁴ *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

³⁵ *Chamber of Commerce*, 131 S. Ct. 1968

³⁶ Gilbert, *supra* note 20, at 161.

³⁷ *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (citing *Mathews v. Diaz*, 426 U.S. 67, 96 (1976)); *Graham v. Richardson*, 403 U.S. 365, 377–380 (1971); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 418–420 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 62–68 (1941); *Truax v. Raich*, 239 U.S. 33, 42 (1915).

³⁸ U.S. CONST. art. I, § 8, cl. 4.

foreign nations,”³⁹ and its “inherent power as sovereign to control and conduct relations with foreign powers.”⁴⁰

In light of its powers, the federal government enacted the Immigration Reform and Control Act of 1986 (“IRCA”),⁴¹ a comprehensive framework for the regulation of the field of immigration and naturalization. Notwithstanding congressional action, state governments, as sovereigns concerned with the issues brought upon them by undocumented immigration, have elaborated local laws aimed at addressing a vast array of issues regarding immigration policy.⁴² Four fundamental Supreme Court decisions—*Hines v. Davis*,⁴³ *De Canas v. Bica*,⁴⁴ *Chamber of Commerce v. Whiting*, and *Arizona v. U.S.*—offer a doctrinal pattern as to how federal courts have tackled any potential conflict begotten by the pervasive federal regulation of the field of immigration and homologous legislation enacted by state and local governments.

1. General Principles

The first of these cases is *Hines v. Davidowitz*. In *Hines*, the Supreme Court analyzed an undocumented immigrant registration law enacted by the commonwealth of Pennsylvania.⁴⁵ The referenced statute required

every . . . [undocumented immigrant] 18 years or over, with certain exceptions, to register once each year; . . . pay \$1 as an annual registration fee; receive an . . . [undocumented immigrant] identification card and carry it at all times; show the card whenever it [was] demanded by any police officer . . . ; and exhibit the card as a condition precedent to registering a motor vehicle in his [or her] name or obtaining a license to operate one.⁴⁶

If an undocumented immigrant failed to comply with the statute’s registration requirements, they were subject to a fine of no more than \$100 or imprisonment for not more than sixty days, or both.⁴⁷ If he or she failed to carry the identification card or show it when required, the punishment was a fine of not more than \$10, or imprisonment for not more than ten days, or both.⁴⁸

By the time the Supreme Court decided the case, Congress had enacted the Alien Registration Act, which imposed further obligations on undocumented immigrants fourteen years of age, such as registration and fingerprinting requirements.⁴⁹ The federal law, however, was more lenient than its Pennsylvanian counterpart. Pennsylvania’s law made registration mandatory and required undocumented immigrants to carry registration cards. In contrast, the federal law recognized that such requirements had occasioned political upheaval in the past⁵⁰ and did not require undocumented immigrants to carry a registration card to be exhibited

³⁹ U.S. CONST. art. I, § 8, cl. 3.

⁴⁰ *Arizona*, 132 S. Ct. at 2498.

⁴¹ Pub. L. No. 99-603, 100 Stat. (codified as enacted in scattered sections of 8 U.S.C. [hereinafter “IRCA” or “The Act”]).

⁴² NATIONAL CONFERENCE OF STATE LEGISLATURES, *2013 Immigration Report, Report Highlights*, available online at <http://www.ncsl.org/research/immigration/2013-immigration-report.aspx> (“In 2013, lawmakers in 45 states and the District of Columbia enacted 184 laws and 253 resolutions related to immigration, for a total of 437. This is a 64 percent increase from the 267 laws and resolutions enacted in 2012”).

⁴³ 312 U.S. 52.

⁴⁴ 424 U.S. 351 (1976).

⁴⁵ *Hines*, 312 U.S. at 59.

⁴⁶ *Id.*

⁴⁷ *Id.* at 59-60.

⁴⁸ *Id.* at 60.

⁴⁹ *Id.* at 60.

⁵⁰ *Id.* at 70 (“Opposition to laws permitting invasion of the personal liberties of law-abiding individuals, or singling out [undocumented immigrants] as particularly dangerous and undesirable groups, is deep-seated in this country. Hostility to such legislation in America stems back to our colonial history”).

to police or other agents. Further, under the federal law, only the willful failure to register was made a criminal offense punishable with a fine of not more than \$1000, imprisonment for not more than six months, or both.⁵¹

The Court, after examining the legislative history of the 1940 Alien Registration Law, as well as the long line of national attempts at federally regulating the registration of undocumented immigrants, held that Congress's 1940 Act was driven by a congressional interest of establishing

a standard for [undocumented immigrant] registration in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with [undocumented immigrants] . . . [while guaranteeing the protection of their] personal liberties . . . and [their right to be] free from the possibility of inquisitorial practices and police surveillance that might . . . affect [the United States'] international relations⁵²

Accordingly, the Court declared Pennsylvania's alien registration law to be impliedly preempted⁵³ by the federal Alien Registration Act, because it stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁵⁴

After *Hines*, the U.S. Supreme Court decided *De Canas v. Bica*.⁵⁵ In *De Canas*, the Court examined a labor law of the state of California which provided that "[n]o employer [could] knowingly employ an [undocumented immigrant] who [was] not entitled to lawful residence in the United States if such employment would have [had] an adverse effect on lawful resident workers."⁵⁶ The Court was called to interpret whether the Immigration and Nationality Act, as a comprehensive scheme governing all aspects of immigration and naturalization, preempted the referenced state law.⁵⁷

After stating that California had an economic and social interest in exercising its police power to protect local workers against the employment of undocumented immigrants, the federal Supreme Court declared that there was no clear or manifest purpose that Congress sought to preempt harmonious state regulation touching on non-citizens in general, or the employment of undocumented immigrants in particular.⁵⁸ According to the Court, nothing in the text, legislative history, or scope of the comprehensive federal immigration scheme indicated the need for exclusivity of federal legislation in this field.⁵⁹ At best, Congress had only expressed "a peripheral concern with [the] employment of [undocumented immigrants]" at that point in time.⁶⁰

Nevertheless, after *De Canas*, Congress enacted the IRCA and explicitly addressed the employment of undocumented immigrants.⁶¹ As it stands today, the federal government's comprehensive immigration scheme prohibits employers from knowingly hiring undocumented immigrants and requires every employer to verify a

⁵¹ *Id.* at 60-61.

⁵² *Id.* at 74.

⁵³ Interpretation of this phrase has been inconsistent. See, e.g., *Arizona*, 132 S. Ct. at 2502 (relying on *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419, n. 11 (2003) and Viet D. Dinh's article, *Reassessing the Law of Preemption*, *supra* note 15, at 2107, to hold that this phrase was constitutive of field preemption and not conflict preemption); but see *Sprietsma v. Mercury Marine*, 537 U.S. 51, 54 (2008) and Kenneth W. Starr, *Reflections on Hines v. Davidowitz: The Future of Obstacle Preemption*, 33 PEPP. L. REV. 1, 3 (2005) (treating the phrase as the origin of the doctrine of obstacle preemption).

⁵⁴ *Hines*, 312 U.S. at 67-68.

⁵⁵ *DeCanas v. Bica*, 424 U.S. 351 (1976).

⁵⁶ *Id.* at 352.

⁵⁷ *Id.* at 353.

⁵⁸ *Id.* at 358.

⁵⁹ *Id.* at 359.

⁶⁰ *DeCanas*, 424 U.S. at 360.

⁶¹ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

prospective employee's immigration status.⁶² Moreover, a specific provision in the IRCA now expressly preempts civil fines for the employment of unauthorized workers like the one upheld in *De Canas*.⁶³

In a third decision published in 2011, *Chamber of Commerce v. Whiting*, the U.S. Supreme Court revisited the issue concerning the federal preemption of state laws regulating the employment of undocumented immigrants. Specifically, the Court had to analyze if the Legal Arizona Worker's Act, which required of licenses of any employer who knowingly employed an undocumented immigrant and required all employers to consult a federal electronic verification system (E-Verify) to confirm that the workers they employed were authorized workers, was federally preempted.⁶⁴

One of the IRCA provisions at issue "expressly preempt[ed] 'any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ[ed], or recruit[ed] or refer[ed] for a fee for employment, [undocumented immigrants]'"⁶⁵ The central issue in *Whiting* was whether the business license suspension penalty imposed by the Arizona law for an employer's intentional employment of an undocumented immigrant was a licensing law not subject to the IRCA's express preemption clause, or if it was a general law engulfed by the IRCA's preemptive scope.

The Arizona scheme required state officials to consult the federal government to confirm an employee's immigration status when a complaint alleging that an employer knowingly hire an undocumented immigrant was brought before a state official.⁶⁶ If the federal government indicated that the employee was an undocumented immigrant, the state could commence an action against the employer to suspend its business license.⁶⁷ State officers could only proceed if the federal authorities had confirmed the employee's immigration status.⁶⁸ Moreover, the state authorities were not authorized to ascertain the employee's immigration status on their own.⁶⁹

After examining Arizona's legal scheme, the U.S. Supreme Court held that the clear language of the IRCA's preemption clause exempted state laws imposing civil or criminal penalties against an employer hiring undocumented immigrants, if said laws were licensing statutes or other laws similar in nature. As interpreted by the Court, Arizona's licensing suspension law was not expressly preempted, since it was a licensing law clearly excluded from IRCA's preemptive reach.⁷⁰

The Court based its decision on a textual reading of the IRCA's preemption clause, relying on an analogical definition of the term "license" as defined in the federal Administrative Procedure Act to validate Arizona's broad definition of the mentioned term.⁷¹ Arizona's definition of the term "license" included documents such as agency permits, certificates, approvals, registrations, charters, memberships, statutory

⁶² *Arizona*, 132 U.S. at 2504 (citing 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2); 1324a(a)(1)(B), (b); 1324a(e)(4), (f)).

⁶³ 8 U.S.C. § 1324a(h)(2). Note how Congress exercised its power under Art. I, Sec. 8 of the federal constitution, and expressly preempted an area of the law of immigration that the Court interpreted as capable of co-existing with homologous state immigration laws. This shows that if a Court fails to appreciate that Congress had a clear-cut preemptive intent, Congress can always enact legislation that expressly preempts the field in controversy. This approach possibly avoids creating a federalism issue that interferes with a state's sovereignty, in comparison to a Court decision that declares a field preempted when Congress did not expressly intend to do so. Such an approach, however, still creates serious uniformity issues and is prone to legitimizing local violations of civil rights.

⁶⁴ *Id.* at 1973.

⁶⁵ *Id.* at 1975 (citing 8 U.S.C. § 1324a(h)(2)) (emphasis in original).

⁶⁶ *Id.* at 1976.

⁶⁷ *Id.*

⁶⁸ *Whiting*, 131 S. Ct. at 1976.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1981.

⁷¹ *Id.* at 1977-81.

exemptions, articles of incorporation, or others forms of permission.⁷² According to the Court, the fact that the Arizona law operated only to suspend and revoke licenses rather than grant them did not change the law's licensing nature.⁷³

The Court also held that Arizona's law was also not impliedly preempted, since Congress expressly preserved to the states the authority to impose sanctions against employers who hire undocumented immigrants through licensing laws in enacting the IRCA.⁷⁴ Finally, the Court relied on a textual approach to conclude that Arizona's requirement that employers consult the federal government's E-Verify system was not precluded or circumscribed by the pertinent federal statutes.⁷⁵

The precedential development of the doctrine of preemption in the field of immigration can be viewed as a trend towards the conscious disuse of implied preemptive categories. Concretely, *Whiting* seemed to limit the preemption of a state law impinging on immigration policy to those occasions when Congress's preemptive intent is clearly espoused in the pertinent federal immigration legislation. This conclusion, however, would soon be tested by a 2012 Supreme Court decision revisiting the subject.

2. *Arizona v. U.S.*

The Supreme Court's most recent expression concerning the federal preemption of state or local government legislation impinging upon the field of immigration is found in *Arizona v. U.S.*, a facial challenge brought by the United States' government against Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, better known as S.B. 1070.⁷⁶ S.B. 1070 constituted Arizona's attempt to "discourage and deter the unlawful entry and presence of [undocumented immigrants] and economic activity by persons unlawfully present in the United States."⁷⁷

The U.S. government contended that federal law preempted four provisions of S.B. 1070.⁷⁸ Two of these provisions created new state offenses.⁷⁹ Particularly, Section 3 penalized an undocumented immigrant's failure to comply with federal non-citizen registration requirements,⁸⁰ while Section 5(C) prohibited an undocumented immigrant from seeking or engaging in work in the state of Arizona.⁸¹

The last two provisions challenged by the United States empowered state and local officials to arrest and investigate undocumented immigrants.⁸² Section 6 authorized "officers to arrest without a warrant a person [they had] 'probable cause to believe ... [had] committed any public offence that [made] the person removable from the United States'."⁸³ The final provision, Section 2(B), mandated that state and local officers who conducted a stop, detention, or arrest had to "make efforts to verify the [detainee's] immigration status with the Federal Government."⁸⁴ In its decision, the U.S. Supreme Court held that Sections 3, 5(C) and 6 of

⁷² *Id.*

⁷³ *Whiting*, 131 S. Ct. at 1979.

⁷⁴ *Id.* at 1984-85.

⁷⁵ *Id.* at 1985-86.

⁷⁶ *Id.* at 2497.

⁷⁷ Note following Ariz. Rev. Stat. Ann. § 11-1051 (West 2012), as cited in *Id.*

⁷⁸ *Arizona*, 132 U.S. at 2497-98.

⁷⁹ *Id.* at 2497.

⁸⁰ *Id.* (citing ARIZ. REV. STAT. ANN. § 13-1509 (West Supp. 2011)).

⁸¹ *Id.* (citing ARIZ. REV. STAT. ANN. § 13-2928(C) (West Supp. 2011)).

⁸² *Id.* at 2498.

⁸³ *Id.* at 2498 (citing ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (West Supp. 2011)).

⁸⁴ *Id.* at 2498 (citing ARIZ. REV. STAT. ANN. § 11-1051(B) (West Supp. 2012)).

S.B. 1070 were federally preempted.⁸⁵ The Court declined to enjoin Section 2(B), however, instead giving Arizona state courts the opportunity to interpret its scope in an as-applied challenge.⁸⁶

Section 3 of S.B. 1070 penalized an undocumented immigrant's failure to complete or carry a non-citizen registration document.⁸⁷ As a peculiar feature, the Arizona law defined the proscribed conduct in reference to the IRCA.⁸⁸ The federal Supreme Court analyzed the IRCA's current non-citizen registration regime and held that, despite its differences from the system analyzed in *Hines*, the scheme was comprehensive in nature and designed as a harmonious whole.⁸⁹ As such, Arizona's undocumented immigrant registration statute was field preempted because it impinged upon the federal government's carefully exercised discretion as to how and when to prosecute and penalize an undocumented immigrant who failed to register according to federal law.⁹⁰ Applying *Hines*, the Court held that the IRCA foreclosed Section 3, even if the state law sought to complement or enforce additional or auxiliary immigration measures.⁹¹

The second provision examined by the Court, Section 5(C), made it a state misdemeanor for an undocumented immigrant to knowingly apply for work, solicit work in a public place, or perform work as an employee or independent contractor in Arizona.⁹² Any undocumented immigrant who violated this provision was subject to a \$2,500 fine and incarceration for up to six months.⁹³

The Court began its analysis of Section 5(C) by restating that after *De Canas*, the enactment of the IRCA comprehensively proscribed the hiring of undocumented immigrants.⁹⁴ The legislative history of the IRCA, however, clearly manifested a congressional intent to not criminally penalize undocumented immigrants who seek employment, because such an approach would be contrary to the federal objective of avoiding criminalization of non-citizens who risked being exploited by their employers.⁹⁵ Although the IRCA's express preemption clause was silent as to whether a state could criminally penalize an employee, the Court understood that Section 5(C) was conflict preempted because it established a criminal enforcement mechanism against undocumented immigrants seeking unauthorized employment, which disrupted the congressional policy as manifested in the text, structure and history of the IRCA of not criminalizing such employees.⁹⁶

The Court then considered Section 6 of S.B. 1070, which provided that a state officer, without a warrant, had the authority to arrest a person if the officer had probable cause to believe that the person had committed any public offense that would have made him removable from the United States.⁹⁷ The Court interpreted this provision as conferring state officers a greater discretion to arrest undocumented immigrants on the basis of removability than Congress had given to trained federal immigration officers.⁹⁸ The Court noted that the federal decision to arrest an undocumented immigrant as a prelude to a potential removal from the United States is guided by a number of factors ordained by the federal statutory structure, and exercised carefully in light of the risks that such a decision poses to the United States' foreign relations.⁹⁹ Section 6, by empowering local officers to arrest an individual in response to his or her potential removability, impinged

⁸⁵ *Id.* at 2510.

⁸⁶ *Id.*

⁸⁷ *Id.* at 2501 (citing ARIZ. REV. STAT. ANN. § 11-1509(A) (West Supp. 2011)).

⁸⁸ *Id.* at 2502 (citing 8 U.S.C. §§ 1304(e), 1306(a)).

⁸⁹ *Id.* at 2502.

⁹⁰ *Id.* at 2502-03.

⁹¹ *Id.* at 2503.

⁹² *Id.* at 2502 (citing ARIZ. REV. STAT. ANN. § 13-2928(C) (West Supp. 2011)).

⁹³ *Id.*

⁹⁴ *Id.* at 2504.

⁹⁵ *Id.*

⁹⁶ *Id.* at 2502.

⁹⁷ *Id.* at 2505 (citing ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (West Supp. 2011)).

⁹⁸ *Id.* at 2506.

⁹⁹ *Id.*

upon a decisional subject entrusted exclusively to the federal government, in consideration of the political and economic consequences that such a decision entails in the United States' relationship with foreign powers. Accordingly, the Court found Section 6 to be conflict preempted because it created an obstacle to the full purposes and objectives of Congress regarding the removal of an undocumented immigrant.¹⁰⁰

Finally, the Court examined Section 2(B) of S.B. 1070, which required state officers to make a reasonable attempt to determine the immigration status of a person they detained or arrested on some other legitimate basis, if the officer had reasonable suspicion to believe that the detainee was an undocumented immigrant.¹⁰¹ The immigration status of the person would be obtained by consulting the Immigration and Customs Enforcement agency (hereinafter, "ICE").¹⁰²

The Court concluded that the IRCA did not preclude a state law that required state officers to consult ICE as to the immigration status of a detained individual.¹⁰³ Instead, Congress explicitly encouraged communications between state officers and the federal government concerning the immigration status of an undocumented immigrant.¹⁰⁴ Hence, the Court concluded that Section 2(B) was not conflict preempted in this regard.¹⁰⁵

Nevertheless, those who challenged S.B. 1070 also argued that Section 2(B) posed an obstacle to the federal immigration framework because state officers would be required to delay the release of some detainees for no reason other than to verify their immigration status.¹⁰⁶ The Court understood, however, that courts could construe Section 2(B) in ways that avoided these concerns, by limiting its reach to only requiring state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee is released.¹⁰⁷ Considering that further state judicial interpretation was needed in order to understand what Section 2(B) meant and how it would be enforced, the Court abstained from holding said provision conflict preempted until an *as applied* challenge was presented.¹⁰⁸

Arizona represents a departure from the Court's previous doctrinal approach in the subject of federal preemption of state immigration laws, halting the turn that began in *Whiting* towards understanding Congressional preemptive intent solely by reference to the text of the IRCA. The emphasis placed on the presumption that state laws should not be preempted unless Congress has expressed a clear and manifest intent to do so was stymied by a new configuration of the Court.

Justices Breyer, Ginsburg, and Sotomayor—dissenters in *Whiting*—joined Justice Kennedy and Chief Justice Roberts—author of *Whiting's* majority opinion—in a decision that reinstated the Court's approach in *Hines*, whereby implied categories of preemption are judicial vehicles that stifle local immigration policy in favor of a centralized, federal approach to immigration. The Justices who had formed part of the majority opinion in *Whiting*—Scalia, Thomas and Alito—are now a minority arguing in favor of state sovereignty and a rejection of implied methods of preemption.

Whiting and *Arizona* create a zone of ambiguity as to the Court's position in the explicit versus implied preemption spectrum, leaving only a degree of certainty as to traditional demarcations between federal and state authority in the elaboration of immigration policy. These cases retain just three demarcations developed through decades of Supreme Court doctrine: (1) the impossibility of a state enacting legislation that affects the

¹⁰⁰ *Id.* at 2507.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 2508.

¹⁰⁴ *Id.* (citing 8 U.S.C. §§ 1357(g)(10(A); 1373(c)).

¹⁰⁵ *Id.* at 2508.

¹⁰⁶ *Id.* at 2509.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2508.

field of undocumented immigrant registration, provided that the federal government continues to preserve a harmonious and all-encompassing legislative scheme that addresses the subject of undocumented immigrant registration; (2) an express preemption of a state's ability to impose civil or criminal penalties against the unauthorized employment of undocumented immigrants, unless such penalties are imposed through licensing laws similar to those examined in *Whiting*; and, (3) the potential for co-existence between the federal immigration structure and state or local laws that mandate the consultation of federal sources (e.g. ICE's Law Enforcement Support Center or E-Verify) to ascertain a non-citizen's immigration status.

Arizona adds two elements which are crucial for the housing ordinances the next part of this Note will examine. First, the Court's determination to find Section 6 conflict preempted, and thereby foreclose any state legislation empowering state officials to conduct warrantless arrests of undocumented immigrants based solely on their potential removability, institutes a budding *Hines*-like demarcation regarding removal procedures. Pointedly, *Arizona* hints that any state legislation that adversely encroaches upon the federal government's discretion to arrest, prosecute, or initiate a removal procedure, will be deemed to be in conflict with the federal removal structure, which pursues particular national interests and objectives in the United States' relationship with foreign powers. Only an express legislative conferral of authority to state governments or a clear indication that Congress did not seek federal exclusivity in a given removal policy will avoid preemption. In a sense, the presumption against preemption of state legislation in immigration matters has been rebutted in favor of a *Hines*-like understanding that removal is an area within the exclusive competence of the federal government.

Secondly, the Court's conclusion in *Arizona* that Section 2(B) would be better addressed through an as-applied challenge that gave state courts an opportunity to interpret the scope of a state immigration law that textually seems to not encroach on the federal immigration scheme. This raises potentially serious conflict-preemption concerns in the application realm and opens the doors to greater degrees of uncertainty as to the boundaries of the preemption doctrine, since as-applied challenges of dubious state laws are varied in possibility.

It is against this uncertain doctrinal backdrop that the federal circuit courts have had to address state and local laws prohibiting landlords from renting a dwelling place to an undocumented immigrant, or that require non-citizens to present proof of residency or citizenship as a condition to receive a renting license. The following part will briefly describe how these ordinances have proliferated throughout the state legislative canvas, concluding with an examination of a recent circuit split that brings to the fore the indeterminacy that plagues the doctrine of preemption within the context of immigration.

III. DIFFERING VIEWS CONCERNING THE PREEMPTION OF CITY HOUSING ORDINANCES: EXAMINING THE EIGHTH, FIFTH AND THIRD CIRCUIT COURT OPINIONS

A. A Trend Towards The Localization Of Immigration In The Housing Context

In response to the federal government's failure to reform the nation's immigration laws in light of modern demographic developments, state and local governments have adopted laws and ordinances aimed at addressing the social, economic, and security concerns that stem from undocumented immigration.¹⁰⁹ According to the National Conference of State Legislatures, in 2013, lawmakers in forty-five states and the District of Columbia enacted 184 laws and 253 resolutions related to immigration.¹¹⁰ These legislative efforts accounted for a sixty-four percent increase from the 267 laws and resolutions enacted in 2012.¹¹¹ Their content addresses a multiplicity of subjects: they create immigration enforcement schemes; define new state

¹⁰⁹ S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1432 (2012).

¹¹⁰ 2013 *Immigration Report* NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/immigration/2013-immigration-report.aspx> (Jan. 20, 2014).

¹¹¹ *Id.*

immigration crimes; promote English-only policies; regulate housing;¹¹² condition unauthorized employment of undocumented immigrants; require registration of non-citizens; and regulate welfare and public health benefits available to immigrants.¹¹³

In recent years local laws concerned with the regulation of housing have surged in numbers.¹¹⁴ Cities, counties, and municipalities such as Farmers Branch, Texas; Hazleton, Pennsylvania; Fremont, Nebraska; Escondido, California; Valley Park, Missouri; and Cherokee County, Georgia, have all adopted such ordinances.¹¹⁵ In general terms, the ordinances follow a pattern of creating “the offense of ‘*harboring [undocumented immigrants]*’ for providing housing to [non-citizens] knowingly or in reckless disregard of the fact of [their undocumented immigrant] status . . . [and further require] tenants to obtain occupancy permits upon proof of, among other things, ‘legal citizenship and/or residency.’”¹¹⁶

The following section will focus on three federal circuit court opinions motivated by the housing ordinances adopted by three of these cities: Fremont, Nebraska; Farmers Branch, Texas; and Hazleton, Pennsylvania. After discussing the legal reasoning behind these decisions, this Note will highlight how the doctrine of preemption, among other legal practices, may be employed to further or hinder the discriminatory implications of these ordinances.

B. *Keller v. City of Fremont*

The first court to examine the legal implications of the housing ordinances previously described was the Eighth Circuit in *Keller v. City of Fremont*.¹¹⁷ *Keller* dealt with a 2010 city ordinance adopted by voters in Fremont, Nebraska which limits hiring and providing rental housing to “illegal aliens” and “unauthorized aliens,”¹¹⁸ as defined in the ordinance.¹¹⁹ A group of landlords, tenants, and employers, facially challenged the ordinance in federal court, on the grounds that: (1) the ordinance was unconstitutional because it violated the Equal Protection, Due Process, and Commerce Clauses of the United States’ Constitution; (2) it was federally preempted under the IRCA;¹²⁰ and (3) it violated various state and federal laws.¹²¹

After the lower federal court issued its decision, the parties appealed the case to the Eighth Circuit.¹²² As explained by the Eighth Circuit, “[t]hese provisions [made] it unlawful for any person or business entity to rent to, or permit occupancy by, ‘an illegal alien, 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’.”¹²³ The term “illegal alien” was defined as “an alien who is not lawfully present in the United States”, in reference to the IRCA.¹²⁴ Moreover, before

¹¹² Ramakrishnan & Gulasekaram, *supra* note 109, at 1433.

¹¹³ Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2055 (2008).

¹¹⁴ See *infra* note 4.

¹¹⁵ *Id.*

¹¹⁶ Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-“Alien” Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 924 (2011) (emphasis in original).

¹¹⁷ *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013).

¹¹⁸ As clarified in *supra* note 4, the use of the terms “illegal aliens” and “unauthorized aliens” are pejorative in nature. Nevertheless, in order to highlight the Court’s use of these pejorative terms, this Note will use these terms when employed by the Court’s opinion.

¹¹⁹ *Keller*, 719 F.3d at 937. As suggested by the circuit court opinion, the citizens of Fremont were concerned with a rise in the city’s Hispanic population, which had nearly tripled in numbers since 2000. *Id.*

¹²⁰ 8 U.S.C. § 1101.

¹²¹ *Keller*, 719 F.3d at 937.

¹²² *Id.* at 939.

¹²³ *Id.* at 938.

¹²⁴ *Id.*

the city government could conclude that an individual was an “illegal alien”, its representatives had to consult the federal government to verify the individual’s legal status.¹²⁵

The provisions further required that, with certain exceptions, every prospective renter over the age of eighteen had to obtain an occupancy license issued by the local government, and every landlord had to obtain a copy of the renter’s license as a condition to signing the lease contract.¹²⁶ After an occupancy license was issued, the Fremont City Police Department would consult the federal government to determine if the individual was an “illegal alien.”¹²⁷ If the federal government determined that the individual was not a “legal resident” or a citizen of the United States, the local police would notify the renter and the landlord of the federal government’s determination and would grant them a period to establish the renter’s legal status as an immigrant in the United States.¹²⁸ If the individual failed to prove his lawful stay in the United States, his license would be revoked and both the landlord and the renter would be fined \$100 a day.¹²⁹ The affected renter and landlord would then have an opportunity to seek administrative and judicial review.¹³⁰

The circuit court examined the district court’s determination that, although the requirement of information as to the renter’s legal status and the subsequent verification of that information with the federal authorities was not preempted by federal law, the ordinance’s imposition of penalties for what equated to be a prohibition of harboring undocumented immigrants, was conflict preempted by the IRCA.¹³¹ After examining *Arizona v. U.S.*, the Eighth Circuit reversed the district court’s determination.¹³²

First, the court understood that Congress had made no pronouncement in IRCA that constituted an exercise of express preemption. Second, and after interpreting *DeCanas v. Bicas*, the Eighth Circuit held that city ordinances such as the one at issue were not field preempted by federal law because they were only designed to deter, or even prohibit, undocumented immigrants from residing within a particular locality, and were not tantamount to immigration laws establishing who may enter or remain in the country.¹³³ The court further held that, as long as the state laws do not attempt to remove the undocumented immigrant from the United States, states have an economic and social interest in deterring undocumented immigrants from entering their state in violation of federal law.¹³⁴

The court’s opinion also sustained that the state’s occupancy license were nothing like the registration laws held preempted in *Arizona v. U.S.* The Eighth Circuit arrived at its conclusion by interpreting that the occupancy license scheme in dispute, different from the registration laws held preempted in the past by the U.S. Supreme Court, required information from all renters—non-citizens and citizens alike—without requiring information only from undocumented immigrants, or even non-renting undocumented immigrants.¹³⁵

Finally, the court also rejected other possibilities of implicit field preemption in relation to the IRCA sections that regulate the harboring of undocumented immigrants.¹³⁶ Said provisions “impose criminal penalties on any person who ‘knowing or in reckless disregard of the fact that an alien has come to, entered, or

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 938-939.

¹³² *Id.* at 940.

¹³³ *Keller*, 719 F.3d at 940-941.

¹³⁴ *Id.* at 941 (citing *Plyer v. Doe*, 457 U.S. 202 (1982)).

¹³⁵ *Id.* at 943.

¹³⁶ *Id.* (citing 8 U.S.C. § 1324(a)(1)(A)(iii)).

remains in the United States in violation of law, conceals, harbors, or shields from detection . . . such alien in any place, including any building or any means of transportation.”¹³⁷

Employing an approach to preemption similar to the Supreme Court’s approach in *De Canas* and *Whiting*, the Eighth Circuit relied heavily on the presupposition that no state law will be held preempted unless Congress clearly manifests an intention to preempt state authority to regulate in a manner consistent with federal law.¹³⁸ Accordingly, the court held that if Congress wanted to preempt local anti-harboring laws, it should do so expressly,¹³⁹ or by instituting a pervasive framework of anti-harboring regulation. Interpreting that that was not the case with the IRCA’s anti-harboring provision, the Eighth Circuit understood that states and local governments could enact laws aimed at supplementing federal legislation in this area.¹⁴⁰

Furthermore, the court held that the Fremont ordinance did not conflict with the IRCA anti-harboring provision just because it defined the word “harboring” more expansively or imposed penalties not contemplated by the federal statute.¹⁴¹ In order to distinguish the Fremont ordinance from Section 5(C) of Arizona’s S.B. 1070, the court limited itself to saying that the *Arizona* provision was focused on enforcing the federal anti-harboring provision, while the Fremont disposition only prohibited “harboring conduct that is inconsistent with the City’s local public interests.”¹⁴² According to the Eighth Circuit, Congress did not intend “to preempt States and local governments from imposing different penalties for the violation of different state or local prohibitions simply because the prohibited conduct was labeled ‘harboring.’”¹⁴³

The Eighth Circuit next addressed whether the ordinance was conflict preempted due to the possibility that it stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in providing exclusive federal procedures for removing undocumented immigrants according to the IRCA.¹⁴⁴ The plaintiffs argued that the Fremont City ordinance scheme would interfere with the federal government’s intervention with undocumented immigrants for their subsequent removal by forcing undocumented immigrants to leave the city after the federal government had already determined their location but was in the process of determining how it would intervene with these immigrants.¹⁴⁵

The Eighth Circuit rejected these contentions. If the Fremont ordinances amounted to a *de facto* removal, the court held, then the state statutes upheld in *De Canas* and *Whiting* should have also been held preempted. In the Eighth Circuit’s view, the laws at issue in *De Canas* and *Whiting* would have also indirectly driven undocumented immigrants out of the state, obscuring their location for federal law enforcement purposes.¹⁴⁶ As such tangential concerns had previously been rejected by the Supreme Court, the Eighth Circuit declined to accept the plaintiff’s reasoning.

The Eighth Circuit also grounded its decision in *Arizona v. U.S.* Specifically, it distinguished the Fremont ordinance from one of the provisions held preempted in *Arizona*, Section 6. According to the court, Section 6 required the local Arizona officials to independently determine if the immigrant was removable from the U.S., and to take action accordingly. The Fremont ordinance, on the other hand, did not authorize state

¹³⁷ *Id.*

¹³⁸ *Id.* at 943 (“‘Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was the clear and manifest purpose of Congress would justify th[e] conclusion’ that Congress ‘intended to oust state authority to regulate . . . in a manner consistent with pertinent federal laws.’”) (citing *DeCanas*, 424 U.S. at 357).

¹³⁹ *Id.* at 942.

¹⁴⁰ *Id.* at 943.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 942.

¹⁴⁵ *Id.* at 943-945.

¹⁴⁶ *Id.* at 944.

officials to remove undocumented persons from the city, only empowering them to fine and revoke occupancy licenses for those without documentation.¹⁴⁷ Since the state provisions in question did not “remove” any undocumented immigrant from the United States (or even from the city), federal immigration officials retained complete discretion to decide whether and when to pursue removal proceedings.¹⁴⁸ Such a scheme, the court concluded, mirrored the system validated in *Whiting* by the Supreme Court.¹⁴⁹

Finally, the Eighth Circuit held that the plaintiffs’ claims that the city ordinance would affect the federal removal procedure by forcing undocumented immigrants outside of the city and thereby upsetting the knowledge of their location for removal purposes, was a claim not fit for a facial challenge.¹⁵⁰ Analogizing to *Arizona*, the court focused on the only provision of S.B. 1070 that was not held preempted by the Supreme Court: Section 2(B).¹⁵¹ The Supreme Court in *Arizona* held that said provision could not be declared conflict preempted because there was a basic uncertainty about what the local law meant and how it would be enforced; hence, at the stage of a facial challenge, without the benefit of a definitive interpretation from the state courts, it would have been inappropriate to assume that the provision in question would be construed in a way that created a conflict with federal law.¹⁵² Employing the same reasoning, the Eighth Circuit held that it was too early to declare the rental provisions conflict preempted, choosing to wait for an as applied challenge to gauge how the state authorities would enforce and interpret its rental provisions.¹⁵³

C. *Villas at Parkside Partners v. City of Farmers Branch*

Shortly after the Eighth Circuit issued its opinion, the Fifth Circuit was asked to decide a similar question on nearly identical facts in *Villas at Parkside Partners v. City of Farmers Branch*.¹⁵⁴ The case arose from the city of Farmer’s Branch, Texas, which passed an ordinance that required every individual who rented an apartment or a single-family unit to obtain an occupancy license.¹⁵⁵ Once the license was obtained, the local authorities would consult the federal authorities as to the individual’s immigration status.¹⁵⁶ If the federal authorities held twice that the individual was an undocumented immigrant, the city inspector would revoke the individual’s license, as well as the landlord’s renting license.

The city ordinance also included seven offenses related to the renting of a dwelling place to or by an undocumented immigrant: (1) renting a dwelling place without a license; (2) making a false statement when applying for a license; (3) renting a residence without obtaining licenses from the occupants; (4) failing to maintain copies from all known occupants; (5) failing to include a provision in the lease indicating that occupancy by a person without a license equates to a default; (6) allowing an occupant to inhabit a residence without a valid license; and (7) knowingly permitting an occupant to lease a property without a license.¹⁵⁷ Any transgressor would be fined up to \$500 for each breach.¹⁵⁸ In addition, violators could be fined for every day that one of these offenses remained without rectification.¹⁵⁹

Despite the similarities between the Farmer’s Branch ordinance and the Fremont ordinance, the Fifth Circuit found the Farmer’s Branch ordinance to be conflict preempted under the Supremacy Clause of the U.S.

¹⁴⁷ *Id.*, at 944.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 944.

¹⁵⁰ *Id.* at 945

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 726 F.3d 524 (5th Cir. 2013).

¹⁵⁵ *Id.* at 526.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 527.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Constitution.¹⁶⁰ In direct opposition to the Eighth Circuit, the Fifth Circuit held that the Texas occupancy license scheme's criminal provisions conflicted with the IRCA's statute criminalizing the harboring of undocumented immigrants as well as its scheme to remove these individuals from the U.S.¹⁶¹ The court found that the ordinance disrupted the federal government's discretion as to when and how to prosecute and bring to fulfillment a removal procedure.¹⁶²

The court also found a conflict between the ordinance and the IRCA since the ordinance granted state officials authority to act as immigration officers outside the "limited circumstances" specified by federal law.¹⁶³ The court further reasoned that federal law did not criminalize an undocumented immigrant's rental of a home without a license, and that the city ordinance, when it instructed arrests for a violation of its provisions, was creating a new category of undocumented immigrant status not contemplated by federal law, thus affecting the IRCA's carefully structured removal scheme.¹⁶⁴ Furthermore, unlike the state provisions validated in *De Canas* and *Whiting*, the Farmer's Branch ordinance's scope also affected non-citizens who may not have lawful status but face no federal exclusion from rental housing, exposing these individuals to arrests, detentions and prosecutions based on the local government's assessment of their "unlawful presence," without federal direction or supervision.¹⁶⁵

In the end, the court found that the city ordinance allowed a state to do what the Supreme Court prohibited in *Arizona*: make an initial determination of the lawful status of an undocumented immigrant without the required intervention of the federal government.¹⁶⁶ The Fifth Circuit rested its conclusion on the testimony of local officials and federal immigration officers, who all conceded that the verification of the undocumented immigrant's status with the federal immigration authorities did not provide enough information about the immigrant's "legal presence in the United States," which is determined through a "labyrinth of [federal immigration] statutes and regulations governing the classification of non-citizens."¹⁶⁷ As such, a local officer would have to make an independent determination as to the lawfulness of the immigrant's stay.¹⁶⁸

The ordinance examined by the Fifth Circuit bore one key difference from the Fremont ordinance: it allowed local officials to arrest undocumented immigrants believed to be illegally staying in the U.S. if they were unable to prove that they were citizens or legal residents of the U.S. The Fifth Circuit analogized the city ordinance to Section 6 of S.B. 1070, held preempted in *Arizona* (Section 6), to determine that the city ordinance was federally preempted because it violated the principle that the removal process is entrusted to the federal government.¹⁶⁹ According to the court, the Farmer's Branch ordinance was even more in conflict with the federal immigration scheme than Section 6 of S.B. 1070 because it did not limit the state officers to arresting an undocumented immigrant they suspected to not be lawfully present in the U.S. with the intention of later referring him to the pertinent federal authorities. Instead, it empowered state officers to arrest, prosecute and sentence an individual beyond the federal government's supervision, allowing the state to achieve an immigration policy of its own.¹⁷⁰ Thus, the Fifth Circuit Court declared Farmer's Branch's ordinance to be conflict preempted because its criminal provisions existed outside the federal statutory structure and conflicted

¹⁶⁰ *Id.* at 528.

¹⁶¹ *Id.* at 529-532.

¹⁶² *Id.* at 530.

¹⁶³ *Id.* at 532.

¹⁶⁴ *Id.* at 533-534.

¹⁶⁵ *Id.* at 532.

¹⁶⁶ *Id.* at 534.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 534.

¹⁷⁰ *Id.* at 534-35.

with federal anti-harboring laws and the federal authority to arrest and detain persons for possible unlawful presence.¹⁷¹

D. *Lozano v. City of Hazleton*

In *Lozano v. City of Hazleton*,¹⁷² the Third Circuit examined two city ordinances which were designed with a similar structure and aim as the ones analyzed by the Eighth and Fifth Circuits.¹⁷³ These ordinances made legal immigration status a condition to entering into a valid lease and made it “unlawful for any person or business entity that [owned] a dwelling unit in the City to harbor an illegal alien... knowing or in reckless disregard of the fact that [the] alien [was] unauthorized.”¹⁷⁴ The ordinances defined the term “harboring” to include the leasing or renting of a dwelling place to an undocumented immigrant. They also required landlords and tenants to abide by an occupancy license regime conditioned upon the tenant’s proof of legal citizenship or residency.¹⁷⁵ Any person found in violation of the ordinance’s provisions would be subject to fines and possible imprisonment.¹⁷⁶

Although the Third Circuit joined the Fifth Circuit and found the local ordinances preempted by federal law, it relied on field preemption in addition to conflict preemption. The Fifth Circuit understood the Supreme Court’s decision in *Arizona* to mean that the IRCA clearly preempted any attempt by the local government to regulate residency of immigrants through the guise of housing regulations.¹⁷⁷ It went on to hold that the IRCA is centrally concerned with the terms and conditions of admission to the country and the subsequent treatment of non-citizens lawfully admitted.¹⁷⁸

The Third Circuit added that the IRCA’s comprehensive scheme plainly precludes state efforts, whether harmonious or conflicting, to regulate residence in the U.S. based on immigration status.¹⁷⁹ As such, although the city’s housing provisions did not control actual physical entry into, or expulsion from, the city or the United States, in essence, that is precisely what they attempted to do.¹⁸⁰

The Third Circuit also found the city ordinance to be conflict preempted because the housing provisions interfered with the federal government’s discretion in, and control over, the removal process.¹⁸¹ Resting on *Arizona*, the court found the housing provisions to be inconsistent with federal anti-harboring laws because they limited all housing options for undocumented immigrants in the city, constituting a *de facto* removal based on the person’s immigration status.¹⁸²

The Third Circuit’s analysis of the Hazleton ordinance also focused on the Supreme Court’s analysis of the S.B. 1070 provisions which gave state officers the authority to arrest an individual based on probable cause that the individual had committed a removable offense. Just as the Supreme Court had held in *Arizona* that the referenced provision would allow the State to achieve its own immigration policy, which could result

¹⁷¹ *Id.* at 535-36. The Court also held the city ordinance to be preempted because its judicial review provision delegated in state judicial officers the power to classify non-citizens and assess the legality of their presence in the U.S. *Id.* at 536-37. A power that, according to the Court, is exclusively reserved to the federal government. *Id.*

¹⁷² 724 F.3d 297 (3d Cir. 2013).

¹⁷³ *Id.* at 301. Between July 2006 and March 2007, the City of Hazleton enacted the Illegal Immigration Relief Act Ordinance and the Rental Registration Ordinance.

¹⁷⁴ *Id.* at 301.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 315-316.

¹⁷⁸ *Id.* at 315.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 316.

¹⁸¹ *Id.* at 317.

¹⁸² *Id.*

in the unnecessary harassment of some non-citizens whom federal officials determined should not be removed, so too the City of Hazleton's provision interfered with the federal immigration scheme, despite the fact that the city ordinance applied to all residents.¹⁸³

IV. A FRAMEWORK FOR POTENTIAL RECONCILIATION

A. Preemption As Discrimination

The three circuit court opinions discussed above make clear the various discriminatory attributes involved in ordinances limiting undocumented people's access to housing. As this section will argue, the local ordinances enacted by the cities of Fremont, Farmers Branch, and Hazleton are quintessential examples of the (1) use of race-neutral laws and legal terminology as a proxy for racial discrimination; and (2) the validation or rejection of discrimination through a legal discourse of preemption.

1. The Use of Race-Neutral Laws and Legal Terminology as a Proxy for Discrimination

In requiring every potential renter to obtain occupancy licenses, the referenced ordinances appear facially race-neutral. Each of these localities' ordinances purports to establish a licensing scheme aimed at "all" interested renters, requiring from "every" potential renter proof of citizenship or legal residency. By so doing, they give a false impression that the scope of their coverage is extendable to all renters in equal terms, when in truth their impact is disparately targeting undocumented immigrants. Specifically, Farmer's Branch's ordinance intends to apply to every "*individual . . . occupying a rented apartment or 'single-family residence.'*"¹⁸⁴ In similar terms, Hazleton's housing ordinance is addressed to "any *prospective occupant* of rental housing over the age of eighteen."¹⁸⁵ Fremont's ordinance uses identical language.¹⁸⁶

This race-neutral language avoids acknowledging that undocumented immigrants will be the only individuals who will always fail to meet the ordinance's proof of citizenship or legal residency requirement. As such, discriminatory intentions are cloaked in over-inclusive categorization efforts, and immigrants of underdeveloped countries who do not have the resources necessary to obtain legal residency or citizenship, are pushed out of cities and states through a legal discourse impregnated with racial profiling, yet covered in false layers of neutrality. To make matters worse, judicial decisions can solidify such racial discrimination by failing to recognize that these race neutral laws structurally propagate racism. This is the case of the Eight Circuit opinion in *Keller*, where the court dismissed the claim that the ordinance targeted undocumented immigrants through race neutral structures. The court asserted that "[t]he [Fremont] Ordinance require[d] *all* renters, including U.S. citizens and nationals, to obtain an occupancy license before renting a dwelling unit in the City."¹⁸⁷ As such, it placed U.S. citizens and undocumented immigrants in the same legal category, despite the fact that the Fremont Ordinance disparately impacted the latter.

On the other hand, the local ordinances under examination adopt a different brand of structural determinism when addressing the landlords within the licensing scheme. By using the phrases "illegal alien" and "harboring of an alien" to penalize a landlord's agreement to rent a dwelling place to an immigrant without proof of citizenship or legal residency,¹⁸⁸ the local laws create a schism between citizens and undocumented immigrants, fostering hostility against foreigners, denying them the basic human right of having shelter, and

¹⁸³ *Id.* at 318.

¹⁸⁴ Farmer's Branch Ordinance No. 2952 at §§ 1(B)(1); 3(B)(1) (emphasis added).

¹⁸⁵ *Lozano*, 724 F.3d at 314 (emphasis added).

¹⁸⁶ *Keller*, 719 F.3d at 938.

¹⁸⁷ *Id.* at 943 (emphasis in original).

¹⁸⁸ *See id.* at 938; *Villas at Parkside Partners*, 726 F.3d at 526-57; *Lozano*, 724 F.3d at 314.

criminalizing anyone who aids them. As such, the law uses a pejorative term to categorize the immigrant as an unwanted other, excluding them from the local community through unreasonable licensing schemes.

2. The Validation or Rejection of Discrimination through a Legal Discourse of Preemption

The ambiguities that plague preemption doctrine can further foster this form of discrimination. As noted above, an obvious discrepancy exists between the non-preemptive result arrived at by the Eighth Circuit opinion in its analysis of the Fremont ordinance and the Fifth and Third Circuits' determination that such ordinances as enacted by the cities of Farmer's Branch and Hazleton, were federally preempted.¹⁸⁹ This circuit split reflects a difference of opinions in the examined circuit court opinions concerning the use of the doctrine of preemption to validate or condemn the discriminatory animus artfully veiled in each of these ordinances.

Each ordinance is justified by its legislative authors through protectionist and national security arguments, and a "state sovereignty" discourse. In the case of Fremont, Nebraska, for example, the city ordinance enacted by popular referendum, which regulated the housing of undocumented immigrants, was specifically grounded in a fear that the growing Hispanic population would increase crime, preclude white residents from finding jobs in the traditional meat-packing town, and change the character of the quiet city.¹⁹⁰

When the Eighth Circuit examined whether or not the ordinance was federally preempted, it relied on the same protectionist argument employed by the city to conclude that the local law was not federally preempted. To do so, the Eight Circuit adopted an approach similar to the Supreme Court's determination in *De Canas* and *Whiting*, by relying heavily on the basic presumption that no state law will be held preempted unless Congress clearly manifests an intention to do so. Based on this principle, it concluded that the city ordinance was not field preempted because it did not seek to remove an undocumented immigrant from the United States, but merely sought to "deter" them from residing in a particular city. Since the ordinance was not tantamount to the removal of an undocumented immigrant—an activity exclusively delegated to the federal authorities—the ordinance allegedly did not affect the legal framework established by Congress. To sustain this conclusion, the Eight Circuit emphasized that the city had an economic and social interest in deterring undocumented immigrants from entering their boundaries in violation of federal law.¹⁹¹ This argument, similar to the discourse employed by the advocates of the ordinance, is clearly protectionist in nature, seeking to use the principles embedded in the doctrine of preemption—deference to state law in the absence of an express Congressional intent to occupy the field—to exclude undocumented immigrants from a particular community, all for the sake of the city's "economic and security" interest.

Comparing the Eighth Circuit's use of the principles of the doctrine of preemption with the Third and Fifth Circuits' legal analysis, there emerges a potential use of the principle of preemption to hinder discrimination, rather than foster it. For instance, the Hazleton, Pennsylvania mayor justified the ordinance regulating the renting of houses by undocumented immigrants on the protectionist basis that the city's Hispanic population, which accounted for forty percent of the residents, was allegedly straining the city's budget, contributing to the rising crime rate, and was changing the character of the city by supposedly adopting unhygienic lifestyles. All of this alleged behavior was due to the federal government's failure to secure the United States' borders and enforce the federal immigration laws.¹⁹² When the Third Circuit examined the ordinance under the doctrine of preemption, it acknowledged that the city ordinance constituted a *de facto* removal, which was preempted by the federal Supreme Court in *Arizona*. Accordingly, the court refused to

¹⁸⁹ See *supra* Part II.B-D.

¹⁹⁰ Monica Davey, *Nebraska Town Votes to Banish Illegal Immigrants*, N. Y. TIMES (June 21, 2010), <http://www.nytimes.com/2010/06/22/us/22fremont.html?%20nebraska&r=0>.

¹⁹¹ *Id.* at 951 (citing *Plyer v. Doe*, 457 U.S. 202 (1982)).

¹⁹² R. Martin, *Immigration and the Argument Against Citizenship*, NPR NEWS (Apr. 14, 2013), <http://www.npr.org/2013/04/14/177204409/immigration-and-the-argument-against-citizenship>.

give deference to a city's protectionist interests, preferring instead to protect an undocumented immigrant's right to housing, at least until the federal government decides to remove the undocumented immigrant through the enforcement of the federal removal procedures.

In Farmer's Branch, Texas, the case was no different; the "ordinance's sole purpose was to exclude undocumented [immigrants], specifically Latinos, from the" city.¹⁹³ Nevertheless, the ordinance's legislative intent did not preclude the Fifth Circuit's decision to rely on *Arizona* to conclude that the ordinance interfered with the federal government's discretion as to when and how an undocumented immigrant should be removed from the United States. Again, the court found that the city ordinance constituted a *de facto* removal, which left the undocumented immigrant with no housing alternatives, since the federal government had not yet decided to remove the non-citizen from the United States.

In light of the information above, it is evident that how courts apply the doctrine of preemption will determine the degree of discrimination that an undocumented immigrant will suffer. Although certainly the Third and Fifth Circuit opinions did not prevent the removal of an undocumented immigrant by the federal government, at least they hindered a city's *de facto* removal of a non-citizen based on racial profiling shielded by protectionist discourse. Based on this conclusion, and in an effort to provide a doctrinal and non-discriminatory solution to the analyzed circuit split, the following section will offer a comprehensive federal answer to the preemption of state or local government ordinances that prohibit undocumented immigrants from renting a dwelling.

B. A Doctrinal And Non-Discriminatory Approach

As explained above, every preemption inquiry is centrally concerned with whether Congress has manifested an express or implied intent that its federal legislation be exclusive in nature, trumping any conflicting state law by virtue of the Supremacy Clause.¹⁹⁴ When examining Congress' preemptive intent, one must keep in mind that preemption doctrine requires a clear and manifest expression that Congress wills its federal legislation to oust any homologous state law.¹⁹⁵ If such a congressional intent is not identified, a presumption exists in favor of states exercising their police powers to regulate a determined subject.¹⁹⁶

1. Express Preemption Analysis

As a first step, one must evaluate if such a Congressional intent has been expressly manifested. An examination of the IRCA shows that Congress has not established any express statutory provision aimed at regulating the conditions or circumstances under which an undocumented immigrant may rent a dwelling. The absence of an express preemptive clause, however, does not foreclose the possibility that the local housing ordinances are preempted.

2. Field Preemption Analysis

The second step of the inquiry requires an examination of whether Congress has impliedly intended for the IRCA to preempt the housing ordinances under consideration; in other words, if the state legislation is field or conflict preempted.¹⁹⁷ Field preemption will exist if a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress has not permitted the states to supplement it, or where an act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed

¹⁹³ *There's Been a Lot of Pain Living in the Shadows, Undocumented Immigrants Face Continuing Uncertainty*, THE DAILY RECORD (Mar. 17, 2015), <http://thedailyrecord.com/2015/03/17/theres-been-a-lot-of-pain-living-in-the-shadows/>.

¹⁹⁴ See *supra* Part I.A.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

to preclude enforcement of state laws on the same subject.¹⁹⁸ To aid one's analysis in determining if the state ordinances under examination are field preempted, this Note will apply the four criteria articulated by Professor Chemerinsky, which were considered in depth earlier in this Note.¹⁹⁹

The first of these criteria requires courts to examine if the area in controversy is one where the federal government traditionally has played a unique role. In connection to this factor, it is important to observe that throughout the three circuit court opinions previously examined, a pattern emerges whereby the local ordinances defined "harboring an illegal alien" to include the leasing of a house to an undocumented immigrant.²⁰⁰ This regulatory activity, however, has been an area where the federal government has traditionally engaged in significant and pervasive regulation.

Since 1917, the federal government has manifested a significant role and has provided a comprehensive scheme for the regulation and prosecution of those who harbor undocumented immigrants.²⁰¹ Specifically, the IRCA establishes criminal sanctions for any person that knowingly "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."²⁰² As part of this elaborate scheme, the IRCA imposes civil and criminal penalties for any undocumented immigrant who unlawfully enters into the United States.²⁰³ Furthermore, Congress has also provided criminal penalties against any individual who brings an undocumented immigrant into the United States;²⁰⁴ aids the entry of an inadmissible immigrant;²⁰⁵ and imports an immigrant for an immoral purpose.²⁰⁶ In light of the above, certainly the federal government has clearly expressed more than a "peripheral concern" with the entry, movement, and residence of undocumented immigrants within the United States.²⁰⁷

Professor Chemerinsky next would have courts determine whether Congress has expressed an intent in the text of the law or in the legislative history that federal law be exclusive in said area. Although the IRCA does not explicitly foreclose state activity on the subject of undocumented immigrant anti-harboring regulations, it does explicitly limit the role that state officers may perform in this field. Within this complex federal immigration framework, Congress has provided that state officers, with the authorization of the federal government, can only assist by arresting the individuals who commit these offenses;²⁰⁸ participating in joint task-forces with federal officers; providing operational support in executing a warrant; or allowing federal immigration officers to gain access to detainees held in state facilities.²⁰⁹ The federal courts, nonetheless, maintain exclusive jurisdiction to prosecute for these crimes and interpret the boundaries of the federal statute.²¹⁰ This evinces a textual parameter as to the ambit of activity allowed to the state actors.

¹⁹⁸ *Id.*

¹⁹⁹ According to Professor Chemerinsky, a state legislation or local ordinance will be preempted: (1) if the area in controversy is one where the federal government traditionally has played a unique role; (2) if Congress has expressed an intent in the text of the law or in the legislative history to have federal law be exclusive in said area; (3) if allowing state and local regulations in the area risk interfering with comprehensive federal regulatory efforts; and, (4) if there is an important traditional state or local interest served by the law. *Id.*

²⁰⁰ *See supra* Part II.B-D.

²⁰¹ *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1263 n.10 (11th Cir. 2012). *See also* *U.S. v. Alabama*, 601 F.3d 1269 (11th Cir. 2012).

²⁰² 8 U.S.C. § 1324(a)(1)(A)(iii).

²⁰³ 8 U.S.C. § 1325.

²⁰⁴ 8 U.S.C. § 1324.

²⁰⁵ 8 U.S.C. § 1327.

²⁰⁶ 8 U.S.C. § 1328.

²⁰⁷ *Georgia Latino Alliance for Human Rights*, 691 F.3d at 1264.

²⁰⁸ 8 U.S.C. § 1324(c).

²⁰⁹ *Arizona*, 132 S. Ct. at 2507.

²¹⁰ 8 U.S.C. § 1329.

Chemerinsky's third and fourth factors involve the risk of state or local regulation interfering with comprehensive federal regulatory efforts and the presence of an important traditional state or local interest in regulating the field. The Court in *Arizona* established that state officers enforcing local immigration efforts of this nature can disrupt and affect the discretion and strategy employed by the federal government in the arrest, prosecution and eventual removal of undocumented immigrants.²¹¹ Although the Eighth Circuit concluded that the Fremont housing ordinance only prohibited harboring conduct that was inconsistent with the city's local economic and security interests,²¹² such factors are incompatible with the IRCA's comprehensive scheme, which impliedly forecloses state participation beyond the federally supervised efforts as previously explained.

In light of the above, and in harmony with the Third and Fifth Circuit Court opinions, this Note's analysis concludes that the local ordinances instituting licensing schemes that criminalize a landlord's provision of a rental lease to an undocumented alien under *de facto* local anti-harboring statutes, is field preempted by the IRCA.

3. Conflict Preemption Analysis

Having examined the housing ordinances in light of the doctrines of *express* and *field* preemption, it is necessary to ascertain if these local provisions are *conflict* preempted; that is, if they stand as an obstacle to the accomplishment and execution of the full congressional purposes and objectives.²¹³

When one pauses to think about the nature of the housing ordinances in dispute, one must see that their functional objective is to drive immigrants out of the cities that have adopted these provisions, by denying undocumented immigrants, in practical terms, the ability to rent a dwelling in the regulated area. Although a *de jure* examination only reveals a simple licensing scheme, which on its face is neutrally applicable to all citizens interested in renting a dwelling, its underlying objective consists of a local agenda aimed at discriminating against undocumented immigrants, by instituting a *de facto* local government non-citizen removal process.

The Supreme Court's decision in *Arizona* provides valuable precedential guidance in making this argument. There, the Supreme Court established that, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States."²¹⁴ The IRCA instructs the federal authorities as to when it is advisable for a removal process to be initiated against an undocumented immigrant.²¹⁵ This decision is highly discretionary in nature, and entails the weighing of complicated factors that advise as to when, how, and if removal is an advisable decision.²¹⁶

Only the federal government, in its constitutional role of interfacing with foreign powers, is capable of exercising such discretion. "A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice."²¹⁷ Accordingly, when state officers and governments institute *de facto* removal procedures that are not authorized, guided or supervised by the federal authorities, the IRCA removal scheme is gravely affected.²¹⁸

The Eighth Circuit declined to reach such a conclusion by stating that it was too early to declare the Fremont rental provisions conflict preempted.²¹⁹ In the court's judgment, it was necessary to wait for an as

²¹¹ *Arizona*, 132 S. Ct. at 2506-07.

²¹² See *supra* Part II.B.

²¹³ See *supra* Part I.A.

²¹⁴ *Arizona*, 132 S. Ct. at 2505.

²¹⁵ *Id.*

²¹⁶ *Id.* at 2506.

²¹⁷ *Id.*

²¹⁸ *Id.* at 2506-07.

²¹⁹ See *supra* Part II.B.

applied challenge to gauge how the state authorities would enforce and interpret its rental provisions.²²⁰ This conclusion, however, fails to recognize that the local ordinance is facially unconstitutional. Regardless of how a local court interprets its scope in an as applied challenge, its final consequence will be to deny undocumented immigrants all possibility of renting a dwelling. This constitutes a *de facto* removal procedure, since the non-citizen will be driven from the city to a location unknown to federal immigration officers. Hence, the federal removal scheme will be upset, and clear Supreme Court constitutional precedents, which establish that the removal process is exclusively entrusted to the federal government, will be gravely violated.

In light of the above, the housing ordinances examined by the Third, Fifth, and Eighth Circuits are conflict preempted, because they constitute an obstacle to the full congressional purposes and objectives in its regulation of the immigration removal procedure. Moreover, their discriminatory intent leads to a *de facto* removal that affects an undocumented immigrant's basic human right to adequate housing and upsets a federal immigration policy that is designed to weigh complicated factors not considered by the ordinances under examination. Deference to state laws, a state's interest in protecting its economic and security interests, or the sovereignty of local governments, cannot suffice to trump basic preemption principles that entrust the federal government with the obligation to coherently coordinate the nation's removal policy. Although declaring a housing ordinance federally preempted does not guarantee that an undocumented immigrant will not be subjected to discriminatory immigration policies, at least it avoids a plethora of local-government immigration laws that seek to protect a citizen's economic and security interest, at the expense of an undocumented immigrant's right to housing. Accordingly, the framework presented herein constitutes the most balanced doctrinal solution to a circuit split that brings to the fore a serious need to reform the United States' immigration law.

V. CONCLUSION

This Note has examined the constitutionality of an ever-increasing wave of local ordinances aimed at denying undocumented immigrants basic housing rights. Through an analysis of a recent circuit split, this Note has endeavored to establish that these new local immigration regulations violate the Constitution's Supremacy clause because they impinge on policy areas traditionally reserved for the federal government. Specifically, this Note has strived to establish that, according to the basic principles of the constitutional preemption doctrine, these housing ordinances are field and conflict precluded, because they illegitimately aspire to intervene with a pervasive federal scheme of anti-harboring regulations, and because they represent an obstacle to the federal government's purposes and objectives in its control of the immigration removal procedure.

Although state security and economic interests urge local governments to adopt new immigration regulations aimed at filling the interstices left by the federal government's failure to legislate and implement a comprehensive immigration policy, such pressures cannot be allowed to result in local immigration policies that undermine the United States' foreign relationships and unnecessarily discriminate against undocumented immigrant communities. Although this Note's analysis was limited to examining the constitutional validity of these housing ordinances in light of the federal Supremacy clause, further studies will have to examine legislative, judicial and communitarian alternatives that will adequately balance the concerns and needs of the local governments, with the basic rights of undocumented immigrants. Meanwhile, the federal government must aspire to responsibly employ its constitutional competence to regulate the field of immigration, aware that the United States is a plural and diverse nation which must accommodate the influx of immigrants and foreigners who seek to build a new future on its shores while contributing to its economic, cultural and political growth.

²²⁰ *Id.*