IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VILLAS AT PARKSIDE PARTNERS d/b/a VILLAS AT PARKSIDE, *et al.*,	§	
and	§	
VALENTIN REYES, *et al.*,	§	Civil Action No. 3:08-CV-1551-B
Plaintiffs,	§	
v.	§	
THE CITY OF FARMERS BRANCH, TEXAS,	§	
Defendant.	§	

BRIEF IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND PROCEDURAL BACKGROUND

On January 22, 2008, the Defendant City of Farmers Branch ("the City") enacted Ordinance 2952 (the "Ordinance"). The Ordinance seeks to regulate the rental of apartments and single-family residences within the City by requiring tenants to obtain a residential occupancy license when obtaining a lease for such properties. Pursuant to its terms, the effective date of the Ordinance was September 13, 2008. On September 3, 2008, Plaintiffs filed this suit, in which they claim that the Ordinance is unconstitutional. Plaintiffs filed an Application for a Temporary Restraining Order on September 8, 2008, which was granted on September 12, 2008. The TRO was later converted to an agreed Preliminary Injunction.

FACTUAL BACKGROUND

Ordinance 2952 was carefully drafted to comply with controlling federal precedents defining the authority of state and local governments to act in ways that discourage illegal immigration or otherwise reinforce federal immigration law. The Ordinance requires each adult tenant of a rental residential unit in the City to obtain a residential occupancy license at the commencement of a lease, prior to occupancy. §§ 26-79(B)(1), 26-119(B)(1).[1] It applies only to future tenancies, commencing after the Ordinance goes into effect. Ordinance 2952, § 7. In order to obtain a license, an applicant need only pay the $5 fee and provide a completed application form with information that the applicant believes is correct (even if it is not actually correct). The city building inspector must issue the license, without scrutiny of the information provided. §§ 26-79(B)(7), 26-119(B)(7). After issuance of the license, the building inspector exercises the City's authority under 8 U.S.C. § 1373(c) to ascertain or verify any alien occupant's immigration

[1]Ordinance 2952 appears in the defendant's appendix at pages 1-14. Where a provision of the Ordinance is to be codified into the Farmers Branch Code of Ordinances, citation will be by code section number.

status, using any method of verification that the federal government directs the City to use. §§ 26-79(D)(1), 26-119(D)(1). Under no circumstances may the City attempt to independently verify any alien's immigration status. §§ 26-79(D)(3), 26-119(D)(3). In cases in which the federal government notifies the City that an alien occupant is not lawfully present in the United States, the Ordinance stipulates the procedures by which notice, suspension of license, and appeal to the City Council may occur. §§ 26-79(D), 26-119(D). The Ordinance also provides for pre-deprivation and post-deprivation judicial review that any landlord or occupant who receives a deficiency notice or revocation notice may utilize. §§ 26-79(E), 26-119(E).

After discovery and deposition of the Plaintiffs, it has become clear that Plaintiffs do not possess standing, and that they have not alleged or proven any set of facts under which they could prevail on their claims.

LEGAL AUTHORITY ISSUED SINCE THE HEARING OF SEPTEMBER 12, 2008

Three precedents of decisive importance have been handed down since the temporary restraining order hearing of September 12, 2008. These precedents further establish that it is impossible for Plaintiffs to prevail on their legal theories.

First, on September 17, 2008, the U.S. Court of Appeals for the Ninth Circuit sustained a state law in a case involving virtually the same preemption challenges and due process challenges as those presented to this Court. In *Chicanos Por La Causa (CPLC) v. Napolitano*, 544 F.3d 976 (9th Cir. 2008)(*rehearing en banc denied*, 2009 U.S. App. LEXIS 7012 (Mar. 9, 2009)), the Ninth Circuit upheld an Arizona law that suspends the business licenses of employers that knowingly hire unauthorized aliens. Importantly, the Ninth Circuit reaffirmed "the continuing vitality of *De Canas v. Bica*, 424 U.S. 351 (1976)," the controlling Supreme Court precedent in all challenges asserting immigration preemption. Because the case was a facial challenge, the Ninth Circuit refused to engage speculation about hypothetical aliens, and in so doing, rejected

precisely the same arguments as those presented in the case at bar: "[A] speculative, hypothetical possibility does not provide an adequate basis to sustain a facial challenge." *CPLC*, 544 F.3d at 985. The Court also rejected a due process argument identical to that in the case at bar, holding that a state court hearing in which the state court defers to a federal determination of immigration status satisfies the requirements of due process. Such a hearing "provides an employer the opportunity, during the state court proceeding, to present rebuttal evidence [and be heard]." *Id.* at 987. Ordinance 2952 reproduces the same hearing structure as that found in the Arizona statute, nearly verbatim, with identical rebuttable presumptions, in §§ 26-79(E) and 26-119(E). *See* Ariz. Rev. Stat. § 23-212(H) (*quoted in CPLC*, 544 F.3d at 986-87).

Second, on January 22, 2009, the California Supreme Court decided the immigration preemption case of *In re Jose C.*, 45 Cal. 4th 534 (2009), and rejected nearly identical preemption challenges to those in the case at bar. The Court sustained a California state law that required California courts to determine whether a juvenile had violated federal immigration laws, and if so, penalize the juvenile by declaring him to be a ward of the court. The Court held that Congress intended to promote local laws that assist in the enforcement of federal immigration laws: "A series of provisions in the INA demonstrate Congress, far from occupying the field, welcomed state and local assistance in enforcement." *Id.* at 552. "Where state law 'mandates compliance with the federal immigration laws and regulations, it cannot be said [state law] stands as an obstacle to accomplishment and execution of congressional objectives embodied in the INA.'" *Id.* at 554 (*quoting In re Manuel P.*, 215 Cal. App. 3d 48, 64 (Ct. App. 1989)). Similarly, Ordinance 2952 is not preempted because it encourages compliance with 8 U.S.C. § 1324(a)(1)(A).

Third, on December 15, 2008, the U.S. Supreme Court issued its decision in the preemp-

tion case of *Altria v. Good*, 129 S. Ct. 538 (2008), reiterating that the bar to finding preemption is extremely high. The Court began by clarifying that the presumption against preemption applies in *all* preemption cases. The Court then noted that in some cases the assumption is especially strong. "That assumption applies with particular force" in cases that concern "a field traditionally occupied by the states." *Id*. at 543. Because the regulation of rental accommodation remains within the states' historic police powers, the assumption of non-preemption must apply with particular force in the case at bar. Plaintiffs can only overcome this assumption by demonstrating that Congress intended to preempt the Ordinance. *See id.* Moreover, Plaintiffs must not only demonstrate a congressional intent to preempt, they must show that such congressional intent is *unambiguous*. "[T]he historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *Id*. (internal citations omitted). "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Id.* (*quoting Bates v. Dow Agrosciences*, 544 U. S. 431, 449 (2005)).

LEGAL STANDARD IN A FACIAL CHALLENGE

It is important to note at the outset that Plaintiffs' suit is a *facial* challenge to the validity of the Ordinance. By launching a highly-speculative facial challenge before the Ordinance has been implemented, they have doomed their own complaint. This is because they must establish that the Ordinance would be unconstitutional under *every conceivable set of circumstances:* "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully since the challenger must establish that *no set of circumstances exist under which the Act would be valid*." *United States v. Salerno,* 481 U.S. 739, 745 (1987)(emphasis added).

In March of 2008, the Supreme Court reaffirmed the *Salerno* standard and made clear that it applies in facial challenges. *Washington State Grange v. Washington State Republican*

Party, 128 S. Ct. 1184, 1190 (2008). The Court also reiterated that to prevail in a facial challenge, a plaintiff must establish "that the law is unconstitutional in *all* of its applications." *Id.* (emphasis added). This is because "[t]he State has had no opportunity to implement [the law], and its courts have had no occasion to construe the law in the context of actual disputes … or to accord the law a limiting construction to avoid constitutional questions." *Id.* The Supreme Court cautioned: "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* (*quoting United States v. Raines*, 362 U.S. 17, 22 (1960)).

In the present case, Plaintiffs' claims are entirely dependent upon such speculation. For example, Plaintiffs speculate at great length about which system the federal government will direct the City to use in verifying the legal status of aliens, and they speculate about what might happen to aliens in various immigration categories. However, none of the tenant Plaintiffs actually fall into those categories, and none of the landlord Plaintiffs has alleged that he actually leases to an alien in such a category. Plaintiffs are asking this Court to "speculate about hypothetical or imaginary cases" in violation of *Washington State Grange*. *Id.* This Court may not follow Plaintiffs down their path of fanciful speculation. To defeat this facial challenge, the City need only establish that it is possible to implement the Ordinance in a constitutional fashion under some conceivable set of circumstances. *Id.*

ARGUMENT

I. PLAINTIFFS LACK STANDING.

A. The Constitutional and Prudential Requirements of Standing.

The case or controversy requirement of Article III, which is the irreducible constitutional minimum of standing, contains three elements:

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally

> protected interest[,] which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted); *Lincoln v. Case*, 340 F.3d 283, 289 (5th Cir. 2003).

In addition to the constitutional requirements of standing, there are three prudential requirements for standing: (1) a plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties;" (2) courts must not adjudicate "generalized grievances;" and (3) a plaintiff's plaintiffs' complaint must fall within "the zone of interests to be protected … by the statute." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474-75 (1982) (*citing Warth v. Seldin*, 422 U.S. 490, 499-500 (1975)).

The party invoking federal jurisdiction bears the burden of establishing standing. *Lujan*, 504 U.S. at 561. Moreover, "[s]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). A "'plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759, 2768-69 (2008)(*quoting DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). "Both standing and class certification must be addressed on a claim-by-claim basis." *James v. City of Dallas*, 254 F.3d 551, 563 (5th Cir. 2001). Plaintiffs must establish "proper jurisdictional bases for each and every claim – particularly when courts are called upon to review a state or local legislative enactment." *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 300 (3rd Cir. 2003). If a plaintiffs lack standing to bring federal claims, an Article III court cannot exercise supplemental jurisdiction over any state law claims in the same complaint. *Id*. at 299-300.

B. The Tenant Plaintiffs Lack Constitutional Standing.

None of the tenant Plaintiffs meets the injury-in-fact requirement of standing, because none of the Plaintiffs can possibly suffer the denial or revocation of a residential occupancy license under the Ordinance. There are five tenant Plaintiffs remaining in this case. Four of the five tenant Plaintiffs identify themselves as U.S. citizens. They are Mary Miller Smith, Ginger Edwards, Alicia Garcia, and Aide Garza. Villas Complaint 4; Reyes Complaint 5; Garcia Depo. 10 (AP108); Garza Depo. 12-13 (AP113-14).

The four U.S. citizens have not established any injury-in-fact that is sufficient to confer standing upon them to raise any of the claims in this matter. Ordinance 2952 does not, in any way, involve the scrutiny or investigation of U.S. citizen tenants. The Ordinance makes clear that when a U.S. citizen applies for a residential occupancy license, he need only declare his U.S. citizenship on the application form. §§ 26-79(B)(5)(i), 26-119(B)(5)(i). The building inspector "shall immediately issue" the residential occupancy license, without in any way questioning the applicant's assertion of U.S. citizenship. §§ 26-79(B)(6), 26-119(B)(6). Greer Depo. 238-39 (AP125-26). Importantly, *the City never attempts to verify a U.S. citizen's assertion of citizenship*. Only if the occupant "has *not* declared himself or herself to be either a citizen or national of the United States" does verification of the occupant's status with the federal government occur. §§ 26-79(D)(1), 26-119(D)(1) (emphasis added). Thus, there is no possibility that the Ordinance could lead to the revocation of any U.S. citizen's residential occupancy license. The U.S. citizen tenants therefore suffer no injury-in-fact and possess no standing.

Aware of the weakness of their standing, these Plaintiffs allege only the following specific injury: that they will be uncertain of "what constitutes a temporary guest," and that hosting

an unlicensed guest might "render[] them liable to losing their home." Reyes Complaint 8.[2] Plaintiffs should read the Ordinance more carefully. The offenses listed in Ordinance 2952 do not impose any liability or penalty whatsoever upon an occupant who resides in a rental unit with an unlicensed occupant. §§ 26-79(C), 26-119(C). The only individual who could possibly be penalized in such a situation would be the landlord, and only if the landlord "knowingly" permitted an unlicensed individual to be an occupant. §§ 26-79(C)(7), 26-119(C)(7). If the landlord were unaware of the occupancy or unlicensed status of the individual in question, he could not be penalized. *Id.* Therefore, the U.S. citizen tenants have suffered no injury-in-fact sufficient to confer standing upon them; nor have they demonstrated how any injury-in-fact might occur.

The only remaining tenant Plaintiff is Jose Arias, who is a citizen of Mexico. Arias Depo. 29 (AP74). Although Plaintiffs' counsel obstructed the City's efforts to precisely determine Arias's current immigration status, *see* Arias Depo. 26-29, 33 (AP71-74, AP75), it is evident that Arias is an alien lawfully present in the United States. First, Arias has possessed a Social Security Number for 7-10 years. Arias Depo. 14-16 (AP67-69). Under federal law, a Social Security Number can only be issued to an alien if the alien provides evidence that he is lawfully present in the United States. 20 C.F.R. § 422.107(e). Presumably Arias is complying with federal law and is not using a Social Security Number that was not issued to him.[3] Second, Arias has an I-485 Application to Register Permanent Residence or Adjust Status pending with U.S. Citizenship and Immigration Services (USCIS), which USCIS has initially reviewed. USCIS has informed Arias

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[2]In the same paragraph, the tenant Plaintiffs also allege vaguely that "their guests may be held criminally liable based on unclear standards for guests." Reyes Complaint 8. This, of course, is insufficient to establish standing, because such guests are hypothetical third parties who are not before this Court and who would be competent to raise their own challenge to the Ordinance if such an imagined scenario ever arose.

[3]It is a felony, punishable by imprisonment of up to five years, if a person "with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him…." 42 U.S.C. § 408(a)(7)(B).

that a final adjudication will be forthcoming in the near future. Arias Depo., Ex. 4 (AP76). Arias is seeking to adjust to lawful permanent resident status. Arias Depo. 22 (AP70). Once USCIS reviews an application and initially determines that approval is possible—as is the case with Arias—the federal government thereby asserts "control" over the alien and regards the alien as lawfully present. "[T]hat person would be under some kind of control, and he would be considered to be lawfully in the United States during the pendency of that application." Jacobs Depo. 95 (AP191). It is clear from the communication between USCIS and Arias that the federal government has acted upon his application and thereby assumed control over Arias. Arias Depo., Ex. 4 (AP76). He is lawfully present, and therefore he cannot lose a residential occupancy license at some future point under the Ordinance, if he ever acquires one.

Moreover, Arias has not alleged facts sufficient to establish that he has suffered, or is about to suffer, injury-in-fact sufficient to establish standing. "To seek injunctive relief… the threat must be actually and imminent, not conjectural or hypothetical." *Summers v. Earth Island Instit.*, 129 S. Ct. 1142, 1149 (2009). First, Arias has not alleged that he intends to move to another apartment in the future and establish a new lease or tenancy that commences after Ordinance 2952 becomes effective. His current lease term extends to June 30, 2009, after which it converts to a month-to-month lease. (AP77-78). Arias will not be required to apply for a residential occupancy license *unless and until he moves and establishes a new lease or tenancy that commences after Ordinance 2952 becomes effective.* Ordinance 2952, § 7. He has not alleged, either in the Reyes Complaint, or in his deposition, that he intends to make such a move in the future. Thus, he has failed to allege that he would ever take actions that would bring him within the ambit of the Ordinance's terms. This falls far short of the "firm intention" that the Supreme Court demands. *Summers*, 129 S. Ct. at 1150. Second, if that day ever comes and Arias moves

to a different apartment in Farmers Branch, as an alien lawfully present in the United States, Arias is entitled to possess a residential occupancy license under Ordinance 2952. If the federal government notifies the City that Arias is an alien lawfully present in the United States, no revocation of his residential occupancy license can occur. §§ 26-79(D)(2)-(3), 26-119(D)(2)-(3). Thus, he cannot possibly suffer any injury-in-fact sufficient to confer standing upon him.

C. The Landlord Plaintiffs Lack Constitutional Standing.

The remaining Plaintiffs are all landlords in the City of Farmers Branch. The landlord Plaintiffs do not allege any injury that constitutes an injury-in-fact sufficient to confer standing upon them. Instead, they simply assert that "the City has thrust upon landlords the burden of notifying renters of the City's license scheme." Villas Complaint 17. This minimal burden of compliance with an ordinance is insufficient to establish standing.

The cost of compliance with an ordinance is a generalized burden that is insufficient to constitute the "particularized" injury necessary to satisfy the injury-in-fact requirement. *Lujan*, 504 U.S. at 560. As the Eastern District of Missouri held in a case strikingly similar to the case at bar, "Plaintiffs' assertion that compliance with the Ordinance places a burden upon them sufficient to constitute an injury is inadequate. Firstly, the Court notes that compliance with any statute, law or ordinance, places some cost compliance upon the subject of the law. Secondly, standing requires that there be a causal connection between the injury and the conduct of which a complaint is made." *Gray v. Valley Park*, No. 4:07CV00881 ERW, 2008 U.S. Dist. LEXIS 7238, **66-67 (E.D. Mo. 2008), *appeal docketed*, No. 08-1681 (8th Cir.). Here, there is no causal connection between the notice requirement and any of Plaintiffs' claims.

Likewise, the District of Connecticut has similarly found no injury-in-fact in the burden of compliance with Section 8 rental housing requirements. "The court rejects Plaintiffs' contention that anxiety and inconvenience constitute injury in fact for purposes of Article III standing

in the context of a case involving section 8 housing subsidies." *Baker v. Property Investors of Connecticut*, 338 F. Supp. 2d 321, 327 (D. Conn. 2004). Absent the actual removal of a tenant from his housing or the denial of a subsidy, injury-in-fact did not exist. *Id.*

The limited inconvenience of complying with a notice requirement is simply not sufficient to establish injury-in-fact. "[L]imited inconvenience does not constitute a concrete injury in fact. There is no legally protected interest in freedom from administrative inconvenience. This is an unfortunate reality of daily life." *Kushner v. Illinois State Toll Highway Authority*, 575 F. Supp. 2d 919, 923 (N.D. Ill. 2008). "[A]t most the Town's conduct resulted in minor inconveniences to the [plaintiff] insufficient to satisfy the injury-in-fact requirement for Article III standing. *See Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ('There is, of course, a de minimis level of imposition with which the Constitution is not concerned.')." *New Creation Fellowship of Buffalo v. Cheektowaga*, 164 Fed. Appx. 5, 7, 2005 WL 3309672, *1 (2nd Cir. 2005). This is particularly evident in light of the fact that the Villas Plaintiffs already provide their tenants with extensive forms and paperwork, regardless of the City's ordinances. (*See* AP31-62).

Plaintiff Reyes separately asserts that he relies upon the income from the leasing of his one rental property, presumably implying that the implementation of Ordinance 2952 will somehow jeopardize his ability to find a new tenant if ever his property becomes vacant. Reyes Complaint 4, *see* Reyes Depo. 6-8 (AP337-39). However, he does not specifically allege or explain how the Ordinance might jeopardize his ability to rent to tenants in the future. See Reyes Complaint 4. Indeed, Mr. Reyes's current tenants' two-year lease runs until September or October of 2009. His tenants have indicated that they intend to renew their lease at that time. Reyes Depo. 9-10 (AP340-41). Therefore it is apparent that Reyes will not have to place his rental property on the market again until September or October of 2011, at the earliest. To base his standing

upon a future transaction with unknown third parties nearly three years from now is highly speculative, and certainly does not meet the *Lujan* requirement that an injury must be "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations omitted). Speculation cannot establish an Article III injury for standing purposes. *Lyons v. City of Los Angeles*, 461 U.S. 95, 105-106 (1983). "The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements," and may not rely on speculation and conjecture to do so. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). "A threatened injury satisfies the injury in fact requirement so long as that threat is real, rather than speculative." *Comsat v. FCC*, 250 F.3d 931, 936 (5th Cir. 2001).

There is a second reason that Mr. Reyes fails to meet the injury-in-fact requirement of standing. To possess standing, a plaintiff must prove a "legally cognizable injury-in-fact." *AFGE v. Styles*, 123 Fed. Appx. 51, 52 (3rd Cir. 2004); *Lujan*, 504 U.S. at 563. Mr. Reyes's hypothetical future "injury" would presumably be the loss of rental income from illegal alien tenants who might otherwise seek to rent from him. Such an injury is not legally cognizable. The income that Mr. Reyes might theoretically lose is income that *depends upon a continuing violation of federal immigration laws*. An illegal alien cannot occupy a rental unit in Farmers Branch without being unlawfully present in the United States. Just as a drug dealer has no legally cognizable interest in income derived from violations of federal drug laws, a landlord has no legally cognizable interest in income derived from violations of federal immigration laws. "[W]here the contract grows immediately out of, and is connected with, an illegal or immoral act, a Court of justice will not lend its aid to enforce it." *Armstrong v. Toler*, 24 U.S. 258, 278 (1826).

Mr. Reyes also fails to meet the causation requirement of standing. For standing purposes, injury-in-fact cannot be dependent upon the independent actions of a third party not be-

fore the court. *Lujan*, 504 U.S. at 560-61. There must be "a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court." *Westfall v. Miller*, 77 F.3d 868, 871 (5th Cir. 1996); *Okpalobi v. Foster*, 190 F.3d 337, 362 (5th Cir. 1999). In Mr. Reyes's case, the injury of being less likely to lease his rental property in the future is "manifestly the product of the independent action of a third party." *Duquesne Light Co. v. EPA*, 166 F.3d 609, 613 (3rd Cir. 1999). This conjectural injury is the result of the decision of hypothetical tenants not to rent apartments from Mr. Reyes on the hypothetical basis that the Ordinance somehow discourages their tenancy. However, these hypothetical tenants are third parties not before the Court.

Finally, it must be remembered that none of the landlord Plaintiffs even alleges that he has ever leased to an alien who is not lawfully present in the United States, or that he is likely to do so in the future. Thus, there is no allegation that any landlord Plaintiff in this litigation would ever be subject to the enforcement proceedings of Ordinance 2952. The District of Arizona rejected the standing of similarly-situated business owners in a lawsuit challenging Arizona's law against illegal immigration. "There is no threat of enforcement proceedings against the Business-Group Plaintiffs by the Defendants or anyone else. The Business-Group Plaintiffs do not knowingly employ or plan to employ any unauthorized alien…. Plaintiffs have presented no evidence of a specific threat directed at them…. They therefore lack standing on this basis." *Ariz. Contractors Ass'n v. Candelaria*, 526 F. Supp. 2d 968, 978 (D. Ariz. 2007) (hereinafter *Ariz. Contractors I*). Similarly, the landlord Plaintiffs lack constitutional standing to bring any preemption, due process, §Section 1981, HUD, or Texas Property Code claim that is based upon the

enforcement of Ordinance 2952 against one of their tenants.[4]

D. The Landlord Plaintiffs Lack Prudential Standing to Bring an INA Preemption Challenge.

Finally, the landlord Plaintiffs lack prudential standing to challenge the Ordinance as being inconsistent with the Immigration and Nationality Act (INA). None of the Plaintiffs is within the zone of interest protected by federal immigration law – which is, by definition, designed to exclude certain aliens and punish those who employ or harbor such aliens unlawfully. Justice O'Connor stated this explicitly with respect to the landlords of illegal aliens:

> The fact that the INS regulation may affect the way an organization allocates its resources – or, for that matter, the way an employer who currently employs illegal aliens *or a landlord who currently rents to illegal aliens allocates its resources*— does not give standing to an entity which is not within the zone of interests the statute meant to protect.

INS v. Legalization Assistance Project of the L.A. County Fed'n of Labor, 510 U.S. 1301 (1993) (opinion by O'Connor, J.). Justice O'Connor stated that such entities outside the zone of interests protected by the INA do not have standing to challenge administrative regulations as being inconsistent with the Act. Plainly, landlords who harbor illegal aliens are not entities that the INA was meant to protect. *Id.* Therefore, regardless of their standing to raise other claims, they possess no standing to raise a preemption challenge that is based on the INA. *Id.*

II. THE ORDINANCE DOES NOT VIOLATE THE SUPREMACY CLAUSE.

A. The Presumption Against Preemption.

"In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the

[4]Nor do the landlord Plaintiffs possess standing to raise the Equal Protection, FHA, or Privileges and Immunities claims – all of which are framed from a tenant's perspective. Therefore, the landlord Plaintiffs lack standing to raise any of the claims in this matter.

historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (*quoting Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). As noted above, the presumption against preemption "applies with particular force" in cases like this one, in which the challenged law is in "a field traditionally occupied by the states" – the regulation of residential rental units. *Altria*, 129 S. Ct. at 543.

The Eastern District of Missouri recently sustained a local ordinance dealing with illegal immigration against a nearly-identical preemption challenge. That Court applied the presumption against preemption and concluded that the presumption could only be set aside if the local ordinance actually attempted to regulate "'who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.'" *Gray* at **24-25 (*quoting De Canas v. Bica*, 424 U.S. 351, 355 (1976)). Because the ordinance did not do so, it could not be regarded as a regulation of immigration. Therefore, the Eastern District of Missouri concluded, "the Ordinance is a regulation on business licenses, an area historically occupied by the states. The rule articulated by the Supreme Court in *Medtronic, Inc.*, is applicable, and the Court will apply a presumption against preemption." *Id.* at *25. The same analysis applies here. The regulation of residential rental units is an area historically occupied by the states, and the Ordinance in no way attempts to regulate who should or should not be admitted into the country.

The presumption against preemption cannot be overcome absent clear and manifest congressional intent to preempt. "[T]he historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *Altria*, 129 S. Ct. at 543 (internal citations omitted). "[W]e will not infer pre-emption of the States' historic police powers absent a clear statement of intent by Congress." *Gade v. National Solid*

Wastes Management Ass'n, 505 U.S. 88, 111-12 (1992) (Kennedy, J., concurring) (*citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); and *English v. General Electric Co.*, 496 U.S. 72, 79 (1990)). In the controlling immigration preemption case of *De Canas*, the Supreme Court applied this high standard:

> [F]ederal regulation … should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has *unmistakably* so ordained.

424 U.S. at 356 (*quoting Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)) (emphasis added). Plaintiffs have not offered *any* evidence of congressional intent to preempt ordinances like Ordinance 2952, much less unmistakable evidence thereof.

B. The *De Canas* Test for Implied Preemption in Immigration.

There are two broad categories of preemption: express preemption and implied preemption. *Gade*, 505 U.S. at 98 (plurality opinion). Express preemption occurs when federal statute expressly bars a state or local government from passing a particular law. Plaintiffs do not claim express preemption. Rather they raise several claims based on implied preemption.

Implied preemption in the immigration context is governed by the controlling Supreme Court precedent of *De Canas*. In that case, the Court laid out a three-part test for determining whether a state or local regulation affecting immigration is displaced through implied preemption. A state regulation is only preempted (1) if it falls into the narrow category of a "regulation of immigration," 424 U.S. at 355, (2) if Congress expressed "the clear and manifest purpose" of completely occupying the field and displacing all state activity, *id.* at 357, or (3) if the state regulation conflicts with federal laws, such that it "stands as an obstacle to the accomplishment … of the full purposes and objectives of Congress." *Id.* at 363. Otherwise, a state or local government is free to enact a law that discourages illegal immigration or "deals with aliens," without being

preempted. *Id*. at 355. Plaintiffs claim, with no applicable case support, that the Ordinance fails all three *De Canas* tests. On the contrary, it is clear that *De Canas* fully supports the Ordinance.

C. The Ordinance Is Not a "Regulation of Immigration."

Plaintiffs allege that the Ordinance "intrudes on the federal government's exclusive power to regulate immigration" by determining "whether an alien should or should not be admitted in the United States and the conditions under which the alien can remain." Villas Complaint 32. Tellingly, Plaintiffs ignore the Supreme Court's definition in *De Canas* of what a preempted "regulation of immigration" actually is: "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas*, 424 U.S. at 355.

The Ordinance in no way determines who should or should not be admitted into the country. On the contrary, the Ordinance defers to federal categories of immigration status and the federal government's determination of any particular alien's immigration status. City officials "shall not attempt to make an independent determination of any occupant's lawful or unlawful presence in the United States." §§ 26-79(D)(3), 26-119(D)(3). Unlike its predecessor ordinance, Ordinance 2952 defers entirely to federal immigration law in any determination of an alien's immigration status: "the building inspector shall, pursuant to Title 8, United States Code, Section 1373(c), verify with the federal government whether the occupant is an alien lawfully present in the United States." Ordinance 2952, §§ 26-79(D)(1), 26-119(D)(1).

Nor does the Ordinance determine "the conditions under which a legal entrant may remain" in the United States. The Ordinance does not purport to establish any new condition that an alien must satisfy to be considered an alien lawfully present in the United States. That is entirely a question of federal law, defined under 8 U.S.C. §§ 1101, *et seq.* The Ordinance *does* es-

tablish conditions for any person (citizen or alien) occupying a rental unit in the City of Farmers Branch. But the Ordinance *does not* establish conditions for a legal entrant to remain within the borders of United States. As the Supreme Court has made clear, a state or municipality is free to enact legislation discouraging illegal immigration into its jurisdiction without being preempted:

> In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, *it does not thereby become a constitutionally proscribed regulation of immigration*….

De Canas, 424 U.S. at 355-56 (emphasis added). Plaintiffs ignore this Supreme Court holding.

1. The Ordinance Uses the Exact Terms and Classifications of Federal Immigration Law.

In their TRO brief, Plaintiffs declare that "Ordinance 2952 does not define, and perhaps cannot define, 'lawfully present.'" Pl. Br. Supp. TRO 8. What Plaintiffs fail to recognize is that *the Ordinance relies entirely upon the definitions and standards of federal immigration law*. As the Supreme Court held in *De Canas*, a city or state need only "adopt[] federal standards in imposing … sanctions" on those who violate federal immigration laws. *Id*. at 355. The Ordinance does exactly that. It only recognizes the definitions provided by federal immigration law, 8 U.S.C. §§ 1101, *et seq.*,, §§ 26-79(A)(1), 26-119(A)(1), and relies on the federal government's determination of each alien's status, pursuant to 8 U.S.C. § 1373(c). No City official is permitted to attempt an independent determination of status: City officials "shall not attempt to make an independent determination of any occupant's lawful or unlawful presence in the United States." §§ 26-79(D)(3), 26-119(D)(3). In any case challenging the application of the Ordinance with respect to a particular alien, federal law, not local law, determines the alien's immigration status: "In a suit for judicial review in which the question of whether the occupant is lawfully present in the United States is to be decided, that question shall be determined under federal law.

In answering the question, the court shall be bound by any conclusive determination of immigration status by the federal government." §§ 26-79(E)(4), 26-119(E)(4).

Plaintiffs then object to the Ordinance's use of the term "lawfully present" itself, asserting that this term is "not based on any identified federal statute." Pl. Br. Supp. TRO 8. This is a strange assertion, because "lawfully present" is exactly the terminology used throughout federal immigration law. *See, e.g.*, 8 U.S.C. § 1229a(c)(2) ("the alien has the burden of establishing ... by clear and convincing evidence, that the alien is lawfully present in the United States"); 8 U.S.C. § 1357(g)(10) (2006) ("for any officer or employee of a State or political subdivision of a State ... (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."); 8 U.S.C. § 1182(a)(9)(B)(i)(II) ("Any alien … who … has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible"). The Ordinance relies upon the express terms of federal law and relies solely upon determinations of immigration status by the federal government. Moreover, Department of Justice regulations do define the term:

> **Alien illegally or unlawfully in the United States**. Aliens who are unlawfully in the United States are not in valid immigrant, nonimmigrant or parole status. The term includes any alien
> (a) Who unlawfully entered the United States without inspection and authorization by an immigration officer and who has not been paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act (INA);
> (b) Who is a nonimmigrant and whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted;
> (c) Paroled under INA section 212(d)(5) whose authorized period of parole has expired or whose parole status has been terminated; or
> (d) Under an order of deportation, exclusion, or removal, or under an order to depart the United States voluntarily, whether or not he or she has left the United States.

27 C.F.R. § 478.11.

However, it must be remembered that the exact definitions of these terms matter not, for the purpose of adjudicating this case. The Ordinance does not entail the determination of any alien's immigration status by any City official. Indeed, it expressly prohibits City officials from attempting to independently determine any alien's immigration status. §§ 26-79(D)(3), 26-119(D)(3). The federal government is the entity that applies the definition to any alien in question. The City merely requests an ascertainment of an alien's status, as expressly contemplated by 8 U.S.C. § 1373(c), and relies upon whatever answer the federal government provides. Plaintiffs' strained doubts about the meaning of the term "lawfully present" are irrelevant to this case.

2. The Dallas District Office of ICE Directly Verifies the Immigration Status of Aliens in Response to Local Inquiries.

In 1996, Congress placed the executive branch of the federal government under a statutory *obligation* to respond to all local inquiries about any alien's status:

> **Obligation to respond to inquiries**
>
> The Immigration and Naturalization Service *shall respond* to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency *for any purpose authorized by law*, by providing the requested verification or status information.

8 U.S.C. § 1373(c) (emphasis added). This federal statute provides the foundation for Ordinance 2952. Congress wanted to assure cities and states that if they enacted programs to discourage illegal immigration and inquire about any alien's status, the federal government *must* respond. Where a city or state relies upon the federal government's determination of an alien's immigration status, no preemption exists. As the District of Arizona specifically held in a case involving a nearly-identical preemption claim: "Importantly, the State defers to the federal government's response to a lawful request under 8 U.S.C. § 1373(c) to make this determination. … *This is harmonization with federal law, not conflict*." *Ariz. Contractors Ass'n v. Candelaria*, 2007 U.S.

Dist. LEXIS 96194, *38 (D. Ariz. 2007) (hereinafter *Ariz. Contractors II*) (emphasis added), *aff'd sub nom. CPLC v. Napolitano*, 544 F.3d 976 (9th Cir. 2008).

Ordinance 2952 does not specify what system or mechanism the federal government must use in responding to the City's status verification inquiries. Indeed, the Ordinance is completely silent on the point, to accommodate whatever mechanism the Department of Homeland Security (DHS) directs the City to use. Greer Depo. 227-28 (AP121-22). The City simply requests a verification of immigration status pursuant to 8 U.S.C. § 1373(c). §§ 26-79(D)(1), 26-119(D)(1). There are at least four possible mechanisms: (1) direct inquiries with the Dallas District Office of ICE; (2) internet inquiries through the Systematic Alien Verification for Entitlements (SAVE) Program maintained by U.S. Citizenship and Immigration Services (USCIS); (3) telephonic inquiries to the Law Enforcement Support Center (LESC) maintained by ICE; or (4) inquiries through the ICE-trained and supervised 287(g) task force officer in the Farmers Branch Police Department. *See* Fuller Depo. 98-102 (AP85-89), Ex. 16 (AP96-104).

Because of the long-standing practices of the Dallas District Office of ICE (formerly INS), it is likely that DHS would direct Farmers Branch to simply continue using that verification mechanism. The Dallas District Office began responding to local and county governmental inquiries regarding the immigration status of particular aliens long before it had a statutory obligation to do so. As early as 1991, the Dallas District Office was already responding to inquiries from city and county governments seeking to determine whether individual aliens were lawfully present in the United States or not. Jacobs Decl. ¶¶ 4, 9 (AP26-27). By the year 2000, the Dallas District Office was responding to "thousands" of such requests each year. *Id.* ¶ 10 (AP27-28). Those inquiries have concerned aliens seeking unemployment benefits, aliens in the custody of local jails, aliens seeking to vote, and aliens in other contexts. *Id.* As Neil Jacobs, the former

Assistant District Director for Investigations in the Dallas District Office stated in his sworn declaration, this longstanding means of verification could easily accommodate Ordinance 2952:

> If and when the implementation of Famers Branch Ordinance 2952 occurs, the Dallas District Office will be capable of verifying in a timely manner whether an alien is lawfully present in the United States or is not lawfully present in the United States and provide such information to the City of Farmers Branch for every alien tenant residing in Farmers Branch whose tenancy commences after Ordinance 2952 becomes effective.

Id. ¶ 16 (AP29). The information collected by the City in the issuance of residential occupancy licenses would be more than adequate for such verification to occur. *See id.* ¶¶ 11-15 (AP28-29).

Importantly, the Dallas District Office has been able to provide a conclusive, official answer to the question of whether "an alien in question is lawfully present in the United States or is not lawfully present in the United States." *Id.* ¶ 12 (AP28). The Dallas District Office has had no difficulty applying this terminology that is used throughout federal immigration law. It is also important to note that during his nine years of supervising the provision of such responses to state and county governments, former Assistant District Director Jacobs was "not aware of any instance in which the Dallas District Office was unable to ascertain whether an alien was lawfully present in the United States or was not lawfully present in the United States." *Id.* ¶ 14 (AP28). Nor has the Dallas District Office ever refused to provide such information to a city or county in the Dallas metropolitan area. *Id.* In response to inquiries made by Farmers Branch jail officers, the City has already received "hundreds" of determinations of alien status from the Dallas District Office. Greer Depo. II, 147, 210-11 (AP129-31); Greer Depo. 224-25 (AP118-19). The City has never received an inconclusive response from the Dallas District Office. Greer Depo. 226-27 (AP120-21). Although the Dallas District Office briefly scaled back its interaction with local entities during the two-year tenure of Anne Pickett as District Director in 2001-03, such verifications resumed after her departure. This is demonstrated by the fact that *current ICE*

personnel have specifically urged City Manager Gary Greer to use the Dallas District Office for alien status inquiries when implementing Ordinance 2952. Greer Depo. 224 (AP118). Thus, when the time comes to implement Ordinance 2952, it is likely that DHS will direct the City to continue using the mechanism of direct communication with ICE.

3. Alternatively, the SAVE Program May be Used for the Same Purpose.

The use of direct inquiries to the Dallas District Office of ICE is only one of several options. Another alternative is the internet-based SAVE Program. In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996). In so doing, Congress ***required*** states and localities to verify with the federal government the immigration status of aliens seeking public benefits, including licenses. 8 U.S.C. § 1621(c). Congress mandated that an "unqualified" alien who is unlawfully present in the United States "is not eligible for any State or local public benefits." 8 U.S.C. § 1621(a). States and localities were not only encouraged to determine the status of aliens seeking benefits such as licenses, they were ***required*** to do so. In order to implement these provisions, the federal government expanded the SAVE system, which enables state and local government agencies to verify electronically whether an alien is lawfully present in the United States. According to DHS, as of April 1, 2007, there were 205 participating local, state, and federal government agencies across the country using the SAVE system to verify aliens' immigration statuses; and that number was increasing steadily.[5] As DHS has stated, "Government agencies use SAVE information to help determine whether a non-citizen is eligible *for any public*

[5]Privacy Impact Assessment USCIS, Verification Information System (VIS), April 1, 2007 (available at www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_vis.pdf), at 18.

benefit, license, or credential based on citizenship and immigration status."[6] Note that SAVE may be used to assess immigration status for "any … license."

Obscuring the reality that SAVE exists precisely to facilitate local ordinances and state laws like the Ordinance at issue in this case, Plaintiffs asserted in their Motion for a TRO that a SAVE verification issued by the federal government does not establish whether an alien is lawfully present in the United States. Pl. Br. Supp. TRO 10. In so doing, Plaintiffs ignored a notice published by the Department of Homeland Security in the Federal Register on March 9, 2007. 72 Fed. Reg. 10820. This notice makes clear that a SAVE verification issued to a state serves to confirm whether an alien is lawfully present in the United States. *Id*. at 10832 (SAVE "check" serves "to confirm lawful status"); *id*. at 10833 ("[T]wenty State DMVs are currently querying SAVE to verify lawful status"); *id*. at 10840 ("DHS also proposes that States conduct a lawful status check through SAVE to verify that the individual has lawful status in the United States"). As the 2007 Federal Register notice makes clear, a SAVE verification "confirm[s] lawful status."

Plaintiffs' fanciful notion that SAVE cannot be used to verify lawful presence in the United States is also contradicted by the fact that 32 states use SAVE to verify the lawful presence of aliens and avoid issuing drivers licenses to aliens not lawfully present in the United States, in order comply with the 2005 REAL ID Act, Pub. L. 109-13, 119 Stat. 231, 302 (49 U.S.C. § 30301).[7] Roessler Depo. 125 (AP388). According to DHS's 2007 Federal Register Statement, "In accordance with the [REAL ID] Act, this proposal would require the States to *verify …lawful status in the United States* …using the SAVE system maintained by U.S. Citizen-

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[6] *Id*. at 2.

[7] The prohibition against issuing drivers licenses to illegal aliens is found in Section 202(c)(2)(B) of the REAL ID Act. Drivers licenses issued by states that do not meet this requirement do not qualify for federal recognition, as described in Section 202(a)(1).

ship and Immigration Services (USCIS). Under section 202(c)(3)(C) of the Act, States have already been required to enter into memoranda of understanding with DHS by September 11, 2005, to use the electronic and automated system to *verify the legal status* of a non-U.S. citizen applying for a REAL ID driver's license or identification card." 72 Fed. Reg. at 10832 (emphasis added).

To illustrate the fallacy of Plaintiffs' argument, take the example of Missouri:

> The department of revenue shall not issue any driver's license to an illegal alien nor to any person who cannot prove his or her lawful presence pursuant to the provisions of this chapter and the regulations promulgated thereunder. …As used in this section, the term "illegal alien" shall mean *an alien who is not lawfully present in the United States*, according to the terms of 8 U.S.C. Section 1101, et seq.

Mo. Rev. Stat. § 302.063 (emphasis added). Missouri law uses precisely the same words that Farmers Branch uses to describe the aliens who are not entitled to the license in question. *See* §§ 26-79(D)(4), 26-119(D)(4). How does the federal government inform Missouri whether or not an applicant is "an alien who is not lawfully present in the United States?" Through the SAVE program. A copy of the SAVE Memorandum of Understanding (MOU) between the Missouri Department of Revenue and USCIS appears in the appendix. (AP437-40). It is sheer fantasy for Plaintiffs to assert that SAVE is unavailable to state and local governmental entities seeking to determine whether a license applicant is "an alien who is not lawfully present in the United States." Missouri and 31 other states have already done so.

As the deposition of John Roessler, chief of the SAVE Program at USCIS, made clear, no state or local government seeking "to determine whether an alien is lawfully present in the United States or not" has ever been denied access to the SAVE Program. Roessler Dep. 146 (AP409). The SAVE program informs the state or local government entity what an alien's "immigration status" is, including whether or not an alien possesses any lawful status. When an

alien's immigration status is that he is unlawfully present, SAVE is able to "provide the status back" to the state or local government. Roessler Depo. 114-20 (AP377-83), 127-32 (AP390-95).

Finally, it must me noted that other federal courts have long held that a state ordinance that denies a benefit to an illegal alien using SAVE is *not preempted*. "The benefits denial provisions of Proposition 187 may therefore by implemented without impermissibly regulating immigration if state agencies, in verifying for services and benefits, rely on federal determinations made by the INS and accessible through SAVE." *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 2d 755, 770 (C.D. Cal. 1995).

4. Plaintiffs' Theory that an Alien can be Both Lawfully Present and not Lawfully Present has no Basis in Law.

In support of their claim that the Ordinance somehow constitutes a preempted regulation of immigration, Plaintiffs argued that an alien may be simultaneously lawfully present and unlawfully present in the United States, and therefore they argued the Ordinance's reliance on a federal determination of status (or indeed *any* determination of status) is impossible. Pl. Br. Supp. TRO 7-8. However, no court has ever issued such a holding.

More importantly, *none of the Plaintiffs is actually in the position imagined by Plaintiffs' counsel*. Plaintiffs are asking this Court to "speculate about 'hypothetical' or 'imaginary' cases" in a facial challenge, in violation of *Washington State Grange*, 128 S. Ct. at 1190. There is no such alien of ambiguous status before the Court. Their existence is purely imaginary. To render a decision based upon the circumstances of such a hypothetical (and nonexistent) alien would violate the *Salerno* standard. To defeat this facial constitutional challenge, the City need only establish that it is possible to implement the Ordinance in a constitutional fashion under some conceivable set of circumstances. *Id.* As the Ninth Circuit observed in a similar immigration preemption case, "[A] speculative, hypothetical possibility does not provide an adequate basis to

sustain a facial challenge." *CPLC*, 544 F.3d at 985.

Importantly, the Fifth Circuit has already rejected Plaintiffs' argument in *United States v. Igbatayo*, 764 F.2d 1039 (5th Cir. 1985), finding no merit in the theory that an illegal alien's status could be ambiguous. Specifically, the Court rejected the notion that an alien could be "deportable" and yet still be lawfully present in the United States:

> The only issue of any note which Igbatayo raises in this appeal is whether he was an "illegal alien" prior to the date that he was actually ordered deported. Igbatayo argues that the language of 8 U.S.C. § 1251(a)(9) …merely renders him "deportable," not "illegal." This argument is not convincing. Although the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., does not define the term "illegal alien," *it is clear that an alien who is in the United States without authorization is in the country illegally*.

Id. at 1040 (emphasis added).

Moreover, if Plaintiffs' theory were correct, then much of federal law would be incomprehensible. Consider 8 U.S.C. § 1373(c), which states: "The Immigration and Naturalization Service *shall respond* to an inquiry by a Federal, State, or local government agency, seeking *to verify or ascertain the citizenship or immigration status* of any individual …." (emphasis added). The Ordinance rests upon this clear statement in federal law that the City may ask the federal government for a determination of any alien's immigration status. Congress expected states and localities to be making inquiries and expected that the INS (or the Department of Homeland Security) would be able to precisely "ascertain" any alien's status. Indeed Congress imposed a statutory obligation to provide an answer. If aliens could simultaneously be lawfully present and not lawfully present, this provision of federal law would make no sense.

Similarly, 8 U.S.C. § 1621(a) requires states and localities to deny "public benefits" (including licenses) to aliens who are "not qualified." A "qualified alien" is defined essentially as any alien who is lawfully present in the United States. 8 U.S.C. § 1641(b). Section 1621(a) would also be incomprehensible if a definitive determination of an alien's legal status could not

be rendered by DHS. Indeed Congress expressly created the SAVE Program so that states and localities could ascertain the legal status of aliens in their jurisdiction. If Plaintiffs' strained theory were correct, then neither 8 U.S.C. § 1373(c) nor 8 U.S.C. § 1621(a) would make any sense. Because Plaintiffs theory can be squared with neither Fifth Circuit case law nor with terms of federal law, summary judgment is appropriate.

5. An Alien Becomes Unlawfully Present the Moment He Commits the Relevant Violation of Immigration Law.

Plaintiffs apparently view this case as an opportunity to resurrect a variety of failed immigration law theories that have been soundly rejected by Article III courts across the country. As revealed in their TRO brief, Plaintiffs' preemption challenge hinges upon their claim that an illegal alien does not become unlawfully present *until an immigration judge says* so in a removal proceeding. Pl. Br. Supp. TRO 11-12.

This theory has already been rejected by the Fifth Circuit. Regardless of whether an immigration judge has adjudicated the case or not, "an alien who is in the United States without authorization is in the country illegally." *Igbatayo*, 764 F.2d at 1040. No deportation decision by an immigration judge need occur before the alien can be regarded as unlawfully present in the United States. *Id.* Every other Circuit to address the issue has reached the same holding. In *United States v. Atandi*, 376 F.3d 1186 (10th Cir. 2004), the Tenth Circuit emphatically rejected Plaintiffs' theory, holding that "an alien who is only permitted to remain in the United States for the duration of his or her status … becomes 'illegally or unlawfully in the United States' … *upon commission* of a status violation." *Id.* at 1188 (emphasis added). The Ninth Circuit has reached the same conclusion, *United States v. Bravo-Muzquiz*, 412 F.3d 1052, 1055 (9th Cir. 2005), as has the Eighth Circuit, *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993). The District of Arizona specifically rejected Plaintiffs' argument in the context of a preemption chal-

lenge: "Plaintiffs are mistaken that the only way to verify whether an alien is unauthorized is through a federal deportation hearing. Rather, the federal government allows the states to verify a person's immigration status in relation to work authorization using § 1373." *Ariz. Contractors Ass'n v. Candelaria*, 534 F. Supp. 2d 1036, 1052 (2008) (hereinafter *Ariz. Contractors III*), *aff'd sub nom. CPLC v. Napolitano*, 544 F.3d 976 (9th Cir. 2008). It is hardly surprising that every Circuit to consider the issue has rejected Plaintiffs' theory. Their theory is as nonsensical as the claim that "a driver going 100 miles per hour is not speeding until he is actually ticketed by a police officer." Such inanities are not countenanced in the Fifth Circuit.

D. <u>The Ordinance is Not Field-Preempted.</u>

Plaintiffs claim that the Ordinance is field preempted because it "attempts to regulate in a field regulated by the federal government." Pl. Br. Supp. TRO 15. In making this claim, Plaintiffs once again ignore the controlling Supreme Court precedent of *De Canas*. In *De Canas*, the Court emphatically rejected the argument that the Immigration and Nationality Act (INA) constituted field preemption and displaced state and local laws relating to aliens.

In *De Canas*, the Supreme Court ***sustained*** against a preemption challenge a California law that imposed penalties on any employer who "knowingly employ[ed] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." 424 U.S. at 352. The *De Canas* Court held that states and localities possessed wide leeway to "deal with aliens" without being preempted. *Id.* at 355. Importantly, the *De Canas* Court considered and ***expressly rejected*** the possibility that the regulation of immigration by the federal government might be so comprehensive that it leaves no room for state action. *Field preemption had not occurred*:

> 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 that conclusion …. Respondents have not

> made that demonstration. They fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.

De Canas, 424 U.S. at 357-58 (internal citations omitted). The Supreme Court's holding that field preemption has not occurred was unequivocal. In September 2008, the Ninth Circuit reaffirmed "the continuing vitality of *De Canas.*" *CPLC*, 544 F.3d 976. See also *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 240-41 (2nd Cir. 2006).

The California Supreme Court was equally emphatic in 2009:

> [T]hose federal circuits to have addressed the question (the Fifth, Ninth, and Tenth) have unanimously concluded *Congress has not occupied the field* and pre-empted state assistance in the enforcement of federal criminal immigration law. …These courts recognize that Congress has established a regime of cooperative federalism, in which local, state, and federal governments may work together to ensure the achievement of federal criminal immigration policy. *This is the antithesis of preemption.*

In re Jose C. 45 Cal. 4th at 553 (emphasis added).

E. <u>The Ordinance Is Not Conflict-Preempted.</u>

In *De Canas*, the Supreme Court made it perfectly clear that state and local governments have wide latitude to enact regulations affecting immigration without being displaced through implied conflict preemption: "[A]n independent review does not reveal any specific indication either in the wording of the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." 424 U.S. at 358 (internal citations omitted). States are free to enact statutes affecting immigration as long as they are harmonious with federal law and they do not defeat congressional objectives. *Id.* Conflict preemption only occurs if the state or local regulation "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA." *Id.* at 363 (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67

(1941)); *Planned Parenthood v. Sanchez*, 403 F.3d 324, 336 (5th Cir. 2005). Six years later, in *Plyler v. Doe*, the Supreme Court reiterated its holding in *De Canas* that states may take steps to discourage illegal immigration. "As we recognized in *De Canas v. Bica*, 424 U.S. 351 (1976), the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." 457 U.S. at 225. The Supreme Court has never departed from this holding.

1. Congress Has Encouraged Local Efforts to Reduce Illegal Immigration.

The central question in conflict preemption is whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. Amer. Honda Motor Co., Inc.*, 529 U.S. 861, 899 (2000). Congress has consistently encouraged states and municipalities to assist in restoring the rule of law to immigration. As the Tenth Circuit has held, "in the months following the enactment of § 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999).

One of the most salient statutes that Congress passed in order to facilitate local ordinances to discourage illegal immigration was 8 U.S.C. § 1373 – the statute that lies at the foundation of Ordinance 2952. By enacting this statute, Congress created a federal statutory structure to facilitate local programs that would discourage illegal immigration. As explained above, 8 U.S.C. § 1373(c) placed the executive branch of the federal government under a statutory *obligation* to respond to all local inquiries about any alien's status. In the same section, Congress also recognized the interest of cities in "[s]ending" and "[m]aintaining" such "information regarding the immigration status, lawful or unlawful, of any individual." 8 U.S.C. §§ 1373(b)(1)-(2). The

fact that Congress wanted municipalities to be able to *send* and *maintain* information – not just receive it – about an alien's legal status is definitive proof that Congress expected state and local governments to implement programs under which they would make inquiries about the legal status of aliens. In addition, the Senate Report accompanying this legislation reiterated Congress's objective of encouraging states to make their own efforts to assist in immigration enforcement:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the *achieving of the purposes and objectives of the Immigration and Nationality Act.*

S. Rep. No. 104-249, 104th Cong., 2d Sess., at 19-20 (1996) (emphasis added). The Ordinance was built around 8 U.S.C. § 1373 and the cooperative effort that it envisions. Indeed the Ordinance makes express reference to this federal statute. *See, e.g.*, §§ 26-79(B)(7), 26-119(B)(7). Finally, it must be remembered that to prevail on a conflict preemption claim, Plaintiffs must prove that Congress "unmistakably" intended to preempt the ordinance at issue. *De Canas*, 424 S. Ct. at 356. Plaintiffs cannot point to a single federal statute suggesting such preemptive intent, much less one that that does so in "unmistakable" terms.

2. DHS Has Encouraged Cities and States to Enact Such Laws.

Not only has Congress made it clear that it seeks to maximize local efforts to discourage illegal immigration, so too has the executive branch. In February 2008, after specifically praising Arizona's state law that penalizes the employers of unauthorized aliens, Secretary of Homeland Security Michael Chertoff made the following public statement:

> [W]hat we're seeing from a variety of metrics is that when a location becomes inhospitable to people who are illegal working, the people who are working illegally leave. And when we target criminal aliens we get them out of the country. So this is not an easy task to undo a problem that's arisen over 30 years, but I think we've really been making some substantial progress *with the help of state*

and local governments.[8]

This DHS statement discredits Plaintiffs' implausible theory that, by discouraging illegal immigration within a local jurisdiction, the Ordinance somehow conflicts with federal objectives. On the contrary, federal objectives are advanced through "the help of state and local governments." Ordinances that make a jurisdiction "inhospitable" to illegal aliens encourage illegal aliens to self-deport, thereby enabling the federal government to make "substantial progress." Plaintiffs have not produced any contrary federal policy statement. Their claim of conflict preemption is completely unsupported.

3. Under the Doctrine of Concurrent Enforcement, the Ordinance Is Not Conflict-Preempted.

States and local governments are not preempted in the immigration arena when they prohibit the same activity that is already prohibited under federal law. "Where state enforcement activities do not impair federal regulatory interests *concurrent enforcement activity is authorized*." *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (citing *Paul*, 373 U.S. at 142 (emphasis added)). Where "[f]ederal and local enforcement have identical purposes," preemption does not occur. *Id*. at 474. The Fifth Circuit has long endorsed the doctrine of concurrent enforcement. "No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws." *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987). In the words of Judge Learned Hand, "it would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow." *Marsh v. United States*, 29 F.2d 172, 174 (2nd Cir. 1928).

Federal district courts recently reviewing laws similar to the Ordinance have upheld those

[8]Statement of Secretary Chertoff, Joint Press Conference with Attorney General Mukasey, Feb. 22, 2008 (available at www.dhs.gov/xnews/releases/pr_1203722713615.shtm) (emphasis added).

laws, based on the doctrine of concurrent enforcement. The District of Arizona has pointed out that conflict preemption cannot occur where concurrent enforcement exists:

> The mere fact that the parallel procedures could result in an employer being found in violation of the [state] Act but not IRCA does not establish conflict preemption. That is simply the result of the *concurrent enforcement activity* in our federal system where Congress has specifically preserved state authority.

Ariz. Contractors II at *38 (emphasis added). The Eastern District of Missouri has also applied the concurrent enforcement doctrine in rejecting a similar conflict preemption challenge:

> [G]enerally, a state has concurrent jurisdiction with the federal government to enforce federal laws. … This allows for greater enforcement of the federal law, while providing additional local sanctions through the licensing law. There is no conflict between the two laws.

Gray at *33 (*citing Gonzales*, 722 F.2d at 474).

The Ordinance was drafted with meticulous care to match the terminology and scope of federal law. The Ordinance will operate to prohibit an alien who is not lawfully present in the United States from retaining an occupancy license, and prohibit a landlord from continuing to rent to an alien who is not lawfully present in the United States, once the landlord becomes aware of the alien's immigration status. The harboring provisions of the Ordinance are consistent with the equivalent harboring provisions of the INA, which impose criminal penalties on:

> Any person who … knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien *in any place, including any building* or any means of transportation.

8 U.S.C. § 1324(a)(1)(A)(iii). The Ordinance makes express reference to 8 U.S.C. § 1324(a)(1)(A) in its preamble. This is perfect concurrence of enforcement.

The Fifth Circuit has repeatedly held that the conduct proscribed by the federal crime of harboring is very wide – certainly wide enough to encompass the conduct prohibited by the Ordinance. "Clearly the words 'in any place' are meant to be broadly inclusive, not restrictive."

United States v. Cantu, 557 F.2d 1173, 1180 (5th Cir. 1977). "Congress intended to broadly proscribe any knowing or willful conduct fairly within any of these terms that tends to substantially facilitate an alien's remaining in the United States illegally." *United States v. Rubio-Gonzales*, 674 F.2d 1067, 1073 n.5 (5th Cir. 1982). This is a very broad range of conduct. "[W]e hold that to 'substantially facilitate' means to make an alien's illegal presence in the United States substantially 'easier or less difficult.'" *United States v. Shum*, 496 F.3d. 390, 392 (5th Cir. 2007) (*quoting United States v. Dixon*, 132 F.3d 192, 200 (5th Cir. 1997)). Providing illegal aliens with "lodging" constitutes harboring. *United States v. Varkonyi*, 645 F.2d 453, 459 (5th Cir. 1981).

It is well established in all federal Circuits that 8 U.S.C. § 1324(a)(1)(A)(iii) prohibits "a wide range of conduct … including providing unlawful aliens with housing," *United States v. Kim*, 193 F.3d 567, 574 (2nd Cir. 1999), or "provid[ing] an apartment for the undocumented aliens." *United States v. Tipton*, 518 F.3d 591, 594 (8th Cir. 2008). Making an apartment available to an illegal alien has repeatedly been a basis for conviction under the federal statute. *Id.*; *United States v. Aguilar*, 883 F.2d 662, 669-70 (9th Cir. 1989); *United States v. Sanchez*, 963 F.2d 152, 155 (8th Cir. 1992). Charging rent does not erase the crime; renting an apartment to an illegal alien constitutes harboring. *United States v. Gomez-Moreno*, 479 F.3d 350, 354 (5th Cir. 2007). *See also United States v. Balderas*, 91 Fed. Appx. 354 (5th Cir. 2004). Indeed, harboring "for the purpose of commercial advantage or private financial gain" increases the severity of the crime. 8 U.S.C. § 1324(a)(1)(B)(i). *See United States v. Zheng*, 306 F.3d 1080 (11th Cir. 2002).

The Ordinance prohibits a subset of activities – knowingly renting an apartment or house to an illegal alien – that falls within the larger federal crime of harboring. The Ordinance adopts federal statutory language and employs federal standards, deferring entirely to federal officials' judgment about the legal status of any alien in question. *See* §§ 26-79(A)(1), 26-79(D)(3), 26-

79(E)(4), 26-79(E)(5), 26-119(A)(1), 26-119(D)(3), 26-119(E)(4), 26-119(E)(5). The Ordinance therefore constitutes concurrent enforcement and cannot be conflict preempted.

Finally, it must be remembered that preemption analysis does not require perfect symmetry between local and federal law. "While the Court recognizes Plaintiffs assertion that there need only be a conflict with the purpose of the federal statute,… this does not mean that every slight difference in emphasis between the federal requirements and the local requirements creates such a conflict." *Gray* at *48. Knowingly renting an apartment to an illegal alien plainly falls within the broader concept of harboring. The City has focused on that subclass of harboring activities because its traditional police powers include the regulation of rental housing. Plaintiffs have not identified a single federal statute that plausibly conflicts with the Ordinance.

III. THE ORDINANCE DOES NOT CONFLICT WITH HUD REGULATIONS.

Plaintiffs make a weak attempt at a secondary preemption claim, arguing that the Ordinance conflicts with Housing and Urban Development (HUD) regulations that prorate federal housing assistance, based on the number of eligible recipients in a household. Pl. Br. Supp. TRO 16. From this proration, Plaintiffs attempt a tremendous leap in logic and assert that HUD therefore has a policy of encouraging "mixed families" (of varying immigration status) to remain in the United States, including those who are unlawfully present. *Id.* Plaintiffs offer no case support or statutory support for this leap in logic. They pointedly fail to mention HUD regulation 24 C.F.R. § 5.508, which actually *prevents* households from obtaining housing assistance for any illegal aliens living with them. Every member of the household must sign an affidavit stating he is either a US citizen or a lawfully present alien eligible for assistance, and must provide documentation. 24 C.F.R. § 5.508(b). 24 C.F.R. § 5.508(e) allows lawfully present members of a household to obtain assistance even if they have illegal aliens living with them, but only at a pro-rata rate *to prevent illegal aliens from gaining any federal housing assistance.*

On this slender regulatory reed – the fact that HUD regulations deal with the possibility of mixed status household – Plaintiffs balance their gargantuan claim that all illegal aliens residing in such households have been implicitly authorized to remain in the United States. Nowhere does this or any other HUD regulation state that such aliens are permitted to remain in the United States. On the contrary, 24 C.F.R. § 5.508(e) attempts to induce such illegal aliens to leave the United States, by denying them federal assistance. Congress's objective is spelled out in 8 U.S.C. § 1601(6): "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." In the face of this unequivocal federal law, plaintiffs strained interpretation of HUD regulations cannot suffice to create conflict preemption. It must be remembered that the preemption of local ordinances by federal law can only occur where "Congress has *unmistakably* so ordained." *De Canas*, 424 U.S. at 356 (emphasis added). Plaintiffs do not even come close to meeting this standard.

IV. THE ORDINANCE DOES NOT DENY PROCEDURAL DUE PROCESS.

As set forth above, because Plaintiffs brought this lawsuit before the Ordinance came into effect or could be enforced, the *Salerno* standard for review must apply. Presenting a worst-case scenario under a facial challenge will not suffice. *Salerno*, 481 U.S. at 745. "The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid …." *Id.* Plaintiffs must establish "that the law is unconstitutional in all of its applications." *Washington State Grange*, 128 S. Ct. at 1190. This is a high hurdle.

The fundamental requirements of due process are notice and a meaningful opportunity to be heard that is appropriate to the circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). There is no rigid set of procedural requirements that must be satisfied. *Id.* at 348. In a due process challenge, courts will balance three factors: (1) the private interests affected, (2) the risk of erroneous deprivation, and (3) the government's interests involved. *Id.* at 334-35.

The Ordinance provides more than adequate notice as well as multiple meaningful opportunities to be heard, including judicial evidentiary hearings. In so doing, the Ordinance goes well beyond the minimum requirements of due process.

A. The Ordinance Is Not Void for Vagueness.

An enactment is facially void for vagueness only when it is impermissibly vague in all its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). The law must be utterly devoid of a standard of conduct to which the citizen must conform. *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982).

To avoid a vagueness challenge, laws need only give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may steer clear of unlawful conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). "It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question.'" *Grayned*, 408 U.S. at 112 (*quoting American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950). Thus Plaintiffs cannot succeed on their claim by merely pointing to words or phrases that could, under certain circumstances, be misconstrued. *See Salerno*, 481 U.S. at 745. The "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." *Rose v. Locke*, 423 U.S. 48, 49 (1975).

Simply put, the allegedly vague terms or provisions of the Ordinance do not rise to the level of vagueness that renders a statute unconstitutional. Plaintiffs strain to find terms and provisions of the Ordinance which they believe to be imprecise, but these terms and provisions are nowhere near so devoid of meaning as to satisfy the standards for facial vagueness.

First, Plaintiffs complain that the terms "agent of a landlord with authority to initiate proceedings to terminate a lease or tenancy" and "person responsible for the management of an

apartment complex" are undefined. Pl. Br. Supp. TRO 19-20. These terms are self-defining. Likewise, Plaintiffs' concern about the term "temporary guest," *see id*. at 21-22, is unwarranted, as this term – which is implicitly defined in the lease agreements of all of the tenant and landlord Plaintiffs – would indicate to any person of reasonable sensibility a guest who had no intention of remaining on the premises on a permanent basis. *See* lease agreements (AP31-62). Moreover, Texas case law has long defined "temporary guest" in contradistinction from a member of a "household," *Barrett v. Commercial Standard Ins. Co*., 145 S.W.2d 315, 318 (Tex. Civ. App. – Fort Worth 1940, no writ), and those state law definitions provide guidance to anyone concerned about violating the Ordinance.

Plaintiffs' complaint regarding the alleged vagueness of the term "federal government," *see* Pl. Br. Supp. TRO 20-21, is without merit. The Ordinance directs the building inspector to verify the occupant's status with the federal government "pursuant to Title 8, United States Code, Section 1373(c)." §§ 26-79(D)(1), 26-119(D)(1). That section, in turn, specifies the Immigration and Nationalization Service (now ICE and USCIS) as the federal agency that must respond to state or local inquiries regarding an individual's immigration status. There is no realistic risk that the National Park Service, or the Securities and Exchange Commission, or the United States District Court for the District of Guam, will be called upon for this purpose.

Similarly strained is Plaintiffs' manufactured "impossibility" of compliance. The Ordinance follows and allows the typical lease transaction to take place: A prospective tenant will first locate available rental property. The tenant then applies for a residential occupancy license, providing the required information such as the address of the property to be rented. The license will be immediately issued. Upon receipt of the license by the landlord, the landlord may then lawfully enter into the lease agreement with the tenant, and the tenant may occupy the premises.

Contrary to Plaintiffs' protestations, landlords do not face liability under Ordinance 2952 "no matter what they do." Pl. Br. Supp. TRO 22. The obligations of each actor involved with rental premises – owners ("landlords"), their agents, those who lease or rent as a landlord or on a landlord's behalf ("lessors"), managers, and those with authority to initiate proceedings to terminate a lease or tenancy – are clearly differentiated and spelled out. The standard of "diligent pursuit" of termination gives reasonable notice of what is required, and the proceedings that must be commenced are "such steps as may be required under the applicable law" to terminate the lease or tenancy, which includes any legally required steps prefatory to actual court proceedings.

Finally, Plaintiffs' purported confusion regarding what leases are affected by the Ordinance and what penalties the Ordinance carry, Pl. Br. Supp. TRO 23-24, is shallow. The Ordinance clearly states that it applies to "leases or tenancies that commence on or after its effective date." Ordinance 2952, § 7. What constitutes the inception of a lease or tenancy, and whether an extension constitutes a new lease, are questions of Texas contract law which is binding upon landlords, tenants, and the City. At bottom, Plaintiffs' perceived sources of vagueness in the Ordinance are quibbles. The Ordinance clearly describes *who* must take or refrain from taking certain actions, and *what* those individuals or entities must do or not do. In no way can it be said to be devoid of all meaning under all circumstances.

B. <u>The Ordinance Provides Adequate Notice.</u>

Plaintiffs continue their quibbling when they address adequacy of notice under the Ordinance. Under the Due Process clause, notice is sufficient if it is reasonably calculated to apprise interested parties of the pendency of the proceeding and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Under most circumstances, notice sent by ordinary mail is sufficient to discharge the government's due process obligations." *Armendariz-Mata v. U.S. Department of Justice, Drug En-*

forcement Administration, 82 F.3d 679, 683 (5th Cir. 1996). The addresses of the landlord and of the tenant are contained in the tenant's license application, and will be within the same city as the building inspector's office. The theoretical possibility that a notice of revocation might go astray or experience extraordinary delay in the mail is insufficient to establish a due process violation.[9]

C. The Ordinance Provides Adequate Opportunity to Be Heard.

In the months since the TRO hearing, the Ninth Circuit has specifically ruled on this question. In an immigration cases raising identical due process challenges to a similar state law, the Ninth Circuit held that a state court hearing in which the state court defers to a federal determination of immigration status satisfies the requirements of due process. Such a hearing "provides an employer the opportunity, during the state court proceeding, to present rebuttal evidence [and be heard]." *Id*. at 987. Ordinance 2952 reproduces the same hearing structure as that found in the Arizona statute, nearly verbatim, with identical rebuttable presumptions, in §§ 26-79(E) and 26-119(E). *See* Ariz. Rev. Stat. § 23-212(H).

Indeed, the Ordinance actually provides occupants and landlords with *more* opportunities to be heard than the Arizona statute does. First, the Ordinance provides the occupant with the opportunity to supply, at the outset of the process, information believed to establish the occupant's lawful presence. §§ 26-79(B)(5)(i), 26-119(B)(5)(i). Even if this information proves to be insufficient, the Ordinance contains safety valves that preclude action adverse to the occupant on the basis of an inconclusive response from the federal government. §§ 26-79(D)(3), 26-119(D)(3). Only upon a specific response from the federal government that the occupant is an

[9]The landlord or agent is protected by the Ordinance even in that event – the offense is to *knowingly* permit an occupant to occupy a rental unit without a valid residential occupancy license. §§ 26-79(C)(7), 26-119(C)(7). If, by reason of a failure of the mail or otherwise, the landlord or agent is unaware that the license has been revoked, there is no offense.

alien not lawfully present does enforcement proceed. §§ 26-79(D)(2), 26-119(D)(2).

Even in that event, the occupant is given a 60-day period in which to submit *additional* information to the federal government before final action is taken, §§ 26-79(D)(2), 26-119(D)(2), thus guarding against the possibility that the federal government's records are in error. After this 60-day period, a second query of the federal government must be made; a revocation notice is issued only if this second query produces a specific response that the occupant is an alien not lawfully present. §§ 26-79(D)(4), 26-119(D)(4).

Even then, the landlord or occupant is afforded judicial review, extending to both the question of whether the Ordinance and other applicable law followed and the question of whether the occupant is lawfully present. §§ 26-79(E), 26-119(E). If judicial review is sought within 15 days after the date of the revocation notice, the notice is automatically stayed until judicial review is finally concluded. §§ 26-79(E)(2), 26-119(E)(2).

Plaintiffs' complaints about the Ordinance provisions governing the scope and procedure for judicial review do not present a valid due process complaint. The District of Arizona addressed this question with respect to Arizona's law and held that due process was afforded by the state court procedure, because "the [state] Court may 'request the federal government to provide automated or testimonial verification pursuant to [§ 1373],'… Under federal law, USCIS has an affirmative duty to respond to such verification requests. 8 U.S.C. § 1373(c)." *Ariz. Contractors Ass'n v. Candelaria*, 534 F. Supp. 2d 1036, 1059-60 (D. Ariz. 2008). The Ninth Circuit affirmed. 545 F.3d at 987. Virtually identical language is found in the Ordinance. §§ 26-79(E)(5), 26-119(E)(5)("request the federal government to provide, in automated, documentary , or testimonial form, a new verification… pursuant to Title 8, United States Code, Section 1373(c)."). And since Texas home-rule cities have the power to do anything that the Legislature

has not forbidden cities from doing, *e.g.*, *Dallas Merchants' & Concessionaires' Ass'n v. City of Dallas*, 852 S.W.2d 489, 490-91 (Tex. 1993), there is no reason why such a city cannot, in the course of creating a process of judicial review under one of its ordinances, prescribe the standards and procedures under which that review is to be conducted.

Finally, due process is also afforded to landlords whose rental licenses are suspended. Any such suspension may be immediately appealed to the City Council, and the suspension is automatically stayed pending appeal. §§ 26-79(D)(8), 26-119(D)(8); Farmers Branch Code of Ordinances §§ 26-78, 26-118.

V. THE ORDINANCE DOES NOT DENY EQUAL PROTECTION OF THE LAWS.

A. The Ordinance Contains no Suspect Classification and Is Therefore Subject only to Minimal Scrutiny.

Plaintiffs assert that the Ordinance discriminates against illegal aliens, discriminates against tenants as opposed to those who own their homes, and discriminates against individuals on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment. However, Plaintiffs have not alleged any factual basis sufficient to establish an Equal Protection violation. Racial, ethnic, and national-origin classifications are of course subject to strict scrutiny and presumed invalid under the Equal Protection Clause. *Adarand Constructors v. Peña*, 515 U.S. 200, 277 (1995). However, there are no such classifications to be found in the Ordinance. By definition, racial or ethnic classifications treat individuals differently because of their race or ethnicity. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 711 (9th Cir. 1997)("But the question we are considering in this section of our opinion is whether the statute classifies, that is, whether it treats people differently by ethnicity or sex…."). No provision of the Ordinance treats people differently because of their race, ethnicity, or national origin. Indeed, it states that it "shall be applied uniformly, and enforcement procedures shall not differ based on a person's

race, ethnicity, religion, or national origin." §§ 26-79(D)(9), 26-119(D)(9); *see also* Ordinance Preamble.

The only classification that exists in the Ordinance is a classification based on *immigration status*. §§ 26-79(D)(2), 26-119(D)(2). The Supreme Court has expressly rejected the notion that laws treating illegal aliens differently than U.S. citizens and aliens lawfully present in the United States amount to a suspect classification:

> We reject the claim that "illegal aliens" are a "suspect class." …Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy."

Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982). It should also be noted that federal immigration law, by definition, "discriminates" against aliens who violate its terms. A city or state law does not offend either the Equal Protection Clause or the Supremacy Clause by reflecting this fact. As Justice Rehnquist would remember with regard to *De Canas*: "The statute in *De Canas* discriminated against aliens, yet the Court found no strong evidence that Congress intended to pre-empt it." *Toll v. Moreno*, 458 U.S. 1 (1982) (Rehnquist, J., concurring).

In moving for a temporary restraining order, Plaintiffs tried to twist the Ordinance's classification based on immigration status into something else entirely; they claimed that the Ordinance presents a classification based on alienage that is subject to strict scrutiny, because it is possible that an alien's occupancy license might be revoked because he is unlawfully present in the United States, while a citizen's license may not be revoked. Pl. Br. Supp. TRO 29. This claim was absurd on its face – the ordinance does not discriminate against aliens generally; it only discriminates against aliens who are not lawfully present in the United States.

The only remaining classification mentioned by Plaintiffs is the fact that the Ordinance treats tenants differently than those who own their homes (in that it does not regulate the latter

category at all). Here too, Plaintiffs have failed to identify a suspect classification. No court in the United States has ever held that tenants constitute a suspect classification. "Because the classification 'tenant' is not a suspect classification under the U.S. Constitution, [the state] need show only that the challenged government action 'bears a rational relation to some legitimate end.'" *Al-Cantara v. New York State Div. of Hous. & Cmty. Renewal*, 2007 U.S. Dist. LEXIS 19786 (S.D.N.Y. 2007) (*quoting Romer v. Evans*, 517 U.S. 620, 631 (1996)).

B. The Ordinance Passes Minimal Scrutiny, Which Is the Correct Standard of Review.

As explained above, the appropriate standard of review is minimal scrutiny. The City need only show that the Ordinance bears a rational relation to some legitimate end. *Id.* As the Supreme Court stated in *Plyler*, elevated scrutiny is inappropriate when assessing a law that distinguishes between aliens lawfully present in the United States and aliens unlawfully present in the United States: "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" 457 U.S. at 223. Accordingly, the state need only present a "rational basis" for its policy. *Id.* at 224.

The City possesses numerous rational bases and legitimate interests for seeking to discourage the harboring of illegal aliens with Farmers Branch in violation of federal law. The most obvious is the simple goal of reinforcing the rule of law. Scott Depo. 93 (AP420). It is estimated that approximately 5,000 illegal aliens are residing in Farmers Branch in violation of federal law. Greer Depo. II 246-49 (AP133-36). A second interest is the reduction of crime. It is a crime to knowingly harbor an illegal alien in an apartment building in violation of 8 U.S.C. § 1324(a)(1)(A). And the City Council expressed a clear interest in preventing additional crimes by individuals who have no legal right to be in the United States in the first place. Koch Depo. 84-88 (AP208-12). Councilman (now Mayor) O'Hare was motivated by the fact that several

murders were committed by illegal aliens – including the murder of a two-year-old girl and the murder of a mother of six. O'Hare Depo. 263-65 (AP239-40). "[R]educing crime is a substantial government interest …." *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 435 (2000). A third interest is alleviating the taxpayer expense caused by the consumption of public services by illegal aliens.[10] Those costs occur in the form of city services, incarceration and other law enforcement costs, public health care costs, and other expenses imposed by aliens unlawfully present in the United States. *See* O'Hare Depo. 211-14 (AP229-32); Greer Depo. 233-34 (AP123-24). In Texas, the annual fiscal cost of illegal aliens residing in the state is $4.67 billion per year.[11] In Farmers Branch, the cost is best quantified at the household level. Each illegal alien-headed household that is occupying a residential rental unit imposes a *net* fiscal cost on taxpayers (after any tax revenues from the illegal aliens are counted) of $19,588 per year.[12] Assuming conservatively a total of 200 such households in Farmers Branch (the number is probably closer to 1,000), the fiscal cost is $3,917,600 per year. This cost to taxpayers is indeed significant. And the reduction of taxpayer costs is a substantial governmental interest. "The district court correctly concluded that the state has a substantial interest in traveler safety and in reducing taxpayer costs …." *United States v. Fort*, 248 F.3d 475 (5th Cir. 2001).

C. Plaintiffs Cannot Prevail on their Discriminatory Purpose and Effect Claim.

Perhaps realizing that an equal protection claim based on discrimination against illegal

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[10]It is estimated that net fiscal cost imposed upon all levels of government by illegal aliens is $ 89.1 billion per year. Robert Rector, "The Fiscal Cost of Low-Skill Immigrants to State and Local Taxpayers," Heritage Foundation Study, (testimony before the Subcommittee on Immigration Committee on the Judiciary, U.S. House of Rep., May 17, 2007) (available at judiciary.house.gov/media/pdfs/rector070517.pdf), at 10.

[11]Federation for American Immigration Reform, Immigration Impact Data for Texas (2008) (available at www.fairus.org/site/PageServer?pagename=research_research79e6).

[12]Robert E. Rector and Christine Kim, The Fiscal Cost of Low-Skill Immigrants to the U.S. Taxpayer (May 22, 2007), Heritage Foundation Special Report #14 (available at www.heritage.org/Research/Immigration/sr14.cfm).

aliens will not get them very far, Plaintiffs in their motion for a temporary restraining order also offered a threadbare equal protection claim based on discriminatory purpose and effect against aliens of Hispanic ethnicity. Pl. Br. Supp. TRO 29-30. Their allegation of discriminatory purpose is transparently weak, based only upon a collection of newspaper clippings – all of which refer to a single City Councilman and most of which refer to stated concerns about declining property values in the City. *Id.* at 29 n.119. Subsequent depositions have not produced any evidence of discriminatory purpose. On the contrary, they have supported the opposite conclusion. O'Hare Depo. 92-93 (AP223-24), 101-02 (AP226-27); Fuller Depo. 127, 229-33 (AP90-95).

An even bigger problem for the Plaintiffs is that in order to subject the Ordinance to strict scrutiny, they must establish *both* discriminatory purpose and discriminatory impact. *Rogers v. Lodge,* 458 U.S. 613, 617 (1982). Supposing *arguendo* that Plaintiffs could somehow produce actual evidence of discriminatory intent on the part of the entire City Council, they still would be unable to show discriminatory impact. It is impossible for them to do so because *the Ordinance has yet to go into effect.* No verification of any alien's immigration status with the federal government has yet occurred, no residential occupancy license has been revoked, and no penalty has been imposed. Thus, the discriminatory impact that Plaintiffs imagine is based entirely on conjecture. Because Plaintiffs rushed to file this suit prior to the Ordinance being enforced against anyone, they cannot bring a coherent discriminatory impact challenge, *because the Ordinance has not yet had any direct impact on anyone.* "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid." *Salerno,* 481 U.S. at 745.

VI. THE ORDINANCE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV, SECTION 2.

Plaintiffs assert that the Ordinance "infringes on one's right to travel to, from and within

the City of Farmer's Branch." Reyes Complaint 18. Their assertion reflects a basic lack of understanding of the Article IV Privileges and Immunities Clause, which by its plain terms, "prevents a State from discriminating against citizens of other States in favor of its own." *Hague v. Committee for Indust. Org.*, 307 U.S. 496, 511 (1939). "If a state statute or regulation imposes identical requirements on residents and nonresidents alike and it has no discriminatory effect on nonresidents, it does not violate the Privileges and Immunities Clause." *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1111-12 (3rd Cir. 1997). Ordinance 2952 does not in any way distinguish between Texans and non-Texans. All new tenants commencing a lease in Farmers Branch are required to obtain a residential occupancy license, regardless of whether they come from a city in Texas or a city in Tennessee. Nor does the requirement of obtaining a residential occupancy license, any more than the requirement of obtaining a drivers license in one's new state, infringe on the right to travel.

VII. THE ORDINANCE DOES NOT VIOLATE THE CONTRACTS CLAUSE.

The Plaintiffs' claim that the Ordinance violates the Contract Clause reflects a fundamental lack of understanding of what that clause actually does. Ever since the 1827 decision of the Supreme Court in *Ogden v. Saunders*, 25 U.S. 213 (1827), the Contracts Clause has been held not to limit the ability of the government to regulate the terms of future contracts. *See Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437, 446 (1903). Ordinance 2952, by its express terms, "applies only to leases or tenancies that commence on or after its effective date." Ordinance 2952, § 7. There is no plausible conflict between the Ordinance and the Contracts Clause.

VIII. THE ORDINANCE DOES NOT DENY SUBSTANTIVE DUE PROCESS.

Plaintiffs set forth no substantive argument or evidence relating to their claim that the Ordinance denies substantive due process. However, it is easily disposed of. Such far-fetched substantive due process claims have repeatedly been rejected by other courts. For example, in

2007 the Middle District of Pennsylvania rejected a similar substantive due process challenge to an ordinance requiring tenants to register with the City in order to occupy their apartments. *Berwick Area Landlord Ass'n v. Berwick*, 2007 U.S. Dist. LEXIS 51207 (M.D. Pa. 2007) ("[T]he Amended Ordinance is a comprehensive regulatory scheme for residential rental properties. It does not explicitly or effectively ban all residential properties. Therefore, we find that it does not burden the fundamental right to establish a home and bring up children."). Plaintiffs have not even stated what substantive due process right they are asserting, much less offered an argument supported by relevant case law.

VIII. THE ORDINANCE DOES NOT VIOLATE THE FAIR HOUSING ACT.

In this claim, Plaintiffs simply repeat their baseless assertions of discriminatory intent, supported only by the same assortment of newspaper clippings they rely upon for their equal protection claim – clippings that in no way support such a conclusion. The depositions of the City Council and Mayors have not revealed one iota of discriminatory intent. *See* Sections V.B-C, *supra*. Moreover, Plaintiffs have failed to establish how the Ordinance is in any way inconsistent with Fair Housing Act.

IX. THE ORDINANCE DOES NOT VIOLATE SECTION 1981.

Plaintiffs' claim based on 42 U.S.C. § 1981 is fatally flawed. The Supreme Court has held that § 1981 prohibits public discrimination against *legal* aliens; however, it has never held that § 1981 prohibits discrimination against *illegal* aliens. *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 418-19 (1948). In *Takahashi*, the Supreme Court held that a state could not "prevent lawfully admitted aliens within its borders from earning a living." *Id.* (emphasis added). Although the Court was not presented with the question of whether illegal aliens were protected under § 1981, the Court's purposeful use of the phrase "lawfully admitted aliens" demonstrates that a different result might have occurred if the plaintiff had been an illegal alien. *See*

also Graham v. Richardson, 403 U.S. 365, 378 (1971).

Indeed, extending § 1981 to illegal aliens would be contrary to congressional intent, given that federal immigration law prohibits employers from hiring illegal aliens. 8 U.S.C. § 1324a. Thus, if § 1981 were to apply to illegal aliens, an employer could be liable for refusing, in accordance with federal immigration law, to hire an illegal alien. *Anderson v. Conboy*, 156 F.3d 167, 180 (2nd Cir. 1998) ("If an employer refuses to hire a person because that person is in the country illegally, that employer is discriminating on the basis not of alienage but of noncompliance with federal law"). Plaintiffs' distortion of § 1981 is plainly flawed, warranting summary judgment.

X. THE ORDINANCE DOES NOT VIOLATE THE TEXAS PROPERTY CODE.

Finally, the Reyes Plaintiffs contend that the Ordinance conflicts with unspecified provisions of Titles 4 and 8 of the Texas Property Code. Reyes Complaint 19. They offer no elucidation of this claim, and none is apparent. Title 4 deals with particular forms of civil action such as eminent domain, trespass to try title, partition, and forcible entry and detainer; its relevance is elusive. Title 8, relating to the law of landlord and tenant, at least deals with a relevant subject matter, but nothing in the Ordinance even arguably conflicts with the provisions of that title.[13]

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant its Motion for Summary Judgment.

[13]Indeed, the Ordinance explicitly defers to "the applicable law and lease provisions" when addressing the termination of a lease or tenancy because an occupant lacks a valid residential occupancy license. §§ 26-79(C)(7), 119(C)(7).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2009, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s P. Michael Jung
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