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

VILLAS AT PARKSIDE PARTNERS D/B/A VILLAS AT PARKSIDE, LAKEVIEW AT PARKSIDE PARTNERS, LTD. D/B/A LAKEVIEW AT PARKSIDE, CHATEAU RITZ PARTNERS D/B/A CHATEAU DE VILLE, MARY MILLER SMITH, ET AL.,	§	
	§	**CIVIL ACTION NO. 3-08-CV-1551-B**
PLAINTIFFS,	§	
V.	§	
	§	**(CONSOLIDATED WITH NO. 3:08-CV-1615-O)**
THE CITY OF FARMERS BRANCH, TEXAS,	§	
DEFENDANT.	§	

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BRIEF IN SUPPORT OF VILLAS PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Plaintiffs Villas at Parkside Partners d/b/a Villas at Parkside ("Villas"), Lakeview at Parkside Partners, Ltd. d/b/a Lakeview at Parkside ("Lakeview"), Chateau Ritz Partners d/b/a Chateau de Ville ("Chateau"), and Mary Miller Smith ("Smith") (together, the "Villas Plaintiffs") file this Brief in Support of their Motion for Partial Summary Judgment, as follows:

I.

PRELIMINARY STATEMENT

The City of Farmers Branch Ordinance 2952 (the "Ordinance") should be declared unconstitutional and its effectuation, implementation, and enforcement permanently enjoined. The Ordinance raises the intolerable specter of persons whom the federal government is allowing to remain in the United States (and, thus, to stay in Farmers Branch) being denied the right to live and dwell in the City pursuant to a municipal regulation that purports to be perfectly congruent with federal policy. Far from providing local assistance in the enforcement of federal deportation orders, the Ordinance creates its own removal scheme. In doing so, it undermines and interferes with the necessary discretion inherent in the federal government's supreme authority over matters of foreign policy in general and immigration in particular. Put simply, the Ordinance conflicts with the federal government's absolute power to determine "who may stay and who must go." If the federal government had wanted such disruptive "help," it undoubtedly would have asked for it.

In attempting to defend the Ordinance, the City argues that its "residential occupancy" licensing decisions depend entirely on an applicant's federal "immigration status." Those having an undefined "lawful" status receive licenses, while those with an undefined "unlawful" status are denied the right to occupy rental housing. Thus, says the City, there is no conflict at all. However, merely because some persons may not be "lawfully present" (a phrase having no uniform definition under federal law) does not mean they are the subject of a deportation order requiring their removal from this country or its political subdivisions – and certainly does not

mean they should be denied the fundamental human necessity of shelter while here. Furthermore, unlike certain state immigration-related employment and drivers' licensing regulations, the Ordinance is not founded upon any federal enabling legislation. Rather, it stands unsupported and alone – a symbolic act of municipal defiance of the United States Government's policies regarding enforcement of federal immigration laws. The City cannot genuinely deny the conflict between the Ordinance and federal immigration policy, given that the Ordinance owes its very existence to the alleged failures of that policy. In sum, the Ordinance should be seen for what it is – namely, a naked attempt by the City to regulate "illegal immigration" within its borders.

For the reasons set forth in the Villas Plaintiffs' Application for Temporary Restraining Order and Preliminary Injunctive Relief, and in light of the additional grounds discussed herein, the Villas Plaintiffs respectfully request that this Court: (a) grant their motion for partial summary judgment; (b) issue an order declaring the Ordinance unconstitutional as a violation of both the Supremacy Clause of Article VI of the United States Constitution and the Due Process Clause of the Fourteenth Amendment thereto; and (c) enter a permanent injunction restraining the City from effectuating, implementing, and enforcing the Ordinance.

II.

THE UNDISPUTED FACTS ON WHICH THIS MOTION IS BASED

A. The Parties

1. Plaintiffs Villas, Lakeview, and Chateau own and operate apartment complexes in The City of Farmers Branch, Texas.[1] Plaintiff Smith is a former member of the City Council of Farmers Branch and is a resident tenant in an apartment complex located in Farmers Branch.[2]

[1] *See* Declaration of Michelle Diamond ("Diamond Declaration") at ¶¶ 2, 34, attached to the Appendix to Villas Plaintiffs' Motion for Partial Summary Judgment (App001, App012); Declaration of Bahareh Brown ("Brown Declaration") at ¶¶ 3, 4 (App032-033).

2. The City is a municipal corporation located in Dallas County, Texas.[3]

B. <u>The City's Initial Foray Into The Immigration Arena</u>

3. The prelude to the City's adoption of a series of three self-styled "Immigration Ordinances" was Resolution 2006-099, adopted in 2006, pursuant to which the Farmers Branch City Council declared:

> [M]illions of individuals have come into our country in flagrant violation of the Immigration Act, most of the illegal aliens coming across our most southerly border . . . [I]t has been estimated that there are currently hundreds of illegal aliens living in the City of Farmers Branch . . . [T]he citizens . . . of the City of Farmers Branch are concerned, worried, upset, frustrated and downright mad that President Bush and the Executive Branch of the United States government has [sic] and is [sic] totally failing in the enforcement of the Immigration Act as it relates to the influx of illegal aliens . . . *[T]he citizens of Farmers Branch, due to the inaction of the Executive and Legislative Branch of our Federal Government to enforce the Immigration Act, are imploring, urging, and demanding their City Council to enact its own laws to help in the enforcement of the Immigration Act* . . . . [T]he City of Farmers Branch's City Council is not only sympathetic to the pleas of its citizens, but is in agreement with the major concerns expressed and is, consequently, carefully reviewing *the role the City can take to help support and enforce the United States immigration laws* and will in the near future . . . out of absolute necessity brought about by the inaction of our federal government, take whatever steps it legally can to respond to the legitimate concerns of our citizens about the utter breakdown and failure of the United States government to enforce immigration laws.[4]

As Resolution 2006-099 reflects, because the federal government was failing to remove "illegal aliens" from the United States – and, particularly, from Farmers Branch – the City considered assuming a portion of that task itself, at least with respect to such persons living within its boundaries.

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[2] *See* Declaration of Mary Miller Smith ("Smith Declaration") at ¶¶ 2-4, 6 (App034-035).

[3] Plaintiffs' Complaint and Jury Demand at ¶ 5 ("Complaint") (Dkt. No. 1); Defendants' Original Answer to Villas Plaintiff's Original Complaint and Jury Demand at ¶ 5 ("Answer") (Dkt. No. 32).

[4] *See* Resolution No. 2006-009, at fourth, sixth, eighth, thirteenth, and fourteenth "whereas" clauses (emphasis added), attached as Exhibit 1 to the Declaration of Jack G.B. Ternan ("Ternan Declaration") (App047-048).

4. On November 13, 2006, the City adopted Ordinance 2892.[5] Ordinance 2892 provided, as a condition to entering into any "apartment complex" lease or rental agreement, including any renewals or extensions thereof, that "the owner and/or property manager" shall require the submission of satisfactory "evidence of citizenship or eligible immigration status for each tenant family."[6]

5. On January 22, 2007, the City adopted Ordinance 2903, which repealed Ordinance 2892.[7] Ordinance 2903 continued to require citizenship and immigration status verification as a prerequisite to entering into any "apartment complex" lease or rental agreement.[8]

6. On May 28, 2008, the United States District Court for the Northern District of Texas, The Honorable Judge Sam Lindsay presiding, entered an order permanently enjoining the City from effectuating or enforcing Ordinance 2903 based on violations of the Supremacy and Due Process Clauses of the United States Constitution.[9] Prior to entering the permanent injunction, the court had issued a temporary restraining order preventing enforcement of Ordinance 2903 on May 21, 2007, and a preliminary injunction on June 19, 2007.[10]

C. <u>The City Unveils Its Third And Latest "Immigration Ordinance."</u>

1. <u>The purported purpose and intended effect of the Ordinance</u>

7. On January 22, 2008, the City formally adopted the Ordinance.[11]

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[5] *See* Complaint at ¶ 27; Answer at ¶ 27.

[6] *See* Complaint at ¶ 31; Answer at ¶ 31.

[7] *See* Complaint at ¶ 37; Answer at ¶ 37.

[8] *See* Complaint at ¶ 40; Answer at ¶ 40.

[9] *See* Complaint at ¶ 41; Answer at ¶ 41.

[10] *See Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 861 (N.D. Tex. 2008) (hereinafter "Villas I").

[11] *See* Complaint at ¶ 44; Answer at ¶ 44.

8. The introductory "whereas" clauses of the Ordinance provide, in pertinent part:

> [F]ederal law prescribes certain conditions (found principally in Title 8, United States Code, Sections 1101, *et seq.*), that must be met before an alien may be lawfully present in the United States . . . *[A]liens not lawfully present in the United States, as determined by federal law, do not meet such conditions as a matter of law when present in the City of Farmers Branch* . . . [I]t is the intent of the City of Farmers Branch to enact regulations that are harmonious with federal immigration law and which *aid in its enforcement.*[12]

9. The City has characterized and referred to the Ordinance on its official website as an "Immigration Ordinance."[13] The City has also referred to Resolution No. 2006-130 (entitled "Resolution Declaring English as the Official Language of the City of Farmers Branch") and former Ordinance 2903 (which Judge Lindsay declared unconstitutional) as "Immigration Ordinances."[14]

10. According to the City, "Ordinance 2952 will prevent aliens not lawfully present in the United States from obtaining rental housing in the City of Farmers Branch, thus discouraging such aliens from unlawfully remaining in the United States."[15]

2. <u>The relevant terms of the Ordinance</u>

11. Under the Ordinance, prospective renters must complete an occupancy license application, pay a $5 fee to the City, and obtain a residential "occupancy license" before they may occupy a single-family residence or apartment in Farmers Branch.[16] In addition, occupants are required to obtain a new license each time they intend to move to a different apartment

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[12] Ordinance at first, second, and seventh "whereas" clauses, attached as Exhibit 1 to the Diamond Declaration (emphasis added) (App018).

[13] *See* Defendant's Objections and Responses to Plaintiff Villas at Parkside's First Request for Admissions, Responses to Requests Nos. 47 and 49, attached as Exhibit 2 to the Ternan Declaration (App054-App055).

[14] *See id.*, Responses to Request Nos. 47-49 and 51 (App054-App055).

[15] *See* Defendant City of Farmers Branch's Objections and Answers to Plaintiff Lakeview at Parkside's First Set of Interrogatories, Answer to Interrogatory No. 8, attached as Exhibit 3 to the Ternan Declaration (App060).

[16] *See* Complaint at ¶ 46; Answer at ¶ 46.

complex or rental house within the City.[17] If multiple occupants live within one home or apartment, each occupant must sign a separate residential occupancy application and obtain a separate occupancy license.[18] Thus, the Ordinance forbids spouses, family members, caregivers, and others at least eighteen years of age from living together unless each obtains a separate residential occupancy license.[19]

12. Failure to comply with those requirements constitutes an offense punishable by a fine of up to $500 per day.[20]

13. The Ordinance requires prospective occupants to attest to their citizenship.[21] If the applicant attests to being a United States citizen or national, the applicant will be issued an occupancy license, and the City will not check his or her citizenship or immigration status.[22] For other applicants, however, the building inspector is required to "verify with the federal government whether the occupant is an alien lawfully present in the United States."[23]

14. If the federal government reports the status of the occupant as an alien "not lawfully present in the United States," the building inspector shall send the occupant a deficiency notice stating that "the occupant may obtain a correction of the federal government's records and/or provide additional information establishing that the occupant is not an alien not lawfully present in the United States."[24] After at least sixty days from the sending of the deficiency

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[17] *See* Complaint at ¶ 47; Answer at ¶ 47.

[18] *See* Complaint at ¶ 47; Answer at ¶ 47.

[19] *See* Complaint at ¶ 47; Answer at ¶ 47.

[20] *See* Complaint at ¶ 48; Answer at ¶ 48.

[21] *See* Complaint at ¶ 49; Answer at ¶ 49.

[22] *See* Complaint at ¶ 49; Answer at ¶ 49.

[23] *See* Complaint at ¶ 50; Answer at ¶ 50.

[24] *See* Ordinance §§ 1, 3 (adding City of Farmers Branch, Texas Code of Ordinances ("City Code") §§ 26-79(D)(2), 26-119(D)(2)) (App022, App028).

notice, "the building inspector shall again make an inquiry to the federal government seeking to verify or ascertain the citizenship or immigration status of the occupant."[25] If the "federal government reports that the occupant is an alien who is not lawfully present in the United States, the building inspector shall send a revocation notice to both the occupant and the lessor" revoking the occupant's residential occupancy license 15 days after the date of the notice.[26]

15. Under the Ordinance, landlords, lessors, "person responsible for the management of an apartment complex," and "any agent of a landlord with authority to initiate preceedings to terminate a lease or tenancy" are all subjected to potential criminal prosecution.[27] It is an offense for a landlord to knowingly permit an occupant to occupy a residence or apartment without a valid residential occupancy license.[28]

3. Determining eligibility for licenses under the Ordinance

16. The City has stated that it "intends to use the Systematic Alien Verification for Entitlements [SAVE] Program to determine whether occupancy license applicants are eligible to rent housing in Farmers Branch."[29]

17. However, the United States Citizenship and Immigration Services ("USCIS"), through its designated representative-witness, testified that the SAVE Program does not inform authorized inquiring parties whether an individual is "lawfully present" or "unlawfully present"

[25] *See* Ordinance §§ 1, 3 (adding City Code §§ 26-79(D)(4), 26-119(D)(4)) (App023, App028).

[26] *See id.*

[27] *See* Complaint at ¶ 72; Answer at ¶ 72.

[28] *See* Complaint at ¶ 73; Answer at ¶ 74.

[29] *See* Answer at ¶ 65.

in the United States; rather, it merely provides information regarding the individual's "immigration status."[30]

18. Indeed, it is undisputed that neither "lawfully present" nor "unlawfully present" is an "immigration status" utilized in any federal immigration database.[31]

19. The Ordinance imposes upon the City Building Inspector the responsibility of enforcing its provisions, which includes verifying with the "federal government" whether an applicant for a residential occupancy license is "lawfully" or "unlawfully" present in the United States.[32] Significantly, the City's Building Inspector testified that, although he will have to make determinations regarding "lawful" presence, he has no knowledge of how he will do so based on information regarding an applicant's "immigration status."[33]

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[30] *See* Deposition of John E. Roessler, dated October 22, 2008 (the "Roessler Depo."), at 56:3-7 ("Q: Does the system ever respond by seeing the words 'lawfully present?' A: No, the system does not respond with that. It responds with the immigration status. It does not answer lawful presence or not."), attached as Exhibit 4 to the Ternan Declaration (App072); *id.* at 161:12-20 ("Q: Earlier, you stated that the SAVE Program doesn't come back with a response with lawfully present, right? A: Correct. Q: It also wouldn't, by definition, come back with – a response to a SAVE inquiry is never going to be the answer unlawfully present, right? A: Correct. It will give the status of the individual.") (App076). Mr. Roessler was designated as a representative of United States Citizenship and Immigration Services under Federal Rule of Civil Procedure 30(b)(6). *See id*. at 11:12-12:3 (App070-App071).

[31] *See* Deposition of Anne Pickett, dated April 10, 2009, at 87:13-18 and 88:2-4 ("Q: Would you ever see the term on the computer screen when you're accessing these databases, would you ever see the term 'lawfully present'? A: No. Q: Would you ever see the term 'lawful status'? A: No . . . Q: So 'lawfully present' isn't a particular immigration status? A: No."); *id*. at 144:17-19 and 145:22-25 ("[T]here's nothing that comes back when you run a database that says 'lawfully present'? A: It says what the person's status [is] … ICE can determine, through viewing the records, what the person's status is, but we would not communicate lawful, unlawful presence to anyone."), attached as Exhibit 8 to the Ternan Declaration (App278-281); *see also* Deposition of Neil Jacobs, dated March 13, 2009, at 72:6-8 ("Q: [T]he term 'not lawfully present,' would that ever appear on the computer screen? A: No."), attached as Exhibit 9 to the Ternan Declaration (App287).

[32] *See* Ordinance §§ 1, 3 (adding City Code §§ 26-79 (D), 26-199 (D)) (App022-23, App027-29).

[33] *See* Deposition of Jim Olk at 156:22-157:5 (the "Olk Depo.") ("Q: So you think at some point you'll have to determine who and who does not fit into some of these categories in

III.

SUMMARY OF MOTION

The Villas Plaintiffs are entitled to partial summary judgment and a declaration that the Ordinance is preempted by federal law for three reasons. First, the Ordinance is an impermissible regulation of immigration because: (a) it creates its own immigration classification scheme for determining which aliens are permitted to reside in the City; (b) that scheme would deny residence to aliens whom the federal government (for whatever reason or no reason at all) allows to remain in the United States, permanently or temporarily; and (c) the City, not the federal government, will determine which aliens are entitled to remain in the City. Second, the Ordinance intrudes into at least three fields of regulation that the federal government has fully occupied: (a) alien registration; (b) alien eligibility for benefits; and (c) restrictions on harboring of aliens. Third, the Ordinance conflicts with federal policy both in intent and effect.

In addition, the Villas Plaintiffs are entitled to summary judgment and a declaration that the Ordinance is void for vagueness and otherwise violative of the Due Process Clause of the Fourteenth Amendment because the Ordinance fails to: (a) define who is a "temporary guest;" (b) identify what categories of leases that are subject to its obligations; (c) provide a meaningful opportunity to be heard; (d) provide a feasible means for compliance; (e) explain post-violation obligations; (f) identify with sufficient specificity the persons on whom it purports to impose obligations; (g) identify the appropriate point of contact within the monolithic "federal government" for obtaining information regarding the applicant's "lawful" or "unlawful" presence; and (h) provide clear direction for entering into a lease without committing a violation.

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order to determine whether they're lawfully present or not? A: Yes. Q: And how will you be acquiring this knowledge, Mr. Olk? A: As I think I just stated, I don't know how I'll be acquiring that knowledge."), attached as Exhibit 5 to the Ternan Declaration (App091); *id.* at 163:20-23 ("Q: So isn't it true you'd have to make that determination if they're lawfully present? A: Yes.") (App092).

Finally, the Villas Plaintiffs are entitled to a permanent injunction restraining the enforcement, implementation, and effectuation of the Ordinance because: (1) they have shown an entitlement to summary judgment on the merits of their Supremacy and Due Process claims; (2) they will suffer irreparable harm in the absence of an injunction; (3) the City will not suffer harm if an injunction issues; and (4) the public interest favors an injunction to protect constitutional rights and prevent any deprivations thereof.

IV.

APPLICABLE LEGAL STANDARDS

A. Summary Judgment

Summary judgment should be rendered if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[34] Only disputes "over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment;"[35] contested fact issues "which are irrelevant and unnecessary will not be considered by a court in ruling on a summary judgment motion."[36] Summary judgment is a particularly appropriate vehicle for resolving cases in which an ordinance is challenged as facially inconsistent with the United States Constitution, because "whether an ordinance is void on its face because it impinges upon constitutionally protected activities is a legal, not a factual question."[37]

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[34] *See Lexxus Int'l, Inc. v. Loghry*, 512 F. Supp. 2d, 647, 655 (N.D. Tex. 2007); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); FED. R. CIV. P. 56(c).

[35] *See Lexus Int'l*, 512 F. Supp. 2d at 656.

[36] *See id.*

[37] *See Holy Spirit Ass'n for the Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 595 (N.D. Tex. 1984) (*citing Holy Spirit Ass'n for the Unification of World Christianity v. Alley*, 460 F.Supp. 346, 347 (N.D. Tex. 1978)).

B. Permanent Injunction

The standard for granting a permanent injunction is "essentially the same as for a preliminary injunction."[38] To obtain a permanent injunction, a plaintiff must show:

> (1) actual success on the merits; (2) an irreparable injury if the injunction is not granted; (3) injury to the plaintiff if the injunction is not granted outweighs the injury to the defendant if it is granted; and (4) the granting of the permanent injunction will not disserve the public interest.[39]

Moreover, "when an alleged deprivation of a constitutional right is involved most courts hold that no further showing of irreparable injury is necessary,"[40] because "the public simply has no interest in effectuating an unconstitutional law."[41] Thus, where an ordinance is held unconstitutional, it should be permanently enjoined.[42]

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[38] *See H and A Land Corp. v. City of Kennedale*, No. Civ. A. 4:02-CV-458-Y, 2005 WL 723690, at *10 (N.D. Tex. Mar. 29, 2005) (*citing Icee Distribs. V. J & J Snack Food Corp*., 325 F.3d 586, 587 n. 34 (5th Cir. 2003)); *Millennium Restaurants Group, Inc. v. City of Dallas*, 191 F. Supp. 2d 802, 809 (N.D. Tex. 2002) ("To justify a permanent injunction, however, the plaintiff must demonstrate actual success on the merits, rather than a likelihood of success.").

[39] *See City of Kennedale*, 2005 WL 723690, at *10; *see also Paulsson Geophysical Services, Inc. v. Sigmar*, 529 F.3d 303, 309 (5th Cir. 2008) (standard for preliminary injunction).

[40] *Villas I*, 557 F. Supp.2d at 878; *see also Davis v. Dist. of Columbia,* 158 F.3d 1342, (D.C. Cir. 1998) ("Although a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes.") (internal citations omitted); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) ("[T]he denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction."); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *RTM Media, L.L.C. v. City of Houston*, 518 F. Supp. 2d 866, 875 (S.D. Tex. 2007) ("It is well established that a violation of a party's constitutional rights constitutes irreparable harm as a matter of law."); *Louisiana Seafood Mngt. Council, Inc. v. Foster*, 917 F. Supp. 439, 442 n. 1 (E.D. La. 1996) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *citing* 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. and Proc. § 2948.1, p. 160-161 (1995)).

[41] *See Sund v. City of Witchita Falls*, 121 F. Supp. 2d 530, 554 (N.D. Tex. 2000) (*citing Valley v. Rapides Parish Sch. Bd*., 118 F.3d 1047, 1056 (5th Cir. 1997).

[42] *See supra* nn. 40-41 and accompanying text.

V.

ARGUMENT AND AUTHORITIES

A. The Ordinance Is Preempted By The United States Constitution And Federal Law.

The Supremacy Clause of the United States Constitution provides that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."[43] State and local laws that interfere with or are contrary to federal law must yield to it.[44] Rooted in the Supremacy Clause, the preemption doctrine has developed as the framework through which courts ascertain whether Congress intended a federal scheme to be the sole law governing any given field of law.[45] The inquiry whether local law stands as an obstacle to federal law requires consideration of the "relationship between state and federal laws as they are interpreted and applied, not merely as they are written."[46]

1. Preemption and the federal government's supreme power over matters of foreign policy and immigration

Due to the national and foreign policy interests involved, the preemption doctrine has often been applied in the context of immigration. Indeed, the "power to exclude or expel aliens" has long been a considered "a power affecting international relations"[47] and, as such, is beyond the power of the state and local governments.[48] The "authority to control immigration—to admit

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[43] U.S. CONST., art. VI, cl. 2.

[44] *See Gibbons v. Ogden,* 22 U.S. 1, 211 (1824); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Villas I,* 577 F. Supp. 2d at 866.

[45] *See Fid. Fed. Sav. & Loan Ass'n. v. De La Cuesta*, 458 U.S. 141, 152 (1982).

[46] *Jones v. Rath Packing Co*., 430 U.S. 519, 526 (1977).

[47] *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) ("The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress").

[48] *See id*. at 706-07 ("The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; *all of which are forbidden to the state governments*. . . .To

or exclude aliens – is vested solely in the Federal Government,"[49] and even a partial encroachment on the federal power over immigration renders a state law invalid.[50] When the federal government "has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land," and "[n]o state can add to or take from the force and effect of such treaty or statute."[51] The federal government "has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization," and the state and local governments "are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and *residence* of aliens in the United States or the several states."[52]

A critical aspect of the federal government's authority in the area of immigration is the discretion inherent in that authority, and states are forbidden from encroaching upon matters within that discretionary realm.[53] For example, only the federal government holds the power "to

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preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation; and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. . . . *The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.")* (emphasis added).

[49] *Truax v. Raich*, 239 U.S. 33, 42 (1915).

[50] *See id*. at 42-43.

[51] *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1940).

[52] *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (emphasis added).

[53] *See Hines*, 312 U.S. at 62-3 ("[T]he supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation is made clear by the Constitution . . . . Our system of government is such that the interests of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively

exclude foreigners from the country, whenever, *in its judgment*, the public interests require such exclusion."[54] The decision to remove or deport aliens already present in this country entails an even greater exercise of discretion[55] – especially given the size and importance of the undocumented alien population in the United States,[56] and the undisputed human consequences of a deportation decision.[57] "In light of the *discretionary federal power* to grant relief from deportation, a State cannot realistically determine that any particular undocumented child [or adult] will in fact be deported until after deportation proceedings have been completed."[58] Thus,

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requires that federal power in the field affecting foreign relations be left entirely free from local interference.").

[54] *Fong Yue Ting*, 149 U.S. at 707 (emphasis added).

[55] *See Reno v. American-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 483-4 (1999) ("At each stage, the Executive has discretion to abandon the endeavor . . . To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation," which is a "commendable exercise in administrative discretion.").

[56] *See Plyler v. Doe*, 457 U.S. 202, 218-9 (1982) ("Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants – numbering in the millions – within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself of adherence to principles of equality under law.").

[57] *See Reno*, 525 U.S. at 497-8 ("Deportation, in any event, is a grave sanction . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom . . . . Deportation has a far harsher impact on most resident aliens than many conceded 'punishments' . . . Uprooting the alien from home, friends, family, and work would be severe regardless of the country to which the alien was being returned; breaking these attachments inflicts more pain than preventing them from being made.") (Ginsburg, J., concurring) (internal citations and quotation marks omitted).

[58] *Plyler*, 457 U.S. at 226.

"the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation."[59]

In its most recent case addressing preemption and immigration, *DeCanas*, the Supreme Court reiterated that the "[p]ower to regulate immigration is unquestionably exclusively a federal power,"[60] and described "regulation of immigration" as including "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[61] The Supreme Court in *DeCanas* also held that preemption occurs where "the nature of the regulated matter permits no other conclusion,"[62] Congress "has unmistakenly so ordained,"[63] or the state legislation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[64]

Accordingly, cases applying *DeCanas* have held that state and municipal laws relating to immigration may be preempted in three ways: (1) constitutionally–preempted because it attempts to regulate immigration; (2) field-preempted because it is an attempt to legislate in a field occupied by the federal government; and (3) conflict-preempted because it either "burdens or conflicts in any manner with any federal laws or treaties" or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[65] Here, like its

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[59] *Hines*, 312 U.S. at 68.

[60] *DeCanas v. Bica*, 424 U.S. 351, 354 (1976).

[61] *See id*. at 355.

[62] *Id*. at 356.

[63] *Id.*

[64] *Id*. at 363.

[65] *See Villas I*, 577 F. Supp. 2d at 866-67; *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995) (hereinafter *LULAC*); *Garrett v. City of Escondido*, 465 F.Supp.2d 1043, 1055 (S.D. Cal. 2006); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 601-602 (E.D. Va. 2004).

predecessors, the Ordinance is preempted by federal law and invalid under the Supremacy Clause pursuant to all three preemption theories.

2. The Ordinance is an improper attempt to regulate immigration.

Federal immigration laws, and the administrative discretion that is inherent in the United States Government's enforcement of those laws, gives rise to a complex and frequently unpredictable regulatory scheme.[66] Immigration statutes and regulations entail numerous and varied classifications. "States enjoy no power with respect to the classification of aliens,"[67] and "Congress may not constitutionally authorize states to set their own standards to determine who is and is not an illegal alien."[68]

In addition, states and local governments may not vary the conditions imposed by Congress upon the residence of aliens in the United States[69] or determine immigration status.[70]

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[66] *See Drax v. Reno,* 338 F.3d 98, 99 (2d Cir. 2003) (describing "the labyrinthine character of modern immigration law" as "a maze of hyper-technical statutes and regulations"); *see also, e.g., Castro-O'Ryan v. INS,* 847 F.2d 1307, 1312 (9th Cir. 1988).

[67] *Plyer*, 457 U.S. at 225.

[68] *Equal Access Educ.,* 305 F. Supp. 2d at 602; *see also id.* at 608 ("Plaintiffs correctly note, however, that a policy that classifies Vasquez as an illegal alien, although he has TPS status and is lawfully present . . .directly conflicts with federal laws . . . Such a conflict with the federal classification scheme under the INA would lead to federal preemption. . . .").

[69] *See Toll v. Moreno*, 458 U.S. 1, 11 (1982) ("Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states."); *Traux,* 239 U.S. at 42 ("The authority to control immigration . . . is vested solely in Federal government."); *Takahashi,* 334 U.S. at 419.

[70] *See Plyler*, 457 U.S. 202, 236 (1992) (Marshall, J., concurring) ("[T]he structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported."); *id.* at 241, n.6 (Powell, J., concurring) ("Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country…. Indeed, even the [federal immigration authorities] cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course."); *LULAC*, 908 F. Supp. at 770 ("Indeed, determinations of immigration status by state agents amounts to immigration regulation whether made for purposes of notifying aliens of their

A "state alien residency requirement" that would deny "abode" (one of "the necessities of life") to aliens whom the federal government allows to reside in this country would be "inconsistent with federal policy," would "encroach upon exclusive federal power," and would be "constitutionally impermissible."[71]

The Ordinance is an improper attempt to regulate immigration because, pursuant to its provisions, the City seeks to register and identify aliens living in Farmers Branch,[72] assess whether they are lawfully present in the United States,[73] and force landlords to expel those who are not,[74] making it impossible for them to live within the City limits. Deciding who may stay and who must depart, and denying residence to the latter, is the very core of immigration regulation.[75]

The Court has appropriately characterized the City's revocation of an alien's residential occupancy license, and the accompanying requirement that such persons be ousted from their

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unlawful status and reporting their presence to the INS or for the limited purpose of denying benefits."); *Villas I,* 577 F. Supp. 2d. at 873.

[71] *Graham v. Richardson*, 403 U.S. 365, 379-80, 91 S. Ct. 1848, 1856 (1971) ("[I]n the ordinary case an alien, becoming indigent and unable to work, will be unable to live where, because of discriminatory denial of public assistance, he cannot 'secure the necessities of life, including food, clothing and shelter.' State alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible.").

[72] *See* Ordinance §§ 1, 3 (adding City Code §§ 26-79(B)-(C), 26-119(B)-(C)) (requiring prospective tenants to file applications listing immigration information) (App019-022, App025-27).

[73] *See id.* (adding City Code §§ 26-79(D), 26-119(D)) (requiring the City building inspector to obtain immigration status information from the "federal government") (App022-23, App027-29).

[74] *See id.* (adding City Code §§ 26-79(C)(7), 26-119(C)(7)) (requiring a landlord to evict tenants when an occupant's license is revoked.) (App022, App027).

[75] *See Toll*, 458 U.S. at 11; *Traux,* 239 U.S. at 42; *Takahashi,* 334 U.S. at 419.

places of residence, as municipal acts of "deportation."[76] After all, the stated purpose of the Ordinance is to "aid" in the "enforcement" of the federal immigration laws.[77] Because one of the purposes of the federal immigration laws is to remove from our national borders those aliens whom the federal government determines should be removed, the City's aim in the "enforcement" of immigration law is to necessarily cause illegal aliens to "go back where they came from" – presumably, to their respective countries of origin. Thus, because it seeks to address the problem of illegal immigration, and presumably to remove those purportedly having no right to reside in this county, the Ordinance is a regulation of immigration.

The Ordinance is an impermissible regulation of immigration in at least three ways. First, because the City is prohibited from creating its own immigration classifications, the Ordinance cannot be constitutional unless the classification used by the City in the Ordinance – the undefined term "lawfully present" – is a known, recognized, and well-understood federal classification for those persons who, however temporarily, are permitted to remain in the United States. As shown below, however, "lawfully present" is not a uniform federal classification. Second, even if such a uniform and precisely-defined classification existed, an alien's status as "unlawfully present" would not be tantamount to a determination by the federal government denying that person a right to housing while he or she remains in the United States. Third,

[76] *See* Transcript of Proceedings, Temporary Restraining Order Before the Honorable Jane J. Boyle, United States District Judge, September 12, 2008 ("TRO Transcript") at 125 (Court's reference to license revocation as "effective deportation from the City"), attached as Exhibit 6 to the Ternan Declaration (App226); *id.* at 136 (The Court: "An act by the City to remove such persons would be an act of deportation where the federal government for any reason or for no reason has chosen not to act.") (App237); *id.* at 145 (Ordinance 2952 has the "intended effect of deporting certain aliens from the City") (App246).

[77] *See* Ordinance at seventh "whereas" clause ("[I]t is the intent of the City of Farmers Branch to enact regulations that are harmonious with federal immigration law and which aid in its enforcement.") (App018).

pursuant to the Ordinance, the City will impermissibly be making determinations regarding an alien's residency rights.

In short, the Ordinance regulates immigration in a manner inconsistent with the federal system because it erroneously equates information regarding a person's "immigration status" with a determination of whether an applicant is "lawfully present," and further mistakenly presumes that a determination of whether a person is "lawfully present" is a determination by the federal government whether a particular individual may remain or reside in the United States.[78] As discussed below, the Ordinance is an impermissible regulation of immigration that is preempted by federal law.

a. The Ordinance regulates immigration based on the undefined but all-important concepts of "lawful presence" and "unlawful presence."

The Ordinance requires the City's building inspector, pursuant to Title 8, United States Code § 1373(c), to verify with the federal government whether an occupant is an alien "lawfully present."[79] If the federal government reports that the occupant is not "lawfully present," the building inspector is directed to revoke the occupancy license.[80] The City's classification of aliens ineligible to live in Farmers Branch – those not "lawfully present" – is inconsistent with federal law.

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[78] *See* TRO Transcript at 134 (The Court: "Although the ordinance includes a disclaimer stating that the City is not intending to alter or supplant federal immigration law, that disclaimer does not save the ordinance from its practical effect, particularly when the City cannot point to any language in the INA to demonstrate how an alien's immigration status or one's citizenship status or even whether one is lawfully present is necessarily coterminous with a determination by the federal government that a particular individual should be allowed to reside, however temporarily, in this country.") (App235).

[79] *See* Ordinance §§ 1, 3 (adding City Code §§ 26-79(D)(1), 26-119(D)(1)) (App022, App027-28).

[80] *See id.* (adding City Code §§ 26-79(D)(4), 26-119(D)(4)) (providing for the revocation of the occupancy license "if the federal government reports that the occupant is an alien who is not lawfully present in the United States") (App023, App028).

Unlike its predecessor ordinances that at least attempted to tie eligibility to particular federal statutory definitions, the Ordinance does not, and perhaps cannot, define "lawfully present."[81] In other words, the City has exchanged one phrase used to determine eligibility for certain benefits – the phrase "eligible immigration status" in Ordinance 2903 (which was purportedly based on HUD regulations) – with another – the phrase "lawfully present" in the current Ordinance (which is not based on *any* identified federal statute). In so doing, the City has missed the mark because the Ordinance has not adopted a federal standard for determining eligibility to stay within the United States.[82]

Simply put, the Ordinance depends upon the existence of uniform federal definitions that give clear and unambiguous meaning to the concepts of an alien's "lawful presence" or "unlawful presence" in the United States. However, no such uniform definitions exist. A survey of the United States Code and the Code of Federal Regulations reveals *numerous different* definitions and uses of those terms, each utilized primarily within its own unique statutory or regulatory context.[83] None of them involves the licensing of the fundamental human right to shelter.

In light of those facts, and in the absence of any definitions within the body of the Ordinance, the notion that the monolithic "federal government" can tell the City of Farmers Branch whether an alien is "lawfully present" or "unlawfully present" for purposes of the City's

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[81] *See Lozano v. City of Hazleton,* 496 F. Supp. 2d 477, 485 (M.D. Pa. 2007) (noting that neither the ordinance in that case nor the Immigration and Naturalization Act defines the term "illegal alien" or "lawfully present.").

[82] *See Villas I*, 577 F. Supp. 2d at 871 ("Because this definition is not consistent and coextensive with federal immigration standards, the City has attempted to regulate immigration in violation of the U.S. Constitution and the Supremacy Clause.").

[83] *See, e.g.,* 8 U.S.C. § 1182(a)(9)(B); 8 C.F.R. § 103.12; 8 U.S.C. § 1229a(c)(2); 49 C.F.R. § 24.2; *see also* 8 U.S.C. § 1357; 8 U.S.C. § 1621(d); 42 U.S.C. § 1436a; 26 U.S.C. § 3304(a)(14)(A); 7 U.S.C. 2015(f); 42 U.S.C. § 4605.

novel and unprecedented "residential occupancy licensing" scheme is pure fiction. Put simply, there is no defined measure of "lawful presence." Without such a measure, the Ordinance is a fruitless and an unworkable exercise.

b. A determination of "unlawful presence" does not equate to a determination that the federal government would remove the alien.

Although it is unclear what "lawful presence" means, it is clear that a determination of an alien's unlawful presence is *not* equivalent to a determination by the federal government that the alien must leave the United States. For instance, the Fifth Circuit has repeatedly held that an alien can be unlawfully present even though the alien had been granted permission to stay and work in the United States by the federal government.[84] Likewise, an alien can be found "unlawfully present" by the federal government, and even ordered removed, yet nonetheless be permitted to stay.[85] There are countless other situations where an alien might be "unlawfully present" yet be permitted to remain in the United States.[86] Accordingly, until the federal government actually deports an individual, there is no way of knowing whether the federal government wishes to remove an "unlawfully present" alien.[87]

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[84] *See United States v. Lucio*, 428 F.3d 519, 524-26 (5th Cir. 2005) (discussing how an alien could still be unlawfully present even though the INS has granted permission to temporarily stay and work in the United States); *United States v. Flores*, 404 F.3d 320, 326-328 (5th Cir. 2005) (same).

[85] *See Clark v. Martinez*, 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

[86] *See Lozano,* 496 F.Supp. 2d at 530 (discussing how occupancy license regime conflicted with federal law because individuals can be permitted to stay in the United States while still being unlawful). Further, other persons may be permitted to work and live in the United States even though they are violating immigration laws. *See, e.g.*, 8 C.F.R. § 274a.12(a)(11-13), (c)(8-11, 14, 18-20, 22, 24) (listing categories of persons who can receive federal permission to work, and implicitly to stay, in the United States even though they may be violating immigration laws). For example, such persons may have pending applications to adjust to a lawful status pursuant to 8 U.S.C. § 1255(i).

[87] *See Plyler*, 457 U.S. at 226 ("But there is no assurance that a [person] subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even become a citizen. In light of the discretionary federal

The City has thus created a classification of aliens ineligible for housing in Farmers Branch – those deemed "not lawfully present" – which is not equivalent to any classification used by the federal government to determine eligibility for housing or residence in the United States.[88] In the words of the Court, "[i]t is difficult to see how the City of Farmers Branch can argue that it is not regulating immigration, when it has once again created what the Court considers at this point a relatively overly simplistic classification scheme to determine who can stay and who has to leave, given the complexity that appears inherent in [the] federal scheme."[89] Accordingly, the Ordinance is preempted by the Supremacy Clause.[90]

c. <u>The Ordinance is preempted because the City, and not the federal government, will determine an alien's eligibility for a "residential occupancy license."</u>

The Ordinance requires the building inspector to "verify with the federal government whether the occupant is an alien lawfully present in the United States"[91] and to revoke the residential occupancy license of any resident whom "the federal government reports . . . is an alien who is not lawfully present in the United States."[92] The City represents that it intends to rely on the Systematic Alien Verification for Entitlements ("SAVE") Program for information

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power to grant relief from deportation, a State cannot realistically determine that any particular undocumented [person] will in fact be deported until after deportation proceedings have been completed.") (internal citations omitted).

[88] *See Lozano,* 496 F. Supp. 2d at 485.

[89] TRO Transcript 136-37 (App237-38).

[90] *See, e.g., Equal Access Educ.,* 305 F.Supp. 2d at 602 ("In short, formulating a legal immigration standard is a regulation of Immigration that states cannot make, as this power belongs exclusively to the federal government."); *see also Traux,* 239 U.S. at 42 (explaining that federal law preempts any state attempt to deny aliens "entrance and abode").

[91] *See* Ordinance §§ 1, 3 (adding City Code §§ 26-79(D)(1), 26-119(D)(1)) (App022, App027-28).

[92] *See id.* (adding City Code §§ 26-79(D)(4), 26-119(D)(4)) (App023, App028).

regarding a person's "lawful" or "unlawful" presence in this country.[93] Indeed, the SAVE Program is the only program used by the federal government for inquiries made under Title 8 United States Code Section 1373.[94]

As an initial matter, the City is neither approved nor authorized to use the SAVE Program for purposes of implementing its "residential occupancy licensing" scheme.[95] Moreover, the SAVE Program cannot make the relevant determination for the City – *i.e.*, whether an alien's occupancy license should be revoked because the alien is "not lawfully present." The SAVE Program does not determine whether a person is or is not entitled to a benefit or license.[96] Nor does it report that the alien is "not lawfully present."[97] Indeed, a report from the SAVE Program

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[93] *See* Answer at ¶ 65 ("Defendant admits that it presently intends to use the Systematic Alien Verification for Entitlements Program to determine whether occupancy license applicants are eligible to rent housing in Farmers Branch.").

[94] *See* Roessler Depo. at 105:17-106:1 ("Q: Is SAVE the only way USCIS response to requests made under this statute? A: To the best of my knowledge, yes.") (App073-74) (objections omitted).

[95] *See* Olk Depo. at 149:2-5 ("Q: And what was the result of the request you made to access SAVE? A: The application was denied . . .") (App087); *City of Escondido,* 465 F. Supp. 2d at 1057 ("Defendant states in oral argument and through its Memorandum that it could make use of the federal government's Systematic Alien Verification for Entitlements (SAVE) program to carry out this task. It is unclear to this Court, however, whether Defendant would be entitled to use the SAVE program where the Ordinance seeks to regulate landlord-tenant relationships outside of the scope of a public benefit.").

[96] *See* Roessler Depo. at 132:18-22 ("[W]hether or not the [state agency] issues this benefit at that point is between the [agency] and the applicant. We don't make determination on the benefits.") (App075).

[97] *See id*. at 56:3-7 ("Q: Does the system ever respond by seeing the words 'lawfully present?' A: No, the system does not respond with that. It responds with the immigration status. It does not answer lawful presence or not.") (App072); *id*. at 161:12-20 ("Q: Earlier, you stated that the SAVE Program doesn't come back with a response with lawfully present, right? A: Correct. Q: It also wouldn't, by definition, come back with – a response to a SAVE inquiry is never going to be the answer unlawfully present, right? A: Correct. It will gives the status of the individual.") (App076).

database "is not a finding of fact or conclusion of law that the individual is not lawfully present."[98]

Because no existing federal information-sharing program has the general capability or authority to inform the City of Farmers Branch whether an applicant for a residential occupancy license in the City is "lawfully present" in the United States, the City apparently intends to interpret for itself the information provided by the federal government and, on that basis, exclude people from its borders, suspend landlords' apartment complex licenses, and levy criminal sanctions.[99] Such conduct is plainly preempted.[100]

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[98] *See* 65 Fed. Reg. 58301, 58302 ("A Systematic Alien Verification for Entitlements (SAVE) response showing . . . an immigration status making the individual ineligible for a benefit is not a finding of fact or conclusion of law that the individual is not lawfully present.") (emphasis added).

[99] *See* Olk Depo. at 154:19-155:1 ("Q: And do you know whether somebody who's a resident alien is lawfully present in the United States? A: I do not. Q: Okay. What about a person who has a pending application for a benefit with the Unites States Immigration Services, do you know whether they are lawfully present or not? A: I do not.") (App088-89); *id.* at 156:5-8 ("Q: Do you think that you'll have to know the answer to some of those questions in order to carry out your duties in enforcing the ordinance? A: Yes.") (App090); *id*. at 156:22-157:5 ("Q: So you think at some point you'll have to determine who and who does not fit into some of these categories in order to determine whether they're lawfully present or not? A: Yes. Q: And how will you be acquiring this knowledge, Mr. Olk? A: As I think I just stated, I don't know how I'll be acquiring that knowledge.") (App090-091); *id*. at 163:20-23 ("Q: So isn't it true you'd have to make that determination if they're lawfully present? A: Yes.") (App092).

[100] *See, e.g., LULAC*, 908 F. Supp. at 770 ("Indeed, determinations of immigration status by state agents amounts to immigration regulations whether made for the purpose of notifying aliens of their unlawful status and reporting their presence to the INS or for the limited purpose of denying benefits."); *Villas I*, 577 F. Supp. 2d at 874 ("The court determines that the Ordinance burdens private citizens and city officials with making immigration status decision based upon a scheme that does not adopt federal immigration standards. Accordingly, the Ordinance is a 'regulation of immigration' inconsistent with the federal government's rights and in violation of the first *De Canas* test.").

The federal statute on which the Ordinance attempts to rely – 8 U.S.C. § 1373(c)[101] – provides for the release of information regarding the "immigration status" of a person within the jurisdiction of the Department of Homeland Security[102] – not information regarding whether that person must leave the country.[103] Moreover, "lawfully present" is not an "immigration status."[104] Instead, the City's building inspector must convert "immigration status" into a determination of whether an alien is entitled to live in Farmers Branch. Although the federal government has determined which immigration statuses prevent an alien from being eligible to receive public benefits,[105] obtain employment,[106] or secure a driver's license,[107] it has not determined which immigration statuses prevent an alien from being eligible to lease housing.

In fact, as Justice Powell explained in *Plyer v. Doe*:[108] "Until an undocumented alien is ordered deported . . . no State can be assured that the alien will not be found to have a federal

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[101] *See* Ordinance § 3 (adding City Code § 26-119(D)(1)) ("[T]he 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.") (App027-28).

[102] *See* 8 U.S.C. § 1373(c) (requiring the Immigration and Naturalization Service to "respond to an inquiry by a Federal, State, or local governmental agency, seeking to verify or ascertain the citizenship or immigration status of an individual within the jurisdiction of the agency"); *see also* 6 U.S.C. §§ 271(B), 291, 552(D), and 557 (abolition of Immigration and Naturalization Service and transfer of functions to the Department of Homeland Security, Bureau of Citizenship and Immigration Services).

[103] *See Lozano,* 496 F. Supp. 2d at 532 ("More than resorting to the Basic Pilot Program or the Systematic Alien Verification for Entitlements ('SAVE') is necessary to determine if the federal government seeks the removal of an individual from the United States.").

[104] *See* Roessler Depo. at 56:3-7 (App072).

[105] *See* 8 U.S.C. §1641(b) (listing the immigration statutes that are included in the category "qualified alien").

[106] *See* 8 U.S.C. § 1324a (prohibiting employment of "unauthorized aliens" and defining "unauthorized alien").

[107] *See* Real ID Act, 119 Stat. 231, Public Law 109-13, Div. B, Tit. II § 202(c)(2)(B) (listing the categories of aliens with "lawful status" for purposes of determining eligibility for driver's licenses).

[108] *See* 457 U.S. at 241 n. 6 (concurring opinion).

permission to reside in the country, perhaps even as a citizen."[109] Accordingly, an agency of the federal government "cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course."[110] Therefore, the federal government *cannot* provide the City with a classification scheme that clearly defines residency rights. Thus, if the enforcement of the Ordinance is not enjoined, the City will be making its own determinations of who is eligible to reside in Farmers Branch and who will effectively be removed from, or kept out of, the City. In sum, the Ordinance is an impermissible and preempted regulation of immigration.

3. The Ordinance intrudes into areas where Congress has occupied the field of regulation.

a. The Ordinance is preempted because it intrudes on the federal government's alien registration scheme.

The Ordinance is an alien registration law, which impermissibility intrudes into Congress' comprehensive alien registration scheme.[111] Over sixty years ago, the Supreme Court made clear that states and local governments cannot supplement the federal alien registration scheme.[112] In that case, Pennsylvania enacted a statute requiring aliens 18 years or older to register once a year, provide information required by the statute, pay a registration fee, receive an identification card, and exhibit the card as a condition precedent to registering a motor vehicle.[113] In reaching its conclusion that states were without power to complement the federal registration

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[109] *See id.*

[110] *See id.*

[111] *See, e.g.,* 8 U.S.C. §§ 1301-1306.

[112] *See Hines*, 312 U.S. at 66-67 ("[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.").

[113] *See id*. at 56.

scheme, the Supreme Court noted that Congress' alien registration scheme involved a delicate balancing of interests.[114]

The inquisitorial Ordinance, like the unconstitutional Pennsylvania statute in *Hines*, seeks to add to federal registration requirements for aliens. Like the statute in that case, the Ordinance requires the registration of all applicants over eighteen, disclosure of the person's country of citizenship and alien identification numbers, and the payment of a fee.[115] Just as the Pennsylvania statute required proof of registration in order to obtain a motor vehicle, the Ordinance requires proof of registration to obtain rental housing.[116] Because states and local governments lack authority to implement additional or supplementary registration schemes, the Ordinance should be enjoined.[117]

b. <u>The Ordinance is preempted because it intrudes into the federal scheme regulating alien eligibility for benefits.</u>

Federal law preempts state and local laws that seek to regulate conduct in a field that Congress intended the federal government to occupy exclusively. Such an intent "may be inferred from a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to

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[114] *See id.* at 71-74 (Registration schemes were often considered "at war with the fundamental principles of our free government, in that they would bring about unnecessary and irritating restrictions upon personal liberties of the individual, and would subject aliens to a system of indiscriminate questioning similar to the espionage systems existing in other lands." Thus, Congress sought to "steer a middle path" and "it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-aiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended to guard against.").

[115] *See* Ordinance §§ 1, 3 (adding City Code §§ 26-79(B)(2)-(6); 26-119(B)(2)-(6)) (App020-21, App025-26).

[116] *See id.* (adding City Code §§ 26-79(C)(1), (4); 26-119(C)(1), (4)) (App021, App027).

[117] *See Hines*, 312 U.S. at 66-67.

preclude enforcement of state laws on the same subject."[118] The Ordinance is preempted because Congress has enacted a comprehensive scheme regulating the eligibility of aliens for certain public benefits and licenses, and the "residential occupancy license" under the Ordinance creates additional, non-federal regulations within that occupied field.

The Ordinance states that pursuant to "Title 8, United States Code Sections 1621, et. seq." some aliens "are not eligible for certain State or local public benefits, including licenses."[119] Those sections of the United States Code set out a comprehensive scheme for determining alien eligibility for certain federal, state, and local benefits. In particular, Congress has explicitly denied specified classes of aliens access to some state of those benefits,[120] while permitting particular classes of other aliens access thereto,[121] and has allowed state and local governments discretion to limit eligibility for particular types of benefits.[122] Further, Congress has authorized states and political subdivisions "to require an applicant for State and local public benefits (as defined in section 1621(c) of this title) to provide proof of eligibility."[123]

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[118] *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal punctuation omitted); *see also Crosby*, 530 U.S. 363, 379 (2000) (state statute touching on foreign relations not saved by the fact that state and federal statute "share the same goals and . . . some companies may comply with both sets of restrictions," because "the inconsistency of sanctions . . . undermines the congressional calibration of force."); *United States v. Locke*, 529 U.S. 89, 115 (2000) (fact that state requirements were similar to federal requirements not enough to avoid preemption, as "[t]he appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation.").

[119] *See* Ordinance at third "whereas" clause (App018).

[120] *See* 8 U.S.C. § 1621(a).

[121] *See* 8 U.S.C. § 1621(b).

[122] *See* 8 U.S.C. §§ 1622, 1624.

[123] 8 U.S.C. § 1625.

Significantly, however, the "residential occupancy license" required by the Ordinance is not a state or local benefit that the federal government has authorized local governments to deny. [124]

Through the Ordinance, the City attempts to license the right to obtain rental housing. Of course, shelter is neither a benefit nor a privilege; rather, it is a basic human necessity. The City's proposed occupancy licenses do not constitute a state or local public benefit under 8 U.S.C. § 1621(c). Accordingly, the Ordinance seeks to restrict an alien's eligibility for a license without authorization from Congress.[125] That is impermissible where, as here, Congress has enacted a comprehensive regulatory scheme that governs when states and local governments can restrict benefits based on immigration status.[126]

c. The Ordinance is preempted because it would intrude into the federal anti-harboring scheme.

Further, the Ordinance purports to be an anti-harboring ordinance.[127] The federal anti-harboring statute, Title 8, United States Code Section 1324(a)(1)(A)(ii), prohibits harboring aliens who the person knows remain in the United States in violation of law.[128] In contrast, the

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[124] "State or local public benefits" are defined by 8 U.S.C. § 1621(c) as: "(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government."

[125] The City has not even obtained permission to use the SAVE Program. *See* Olk Depo. at 149:2-5 ("Q. And what was the result of the request you made to access SAVE? A. The application was denied because the ordinance was not in effect.") (App087).

[126] *See supra* n. 118; 8 U.S.C. §§ 1601-1646 (containing federal scheme governing benefits to aliens).

[127] *See* Ordinance at fourth "whereas" clause ("WHEREAS, pursuant to Title 8, United States Code, Section 1324(a)(1)(A), prohibits the harboring of aliens not lawfully present in the United States, including, as the courts of the United States have held, the provision of residential accommodations to such aliens.") (App018).

[128] *See* 8 U.S.C. § 1324(a)(1)(A)(iii) (making it a punishable offense if a person "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the

Ordinance prohibits the act of knowingly renting apartments and single-family residences to unlicensed occupants, whose presence may or may not violate federal immigration law.[129]

In addition, the Ordinance exposes certain alien occupants (the "harbored") to potential criminal liability, whereas the federal anti-harboring statute only subjects the "harborors" to criminal sanction. The Ordinance thus imposes requirements that exceed those of the federal anti-harboring statute. Indeed, in a decision issued just eleven days ago, a federal district court observed that "[n]o court has ever held that the mere provision of housing to an illegal alien constitutes harboring."[130] The reason why the rental of an apartment to such persons is not unlawful is that a violation of the anti-harboring statute requires, among other things, a showing that the landlord "prevent[ed] government authorities from detecting" the alien.[131] In connection with an ordinary landlord-tenant rental relationship, the mere act of leasing in no way prevents or hinders the federal government from detecting the alien.[132]

In any event, neither state nor local anti-harboring laws could ever be compatible with the federal statute because they would intrude upon the prosecutional discretion invested in the United States Government in connection with the enforcement of housing-based immigration

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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").

[129] *See* Ordinance §§ 1, 3 (adding City Code §§ 26-79(C)(7), 26-119(C)(7)) ("It shall be an offense for a landlord or agent of a landlord. . . to knowingly permit an occupant to occupy a single family residence [or apartment] without a valid residential occupancy license.") (App022, App027).

[130] *See Delrio-Mocci v. Connolly Properties, Inc*., 2009 WL 971394, at *4 (D.N.J. April 9, 2009).

[131] *Id.* (citing *U.S. v. Silveus*, 542 F.3d 993, 1003-4 (3d Cir. 2008)).

[132] *See id.* ("Defendants rented the apartments to illegal aliens with the purpose of making a profit …. Defendants did not take any affirmative or material steps to prevent authorities from learning about the existence of their illegal immigrant tenants.").

policy. Accordingly, the Ordinance is preempted because it attempts to regulate in a field occupied by the federal government.[133]

4. The Ordinance conflicts with federal law and federal policies.

As demonstrated above,[134] the prelude to the City's serial adoption of three "immigration ordinances" was Resolution 2006-099, in which the City Council noted that "the citizens of Farmers Branch, due to the inaction of the Executive and Legislative Branch of our Federal Government to enforce the Immigration Act, are imploring, urging, and demanding their City Council to enact its own laws to help in the enforcement of the Immigration Act."[135] In response to those cries for action, the City Council stated that it was "not only sympathetic to the pleas of its citizens," but was "in agreement with the major concerns expressed."[136]

Consequently, the City Council undertook to review the role the City could assume in enforcing the United States immigration laws "out of absolute necessity brought about by the inaction of our federal government" and the "breakdown and failure of the United States Government to enforce immigration laws."[137] In other words, because the federal government was failing to deport "illegal aliens" from the United States – and, particularly, from Farmers Branch – the City looked to take on that task itself, at least with respect to such persons living within its boundaries. That led to the unholy trinity of ordinances.

After a Texas state court temporarily enjoined the first ordinance adopted pursuant to Resolution 2006-099 (namely, Ordinance 2892), and Judge Lindsay permanently enjoined the

[133] *See City of Escondido*, 465 F. Supp. 2d at 1056 (granting a temporary restraining order preventing the City of Escondido from enforcing a housing ordinance because, in part, the "court finds serious concerns in regards to the field preemption of the Ordinance by existing federal statutes [8 U.S.C. § 1324(a)(1)(A)]").

[134] *See supra* § II.B.

[135] Resolution 2006-099 (App046-49).

[136] *Id.* (App048).

[137] *Id.*

effectuation and enforcement of the second such measure (Ordinance 2903), the Farmers Branch City Council passed the current Ordinance – which is the subject of this action.[138] In the introductory "whereas" clauses of the Ordinance, the City Council noted that "aliens not lawfully present in the United States" are, by definition, unlawfully here "when present in the City of Farmers Branch."[139] In order to address those persons, the City passed the Ordinance to "aid" in the enforcement of federal immigration laws.[140]

The foregoing removes any doubt that the Ordinance was intended as a regulation of immigration. Put simply, the Ordinance seeks to accomplish what the City had previously threatened to do pursuant to Resolution 2006-099 – remove from Farmers Branch aliens "not lawfully present in the United States" because of the federal government's alleged failure to do so.

In fact, the City has declared that, with respect to its immigration policies, "the underlying important principle is the necessity in this country to obey and respect the laws; the Rule of Law, and that is not what is happening and is not what has been happening in this country for at least the last ten (10) years."[141] Of course, when an individual, a group of persons, or a political subdivision purports to take upon itself the task of "enforcing" federal law in a manner inconsistent with federal policies, such action is called "vigilante justice" – which inevitably leads to injustice.

The federal government's *de facto* immigration policy, which the City has set out to oppose, has been acknowledged by the Supreme Court. In *Plyer v. Doe*, the Supreme Court held that because there is no assurance that an alien "subject to deportation will ever be deported," a

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[138] *See supra* § II.B. and C.

[139] *Id.* at § II.C.1.

[140] *Id.*

[141] *See* Resolution 2006-099 at twelfth "whereas" clause (App047).

state may not deny certain fundamental rights to aliens "enjoying an inchoate federal permission to stay."[142] In addition to acknowledging such "inchoate federal permission," the Supreme Court noted the Attorney General of the United States' statement that, "We have neither the resources, the capability, nor the *motivation* to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community."[143] By seeking to alter that *status quo*, the Ordinance is in conflict with federal policy.[144]

Specifically, the Farmers Branch building inspector will be required to play the role of immigration prosecutor.[145] Further, landlords will be required to expel aliens whom the City has deemed unfit to live in Farmers Branch,[146] notwithstanding that only immigration judges or other appropriate federal officials can perform those functions.[147]

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[142] *Pyler*, 457 U.S. at 226 (1982).

[143] *Id*. at 219 n.19 (emphasis added).

[144] *See Lozano*, 496 F. Supp. 2d at 531 ("The ordinances also conflict with federal law in that they assume that the federal government seeks the removal of all undocumented aliens.").

[145] *See* Ordinance §§ 1, 3 (adding City Code §§ 26-79(E)(1), 26-119(E)(1)) (permitting for a landlord or tenant to bring a suit against the building inspector to challenge the revocation notice) (App023, App029); Olk Depo. at 242:20-25 (Q: "[D]o you feel that you would be confident to testify as to whether or not they were lawfully present in the United States?" A: "I would feel confident that I had the documentation as established once the procedure is established to show how I made my determination.") (App098); *id*. at 243:2 ("you would take that information that's been provided by the Federal Government and you explain how you would analyze that to determine that their license should be revoked; is that what you would testify to?" A: "Yes, sir.") (App099).

[146] *See* Ordinance §§ 1, 3 (adding City Code §§ 26-79(C)(7), 26-119(C)(7)) ("It shall be an offense for a landlord or agent of a landlord. . . to knowingly permit an occupant to occupy a single family residence [or apartment] without a valid residential occupancy license.") (App022, App027).

[147] *See Lozano,* 496 F. Supp. 2d at 533 ("Immigration status can only be determined by an immigration judge . . . Further, the proceeding before the immigration judge is the sole and exclusive procedure for determining whether an alien may be admitted . . . or . . . removed from the United States.").

B. The Ordinance Violates The Due Process Clause Of The Fourteenth Amendment.

The Fourteenth Amendment guarantees due process of law, and proscribes state and municipal laws that are so vague that persons of common intelligence must necessarily guess at their meaning (which, of course, may differ between persons).[148] A law is unconstitutionally vague where it: (a) fails to provide those targeted by the statute a reasonable opportunity to know specifically what conduct is prohibited; or (b) is so indefinite as to allow arbitrary and discriminatory enforcement.[149] A law is void for vagueness under the Due Process Clause if it is inherently standardless or if its enforcement depends upon arbitrary discretion vested in those ultimately responsible for achieving its objectives.[150] Moreover, due process requires that persons be provided adequate notice and hearing before they are deprived of life, liberty, or property.[151]

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[148] *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1971); *Beckerman v. City of Tupelo*, 664 F.2d 502, 510-11 (5th Cir. 1981) (holding a statute unconstitutionally vague).

[149] *See Kolendar v. Lawson,* 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999) ("It is established that a law fails to meet the requirements of Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.") (*quoting Giaccio v. Pennsylvania,* 382 U.S. 399, 402-403 (1966)); *Kramer v. Price*, 712 F.2d 174, 175-76 (5th Cir. 1983), *vacated on other grounds*, 723 F.2d 1164 (5th Cir. 1984) (providing that the standard for finding a statute void for vagueness is whether the statute (1) fails to define the offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited and (2) fails to establish minimum guidelines to govern law enforcement, which invites arbitrary and discriminatory law enforcement).

[150] *See Grayned*, 408 U.S. at 108-09 ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."); *Beckerman*, 664 F.2d at 510-11.

[151] *See, e.g., LaChance v. Erickson,* 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard"); *Lozano,* 496 F. Supp. 2d at 534 ("The fundamental requirements of due process are notice and a meaningful opportunity to be heard. . . ."); *City of Escondido,* 465 F.Supp.2d at 1058 ("The right to be heard prior to the deprivation of a property interest is a fundamental protection of the Due Process clause.").

The Ordinance imposes criminal penalties for violations which the City fails to define with sufficient certainty that ordinary people are able to understand exactly what conduct is prohibited. As such, the Ordinance invites arbitrary and discriminatory enforcement practices[152] and, therefore, violates the Due Process Clause. Moreover, unless the Ordinance is declared unconstitutional, the City will deprive persons of their property interests (leases, income from leases, and licenses) with inadequate – or no – notice and hearing.[153]

1. Who is a "temporary guest"?

Under the Ordinance, it is: (1) "an offense for a lessor to lease or rent an or apartment without obtaining and retaining a copy of the residential occupancy license of any and all known occupants;"[154] and (2) an offense for a landlord to "knowingly permit an occupant to occupy an apartment without a valid residential license."[155] The Ordinance defines "occupant" as "a person, age 18 or older, who resides at an apartment,"[156] but excludes from that definition "a temporary guest of an occupant."[157] But the Ordinance provides no criteria or guidance for distinguishing between an "occupant" and a "temporary guest."

In fact, the distinction raises many genuine questions. It is unclear whether the term "temporary" refers to the intention of the "guest" (or the "occupant") or the period of time in which the "guest" actually resides in or occupies the unit. Moreover, if "temporary" refers to a measurement of time, how long of an increment is it? Again, the Ordinance provides no

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[152] *See Grayned*, 408 U.S. at 108-09.

[153] *See Lozano*, 496 F. Supp. 2d at 537 ("It cannot be disputed that tenants have a property interest in their apartments for the term of their lease. As owners of the property, the landlords also have an interest in the right to income on the property.") (internal citations omitted).

[154] *See* Ordinance § 3 (adding City Code § 26-119(C)(4)) (App027).

[155] *See id.* (adding City Code § 26-119(C)(7)) (App027).

[156] *See id.* (adding City Code § 26-119(A)(5)) (App027).

[157] *See id.*

answers. Of equal importance, the building inspector does not know what a temporary guest is,[158] and determining whether someone is a temporary guest will be pure guesswork.[159] Therefore, lessors, landlords, and agents are left to speculate whether a person is an "occupant" or is merely a "temporary guest" – and will be subject to continuing criminal sanctions and the suspension of the landlord's apartment license if the building inspector determines, in his discretion, that a person who was treated as a "temporary guest" is actually an "occupant." Accordingly, the Ordinance fails to provide landlords with an opportunity to know what conduct is prohibited.[160]

2. Renewals, extensions, and holdovers

Although the Ordinance "applies only to leases or tenancies that commence on or after its effective date,"[161] it is not clear whether it applies to holdover tenants and/or renewals and extensions of current leases.[162] For example, after the effective date of the Ordinance, does a lessor violate the Ordinance if, without all of the occupants having first provided an occupancy license, an existing lease is renewed? Again, the Ordinance provides no answer. The Ordinance is thus inherently vague as to the duties imposed.

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[158] *See* Olk Depo. at 141:4-6 ("Q: What is a temporary guest under the language of this ordinance, Mr. Olk? A: If the term's not defined, I don't know.") (App085).

[159] *See id.* at 143:14-17 ("Q: So the temporary guest term used in this ordinance will be a discretionary function out of your office? A: Correct.") (App086).

[160] *See* Diamond Declaration at ¶¶ 7-12 (App002-004); Brown Declaration at ¶ 5 (App033).

[161] *See* Ordinance § 7 (App030).

[162] *See, e.g.,* Diamond Declaration at ¶ 33 (App011); Brown Declaration at ¶ 5 (App033); Smith Declaration at ¶ 14 (App034-40).

3. The Ordinance fails to provide a meaningful opportunity to be heard.

The Ordinance fails to meet the requirements of due process because it does not provide a meaningful opportunity to be heard.[163] First, neither the Ordinance nor 8 U.S.C. § 1373 provides a tenant with guidance of what information would be sufficient to correct the federal government's records, thereby depriving the tenant of any ability to prepare for any "hearing." Not even the building inspector, the agent of the City responsible for collecting and conveying the "additional information" to the "federal government,"[164] knows what "additional information" should be provided.[165]

Second, the judicial review procedures provided to the landlord and tenant by the Ordinance are inadequate because only a federal immigration judge, not state or municipal courts, can determine lawful immigration status.[166]

Third, the landlord's post-suspension right to appeal to the City Council[167] is illusory because the Ordinance prohibits the City Council from considering whether the cause of the suspension – the revocation of the occupant's license – was erroneous.[168]

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[163] *See LaChance*, 522 U.S. at 266 ("The core of due process is the right to notice and a meaningful opportunity to be heard"); *Lozano*, 496 F. Supp. 2d at 534 ("The fundamental requirements of due process are notice and a meaningful opportunity to be heard.").

[164] *See* Ordinance §§ 1, 3 (adding City Code §§ 26-79(D)(2), § 26-118(D)(2)) ("[T]he occupant may obtain a correction of the federal government's records and/or provide additional information establishing that the occupant is not an alien lawfully present in the United States. If the occupant provides such additional information, the building inspector shall promptly submit that information to the federal government.") (App022, App028).

[165] *See* Olk Depo. at 234:14-19 ("Q: Do you know what additional information they would be able to provide? A: Not at this point. Q: Do you know how you'd go about finding that information? A: Not at this point.") (App095).

[166] *See Lozano*, 496 F. Supp. 2d at 538 (holding that judicial review in the state court system provided no remedy and was inadequate to meet the requirements of due process because only an immigration judge can determine immigration status).

[167] *See* Ordinance § 3 (adding City Code § 26-119(D)(8) ("The suspension of a landlord's rental license may be appealed to the city council pursuant to Section 26-118.") (App029).

Fourth, the Ordinance attempts to impose upon state and federal courts unprecedented and confusing obligations in connection with their judicial review of deficiency notices and revocation notices. For example, the Ordinance requires the reviewing court to "request the federal government to provide, in automated, documentary or testimonial form, a new verification of the citizenship or immigration status of the occupant" in question.[169] The Ordinance does not explain the City's authority to require state or federal courts to take such action (no such authority exists), and is silent with respect to the effect of a federal or state court's (rightful) refusal to make such a demand on the "federal government."[170] Further, the Ordinance imposes hopelessly-vague rules of evidence on reviewing courts. For instance, the Ordinance creates a "rebuttable presumption" that the "most recent determination of the immigration status of an individual" is correct, while simultaneously claiming that a state or federal court "shall be bound by any conclusive determination of immigration status by the federal government."[171] The Ordinance is silent with respect to what constitutes a "conclusive determination" by the monolithic "federal government" – other than the singularly unhelpful statement that a "determination is conclusive if, under federal law, it would be given preclusive effect on the question."[172] The Ordinance also fails to identify the branch or agency of the

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[168] *See id.* § 4 (adding City Code § 26-118(f)) ("This section does not apply to any decision or order of the building inspector issuing a deficiency notice or a revocation notice with respect to a residential occupancy license pursuant to Sections 26-119(D) or 26-199(D)(4). Any such decision or order may be appealed only through a suit for judicial review pursuant to Section 26-199(D)(9).") (App030).

[169] *Id.* §§ 1, 3 (adding City Code §§ 26-79(E)(5), 26-119(E)(5)) (App024, App029).

[170] Further, it is not clear that courts are permitted to request the information as federal law allows "agencies" to obtain immigration status information. *See* 8 U.S.C. § 1373(c) ("The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency. . . .").

[171] Ordinance §§ 1, 3 (adding City Code §§ 26-79(E)(4)-(5), 26-119(E)(4)-(5)) (App024, App029).

[172] *Id.* (adding City Code §§ 26-79(E)(4), 26-119(E)(4)) (App024, App029).

"federal government" whose determinations (rebuttable, conclusive, or otherwise) are to be given deference. In short, the Ordinance seeks to alter the rules of evidence to require a party seeking review to overcome hearsay evidence created by a nonparty that, in undefined situations, is "conclusive" of the question being reviewed. That is not a meaningful opportunity to be heard.

Fifth, the judicial review proceedings brought against the City will also require the City to defend the accuracy of the federal determination. City officials are neither authorized nor qualified to act as immigration officials – let alone immigration prosecutors.[173]

Finally, the Ordinance provides for no hearing prior to the suspension of the landlord's license[174] and the building inspector will not hold a hearing prior to such a suspension.[175] In short, the landlord will be subject to losing all rents and the ability to operate its business without *any* hearing.

4. Landlords face liability no matter what they do.

It is an offense under the Ordinance for a landlord to knowingly permit an occupant to occupy a residence or apartment without a valid residential occupancy license.[176] A landlord has a "defense to prosecution" if the landlord can show that it "commenced and diligently pursued such steps as may be required under the applicable law and lease provisions to terminate the lease or tenancy."[177] However, the nebulous phrase "diligently pursue" is not defined and, thus,

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[173] *See supra* n. 147.

[174] *See* Ordinance at §§ 1, 3 (adding City Code §§ 26-79(D)(5), 26-119(D)(5)) (App023, App028).

[175] *See* Olk Depo. at 240:5-7 ("Q: Would you hold any sort of hearing prior to suspending their license? A: No.") (App096).

[176] *See* Ordinance § 3 (adding City Code § 26-119(C)(7)) (App027).

[177] *See id.*

Section 26-119 exposes landlords and their agents to potential criminal prosecution even if eviction and termination proceedings have been commenced and are being pursued.

The word "diligently" is ambiguous and raises a number of questions (*e.g.*, Is litigation necessary or are non-judicial steps sufficient? How long must a landlord wait for a demand to be satisfied before filing suit? Must all litigation-related requests be made on an emergency or expedited basis?). The answers to those and other questions are particularly important, given that Section 26-119(D)(5) provides that "the building inspector shall suspend the landlord's apartment complex license," in the event that the "landlord or the landlord's agent commits an offense under paragraph (C)(7) of this section." The Ordinance therefore fails to provide adequate notice to those who face potential criminal prosecution.[178]

Additionally, the above-stated defense will not, in any event, prevent suspension of a landlord's license by the building inspector under Section 26-119(D)(4) because: (1) it is a defense to a criminal prosecution, not a means for avoiding the suspension of a license;[179] and (2) at any rate, the building inspector will not be apprised of the landlord's "diligent efforts" because the Ordinance does not provide for a hearing before the building inspector.[180] Thus, the building inspector must revoke the landlord's license once a revocation of an occupant's license is effective.[181] Eviction proceedings, however, cannot be initiated until: (1) the default occurs (the effective date of the revocation); and (2) the landlord provides the tenant in default with

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[178] *See, e.g.,* Diamond Declaration at ¶¶ 24-27 (App007-009); Brown Declaration at ¶ 5 (App033).

[179] *See* Ordinance at § 3 (adding City Code § 26-119(C)(7)) (App027).

[180] *See supra* n. 175.

[181] *See* Ordinance § 3 (adding City Code § 26-119(D)(5) ("If a landlord or the landlord's agent commits an offense under paragraph (C)(7) of this section, the building inspector shall suspend the landlord's apartment complex license.") (App028).

notice to vacate the premises, at least three days before filing a suit to evict.[182] Moreover, the Ordinance also subjects landlords to civil rights suits. Specifically, landlords will be forced to effectuate the City's discriminatory policy, and thereby potentially subject themselves to a civil rights suit by their tenants. The Ordinance thus turns landlords into unwilling adversaries of both their tenants and the City and provides no means for satisfying the demands of either.

5. Even the obligations after a violation are vague.

The Ordinance provides that: "(5) If a landlord or the landlord's agent commits an offense under paragraph (C)(7) of this section, the building inspector shall suspend the landlord's apartment complex license; and (6) During the period of suspension, the landlord shall not collect any rent, payment, fee, or any other form of compensation from, or on behalf of, any occupant or tenant in the apartment complex."[183] It is not clear from those provisions whether a landlord: (1) must prorate every tenant's rent for each day the landlord's license is suspended; (2) is prevented only from collecting monies that come due during the suspension period; and/or (3) may, after the suspension is lifted, collect the amounts previously uncollected. Even the building inspector does not know the landlord's rights and obligations in that respect.[184]

Further, Section 26-119(D)(7) provides that the suspension of the landlord's license shall terminate one day after the landlord or the landlord's agent submits to the building inspector "a sworn affidavit of the owner or agent stating that each and every violation of paragraph (C)(7) on which revocation was based has ended," and including "a description of the specific measures

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[182] *See* TEX. PROP. CODE § 24.005(a) ("The landlord must give a tenant who defaults or holds over beyond the end of the rental term or renewal period at least three days' written notice to vacate the premises before the landlord files a forcible detainer suit.").

[183] Ordinance § 3 (adding City Code § 26-119(D)(5)-(6)) (App028).

[184] *See* Olk Depo. at 242:6-9 ("Q: After the suspension ends, under (D)(7), are they – is the apartment landlord allowed to collect the rent for the time period there was a suspension? A: I don't know.") (App098).

and actions taken to end the violation." Because Section 26-119(C)(7), as set forth above, is inherently ambiguous, it is impossible for a landlord or landlord's agent to determine whether any alleged violation "has ended" and what specific measures and actions must be taken to end such violations, especially when the alleged violations relate to the landlord's purported failure to "diligently pursue" steps to terminate the lease and/or tenancy. The building inspector has unfettered discretion to determine whether a landlord's affidavit is sufficient proof that a violation has "ended."[185] Accordingly, a landlord is prevented from understanding its obligations under the Ordinance, and is thereby denied due process.[186]

6. The Ordinance fails to identify with sufficient specificity the persons on whom it purports to impose obligations.

Under Section 3 of the Ordinance, lessors,[187] persons "responsible for the management of an apartment complex,"[188] "any agent of a landlord with authority to initiate proceedings to terminate a lease or tenancy,"[189] and landlords[190] are all subject to potential criminal prosecution.

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[185] *See id.* at 241:9-15 ("Q: Who determines whether or not the affidavit is sufficient to end the suspension? A: I would. Q: And are there any guidelines that would – you would use to determine whether that suspension should be ended? A: We've not established them yet.") (App097).

[186] *See* Diamond Declaration at ¶¶ 24-27 (App007-009); Brown Declaration at ¶ 5 (App033).

[187] *See* Ordinance § 3 (adding City Code §26-119(C)(5)) ("It shall be an offense for a lessor to lease or rent an apartment without obtaining a copy of the residential occupancy license of any and all known occupants.") (App027).

[188] *See id.* § 3 (adding City Code § 26-119(C)(7)) ("It shall be an offense for a person responsible for the management of an apartment complex to fail to maintain on the premises of the apartment complex a copy of the residential occupancy license of each known occupant of the apartment complex, or to fail to make such copy available for inspection by the Building Inspector during regular business hours.") (App027).

[189] *See id.* § 3 (adding City Code § 26-119(C)(7) ("It is a defense to a prosecution under this paragraph that the landlord or agent has commenced and diligently pursued such steps as may be required under the applicable law and lease provisions to terminate the lease or tenancy.") (App027).

[190] *See id.*

The Ordinance, however, does not define the phrase "person responsible for the management of an apartment complex" or the term "agent of a landlord."[191] Indeed, the City building inspector, the person charged with enforcing the Ordinance, does not know who is potentially liable.[192] Further, the Ordinance does not even provide for lessor's agents, managers, or responsible persons to receive notice of revocations. The Ordinance is therefore impermissibly vague and confusing as to the identity of those upon whom it seeks to impose criminal liability.[193]

7. The monolithic "federal government"

There are at least forty-two references to the "federal government" in the operative provisions of the Ordinance.[194] However, nowhere in the Ordinance is "federal government" defined. As a result, it should be given its ordinary meaning – namely, the executive, legislative, and judicial branches of the United States Government. Thus, "federal government" includes, but is not limited to, the hundreds of departments, divisions, agencies, units, bureaus, and commissions that comprise the bureaucracy of the Executive Branch. However, the "federal government" has no contact person, address, or telephone number.[195] It is a mere phrase intended to encompass *every* institution that makes up the Government of the United States. In

[191] *See id.* § 3 (adding City Code § 26-119(A) (defining "alien," "apartment," "landlord," "lessor," and "occupant," but not "person responsible for the management" or "agent of a landlord with authority to initiate proceedings to terminate a lease")) (App025).

[192] *See* Olk Depo. at 230:16-18 ("Q: Would a person working for a management company be somebody who committed an offense under (C)(4)? A: I don't know.") (App093); *id*. at 231:4-7 (Q: "So the landlord – well, are there circumstances which the landlord might not be the lessor?" A: "I don't know.") (App094); *id*. at 231:17-19 (Q: "Is somebody working for a management company an agent of the landlord?" A: "I don't know.") (App094).

[193] *See, e.g.,* Diamond Declaration at ¶¶ 13-14 (App004-005); Brown Declaration at ¶ 5 (App033).

[194] *See* Ordinance (App018-31).

[195] For example, the Ordinance provides that "the occupant may obtain a correction of the federal government's records and/or provide additional information establishing that the occupant is not an alien not lawfully present . . . directly to the federal government," but does not state what information should be provided and to whom besides the ubiquitous "federal government." *See* Ordinance § 3 (adding City Code § 26-119(D)(2)) (App028).

light of the sheer breadth of the term, any municipal law (such as the Ordinance) which depends upon the participation and involvement of, and requires fact-specific and time-critical communications with, the "federal government" is so vague and indefinite as to render it meaningless.[196] For this reason, alone, the Ordinance is void.

8. Compliance is impossible.

In order to obtain an occupancy license, the Ordinance, among other things, requires applicants to provide: (1) the address of the residence or apartment to be rented; and (2) the date of the lease or rental commencement.[197] The Ordinance, however, also provides that: "[i]t shall be an offense for a lessor to lease or rent without obtaining and retaining a copy of the residential occupancy license of any and all known occupants;"[198] and "[i]t shall be an offense for a person to knowingly make a false statement of fact on an application for a residential occupancy license."[199] In other words, under the Ordinance, a lessor cannot lease to a tenant without the tenant first providing an occupancy license, but a tenant cannot accurately complete the occupancy license application without having signed a lease. Therefore, compliance with the Ordinance is impossible.[200]

Indeed, the Ordinance establishes the following Alice-in-Wonderland syllogism: (a) a person may not reside in an apartment without a license, (b) a person is not an "occupant" unless he or she resides in an apartment, (c) prior to occupying any apartment, each "occupant" must

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[196] *See* Diamond Declaration at ¶¶ 28-29 (App009-010); Brown Declaration at ¶ 5 (App033); Smith Declaration at ¶¶ 11-13 (App038-39).

[197] *See* Ordinance § 3 (adding City Code § 26-119(B)(5) (App026).

[198] *Id.* (adding City Code § 26-119(C)(4)) (App027).

[199] *Id.* (adding City Code § 26-119(C)(2)) (App027).

[200] *See* Diamond Declaration at ¶¶ 19-21 (App006-07); Brown Declaration at ¶ 5 (App033).

obtain a residential occupancy license; so, therefore, no one could ever obtain a license![201] The Ordinance creates a classic "Catch 22:" You need a license before you may occupy an apartment in Farmers Branch, but you have to occupy an apartment before you can get a license. Such absurd draftsmanship runs throughout the fatally-flawed Ordinance.

C. Plaintiffs Are Entitled To Permanent Injunctive Relief.

The Villas Plaintiffs are entitled to a permanent injunction prohibiting the effectuation, implementation, enforcement, or threatened enforcement of the Ordinance. As shown above, the Villas Plaintiffs have demonstrated actual success on the merits, because the Ordinance is preempted by federal law and is void for vagueness. Further, the Villas Plaintiffs are entitled to permanent injunctive relief because (1) the Ordinance poses a substantial threat of irreparable harm to the Villas Plaintiffs; (2) the harm to the Villas Plaintiffs of denying the injunction outweighs the harm to the City of granting the injunction; and (3) the public interest would be served by the entry of an injunction.[202]

1. The Ordinance poses a substantial threat of irreparable harm.

The Supreme Court has noted that injunctive relief is appropriate when no adequate remedy at law exists because "repetitive penalties attach to continuing or repeated violations."[203] Here, under the Ordinance, Plaintiffs face such repetitive penalties. Specifically, the Ordinance

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[201] *See* Defendant's Objections and Responses to Plaintiff Villas at Parkside's First Request for Admissions, Responses to Request Nos. 38-41 ("[A]n 'occupant' is a person, age 18 or older, who resides at an apartment . . . [A] person is not an 'occupant' unless he or she resides at an apartment . . . [P]rior to occupying any leased or rented apartment, each 'occupant' must obtain a residential occupancy license . . . [A]n 'occupant' may not legally occupy a leased or rented apartment without first having obtained a residential occupancy license.") (App052).

[202] *See City of Kennedale*, 2005 WL 723690, at *10; *Paulsson Geophysical Serv., Inc.*, 529 F.3d at 309.

[203] *See Morales v. Trans. World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (affirming trial court's granting of an injunction preventing attorneys general from enforcing a preempted law).

provides for a fine up to $500 for each offense and "a separate offense shall be deemed committed upon each day during or on which a violation occurs or continues."[204]

Moreover, "when an alleged deprivation of a constitutional right is involved most courts hold that no further showing of irreparable injury is necessary."[205] Accordingly, because the Ordinance violates the Constitution, the Villas Plaintiffs will suffer *per se* irreparable injury if the Ordinance is not enjoined. In addition, operation of the leasing business of Villas, Lakeview, and Chateau (the "Landlord Plaintiffs") is unlawful without a license,[206] and failure to comply with the Ordinance causes—without a hearing—a mandatory suspension of that license.[207] Therefore, enforcement of the unconstitutional Ordinance would potentially subject the Landlord Plaintiffs to the loss of their respective licenses (and, accordingly, the loss of their business) and thereby cause irreparable harm.[208]

Further, the Landlord Plaintiffs stand to lose 30% of their customer base, as well as suffer a substantial decline in the value of their businesses, if the Ordinance goes into effect.[209] Courts recognize that the loss of customers and goodwill is irreparable because the injury is of an

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[204] *See* Ordinance § 5 (App030).

[205] *See supra* n. 40.

[206] *See* City Code 26-112(a) ("It shall be unlawful for any person to own, operate, manage, or maintain an apartment complex in the city without a current and valid license having been issued for the apartment complex.").

[207] *See* Ordinance § 3 (adding City Code § 26-119(D)(5)) (App028).

[208] *See Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro*, 875 F.2d 1174, 1179 (5th Cir. 1989) (affirming injunction where party would suffer potential economic loss so great as to threaten the existence of the party's business); *Millenium Restaurants Group v. City of Dallas,* 191 F. Supp. 2d 802, 810 (N.D. Tex. 2002) (granting an injunction where the loss of a license due to unconstitutional ordinance would cause the closing its business).

[209] *See* Diamond Declaration at ¶¶ 46-47 (App016); Brown Declaration at ¶¶ 5-6 (App033).

ongoing nature and the amount of damages is difficult to calculate.[210] Accordingly, unless the Court enjoins the enforcement of the Ordinance, Plaintiffs will suffer irreparable injury.

2. The harm to the Villas Plaintiffs greatly outweighs any alleged harm to the City.

In contrast to the considerable, irreparable, and immediate harm that the Ordinance will inflict upon the Villas Plaintiffs if not enjoined, the City can claim no injury that would result from enjoining the effectuation and enforcement of the Ordinance. In the prior action, the City "could not demonstrate any specific, quantifiable harm" from being unable to enforce Ordinance 2903, and the court found that the alleged "abstract and hypothetical injury to the city" did not outweigh the likely irreparable harm to the Villas Plaintiffs.[211] Likewise here, the City has provided no admissible evidence that the City will suffer harm if the Ordinance is enjoined.[212] Accordingly, the Court should enter a permanent injunction.

3. The entry of a permanent injunction would serve the public interest.

Finally, as demonstrated above, the Ordinance runs afoul of the United States Constitution and federal statutes. The public interest "does not extend so far as to allow . . . actions that interfere with the exercise of fundamental rights."[213] In fact, preventing the enforcement of the Ordinance will greatly serve the public interest by protecting the

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[210] *See AT&T Comm. of Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 594 (N.D. Tex. 1998) (granting injunction where plaintiff would be irreparably harmed by a loss of customers and good will); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) (affirming an injunction because loss of market share constitutes irreparable harm).

[211] *See Villas I*, 577 F. Supp. 2d at 878.

[212] In fact, the City has admitted that it does not know how many illegal immigrants live in Farmers Branch and has conducted no study to determine the effect of illegal immigrants on Farmers Branch. *See* Defendant City of Farmers Branch's First Amended Objections and Responses to Plaintiff Lakeview at Parkside's First Request for Admissions, Responses Nos. 2 and 6 (App255-56).

[213] *See Deerfield Med. Center v. City of Deerfield Beach*, 661 F.2d 328, 338-339 (5th Cir. 1981); *Villas I*, 577 F. Supp. 2d at 879.

constitutional rights of the Villas Plaintiffs.[214] In short, "the public simply has no interest in effectuating an unconstitutional law."[215] Accordingly, a judgment permanently enjoining the enforcement of the Ordinance would serve the public interest.

VI.

CONCLUSION AND REQUEST FOR RELIEF

For all the reasons set forth above, the Villas Plaintiffs respectfully request that the Court: (1) grant their motion for partial summary judgment; (2) declare that Ordinance 2952 is preempted by federal law and void for vagueness pursuant to the Supremacy Clause of Art. VI of the United States Constitution and the Fourteenth Amendment thereto; (3) issue a permanent injunction prohibiting the City from effectuating, implementing, and enforcing the Ordinance; and (4) award the Villas Plaintiffs such other and further relief to which they are justly entitled and which this Court deems just and proper.

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[214] *See Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) ("it is always in the public interest to protect constitutional rights." (*citing Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998)); *Incubus Invs., L.L.C. v. City of Garland,* No. Civ. A 303CV2039-KM, 2003 WL 23095680, at *4 (N.D. Tex. 2003) (memo op.) ("[I]t is in the public's interest to protect rights guaranteed under the Constitution."); *Sund,* 121 F. Supp. 2d at 554 (N.D. Tex. 2000) ("Injunctive relief will serve the public interest because it will protect the constitutional rights of Plaintiffs."); *Free Market Found. v. Reisman*, 540 F. Supp. 2d 751, 759 (W.D. Tex. 2008) ("[A] government's constituents have a vested interest in their government enacting constitutionally sound laws.").

[215] *See Sund,* 121 F. Supp. 2d at 554 (*citing Valley v. Rapides Parish Sch. Bd.,* 118 F.3d 1047, 1056 (5th Cir. 1997)).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2009, I electronically submitted the following document to the Clerk of the Court for the U.S. District Court for the 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 individuals who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ C. Dunham Biles
C. Dunham Biles

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