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# “MI CASA NO ES SU CASA”: HOW FAR IS TOO FAR WHEN STATES AND LOCALITIES TAKE IMMIGRATION MATTERS INTO THEIR OWN HANDS

SOSA THOMAS\*

## INTRODUCTION: UNDOCUMENTED IMMIGRATION AND LOCAL REACTION

On June 28, 2007, the United States Senate failed to pass comprehensive immigration reform.<sup>1</sup> This resulted in anti-immigrant sentiment by States and localities frustrated with the lack of decisive action by the federal government.<sup>2</sup> Problematically, some state and local governments responded with unjust, unconstitutional, and piecemeal laws.<sup>3</sup> For example, Farmers Branch, Texas became the first municipality to have a public vote to ban undocumented immigrants from renting apartments.<sup>4</sup> The city claimed that the purpose of the ordinance was to “promote the public health, safety, and general welfare of the public.”<sup>5</sup> Owners and tenants of apartment complexes brought an action in District Court challenging the constitutionality of the ordinance.<sup>6</sup> Judge Sam A. Lindsay held that the ordinance was preempted by federal law and granted a temporary restraining order, followed by a preliminary injunction.<sup>7</sup>

Like Farmers Branch, local lawmakers across the country are increasingly concerned with controlling immigration in their

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1. *Immigration Bill Suffers Major Defeat in Senate*, Associated Press, June 28, 2007, available at <http://www.msnbc.msn.com/id/19475868>.

2. *Id.*

3. *Id.*

4. Farmers Branch, Tex., Ordinance 2903 (Jan. 22, 2007).

5. *Id.*

6. *Villas at Parkside Partners v. City of Farmers Branch*, 2007 WL 1774660, at \*4 (N.D. Tex. June 19, 2007).

7. *Villas at Parkside Partners v. City of Farmers Branch*, 2007 WL 1498763, at \*10 (N.D. Tex. May 21, 2007); *Villas at Parkside Partners*, 2007 WL 1774660, at \*4.

communities because of constituent demands.<sup>8</sup> The United States houses an estimated ten to twelve million undocumented immigrants, who increase costs for states in areas such as education and healthcare.<sup>9</sup> A report by the National Conference of State Legislatures found that as of July 2, 2007, legislatures among the fifty states had introduced at least 1,404 pieces of legislation related to immigration,<sup>10</sup> with state legislatures introducing roughly two and a half times more immigration bills in 2007 than in 2006.<sup>11</sup> These states have focused on issues such as employment, health, identification, driver's licenses, law enforcement, public health benefits, and human trafficking.<sup>12</sup> Reasons for this drastic increase in state control of immigration issues include constituent demand, undocumented immigrants' impact on state budgets, and lack of comprehensive immigration reform by Congress.

This Comment provides a background of state enacted immigration legislation and analyzes impermissible state actions in the realm of immigration law. Part I outlines the history of how immigration law has been regulated under federal law. Part II provides examples of how far states have taken their immigration reform to control undocumented immigrant populations in their communities. Part III focuses on the constitutional limits of state enacted immigration legislation. Part IV addresses the economic ramifications of state enacted immigration laws. Part V discusses the public policy arguments behind these immigration laws. Part VI discusses ways to control undocumented immigration. Part VII analyzes if it is possible for states to enact any legislation that impacts immigration. This comment will ultimately show that states and localities, in enacting immigration legislation, overstep their powers and raise serious public policy concerns. Lastly, this comment will examine the extent to which states can legally regulate in this area.

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8. See generally NATIONAL CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION (2007), available at <http://www.ncsl.org/programs/immig/2007StateLegislationImmigration.htm>.

9. Jerry Seper, *States Stepping Up to Tackle Immigration Laws*, WASHINGTON TIMES, July 18, 2006, available at <http://washingtontimes.com/news/2006/jul/17/20060717-114643-5345r/>.

10. See *supra* note 8.

11. *Id.*

12. *Id.*

## I. HISTORY OF HOW IMMIGRATION LAW HAS BEEN REGULATED BY FEDERAL LAW

For over a century, the federal government has regulated immigration.<sup>13</sup> The power to regulate immigration is not expressly enumerated in the Constitution, but the Supreme Court has found that the Commerce Clause, Naturalization Clause, Migration and Importation Clause, and War Powers Clause give the federal government authority to regulate immigration.<sup>14</sup> The Supreme Court has also found that implied powers to regulate immigration are inherent in the notion of sovereignty and the foreign policy power.<sup>15</sup>

Under the Articles of Confederation, the states had power over some immigration laws.<sup>16</sup> However, under the Constitution, the Supreme Court did not allow state and local efforts to regulate immigration law when they conflicted with federal immigration policy.<sup>17</sup> In the *Passenger Cases*, the Court restricted state power over immigration and explained that the Commerce Clause excludes states from regulating commerce in any way except to control their own internal trade, and limited legislative regulation completely and entirely to Congress.<sup>18</sup> In 1876, the Court invalidated a state tax and bond requirement for immigrants because there was a need for uniform admission processes for immigrants into the United States.<sup>19</sup> Additionally in 1876, the Court invalidated state inspection and bond requirements for immigrants, clarifying that federal power can preempt state regulation.<sup>20</sup>

By the late 1800s, the Supreme Court stated that local immigration efforts that conflicted with federal policy would be preempted.<sup>21</sup> Eventually the Court determined that immigration and foreign relations were "intimately related."<sup>22</sup> Thus, states could not intrude into this federal domain by enacting laws that

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13. Michael J. Wishnie, *Laboratories of Bigotry?: Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 501 (May 2001).

14. MONICA GUIZAR, FACTS ABOUT FEDERAL PREEMPTION, NATIONAL IMMIGRATION CENTER at 1 (June 2007), available at <http://aila.org/content/default.aspx?docid=23632>.

15. *Id.*; see also *Chae Chan Ping v. U.S. (The Chinese Exclusion Case)*, 130 U.S. 581 (1889); see also *Fong Yue Ting v. U.S.*, 149 U.S. 698, 711 (1893).

16. Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 956 (Summer 1995).

17. *Id.*

18. *Smith v. Turner (The Passenger Cases)*, 48 U.S. (7 How.) 283, 493-94 (1849).

19. *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1876).

20. *Chy Lung v. Freeman*, 92 U.S. 275, 281 (1876), see also *The Passenger Cases*, 48 U.S. at 493-94 (invalidating state tax on immigrants).

21. Wishnie, *supra* note 13, at 501.

22. See *supra* note 16, at 956; see also *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

regulate immigration.<sup>23</sup> However, states still had some power to create regulations that impacted immigrants within their borders.<sup>24</sup> In *DeCanas v. Bica*, the Court held that a California statute that prohibited known undocumented immigrants from being employed if the employment would injure legal workers was not preempted under the Supremacy Clause as regulation of immigration.<sup>25</sup> Prior to this ruling, California courts held that, because the federal government has exclusive constitutional power to regulate immigration, the state statute was constitutionally prohibited.<sup>26</sup> Conversely, the Court stated:

[the] fact that aliens are the subject of a state statute does not render it a regulation of immigration. Even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.<sup>27</sup>

In other words, the Court began to mark situations when states could regulate immigration absent congressional action. Nevertheless, “[e]ven when the Constitution does not itself commit exclusive power to regulate a particular field to the Federal Government, there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause.”<sup>28</sup> These situations occur when Congress intends to occupy an entire field of regulation even when not expressly stated so.

#### A. *Plenary Power of the Federal Government in Immigration Law*

It has been well established that regulation of immigration is solely within the power of the federal government. Whatever frustrations states may feel about the current condition of federal immigration enforcement, they do not have the power to enact ordinances that disrupt this carefully drawn statutory scheme.<sup>29</sup>

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23. See *supra* note 16, at 956; see also *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

24. See *Doe v. Ga. Dep't of Pub. Safety*, 147 F. Supp.2d 1369 (N.D. Ga. 2001) (stating that regulating and supervising those authorized to drive automobiles on the highways of Georgia is a legitimate exercise of police power); *Sanchez v. State*, 692 N.W.2d 812 (Iowa 2005) (holding state's driver's license scheme, which required producing a social security number or federal documentation authorizing person to be in country, to be rationally related to not having its government facilitate the concealment of illegal immigrants).

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

26. See *id.* at 351.

27. See *id.*

28. *Id.* at 356.

29. *Lozano v. Hazleton*, No. 3:06cv1586, 2007 WL 2163093, at \*77 (M.D. Pa. July 26, 2007).

The counter argument is that, because states are sovereign entities, they possess the inherent authority to enforce and regulate immigration laws.<sup>30</sup> While the federal government possesses enumerated powers, the states possess powers that are limited to the extent that federal law and the Constitution preempt that power.<sup>31</sup> Thus, the argument continues that because the Constitution does not clearly define the source of immigration power, states are free to use their police power to regulate immigration.<sup>32</sup> Courts, however, have interpreted the Constitution as giving immigration power to the federal government through the Commerce Clause, the Necessary and Proper Clause, and the War Powers Clause.<sup>33</sup> Moreover, the federal government has been granted broad constitutional powers in order to determine the status of aliens, a power that states lack.<sup>34</sup>

The Supreme Court refers to the Immigration and Nationality Act ("INA") as "the comprehensive federal statutory scheme for regulation of immigration and naturalization."<sup>35</sup> The INA regulates the authorized entry, length of stay, residence status, and deportation of aliens.<sup>36</sup> To enforce this act, Congress created the Immigration and Naturalization Service ("INS"), which has recently been renamed Immigration and Customs Enforcement ("ICE").<sup>37</sup> Congress has further expressed its interest in regulating immigration by enacting laws other than the INA, including the Immigration Reform and Control Act of 1986 ("IRCA"), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IRA"), and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRA").<sup>38</sup> Since 1986, IRCA

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30. Daniel Booth, Note, *Federalism on Ice: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J. L. & PUB. POL'Y 1063, 1068-69 (2006).

31. *Id.*

32. *Id.*

33. *Id.* (citing *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 124 n.3 (1976); *see also Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (parenthetical explanation of the source's relevance is encouraged).

34. *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (*citing Hines*, 312 U.S. at 66).

35. *See DeCanas*, 424 U.S. at 353.

36. Immigration and Naturalization Act, 8 U.S.C.A. § 1324 (2008). Additionally, the INA provides for federal enforcement, which reveals Congress's strong interest in the realm of immigration.

37. *See* U.S.C. 1551-1557 (1994); *see also* <http://www.ice.gov/about/index.htm>.

38. Hector O. Villagra, *Arizona's Proposition 200 and the Supremacy of Federal Law: Elements of Law, Politics, and Faith*, 2 STAN. J. C. R. & C. L. 295, 299-301 (2006). *See also* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986). The IRCA legalized knowingly hiring or recruiting undocumented immigrants, required employers to prove their employees' immigration status, and granted amnesty to undocumented immigrants who entered the United States before January 1, 1982 and resided there continuously

has expressly preempted state laws that impose civil or criminal sanctions on employers who hire undocumented immigrants.<sup>39</sup>

B. *How to Determine if State and Local Laws Are Preempted by Federal Law*

State immigration law is preempted by federal law because there is a need for uniform national immigration policy.<sup>40</sup> In *DeCanas*, the Supreme Court articulated three tests to determine whether federal law preempts state or local law relating to immigration.<sup>41</sup> The test includes the following considerations: (1) constitutional preemption<sup>42</sup>, (2) field preemption<sup>43</sup>, and (3) conflict preemption.<sup>44</sup> An ordinance or state law that fails any one of these tests is preempted by federal law.<sup>45</sup>

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39. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002). “IRCA ‘forcefully’ made combating the employment of illegal aliens central to [t]he policy of immigration law;” *see also* Ted J. Chiappari & Stephen Yale-Loehr, *Can Cities and States Legally Regulate Immigration?*, *NEW YORK LAW JOURNAL* 3, Aug. 15, 2007. With IRCA, “Congress has indicated that one of the central features of federal immigration policy is controlling the employment of unauthorized workers.” However in Arizona the legislature passed the Legal Arizona Workers Act in 2007, which prohibited employers from knowingly or intentionally hiring undocumented workers. This legislation was one of the most aggressive actions against employment of undocumented immigrants that the country has ever seen. Under this act, Arizona would suspend the business license of a firm that knowingly hires undocumented workers the first time the act is violated. The second time authorities catch a business employing undocumented immigrants, its license will be permanently revoked. *See* H.B. 2779, 48th Leg., 1st Reg. Sess. (Ariz. 2007). Hazleton, Pennsylvania also tried to regulate businesses to make sure they were not hiring undocumented immigrants. *See* Hazleton, Pa., Ordinance 2006-10 § 4 (July 16, 2006).

40. *See supra* note 14, at 2. If various states were to pass different immigration laws, a clear controversy would exist: some states might pass strict laws excluding illegal immigrants from their state, and other states might become “havens” for illegal immigrants. *See* Kevin Fandl, *Immigration Posses: U.S. Immigration Law and Local Enforcement Practices* (February 2008) (unpublished manuscript, on file with the Journal of Legislation Notre Dame Law School) available at [http://mason.gmu.edu/~kfandl/index\\_files/Page458.htm](http://mason.gmu.edu/~kfandl/index_files/Page458.htm).

41. *See DeCanas*, 424 U.S. at 356. The court found that the California labor law that prohibited the employment of “an alien who is not entitled to lawful residence” was not preempted by federal legislation since none of the three tests were met. *Id.* at 353.

42. *See id.* at 356; *see also supra* note 14, at 2. Constitutional preemption refers to whether the state is attempting to impermissibly regulate immigration).

43. *See id.* at 356; *see also supra* note 14, at 2. Field preemption is whether Congress intended to occupy the field and oust state or local power. Both constitutional and field preemption can cause a state regulation, even if it is harmonious with federal regulation, to be invalidated under the Supremacy Clause.

44. *See id.* at 356; *see also supra* note 14, at 2. Lastly, conflict preemption is whether the state or local law stands in conflict with the federal law and thus makes compliance with both state and federal law impossible. *See id.* at 356.

45. *See supra* note 14, at 2.

## II. HOW FAR HAVE STATES TAKEN THEIR IMMIGRATION REFORM?

States have been trying to enact more immigration legislation to compensate for the lack of immigration reform and enforcement by the federal government.<sup>46</sup> Both sides of the immigration debate have acknowledged that federal government inaction has pushed states and localities to enact their own immigration reforms.<sup>47</sup> States argue that the perceived lack of concern by the federal government has prompted the use of state police powers to supplement federal enforcement of immigration laws through measures such as rent ordinances.<sup>48</sup> However, these non-uniform, anti-immigrant laws enacted by localities have serious legal flaws,<sup>49</sup> and although states are frustrated with the lack of enforcement of immigration laws, the state and municipal efforts to regulate immigration are unconstitutional.<sup>50</sup>

As of July 2, 2007, at least 1,404 pieces of legislation related to immigration were introduced among the fifty states.<sup>51</sup> However, states and localities risk crossing constitutional boundaries.<sup>52</sup> According to a recent study, all fifty state legislatures have considered bills on regulating immigration.<sup>53</sup> The main ways in which local laws attempt to regulate immigration include the following: (1) prohibiting the renting or leasing of property to undocumented immigrants, (2) punishing employers and businesses for employing unauthorized immigrants, and (3) enacting “English only” ordinances that only allow English to be the official language used in city business.<sup>54</sup> This comment will focus prima-

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46. Chiappari & Yale-Loehr, *supra* note 39.

47. See, e.g., Walter Ewing, *Missing the Target: Anti-Immigrant Ordinances Backfire*, Immigration Policy Center Perspectives on Immigration, Aug. 2007, available at <http://www.immigrationpolicy.org/index.php?content=P070801>; see also James Jay Carafano, *Illegal Immigration Alternatives: How States Should Respond*, The Heritage Foundation Policy Archive (June 26, 2007), available at <http://www.heritage.org/Research/Immigration/wm1526.cfm>.

48. See generally Marshall Coover, Comment, *Put Me in the Game, Coach: Texas Should Accept the Invitations from Congress, the Federal Judiciary, and the U.S. Department of Justice for States to Join the Immigration Law Enforcement Team*, 39 TEX. TECH LAW R. 315 (2007) (arguing the authority of states to enforce federal immigration laws).

49. See, e.g., *Villas at Parkside Partners*, 2007 WL 1774660, at \*15 (explaining that the ordinance did not explicitly state how to determine legal status when figuring out who can legally rent).

50. American Civil Liberties Union: Immigrant Rights: Discrimination, available at <http://www.aclu.org/immigrants/discrim/index.html>.

51. See *supra* note 8.

52. See *infra* Part III.

53. See *supra* note 8.

54. Various cities around the country are enacting “English only” ordinances that make English the official language of the city and require that all city departments conduct business in English. In 2000, 2.5% of people surveyed said they did not speak English, as opposed to 3% in 2006. See *Non-English Speakers Struggle:*



rily on the constitutional issues, federal preemption problems, and the economic and public policy considerations concerning rental ordinances.

#### A. *Undocumented Immigrant Rent Ordinances*

In the wave of anti-immigration ordinances sweeping the country, rent ordinances have received the most attention from the press and public. In general, these laws require business owners and landlords to verify citizenship or immigration status of prospective tenants.<sup>55</sup> For instance, in Escondido, California, the city council voted to enact such an ordinance in October 2006.<sup>56</sup> Under this law, a resident, business, or city official could file a complaint alleging a tenant was an undocumented immigrant.<sup>57</sup> The owner of the property would then have to provide the city with residency information concerning the tenant in question.<sup>58</sup> If the resident is determined to be undocumented, he or she would have to move within ten business days.<sup>59</sup> Property owners who did not evict residents within that ten-day period would face suspension of their businesses licenses.<sup>60</sup> Complaints based solely on a resident's ethnicity, national origin, or race would be considered invalid.<sup>61</sup>

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*English-only Ordinances come amid Slight Increase in Residences with Poor Language Skills in the Language*, NEWS AND OBSERVER, Sept. 22, 2007, available at <http://www.tmcnet.com/usubmit/2007/09/22/2958487.htm>; see also U.S. Census Bureau 2007. States are concerned that their residents cannot speak English, and although these ordinances do not directly target undocumented immigrants the effect is essentially to discourage immigrants from using social services provided by the locality. These "English only" laws vary in their scope from declaring English as the official language of the state to restricting official government services to be in English. See ACLU Briefing Paper Number 6, *Lectric Law Library Stacks*, available at <http://www.lectlaw.com/files/con09.htm>. Not only are English only ordinances prohibiting the use of other languages by government agencies, but some legislation is also promoting the enactment of the laws that allow private businesses to regulate language. *Id.*

In Pahrump, Nevada, on November 14, 2006, the city passed one ordinance that declared English the official language and another ordinance forbidding flying of a foreign flag without an American flag beside it. See Steve Friess, *Stars and Strife: Flag Rule Splis Town*, N. Y. TIMES, Dec. 8, 2006. According to the town's board, the law was "intended to bring the community together under a common language and custom." This law was then repealed by the council after new board members took over, but it is a good illustration of the type of English only ordinances that are appearing all over the country.

55. See discussion *infra* Part III.A.

56. See Escondido, Cal., Ordinance 2006-38 R (Oct. 18, 2006).

57. CAACOMPASS, Report by the California Apartment Association at 2 (revised June 2007).

58. *Id.*

59. *Id.*

60. *Id.*

61. See J. Harry Jones, *Escondido Council Votes 3-2 to Approve Ordinance*, SAN DIEGO UNION TRIBUNE, Oct. 19, 2006, available at <http://www.signonsandiego.com/>

The American Civil Liberties Union ("ACLU") filed a lawsuit arguing that the ordinance was preempted by federal law and violated Due Process and federal fair housing laws.<sup>62</sup> In December 2006, District Judge John Houston granted a temporary restraining order prohibiting enforcement of the law.<sup>63</sup> The judge explained that he had serious questions about whether the law would survive legal scrutiny, and that it may inflict irreparable harm on tenants and landlords.<sup>64</sup> In reaction to the order, the city council withdrew its ordinance and a month later, in a resolution, it asked the federal government for more power to address the lack of a uniform immigration policy.<sup>65</sup>

Another undocumented immigrant rent ordinance that made headlines was the Illegal Immigration Relief Act ("IIRA") passed in Hazleton, Pennsylvania on September 21, 2006.<sup>66</sup> The ordinance declared its purpose as "abat[ing] the nuisance of illegal immigration" because such immigration "leads to higher crime rates" and "diminishes [the] overall quality of life."<sup>67</sup> IIRA prohibited undocumented immigrants from leasing or renting property and prohibited property owners from renting or leasing to undocumented immigrants.<sup>68</sup> IIRA's "enforcement scheme involve[d] verification of the subject alien's status with USCIS. During the period that the landlord's license [was] suspended, the landlord [was] not permitted to collect any rent, payment, fee or any other form of compensation from any tenant."<sup>69</sup> These harsh consequences encouraged landlords to verify the status of their tenants prior to renting to them.<sup>70</sup> On July 26, 2007, the United States District Court for the District of Pennsylvania struck down IIRA, a blow to various other localities that were considering similar measures.<sup>71</sup> The court ruled that the ordinance conflicted with the Supremacy Clause and was preempted by federal law.<sup>72</sup>

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news/northcounty/20061019-9999-7m19ecoun.html; *see also* Escondido, Cal., Ordinance 2006-38 R.

62. *Garrett v. City of Escondido*, 465 F. Supp.2d 1043 (S.D. Cal. 2006).

63. *See Garrett*, 465 F. Supp.2d at 1043.

64. Associated Press, CNN.com, *available at* <http://www.cnn.com/2006/US/11/17/immigrant.law.ap/index.html>.

65. *See supra* note 71, at 2.

66. *See Hazleton, Pa., Ordinance 2006-18* (Sept. 21, 2006); *Lozano v. Hazleton*, No. 3:06cv1586, 2007 WL 2163093, at \*13 (M.D. Pa. July 26, 2007).

67. *See Hazleton, Pa., Ordinance 2006-18* § 2 (Sept. 21, 2006).

68. *See id.* at § 5.

69. Geoffrey Forney, *Hazleton: An Example of Local Government and Immigration Regulation*, THE LEGAL INTELLIGENCER, at 2 (Mar. 21, 2007).

70. *Id.*

71. *Lozano v. Hazleton*, No. 3:06cv1586, 2007 WL 2163093, at \*77 (M.D. Pa. July 26, 2007).

72. *Id.*

Yet another illegal immigrant rent ordinance that made headlines was the Farmers Branch Ordinance 2903. Farmer's Branch, Texas passed an ordinance that banned illegal immigrants from renting apartments.<sup>73</sup> The city council first passed Ordinance 2892 – a similar ordinance – but later repealed it after a state court issued a temporary restraining order enjoining implementation because Ordinance 2892 may have violated the Texas Open Meetings Act.<sup>74</sup> The city then adopted Ordinance 2903 in January 2007,<sup>75</sup> instituting criminal penalties for landlords who rented to undocumented immigrants.<sup>76</sup> On May 12, 2007, the voters in Farmers Branch approved the ordinance by a more than 2-1 margin, in a vote where 43% of the registered voters showed up.<sup>77</sup> United States District Judge Sam Lindsay initially issued a temporary restraining order stating that a threat of immediate and irreparable harm to the landlords and tenant plaintiffs existed,<sup>78</sup> and later granted a preliminary injunction finding that the ordinance was preempted by the Supremacy Clause.<sup>79</sup>

### III. THE CONSTITUTIONAL QUESTION OF STATE AND LOCAL IMMIGRATION LAW

#### A. *Undocumented Immigrant Rent Ordinances Are Unconstitutional*

Courts have yet to rule definitively on the constitutionality of local ordinances that prohibit renting to undocumented immigrants.<sup>80</sup> Various courts have dodged the constitutional issue by issuing restraining orders and injunctions, mostly expressing concern about the comparative harm to the plaintiffs if these ordinances are put into effect.<sup>81</sup> Analysis of the constitutionality of such ordinances follows.

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73. Stephanie Sandoval, *FB Immigration Wins Easily*, DALLAS MORNING NEWS, Aug. 13, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/news/politics/local/stories/051307dnmetfarmersbranch.621241fe.html>.

74. *Villas at Parkside Partners*, 2007 WL 1774660 at \*1.

75. *Id.*

76. *Id.* at \*4.

77. *Id.*; see also Sandoval, *supra* note 73.

78. See *Villas at Parkside Partners*, 2007 WL 2163093.

79. See *Villas at Parkside Partners*, 2007 WL 1774660.

80. See generally *Garrett*, 465 F.Supp.2d at 1049; See *Lozano v. Hazleton*, No. 3:06cv1586, 2007 WL 2163093 (M.D. Pa. July 26, 2007); See generally *Villas at Parkside Partners*, 2007 WL 1774660.

81. See generally *Garrett*, 465 F.Supp.2d at 1049 (issuing a temporary restraining order).

1. *Legislation Preempted by the Federal Government: The Farmers Branch, TX Preemption Analysis*

For an ordinance like the one passed by Farmers Branch to survive judicial scrutiny, it must survive a preemption analysis using the *DeCanas* test.<sup>82</sup> Specifically, “the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties.”<sup>83</sup> The Supreme Court has found that federal law prohibits state denial of “the necessities of life, including food, clothing and *shelter*.”<sup>84</sup> In addition, the Court has held that a states’ attempt to deny “entrance and abode” are inconsistent with federal policy and therefore constitutionally impermissible.<sup>85</sup> Accordingly, the rent ordinances passed by various cities and towns are preempted by federal law and fail the *DeCanas* three part test.

The first *DeCanas* test is constitutional preemption, which determines whether a locality is essentially regulating immigration.<sup>86</sup> Because the “power to regulate immigration is unquestionably exclusively a federal power,” if Ordinance 2903 proves to regulate immigration then it is “constitutionally proscribed.”<sup>87</sup> In contrast to the Hazleton Ordinance, which attempted to define “illegal immigrant,” the Farmers Branch ordinance adopted citizenship and immigration requirements to be consistent with the provisions of 24 Code of Federal Regulations §5, which obtains regulations issued by the United States Department of Housing and Urban Development (“HUD”) outlining restrictions on federal housing subsidies to noncitizens.<sup>88</sup> Nevertheless, the Ordinance is still constitutionally preempted because Farmers Branch is classifying immigrants without any authority to do so. The city argued that Ordinance 2903 passed the constitutional preemption test because it was not a regulation of immigration and does not affect any legal resident in the United States.<sup>89</sup> However, the plain language of HUD regulations refutes the city’s argument.<sup>90</sup> Although HUD regulations allow federal housing assistance for aliens who are lawfully admitted as

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82. Farmers Branch, TX Ordinance 2903 (Jan. 22, 2007).

83. *DeCanas*, 424 U.S. at 358.

84. *Graham v. Richardson*, 403 U.S. 365, 380 (1971) (*emphasis added*); *see also* *Truax v. Raich*, 239 U.S. 33, 42 (1915).

85. *See Graham*, 403 U.S. at 379; *see also Truax*, 239 U.S. at 42.

86. *See DeCanas*, 424 U.S. at 354.

87. *Id.* at 356.

88. *Compare* Hazleton, Pa., Ordinance 2006-18 § 3 (D) (Sept. 8, 2006) (“‘illegal alien’ means an alien who is not lawfully present in the United States according to 8 U.S.C. §1101 et. seq.”) *with* Farmers Branch, Tex., Ordinance No. 2903 §3(1) (Jan. 22, 2007).

89. *See Villas at Parkside Partners*, 2007 WL 1774660 at \*7.

90. Farmers Branch, TX Ordinance 2903 § 3 (Jan. 22, 2007). Ordinance 2903 creates a new classification of immigration by incorporating the definitions used in

permanent residents, Ordinance 2903 prevents various classes of non-citizens who are *legally* in the country from receiving federal housing assistance, such as “alien visitors, tourists, diplomats, and students who enter the United States temporarily.”<sup>91</sup> Therefore, Farmers Branch would exclude people who can technically legally rent within their city.

The second *DeCanas* test states that local statutes are preempted if they attempt to legislate in a field that is completely occupied by federal laws – the field preemption test.<sup>92</sup> Immigration law is within the scope of the federal power through the enactment of the Immigration and Nationality Act.<sup>93</sup> Although not all laws that affect immigrants are regulations on immigration law,<sup>94</sup> in this particular case, Farmers Branch is specifically trying to decide who can and cannot reside in their city, while punishing landlords and property managers with criminal penalties if they “contract to give shelter to individuals who lack ‘eligible immigration status.’”<sup>95</sup> This effort effectively creates the city’s own harboring statute, even though the city seeks to hide it through semantics.<sup>96</sup> Harboring statutes are preempted by the INA, which already provides criminal penalties when a person harbors an undocumented alien.<sup>97</sup> Unlike *DeCanas*, where federal law was found to not legislate in the field of employment, criminal penalties for harboring aliens are specifically regulated by federal statutes.<sup>98</sup> Additionally, Ordinance 2903 will prohibit lawful classes of immigrants from living in Farmers Branch.<sup>99</sup> Another argument in favor of field preemption would be that the federal government has set specific consequences and penalties for illegal immigration, which consists primarily of apprehension, detention, and deportation of undocumented immigrants.<sup>100</sup> By preventing undocumented immigrants from renting, states are es-

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the HUD regulations, which outline the restrictions of federal housing subsidies on non-citizens

91. See *Villas at Parkside*, 2007 WL at \*6 (citing 42 USC § 1436(a)(1)).

92. See *DeCanas*, 424 U.S. at 356-58; see also *supra* note 14, at 1.

93. See *Lulac v. Wilson*, 908 F. Supp. 755, 775-76 (C.D. Cal. 1995) (citing *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983)).

94. See *DeCanas*, 424 U.S. at 355-56 (“even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve”); see generally *Equal Access to Education v. Merten*, 305 F.Supp. 2d 585, 601-11 (E.D. Va. 2004) (prohibiting illegal aliens from enrolling in post secondary institutions not preempted); see generally *John Doe No. 1 v. Ga. Dep’t of Pub. Safety*, 147 F. Supp.2d 1369, 1375-76 (N.D. Ga. 2001).

95. See *Villas at Parkside Partners*, 2007 WL 1774660, Plaintiff’s Compl. at \*9.

96. *Id.*

97. *Id.*

98. See *Garrett*, 465 F. Supp.2d 1043 (S.D. Cal. 2006).

99. See *Villas at Parkside Partners*, 2007 WL 1774660 at \*6 (citing 42 USC § 1436(a)(1)).

100. Immigration and Naturalization Act, 8 U.S.C.A. 1324.

essentially imposing additional consequences that the federal government has decided are not necessary. In sum, undocumented immigrant rent ordinances seek to supplant federal legislation by enacting legislation in a field that is comprehensively legislated.<sup>101</sup>

Even if Congress did not intend to completely oust immigration issues from state power, "the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties."<sup>102</sup> The Farmers Branch Ordinance 2903 conflicts with federal law by precluding lawful immigrants from leasing apartments and imposing heightened citizenship verification standards.<sup>103</sup> As stated previously, under field and constitutional preemption, certain classes of immigrants are allowed, through the INA, to stay in the United States without restriction on where they choose to reside.<sup>104</sup>

Moreover most of these rent ordinances require landowners and business owners to become experts in distinguishing valid forms of identification from invalid forms, and to verify immigration status or determine the authenticity of immigration-related documentation.<sup>105</sup> Consequently, to avoid massive penalties, landlords would discriminate against all foreigners, rather than risk the fines and penalties associated with non-compliance.<sup>106</sup>

## 2. *Farmers Branch, TX Undocumented Immigrant Rent Ordinance: Violation of Due Process*

Not only is the Farmers Branch Ordinance preempted by the Supremacy Clause, it is also a violation of Due Process under the Fourteenth Amendment.<sup>107</sup> The Ordinance is vague when it comes to the actual enforcement by the "owner and/or property manager."<sup>108</sup>

First, it does not clearly articulate who will be liable for non-compliance with the ordinance.<sup>109</sup> It could possibly be the prop-

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101. See *Villas at Parkside*, 2007 WL 1774660, Plaintiff's Compl. at \*9.

102. See *DeCanas*, 424 U.S. at 358.

103. Farmers Branch, Tex., Ordinance 2903 (Jan. 22, 2007).

104. 8 U.S.C. § 1101(a)(15)(F), (H) (foreign students, temporary workers). The government also permits individuals like persecuted refugees, asylees, and battered immigrant women and children to stay in the United States even though they could not otherwise lawfully remain. 8 U.S.C. § 1101(a)(42), 1157; 8 U.S.C. § 1101(a)(42)(A), 1158; 8 U.S.C. § 1154.

105. See Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006); Farmers Branch, Tex., Ordinance 2903 (Jan. 22, 2007).

106. See generally Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006); Farmers Branch, Tex., Ordinance 2903 (Jan. 22, 2007) (clear penalties for violation of the ordinance).

107. See *Villas at Parkside Partners*, 2007 WL 1774660 at \*15.

108. Farmers Branch, Tex., Ordinance 2903 at Sec. 3 (Jan. 22, 2007).

109. See *Villas at Parkside Partners*, 2007 WL 1774660 at \*15.

erty manager, who may or may not have dealt directly with the tenant, or the owner of the property, who probably never dealt with the tenant. There seems to be a requirement of strict compliance read into the Ordinance that does not have any sort of good faith standard in case a mistake is made by an “owner and/or property manager.”<sup>110</sup>

Secondly, the Ordinance fails to explain specific guidelines for how to determine legal status.<sup>111</sup> The Ordinance provides that the future tenant must prove citizenship or “eligible immigration status.”<sup>112</sup> “Eligible immigration status” is a vague term within this context; as explained before, the HUD regulations that Farmers Branch adopted would exclude even legal immigrants from renting within the city.<sup>113</sup> Put another way, state laws that impose “discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.”<sup>114</sup>

Lastly, proof of immigration status would be difficult for a landlord to figure out if clear guidelines are not laid out.<sup>115</sup> But it is not within the power of localities to determine what the guidelines are for “eligible immigration status,” because that is clearly within the realm of the federal government.<sup>116</sup> Currently, there is not a federal standard to determine immigration status for housing; instead, unless an undocumented immigrant is ordered deported by the federal government, no state can be sure that the immigrant will not be given permission to reside in the country.<sup>117</sup> Additionally, because the ordinance is so vague it is possible that “owners and/or property owners” could be held criminally liable for non-compliance without realizing or understanding why: hence depriving them of “life, liberty, or property without due process of law.”<sup>118</sup> Also, it is a disturbing possibility that landlords, who are not trained in federal immigration work, would refuse to rent to anyone who in their opinion may appear like an immigrant.

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110. Farmers Branch, Tex., Ordinance 2903 at Sec. 3 (Jan. 22, 2007).

111. See *Villas at Parkside Partners*, 2007 WL 1774660 at \*15.

112. Farmers Branch, Tex., Ordinance 2903 at Sec. 3 (Jan. 22, 2007): see also *Villas at Parkside Partners*, 2007 WL 1774660 at \*15.

113. See *supra* discussion Part III.A.1.

114. See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948).

115. See *Villas at Parkside Partners*, 2007 WL 1774660 at \*15.

116. See *supra* discussion Part III.A.1.

117. See *Pylar v. Doe*, 457 U.S. 202, 241 n.6 (Powell, J. concurring).

118. U.S. CONST. amend. XIV § 1.

#### IV. ECONOMIC RAMIFICATIONS ON LOCAL GOVERNMENTS AFTER ENACTING IMMIGRATION LAWS

If localities do enact the previously stated immigration laws and the lower courts allow them to stand, it is likely that appeals will be made and localities will have to fight the case all the way to the Supreme Court. Additionally, many immigrants will not want to live in a town that they feel is being hostile toward them so there will be mass exoduses from particular communities.<sup>119</sup> This will lead to the economic downturn of a locality or state that has driven away their immigrants.<sup>120</sup> Localities and states need to weigh the social, economic, and legal costs of pursuing these ordinances that are constitutionally questionable.<sup>121</sup>

Taxpayers will bear the high cost of legal challenges that will inevitably be brought against localities for enacting local illegal immigrant ordinances. One may wonder how high the expense of defending a federal lawsuit can possibly be, but a civil rights lawsuit against a municipality might take years just to reach trial, which would require a significant amount of taxpayer money. Escondido, California abandoned its undocumented immigrant rent ordinance after it discovered the legal cost to defend it would top \$1 million.<sup>122</sup>

Furthermore, if a large number of people leave a locality it may lead to drastic economic consequences.<sup>123</sup> After the Hazleton, Pennsylvania ordinance was struck down on July 27, 2007, Riverside, New Jersey rescinded their legislation that penalized anyone who employed or rented to an undocumented immigrant.<sup>124</sup> Mayor George Conard of Riverside stated that the town had already spent \$82,000 defending the ordinance and that the legal costs forced the town to delay road paving projects, buying a new dump truck, and making repairs to its town hall.<sup>125</sup> Additionally, the departure of a significant portion of immigrants resulted with the closing of stores, restaurants, and shops that catered to those immigrants.<sup>126</sup> Indeed, in Irving, Texas, which has been working with federal immigration officials in deporting undocumented immigrants leading to a mass exodus of Lati-

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119. Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, available at <http://www.nytimes.com/2007/09/26/nyregion/26riverside.html?ei=5088&en=89cc5271d5772f09&ex=1348459200&partne r=rssnyt&emc=rss&pagewanted=print>.

120. *Id.*

121. *Id.*

122. Anabelle Garay, *Attempts to Curb Illegal Immigration Prove Costly*, WASH. POST, May 6, 2007, at A12.

123. *Id.*

124. Belson & Capuzzo, *supra* note 119.

125. *Id.*

126. *Id.*



nos,<sup>127</sup> city's local Wal-Mart business was down 25% in revenue, occupancy in Irving apartments decreased, and the Irving Mall took a hit.<sup>128</sup>

The Wal-Mart example is not a singular instantiation of the economic impact on companies from the loss of immigrant consumers.<sup>129</sup> For example, Western Union lobbies for immigrant friendly laws because of the high profits (nearly \$1 billion a year) they receive by helping immigrants send money back home.<sup>130</sup> Economic remittances play a large role not only on the national front but also within the global community – last year migrant workers from poor countries sent home \$300 billion.<sup>131</sup>

Localities are trying their best to receive private donations and have insurance offset some of the cost of fighting the legal challenge. But all in all, it will most likely adversely affect not only a small town's economy, but the entire nation, when laws are passed that cause communities to lose a large immigrant population.

#### V. PUBLIC POLICY: TRUE PURPOSE OF STATE AND LOCAL IMMIGRATION REGULATIONS

Most localities enact immigrant ordinances intending to remedy the criminal, economic, and social ills caused by undocumented immigrants. Even though states are not nearly as affected by immigration as localities, in many instances public opinion is not always equal to the truth. For example, some Farmers Branch, TX residents claimed that undocumented immigrants increased the crime rate and decreased property value,<sup>132</sup> when in fact, the town's crime rate decreased by 27% from 1995 to 2005, while the average value of a home increased by 63%.<sup>133</sup>

Immigration laws passed by each locality indirectly affect the foreign policy of this country. Individual localities have no right to adopt their own foreign policy that in the end will affect

127. Brandon Formby, *More Passionate Protests in Irving*, DALLAS MORNING NEWS, Oct. 12, 2007, at B1.

128. 2007 *Dallas Morning News Texan of the Year: Voices of Illegal Immigration*, DALLAS MORNING NEWS, Jan. 6, 2008 (quoting Herb Gears, Mayor of Irving), available at <http://www.dallasnews.com/sharedcontent/dws/dn/opinion/texanofyear/stories/123007dnceditoyvoices.27f87f.html>.

129. Jason DeParle, *A Western Union Empire Moves Migrant Cash Home*, N.Y. TIMES, Nov. 22, 2007, at A1.

130. *Id.*

131. *Id.*

132. Tanya Broder, *State and Local Policies on Immigrant Access to Services Promoting Integration or Isolation?*, NATIONAL IMMIGRATION LAW CENTER, 13 (2007), available at [http://www.nilc.org/immspbbs/sf\\_benefits/statelocalimmppolicies06-07\\_2007-05-24.pdf](http://www.nilc.org/immspbbs/sf_benefits/statelocalimmppolicies06-07_2007-05-24.pdf).

133. *Id.*

the nation as a whole.<sup>134</sup> While "[t]he link between immigration and foreign policy does not necessarily mean that the federal government should have exclusive control over every policy with any conceivable impact on immigration,"<sup>135</sup> and it is possible that a local ordinance may not have any effect on foreign policy, it is more than likely that the way the United States treats another country's citizens will effect how that country views the United States, thus affecting international economic and social relations.<sup>136</sup>

Another argument for local immigrant ordinances is that such ordinances are a response to the drastic changes in a town's composition due to a surge in its immigrant population. The fear of immigrants is fueled by those who assume that every newcomer is an undocumented immigrant straining the local economy. Some argue that localities understand that their ordinances regulating immigration will be declared unconstitutional but pass them anyway with the intent to drive out immigrants from their communities.<sup>137</sup>

As a policy matter, these ordinances hurt the country as a whole.<sup>138</sup> Different local immigration policies would be divisive to the country and pit neighbor against neighbor.<sup>139</sup> Trying to fix immigration problems in a piecemeal fashion is an unreasonable solution to this problem.<sup>140</sup>

## VI. HOW TO REGULATE UNDOCUMENTED IMMIGRATION?

Unfortunately, it seems as though states must wait for the federal government to revamp the immigration system. The most logical and realistic solution would probably be amnesty, while at the same time drastically increasing protection at the border. Additionally, funds must be put toward enforcing labor laws that will force employers not to exploit undocumented immigrants.

Amnesty would equate to allowing the estimated 12 million undocumented immigrants in this country to stay and become cit-

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134. *Id.*

135. *Id.*

136. *Id.* at 893-95.

137. Miriam Rozen & Brenda Jefferys, *Legal Players Line Up on Both Sides of the Farmers Branch Ordinance Tussle*, TEXAS LAWYER, May 21, 2007, available at [http://bicklebrewer.com/index.php?id=486&backPID=504&begin\\_at=125&tt\\_news=1908](http://bicklebrewer.com/index.php?id=486&backPID=504&begin_at=125&tt_news=1908).

138. Ted J. Chiappari & Stephen Yale-Loehr, *Cities and States Rush In Where Congress Fears to Tread*, NEW YORK LAW JOURNAL, Feb. 26, 2007.

139. *Id.*

140. *Id.*

izens.<sup>141</sup> Realistically, the federal government is going to have to make effective changes to the immigration scheme, which will most likely include amnesty for undocumented immigrants that have been in this country for a long period of time.<sup>142</sup> The argument against amnesty – that it undermines the rule of law and that it will spawn even more undocumented immigration – is not unfounded. But the law has been lax when it comes to enforcement, which has spawned an increase in undocumented immigration.<sup>143</sup> If amnesty is granted to those already here and if border and immigration restrictions increase in strictness, there could truly meaningful change in the current federal immigration scheme.

#### VII. HOW FAR CAN LOCALITIES AND STATES GO IN REGULATING IMMIGRATION?

States can regulate within their borders, especially when they are exercising their police powers. For example, regulating whether driver's licenses should be given to an undocumented immigrant is an allowable extension of state power.<sup>144</sup> But an unacceptable extension of state power would be the regulation of public benefits and education.<sup>145</sup> How is it that states can regulate driver's licenses but not public benefits and education?<sup>146</sup>

In *DeCanas* the Supreme Court stated that because the California statute at issue did not amount to a "determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain," it was not a regulation of immigration.<sup>147</sup> Furthermore, in *Lulac 1* sections of Proposition 187 were held to be preempted by federal law while other sections were upheld as constitutional.<sup>148</sup> The court held that Proposition 187's verification, notification and cooperation/reporting requirements were a regulation of immigration because it "created a comprehensive scheme to detect and report the

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141. Nathan Thornburgh, *The Case for Amnesty*, TIME MAGAZINE 39, June 18, 2007.

142. *Id.*

143. *Id.* at 42.

144. *See Doe v. Ga. Dep't of Pub. Safety*, 147 F. Supp.2d 1369 (N.D. Ga. 2001); *Sanchez v. State*, 692 N.W.2d 812 (Iowa 2005). Arguments have been made that denial of a driver's license is denial of the fundamental right to interstate travel. This has been refuted in that only citizens and legal immigrants have this fundamental right. *See Doe*, 147 F. Supp.2d at 1374-75.

145. *See League of United Latin American Citizens v. Wilson (LULAC 1)*, 908 F.Supp. 755 (C.D. Cal. 1995); *League of United Latin American Citizens v. Wilson (LULAC 2)*, 997 F.Supp. 1244 (C.D. Cal. 1997).

146. *See Doe*, 147 F. Supp.2d 1369.

147. *See DeCanas*, 424 U.S. at 355; *see also LULAC 1*, 908 F.Supp. at 769.

148. *See LULAC 1*, 908 F.Supp. at 768-770.

presence and effect the removal of illegal aliens."<sup>149</sup> It was not simply an exercise of state police power. Instead, the purpose was to "deter foreign nationals from entering and remaining in the United States without proper documentation."<sup>150</sup> This was an improper use of state power to regulate immigration.

#### CONCLUSION

In conclusion, immigrant rent ordinances are generally unconstitutional. How courts decide these rent ordinance will determine the fate of how far states can go in regulating immigration. Not only can state and local immigration laws violate the Constitution, but they also hurt the country as a policy matter. The federal government will have to address the obvious concerns of states and localities regarding their illegal immigrant populations, but until they do, localities will keep trying to solve the immigration question on their own, which will affect the nation as a whole.

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149. *Id.* at 769.

150. *Id.* at 755.

