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“Not the Place for You”: Anti-Immigrant Housing Ordinances, Federal Preemption, and *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014)

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Note*

“Not the Place for You”¹:
Anti-Immigrant Housing
Ordinances, Federal Preemption,
and *Keller v. City of Fremont*,
719 F.3d 931 (8th Cir. 2013), *cert.*
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* Nathan D. Clark: JD Candidate, 2015, University of Nebraska College of Law (NEBRASKA LAW REVIEW, Editor-in-Chief, Volume 93); B.A. Wabash College, 2003. I would like to thank members of the *Nebraska Law Review* who assisted in making the editing and publication of this Note a cinch. I would especially like to express my gratitude to my wife Sarah, my parents, Ken and Joan, and my sister Lisa, for their love and support, and for tolerating my prolonged periods of Note-induced unavailability.

1. Regarding the purpose of an anti-immigrant ordinance, a Farmers Branch, Texas councilperson testified “the resolution was ‘one of several things that sent a message to people who aren’t in the country legally, Farmers Branch is not the place for you.’” *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 675 F.3d 802, 805–06 n.4 (5th Cir. 2012), *aff’d on reh’g en banc*, 726 F.3d 524 (5th Cir. 2013). Preemption of an area of the law by the federal government, ironically, communicates this same message to the states.

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I. INTRODUCTION

In 2008, the City of Fremont, Nebraska passed an ordinance that, among other things, prohibited undocumented immigrants² from renting housing within its borders.³ This ordinance is part of a trend by state and local governments—developing since the mid-2000s—to deter the influx of undocumented immigrants into their communities and dispel those already present.⁴ This trend ostensibly reflects two concerns.⁵ First, states enact these measures citing pressures created

2. Court decisions and laws may use the term “illegal immigrant,” “illegal alien,” “undocumented entrant,” etc. For consistency this Note will use the term “undocumented immigrant” throughout.

3. Fremont, Neb., Ordinance 5165 (June 21, 2010), *archived at* <http://perma.unl.edu/B3M9-FSEG>.

4. There were 39 pieces of state legislation related to immigrants in 2005. This number increased to a peak of 353 in 2009 and remains elevated. *State Laws Related to Immigration and Immigrants*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/immig/state-laws-related-to-immigration-and-immigrants.aspx> (last updated Feb. 24, 2014), *archived at* <http://perma.unl.edu/AN9N-Y9DS>; Lisa Maria Garza, *Number of Immigration Measures Passed by U.S. States Jumps in 2013: Report*, REUTERS (Sept. 11, 2013, 11:38 PM), <http://www.reuters.com/article/2013/09/12/us-usa-politics-immigrationlaws-idUSBRE98B03J20130912>, *archived at* <http://perma.unl.edu/ZG9Q-HK L9>.

5. A third concern—xenophobic animus—arguably underlies some of these efforts. See Kristen Hinman, *Valley Park to Mexican Immigrants: “Adios, illegals!”*, RIVERFRONT TIMES (Feb. 28, 2007), <http://www.riverfronttimes.com/2007-02-28/news/valley-park-to-mexican-immigrants-adios-illegals/>, *archived at* <http://perma.unl.edu/HD6B-297X> (quoting the Mayor of Valley Park, Missouri, who advocated and passed an anti-immigrant ordinance, as stating: “You got one guy and his wife that settle down here, have a couple kids, and before long you have

by the presence of large populations of undocumented immigrants.⁶ The resulting increase in the number of workers raises the supply of labor, putting downward pressure on wages for low-skill jobs.⁷ There is concern that undocumented immigrants create higher crime rates and put pressure on local law enforcement services.⁸ There is also a perception that undocumented immigrants burden emergency medical services for health care⁹ and place an increased demand for educational services on local schools.¹⁰ Several states estimate undocumented immigrant populations do not fully offset their fiscal impact on state budgets with contributions to state tax revenues.¹¹ Based on these concerns, communities have felt compelled to dispel and deter the presence of undocumented immigrants to protect local interests.¹²

Cousin Puerto Rico and Taco Whoever moving in.”); Dave Williams, *Lawmakers Pass Immigration Crackdown*, ATLANTA BUS. CHRON. (Apr. 14, 2011, 6:58 PM), <http://www.bizjournals.com/atlanta/news/2011/04/14/ga-senate-passes-immigration-bill.html>, archived at <http://perma.unl.edu/7HH9-27FF> (quoting a state congress person as stating: “I want to take care of our people, I don’t want to take care of Mexican people.”).

6. See, e.g., Fremont, Neb., Ordinance 5165, archived at <http://perma.unl.edu/B3M9-FSEG> (citing fiscal burdens, crimes, and unauthorized employment resulting from presence of undocumented immigrants); Escondido, Cal., Ordinance 2006-38R (Oct. 18, 2006), archived at <http://perma.unl.edu/9D7A-BXFM> (“The harboring of illegal aliens in dwelling units in the City, and crime committed by illegal aliens harm the health, safety and welfare of legal residents in the City.”); Riverside, N.J., Illegal Immigration Relief Act, Ordinance 2006-16 (July 26, 2006), archived at <http://perma.unl.edu/U6LQ-SEJJ> (citing negative impacts on streets, housing, neighborhoods, classroom overcrowding, school budgets, crime rates, public safety, and quality of life by undocumented immigrants).
7. GEORGE BORJAS, IMMIGRATION AND THE AMERICAN WORKER: A REVIEW OF THE ACADEMIC LITERATURE 13 (2013), archived at <http://perma.unl.edu/JF9B-YE3L> (concluding undocumented immigrants are responsible for a 4% decrease in wages earned by high-school dropouts).
8. See sources cited *supra* note 6.
9. See, e.g., Miriam Jordan, *Illegal Immigration Enters the Health Care Debate*, WSJ.COM (Aug. 15, 2009, 12:01 AM), <http://online.wsj.com/news/articles/SB125027261061432585>, archived at <http://perma.unl.edu/UE5S-KWA8>.
10. See, e.g., Richard F. LaMountain, *Illegal Immigrants Burden Portland-Area Schools*, OREGONLIVE.COM (Oct. 3, 2009, 5:01 PM), http://www.oregonlive.com/opinion/index.ssf/2009/10/illegal_immigrants_burden_port.html, archived at <http://perma.unl.edu/9Q8R-VYHG>.
11. See CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 9–10 (2007), archived at <http://perma.unl.edu/3JVB-FXKD>.
12. The impact undocumented immigrants have on local economies is a subject of debate, as is the accuracy of such estimates. *Id.* at 1 (“It is important to note . . . that currently available estimates have significant limitations; therefore, using them to determine an aggregate effect [of the economic impact of undocumented immigrants] across all states would be difficult and prone to considerable error.”). It is not clear whether or to what extent the burdens undocumented immigrants place on local economies are offset by benefits, but some argue those burdens are overstated. See, e.g., Adam Davidson, *Do Illegal Immigrants Actually Hurt the U.S. Economy?*, NYTIMES.COM (Feb. 12, 2013), <http://www.nytimes>

Second, this increase in state and local anti-undocumented immigrant laws reflects frustration with the federal government.¹³ Many feel strongly the federal government should effectively implement and enforce federal immigration law to alleviate the pressures undocumented immigrants place on states and localities.¹⁴ The perceived local pressures outlined above are viewed as symptomatic of lax enforcement and inadequate concern for communities affected by immigration.¹⁵ If the federal government is not going to hold up its end—so the thinking goes—then affected communities must pick up the slack.

States have attempted to control the influx of these unwanted populations through statutes and local ordinances that take a variety of approaches. Some require the use of E-Verify¹⁶ by employers,¹⁷ im-

.com/2013/02/17/magazine/do-illegal-immigrants-actually-hurt-the-us-economy.html?pagewanted=all&r=0, archived at <http://perma.unl.edu/QA7R-HE39>; Gordon H. Hanson, *The Economics and Policy of Illegal Immigration in the United States*, MIGRATION POL'Y INST. 10 (Dec. 2009), <http://www.migrationpolicy.org/pubs/hanson-dec09.pdf>, archived at <http://perma.unl.edu/JD38-JE3Q> (“Many unauthorized immigrants contribute to government coffers at the local, state, and federal levels by paying income, payroll, property, and sales taxes.”); Meredith L. King, *Immigrants in the U.S. Health Care System: Five Myths that Misinform the American Public*, CTR. FOR AM. PROGRESS 5 (June 7, 2007), http://www.americanprogress.org/wp-content/uploads/issues/2007/06/pdf/immigrant_health_report.pdf, archived at <http://perma.unl.edu/VBE8-F2MS> (pointing to use of emergency room services by less than 10% of documented and undocumented Mexican immigrants compared to 20% of whites and Mexican Americans); Edward Schumacher-Matos, *How Illegal Immigrants Are Helping Social Security*, THE WASH. POST (Sept. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090202673.html>, archived at <http://perma.unl.edu/LZ5E-6HUM>.

13. RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 1:3 (2013 ed.), available at Westlaw STEEL ON IMMIGRATION LAW § 1:3 (2013 ed.) (“In subsequent years [since 2006], the intense political and social controversy over immigration law has limited Congress to enact virtually no statutory changes to the Immigration and Nationality Act. . . . This has led to some states seeking to address certain aspects of the immigration laws of the country, especially in the area of enforcement.”).
14. See, e.g., *Arizona’s Immigration Frustration*, WSJ.COM (Apr. 27, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052748703465204575208382473306238.html>, archived at <http://perma.unl.edu/TSS8-D3BP>; Randal C. Archibold, *Arizona Governor Signs Tough Bill on Hiring Illegal Immigrants*, NYTIMES.COM (July 3, 2007), http://www.nytimes.com/2007/07/03/us/03arizona.html?_r=0, archived at <http://perma.unl.edu/G33D-VFM4> (quoting the Governor of Arizona’s observation that “Congress has failed miserably”).
15. See, e.g., Jon Feer, *SCOTUS Ruling on Arizona S.B. 1070 Affirms States Have a Role to Play on Immigration*, POLICYMIC.COM (June 29, 2012), <http://www.policymic.com/articles/10360/scotus-ruling-on-arizona-s-b-1070-affirms-states-have-a-role-to-play-on-immigration>, archived at <http://perma.unl.edu/9K3F-6FS4> (“Those who seek continued lax enforcement of immigration laws are generally hostile to state involvement.”).
16. E-Verify is an Internet-based system for checking the employment eligibility of immigrants under federal law. See generally *E-Verify: Background Information*,

posing civil and criminal sanctions on those who hire undocumented immigrants.¹⁸ Others require proof of lawful presence in the country on driver's license applications,¹⁹ or tighten federal eligibility requirements for access to public benefits.²⁰ Arizona famously has required

NAT'L IMMIGRATION LAW CTR. (last visited Oct. 10, 2013), <http://www.nilc.org/everifyinfo.html>, archived at <http://perma.unl.edu/BBU8-CWG2>.

17. See, e.g., Act of July 5, 2012, P.L. 1086, 2012 Pa. Laws No. 127 (requiring use of E-Verify for public works contractors and subcontractors); L.A. REV. STAT. ANN. § 38:2212.10 (2014) (same for private employers bidding on state contracts); Utah Immigration Accountability and Enforcement Amendments, ch. 18, 2011 Utah Laws 228 (codified as amended in scattered sections of UTAH CODE ANN. titles 63G, 63J, 67, 76, 77 (West 2014)) (same for employers with 15 or more employees); Act of May 20, 2011, ch. 436, 2011 Tenn. Laws ch. 436 (codified as amended in scattered section of TENN. CODE ANN. titles 3–8, 12, 39, 50 (West 2014)) (same in absence of work authorization documents for public employers and private employers with more than 500 employees); VA. CODE ANN. § 40.1-11.2 (West 2014) (same for state agencies), Act of Apr. 8, 2009, LB 403, 2009 Neb. Laws 788 (codified as amended in scattered section of NEB. REV. STAT. ch. 77 (Reissue 2009)) (same for public agencies and contractors). See also *State E-Verify-related Bills, Laws, Executive Orders*, NAT'L IMMIG. L. CENTER, <http://www.nilc.org/stateeverify-policyresrces.html> (last visited Oct. 10, 2013), archived at <http://perma.unl.edu/KL3C-RACG> (providing tables and maps surveying state bills related to E-Verify).
18. See, e.g., Fremont, Neb., Ordinance 5165, § 1, Part 5(H) (June 21, 2010), archived at <http://perma.unl.edu/B3M9-FSEG> (criminalizing failure of employers to register with E-Verify and to check the status of new employees, and imposing sanction of business license revocation, cancellation of city contracts, and recalling of city grants or loans); Beason-Hammon Alabama Taxpayer and Citizen Protection Act, No. 535, § 17(b), 2011 Ala. Acts 888, 914 (imposing civil liability for compensatory damages on businesses that discharge or fail to hire lawful workers while retaining or hiring unauthorized workers); Hazleton, Pa., Ordinance 2006-18, § 4(B) (Sept. 21, 2006), archived at <http://perma.unl.edu/JZP5-E8ZB> (criminalizing and imposing civil liability on businesses hiring unauthorized workers, and providing the use of E-Verify as a defense).
19. See, e.g., ARK. CODE ANN. § 27-16-1105(a) (West 2014) (requiring proof of citizenship or lawful status to apply for a driver's license); Act of May 24, 2011, ch. 282, 2011 Or. Laws 928 (codified as amended in scattered sections of OR. REV. STAT. ch. 807 (2013)) (same); VA. CODE ANN. § 46.2-328.1 (West 2014) (same); ARIZ. REV. STAT. ANN. § 41-1080 (2014) (same for licensing and state-issued identification); Act of Feb. 11, 2009, ch. 315, 2009 Utah Laws 1489 (codified as amended in scattered sections of UTAH CODE ANN. titles 46, 53, 63G (West 2014)) (requiring lawful status for issuance of driver's license or identification card).
20. "Unqualified" immigrants are already denied certain benefits under federal law. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title IV, 110 Stat. 2105, 2260–77 (codified as amended at 8 U.S.C. §§ 1601–1646 (2012)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of Omnibus Appropriations Consolidation Act, 1997, Pub. L. No. 104-208, Title V, 110 Stat. 3009, 3009-670–88. According to the National Immigration Law Center, the states that have gone beyond federal eligibility mandates as of July, 2011 are Arizona, Utah, Idaho, Colorado, Nebraska, Oklahoma, Montana, Indiana, Alabama, Georgia, South Carolina, and Virginia. *State Immigration-Related Legislation: Last Year's Key Battles Set the Stage for 2012, Laws Requiring Verification of Immigration Status for Public Benefits*,

law enforcement officers to check the immigration status of persons they suspect of being in the country illegally²¹ and permitted such suspicion to be the basis for warrantless detainment.²² Arizona also imposed criminal sanctions on undocumented immigrants for seeking employment.²³ Several states have proscribed the transit and concealment of undocumented immigrants.²⁴ Another tactic on this score—and the subject of this Note—are anti-immigrant housing ordinances (AIHOs).²⁵ AIHOs generally require prospective tenants to apply for and obtain a rental license, then deny these licenses to those who cannot prove lawful presence in the country.²⁶

The increase in state and local regulation of undocumented immigrants has been accompanied by a rise in legal challenges to these laws.²⁷ Plaintiffs often invoke the due process or equal protection clauses of the Fourteenth Amendment.²⁸ The most common challenges, however, have been claims that federal law preempts these state and local efforts.²⁹ When courts have struck down AIHOs, they have done so in recognition of the federal government's preemptive authority over immigration.³⁰

Federal preemption of state immigration law is a topic of some controversy. Immigration policies are hotly debated³¹ and federal pre-

NAT'L IMMIGRATION LAW CTR., <http://www.nilc.org/states-wrapup-2011.html> (last visited Oct. 10, 2013), archived at <http://perma.unl.edu/5CSJ-H62Z>.

21. ARIZ. REV. STAT. ANN. § 11-1051 (2014). See *infra* subsection II.C.4.

22. *Id.* § 13-3883(A)(5) (2014), *invalidated by* Arizona v. United States, 132 S. Ct. 2492 (2012).

23. *Id.* § 13-2928(C) (2014), *invalidated by* Arizona, 132 S. Ct. 2492.

24. See, e.g., GA. CODE ANN. § 16-11-201 (West 2014); S.C. CODE ANN. § 16-9-460 (2013), *invalidated by* United States v. South Carolina, 720 F.3d 518 (4th Cir. 2013); Beason-Hammon Alabama Taxpayer and Citizen Protection Act, No. 535, § 13, 2011 Ala. Acts 888, 907-09; ARIZ. REV. STAT. ANN. § 13-2929 (2014).

25. This term is borrowed from Daniel Eduardo Guzmán, Note, "There Be No Shelter Here": Anti-Immigrant Housing Ordinances and Comprehensive Reform, 20 CORNELL J.L. & PUB. POL'Y 399 (2010).

26. See *infra* text accompanying notes 135–39.

27. See, e.g., *Immigration Enforcement-Related Litigation*, NAT'L IMMIG. L. CENTER, <http://www.nilc.org/litigationie.html> (last visited Oct. 17, 2013), archived at <http://perma.unl.edu/LJU8-U7HG>; Jerry Markon, *Obama Administration Widens Challenges to State Immigration Laws*, WASH. POST (Sept. 29, 2011), http://articles.washingtonpost.com/2011-09-29/politics/35276353_1_immigration-laws-illegal-immigrants-check-immigration-status, archived at <http://perma.unl.edu/EYL7-AP46>.

28. U.S. CONST. amend. XIV, § 1. See Yolanda C. Garcia et al., *Where Are Courts Drawing the Line? The Contours of Preemption and Other Constitutional Bases for the Enjoinment of Modern State-Propounded Immigration-Related Statutes and Ordinances*, 37 T. MARSHALL L. REV. 81, 91–96 (2011).

29. Garcia et al., *supra* note 28, at 83 (noting that while these "[c]hallenges . . . often focus on preemption," few cases deal with due process or equal protection).

30. See *id.*; *infra* section II.D.

31. See, e.g., *Courts Block Provisions in Immigration Laws, Lets Some Controversial Ones Stand*, CNN.COM (Aug. 22, 2012, 12:13 PM), <http://www.cnn.com/2012/08/>

emption is an unsettled legal doctrine at the heart of perennial issues of federalism.³² The Eighth Circuit's split panel decision in *Keller v. City of Fremont*³³ is quintessential. The ordinance at the heart of the case was a subject of contention among Fremont voters and in the media.³⁴ The decision put the Eighth Circuit in a position at odds with holdings in the Third,³⁵ Fourth,³⁶ Fifth,³⁷ Ninth,³⁸ and Eleventh Circuits,³⁹ and produced a strongly worded dissent.⁴⁰ As such, *Keller* provides a useful illustration of federal preemption in the area of immigration and AIHOs specifically.

The significance of *Keller* stems from two aspects of the opinion. First, it presents a green light to states and municipalities in the Eighth Circuit to enact AIHOs, ending an unbroken record of success-

20/justice/state-immigration-laws/, archived at <http://perma.unl.edu/46ET-ZVC8>; *Talk of the Nation: How New Immigration Laws are Changing States*, NPR (Apr. 30, 2012, 1:00 PM), <http://www.npr.org/2012/04/30/151700266/how-new-immigration-laws-are-changing-states>, archived at <http://perma.unl.edu/TVH5-P3PU>; *Why Congress Falters on Immigration*, NYTIMES.COM (Dec. 8, 2010), <http://www.nytimes.com/roomfordebate/2010/12/08/why-cant-congress-act-on-immigration>, archived at <http://perma.unl.edu/QAM8-TMRC>.

32. JAMES T. O'REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAWS: LEGISLATION, REGULATION, AND LITIGATION* 39 (2006) ("Commentators have observed recently that the Supreme Court's views of preemption are in 'a time of enormous flux,' . . . [and] have suggested that the breadth of the express preemption defense appears to be narrowing, while the scope of 'conflict preemption' seems to be widening.") (quoting Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U.L. REV. 559, 617 (1997)). Implied preemption, the form of preemption most often invoked in these challenges, "remains quite controversial even after years of debate." *Id.* at 66.
33. 719 F.3d 931 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014).
34. *See, e.g.*, Margery A. Beck, *Nebraska Immigration Law Passes: Special Election Held in Fremont to Ban Hiring or Renting Property to Illegal Immigrants*, HUFFINGTON POST (June 22, 2010, 9:10 PM), http://www.huffingtonpost.com/2010/06/22/nebraska-immigration-law_n_620528.html, archived at <http://perma.unl.edu/YY8Q-FA68>; Huma Kahn, *Midwest Town Mandates Immigration Check for Renters*, ABC NEWS (June 21, 2010), <http://abcnews.go.com/Politics/immigration-debate-heats-fremont-nebraska/story?id=10972180>, archived at <http://perma.unl.edu/LF35-GQGT>; Leslie Reed, *Foes Say Fight Will Go On Against Fremont's Illegal-Immigrant Housing Law*, OMAHA.COM (June 29, 2013, 1:02 PM), <http://www.omaha.com/article/20130628/NEWS/130629626/1685>, archived at <http://perma.unl.edu/W4EC-8SJU>; Leslie Reed, *City Torn by Immigration Proposal*, OMAHA.COM (June 10, 2010, 8:00 AM), <http://www.omaha.com/article/20100610/NEWS/01/706109891/0>, archived at <http://perma.unl.edu/F93Y-KZGT>.
35. *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013).
36. *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013).
37. *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524 (5th Cir. 2013).
38. *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006).
39. *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250 (11th Cir. 2012); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012).
40. *Keller v. City of Fremont*, 719 F.3d 931, 953–60 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014) (J. Bright, dissenting).

ful challenges to these laws nationwide. As one commentator has noted, the doctrine of federal preemption does not necessarily provide a sufficiently predictable legal tool for challenging AIHOs.⁴¹ But preemption has, until *Keller*, proved to be an effective and consistently successful basis for striking down these laws. By upholding Fremont's ordinance, *Keller* clears a path for cities and states to remove undocumented immigrants from their borders by precluding them from entering into private contracts for housing.⁴²

Second, *Keller* is significant because the language of the ordinance at issue is substantially identical to AIHOs struck down by other circuits. Fremont did not discover a new way to write AIHOs that satisfied the objections of the courts. Instead, the Eighth Circuit adopted a narrow view of federal preemptive authority over immigration and characterized the AIHO at issue as nothing more than a "local property licensing scheme."⁴³ Furthermore, the Eighth Circuit based its view in part on a heightened standard for preemption which was inapplicable and which the court did not make an effort to justify.⁴⁴

This Note argues the Fremont ordinance, and other AIHOs, should be federally preempted. Part II reviews the doctrine of federal preemption and describes the historic recognition of federal authority over immigration. It also summarizes Supreme Court case law on immigration and preemption, lower court decisions on AIHOs, and the *Keller* decision. Part III argues for preemption of the Fremont ordinance.

II. BACKGROUND

A. Federal Preemption

Federal preemption arises as a necessary consequence of the dual sovereignty of state and federal governments, and the primacy of federal law in particular areas.⁴⁵ Thus, "in cases of concurrent authority,

41. Citing cases in Pennsylvania and Texas where housing ordinances similar to Fremont's were federally preempted, Professor Rigel Oliveri noted that "[a]lthough it is tempting for immigrant rights advocates to take solace in these two district court opinions and assume that preemption doctrine will thwart further municipal attempts at passing [anti-illegal immigrant] housing ordinances, preemption is a risky and unsatisfying approach for several reasons." Rigel C. Oliveri, *Between A Rock and A Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 68 (2009).

42. See *infra* section II.E.

43. *Keller*, 719 F.3d at 943.

44. See *infra* Part III.A.

45. See generally O'REILLY, *supra* note 32, at 29–34. Preemption cases are most often based on the Supremacy Clause of the Constitution, but some have criticized this, arguing that preemption and supremacy are distinct concepts. *Id.* at 30–31; see U.S. CONST. art. VI, cl. 2.

where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union, being the supreme law of the land, are of paramount authority.”⁴⁶ Federal law—the Constitution, federal statutes, and treaties—preempts expressly or by implication.⁴⁷ Both express and implied preemption often stem from a judicial assessment of what Congress has purposed.⁴⁸ *Express* preemption occurs when Congress, pursuant to its Constitutional authority, unequivocally states its intent that state governments refrain from regulating in a particular area.⁴⁹

Federal law preempts by *implication* where the courts infer that an entire subject area, or “field,” is to be occupied by federal law to the exclusion of the states, or where compliance with a state law directly conflicts with federal law.⁵⁰ The first of these implied forms of preemption—the inference that federal law occupies a field (field preemption)—may arise from federal legislation or administrative regulation. If a federal statutory or regulatory scheme is sufficiently “pervasive,” a judge may infer Congress did not intend to allow state law to operate in that field.⁵¹ Where field preemption applies, states may not supplement federal law, even where a state law is in harmony with federal law.⁵² This is because where a statutory framework achieves policy

46. *Houston v. Moore*, 18 U.S. 1, 49–50 (1820).

47. *See generally* O’REILLY, *supra* note 32, at 69–78. Note that the taxonomical breakdown of terminology may differ slightly from author to author.

48. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[T]he purpose of Congress is the ultimate touchstone’ in every pre-emption case.”) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

49. An example of this type of preemption can be seen in the area of immigrant employment. The Immigration and Nationality Act of 1965 provides: “The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” Immigration and Nationality Act of 1965 § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2012). Express preemption is not currently applicable to regulation of immigrant housing, and so will not be discussed further in this Note.

50. O’REILLY, *supra* note 32, at 69–78. The Supreme Court summarized preemption by implication in *Rice v. Santa Fe Elevator Corp.*:

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.

331 U.S. 218, 230 (1947) (citations omitted).

51. *See* O’REILLY, *supra* note 32, at 72–75.

52. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (“Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.”); *Pennsylvania v. Nelson*, 350 U.S. 497,

objectives through a balancing of incentives and disincentives, the absence of a provision may be as important to achieving those objectives as positive law; Congress's prerogative to set policy in a field precludes state supplementation.⁵³

The inference that federal law occupies a field may also arise from either the Constitution's delegation of power from the states to the federal government or as a function of federal sovereignty.⁵⁴ In this case, preemption arises as a result of the federal structure and so may be termed "structural preemption."⁵⁵ Structural preemption is an inherent aspect of federalism and so, in theory, would turn on the courts' interpretation of the Constitution or of national sovereignty rather than on Congressional intent.

The second form of implied preemption arises where there is a conflict in complying with both state and federal law. Conflict preemption operates where compliance with both state and federal law is not possible, and in this situation is termed "impossibility conflict preemption."⁵⁶ Conflict preemption also operates where compliance with state law would present an obstacle to whatever goal federal law is attempting to achieve, and is then termed "obstacle conflict preemption."⁵⁷ Where there is an allegation of obstacle conflict preemption, a state cannot necessarily defeat the allegation by claiming it aims to achieve federal objectives by its own distinct methods.⁵⁸ Differing methods may impede federal objectives as well as differing policy goals.⁵⁹ Conflict preemption turns less on Congress's intent to pre-

504 (1956) (determining federal sedition acts "evinced a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it").

53. See sources cited *supra* note 52.

54. See O'REILLY, *supra* note 32, at 77 (referring to this as "direct constitutional preemption").

55. Pratheepan Gulasekaram, *Immigration Federalism Post-Arizona*, AM. CONST. SOC'Y FOR L. & POL'Y (Aug. 8, 2013), http://www.acslaw.org/acsblog/immigration-federalism-post-arizona#_ftnref1, archived at <http://perma.unl.edu/4Z6B-5UPS> (referring to a "structural or sovereignty-based form of preemption").

56. Federal and state law may conflict where compliance is not strictly impossible, but highly impractical (such as a business activity mandated by federal law where compliance with a state price-setting requirement would "trap" the business's costs). O'REILLY, *supra* note 32, at 73-74 (citing *Miss. Power v. Miss. ex rel. Moore*, 487 U.S. 354 (1988)). Courts are obligated to attempt to reconcile potentially conflicting federal and state laws. *Id.* at 74.

57. Determination of this form of preemption is, to some extent, a subjective inquiry. See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment."); O'REILLY, *supra* note 32, at 74-76.

58. See *Arizona*, 132 S. Ct. at 2505 ("The Court has recognized that a '[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.'") (quoting *Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 287 (1971)).

59. *Id.*

empt than on the need for federal law to function and to effectuate Congress's policy objectives.⁶⁰

An important caveat to the preemption taxonomy is the presumption against preemption in areas that fall within the states' historic police powers.⁶¹ States, under their police powers, may regulate for the health, safety, general welfare, or morals of their populations.⁶² Congress must show a "clear and manifest purpose" to preempt state action when attempting to regulate within these areas.⁶³ This heightened clear and manifest purpose standard is seen as protecting the "federalism bargain," wherein states agreed to cede some part of their sovereignty but not others.⁶⁴

B. Federal Authority in the Area of Immigration

The federal government's authority over immigration is based on powers delegated to it by the Constitution and on its exclusive command over foreign affairs.⁶⁵ This authority has a long historical pedigree; the Supreme Court has consistently noted the plenary nature of

60. O'REILLY, *supra* note 32, at 73.

61. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("Congress legislated here in field which the States have traditionally occupied. So we start with the assumption that the historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citations omitted); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.").

62. 16A AM. JUR. 2D *Constitutional Law* § 344 (2013).

63. *Rice*, 331 U.S. at 230.

64. O'REILLY, *supra* note 32, at 7–8. Whether the presumption against preemption is still truly extant is a subject of some controversy. See, e.g., *United States v. Locke*, 529 U.S. 89, 108 (2000) (acknowledging presumption and finding it does not apply in areas historically regulated by the federal government); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (applying presumption). But see, e.g., O'REILLY *supra* note 32, at 8 ("[T]he Supreme Court has ignored the presumption in some recent cases . . .") (citing *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88 (1992)); Mary J. Davis, *Unmasking the Presumption in favor of Preemption*, 53 S.C. L. REV. 967, 968 (2002) ("Historically, the Supreme Court has said . . . there is a presumption against preemption. There is no such presumption any longer, if, indeed, there ever really was one."). This debate is beyond the scope of this Note. Several of the relevant cases discussed treat the presumption as alive and well, and this Note will do the same.

65. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) ("This authority rests in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization,' and its inherent power as sovereign to control and conduct relations with foreign nations.") (citations omitted); *Hines v. Davidowitz*, 312 U.S. 52 (1941) ("That the 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 was pointed out by authors of The Federalist in 1787, and has since been given continuous recognition by this Court.").

Congress's authority to exclude and expel non-citizens since the 1880s.⁶⁶ Congress has used this authority to extensively regulate immigration, and its exclusivity is well-settled.⁶⁷

1. *The Naturalization Clause, Foreign Affairs, and Foreign Commerce*

The Constitution gives Congress the power through the Naturalization Clause “[t]o establish an uniform Rule of Naturalization.”⁶⁸ Because the central objective of this power is uniformity, it must be an exclusive power; if each State were left to determine its own naturalization policy, such uniformity would be unachievable.⁶⁹ Immigration policy also touches on foreign affairs and international commerce through the exclusion and expulsion of non-citizens.⁷⁰ The federal government's power in the arena of foreign affairs is an inherent aspect of the sovereignty of the national government,⁷¹ and the authors of the Federalist papers noted the federal government's authority over

66. See MILTON R. KONVITZ, *CIVIL RIGHTS IN IMMIGRATION* 1–3 (1953).

67. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”).

68. U.S. CONST. art. I, § 8, cl. 4.

69. James Madison observed that a person unfit for nation-wide citizenship under the laws of one state, could acquire that citizenship under the laws of a different state with more lenient criteria. See THE FEDERALIST NO. 42, at 276–77 (James Madison) (Nat'l Found. for Educ. in Am. Citizenship 1937) (1788).

70. See *Arizona*, 132 S. Ct. at 2498 (“Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation”); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. . . . If it be otherwise, a State can, at her pleasure, embroil us in disastrous quarrels.”); *Developments in the Law Immigration and Nationality*, 66 HARV. L. REV. 643, 681 (1953) (“The source of the power to deport aliens has been found in the power of Congress to regulate foreign commerce and in the sovereignty of the national Government with respect to foreign affairs.”).

71. *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889) (“The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the [C]onstitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.”).

foreign relations should be exclusive.⁷² The power to regulate foreign commerce is given to Congress in the Constitution.⁷³

2. Congressional Enactments

Congress exercised its powers over naturalization as early as 1790 with the Naturalization Act.⁷⁴ The Alien and Sedition Acts of the 1790s⁷⁵ made the then-controversial attempt to allow the national government to remove aliens.⁷⁶ Congress did not pass an immigration statute excluding foreigners again until 1862.⁷⁷ Congress has regularly exercised its authority since that time,⁷⁸ and passed its most comprehensive immigration legislation with the Immigration and Naturalization Act of 1952 (INA).⁷⁹ That Act set parameters governing preference for and exclusion of immigrants, the issuance of visas, and inspection upon entry.⁸⁰ It also set in place rules, procedures, and exceptions for deportation hearings.⁸¹ The INA has been amended a number of times since 1952,⁸² but still “continues to be the basic immigration statute.”⁸³ Subsequent major pieces of legislation

72. See, e.g., THE FEDERALIST NO. 3, at 14 (John Jay) (Nat'l Found. for Educ. in Am. Citizenship 1937) (1788) (“It is of high importance to the peace of America that she observe the laws of nations toward all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies.”); THE FEDERALIST NO. 80, at 517 (Alexander Hamilton) (Nat'l Found. for Educ. in Am. Citizenship 1937) (1788) (“[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members.”).

73. U.S. CONST. art. I, § 8, cl. 3.

74. Naturalization Act, ch. 3, 1 Stat. 103 (1790) (restricting naturalization to whites who resided in the United States for at least two years).

75. Naturalization Act, ch. 54, 1 Stat. 566 (1798); Alien Act, ch. 58, 1 Stat. 570 (1798); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24 (2012)).

76. See e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2512 (2012) (Scalia, J., dissenting) (“[T]he controversy surrounding the Alien and Sedition Acts involved a debate over whether, under the Constitution, the States had *exclusive* authority to enact such immigration laws); Jelte Olthof, *History As Our Guide?: The Past As an Invisible Source of Constitutionality in the Legislative Debates on the Alien Act in the United States (1798) and the Émigrés Problem in France (1791)*, 57 ST. LOUIS U. L.J. 377, 385 (2013) (“Following the Tenth Amendment . . . the competence to remove aliens clearly rested with the states, not the federal government.”).

77. Anti-Coolie Act, ch. 27, 12 Stat. 340 (1862) (preventing the importation of Chinese slave labor).

78. See JACK WASSERMAN, *IMMIGRATION LAW AND PRACTICE* 611–18 (3d ed. 1979).

79. Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in 8 U.S.C. §§ 1101–1537 (2012)).

80. See STEEL, *supra* note 13, § 1:2.

81. *Id.*

82. *Id.* § 1:3.

83. *Id.* § 1:2.

in the area of immigration include the Immigration Reform and Control Act of 1986;⁸⁴ the Immigration Act of 1990;⁸⁵ the Illegal Immigration Reform and Immigrant Responsibility Act of 1996;⁸⁶ and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.⁸⁷

The combination of the preemption taxonomy, the state police power presumption, and federal authority over immigration presents an outline of the doctrine of federal preemption in the context of immigration. If a state attempts to regulate core aspects of immigration such as naturalization, exclusion (admission), or expulsion (removal), that attempt is structurally preempted under the federal government's exclusive constitutional and sovereign powers. Outside of this core area, federal statutes that take immigration as their subject may preempt state law where Congress is so-authorized and when it intends such a result. Such intent can be shown where the federal law occupies a field in which the state law operates and thus precludes even harmonious state regulation. The courts may also preempt state law where it conflicts with federal law, either in compliance, objectives, or means of achievement. The showing of congressional intent must meet a heightened standard of a clear and manifest purpose—rebutting the presumption against preemption—for federal law to preempt a field within the states' historic police powers.

C. Supreme Court Immigration Jurisprudence

The Supreme Court has taken up the issue of federal authority over immigration extensively since the late 19th Century. It has attempted to delineate core immigration areas reserved to the federal government and to articulate the preemptive scope of federal statutes. These issues are far from fully resolved, but the Court has provided some guidelines along the way.

1. Early Supreme Court Cases

*Chy Lung v. Freeman*⁸⁸ presents one of the earliest examples of the Supreme Court's recognition of structural preemption. The Court in *Chy Lung* struck down a California statute that allowed a local "Commissioner of Immigration" to deny entry to certain classes of foreigners entering San Francisco by ship.⁸⁹ This effectively gave the

84. Pub. L. No. 99-603, 100 Stat. 3359 (amending the INA).

85. Pub. L. No. 101-649, 104 Stat. 4978 (amending the INA).

86. Enacted as Division C of Omnibus Appropriations Consolidation Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009.

87. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 8 U.S.C. §§ 1601–1646 (2012)).

88. 92 U.S. 275 (1875).

89. *Id.*

Commissioner discretion to determine who could enter the country.⁹⁰ The Court held “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. . . . If it be otherwise, a State can, at her pleasure, embroil us in disastrous quarrels.”⁹¹ The Court here gives an important justification for the supremacy of federal over state immigration law—that the treatment of foreign nationals by one state can produce repercussions for which the entire nation must answer.⁹²

Another early Supreme Court case that dealt with federal authority over immigration was *The Chinese Exclusion Case*.⁹³ The plaintiff was a Chinese laborer who left the United States to visit China in 1887.⁹⁴ His certificate of reentry was voided under a federal statute during his absence, and he was detained when he attempted to reenter in San Francisco.⁹⁵ On a writ of *habeas corpus*, the Court evaluated Congress’s authority to enact the statute.⁹⁶ It noted the inherently national nature of foreign affairs⁹⁷ and the federal government’s duty to “give security against foreign aggression and encroachment.”⁹⁸ Thus, the Court concluded, this national authority over foreign affairs must include the power of exclusion.⁹⁹ The Court held the “power of exclusion of foreigners” was “incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution.”¹⁰⁰ Five years later in *Fong Yue Ting v. United States*, the Court conceived of this power to exclude foreigners as also including the power to expel them.¹⁰¹ In *Fok Young Yo v. United States*, this power was extended to the privilege of transit.¹⁰²

90. *Id.*

91. *Id.* at 280.

92. See Hamilton, THE FEDERALIST NO. 80, *supra* note 72.

93. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

94. *The Chinese Exclusion Case*, 130 U.S. at 582.

95. *Id.*

96. *Id.* at 590–603.

97. *Id.* at 604 (“While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation . . .”).

98. *Id.* at 606.

99. *Id.* at 606–09.

100. *Id.* at 609.

101. 149 U.S. 698, 707 (1893) (“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.”).

102. 185 U.S. 296, 302–03 (1902) (“The doctrine is firmly established that the power to exclude or expel aliens is vested in the political departments of the government, to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to such regulations, except so far as the judicial depart-

2. Hines v. Davidowitz

The Supreme Court handed down a now-seminal instance of implied preemption of a state immigration law in *Hines v. Davidowitz*.¹⁰³ In *Hines*, the Court struck down a Pennsylvania statute that required aliens to register annually with the State and to carry a registration card at all times.¹⁰⁴ The Court invoked the Supremacy Clause, the federal government's authority over foreign affairs, and the Naturalization Clause in concluding the Alien Registration Act of 1940¹⁰⁵ preempted the Pennsylvania statute.¹⁰⁶ The Alien Registration Act and its legislative history demonstrated Congressional intent to have in place only a single "integrated and all-embracing system" of immigrant registration.¹⁰⁷ Congress intended "to protect the personal liberties of law-abiding aliens through one uniform national registration system"—a purpose to which the Pennsylvania statute proved an obstacle.¹⁰⁸

3. DeCanas v. Bica

*DeCanas v. Bica*¹⁰⁹ took up state regulation of immigrant employment and provided a limiting view of the scope of the preemptive power of federal immigration law.¹¹⁰ California passed a law prohibiting employers from hiring undocumented immigrants if "such employment would have an adverse effect on lawful resident workers."¹¹¹ The Court noted the exclusively federal nature of the power to regulate immigration, but found that the statute was not within the scope of that power.¹¹² In oft-quoted language, the Court specified that a state only regulates immigration—thereby invading federal powers—when that regulation is "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."¹¹³ It determined California was not regulating immigration directly, but was merely making an effort

ment is authorized by treaty or by statute, or is required by the Constitution, to intervene. And as a general proposition this must be true of the privilege of transit." (citations omitted).

103. 312 U.S. 52 (1941).

104. *Id.* at 60.

105. Pub. L. No. 670, 54 Stat. 670 (repealed 1952).

106. *Hines*, 312 U.S. at 62–63.

107. *Id.* at 74.

108. *Id.*

109. 424 U.S. 351 (1976).

110. *DeCanas* is seen as part of an effort by the Burger Court to provide uniformity to application of the preemption doctrine in a manner more permissive to state legislation. See Robert S. Catz & Howard B. Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295, 320 (1977).

111. *DeCanas*, 424 U.S. at 352.

112. *Id.* at 355.

113. *Id.* This language provides a test that has been cited in nearly every AIHO case.

to “strengthen its economy” in a way that incidentally touched on immigration.¹¹⁴ Additionally, the Court found the law was within California’s police powers because it “focuse[d] directly upon . . . essentially local problems and [was] tailored to combat effectively the perceived evils.”¹¹⁵ The Court concluded neither the language, legislative history, nor scope of the INA evinced the “clear and manifest purpose” standard needed to preempt the California statute.¹¹⁶

4. Arizona v. United States

The Court handed down its most recent decision on preemption of state immigration law in *Arizona v. United States*.¹¹⁷ In so doing, it struck down three provisions of an Arizona statute,¹¹⁸ declining to enjoin a fourth under a facial challenge.¹¹⁹ The Court looked first to § 3 of the law, which imposed criminal penalties on undocumented immigrants who failed to carry registration documents.¹²⁰ Analogizing to *Hines*, the Court found this provision field preempted by the comprehensive nature of federal laws governing alien registration.¹²¹ The federal scheme “provide[d] a full set of standards” and “was designed as a ‘harmonious whole.’”¹²² Such a scheme “reflect[ed] a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.”¹²³

The Court next addressed § 5(C) of the Arizona law, which imposed criminal penalties on undocumented immigrants for applying for, soliciting, or performing work as either an employee or a contractor.¹²⁴ The Court found the absence of criminal penalties on immigrant employees in federal law was a deliberate determination by Congress that such “penalties would be ‘unnecessary and unworkable.’”¹²⁵ Thus, Arizona’s criminal penalties presented an obstacle to

114. *Id.*

115. *Id.* at 357.

116. *Id.* at 357–58.

117. 132 S. Ct. 2492 (2012).

118. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

119. *Arizona*, 132 S. Ct. at 2507–11. The Court found “[i]t was improper . . . to enjoin § 2(B) [of Arizona’s statute] before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives.” *Id.* at 2510.

120. *Id.* at 2501–03.

121. *Arizona*, 132 S. Ct. at 2502.

122. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

123. *Id.*

124. *Id.* at 2503–05.

125. *Id.* at 2504 (quoting U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS 66 (1981)).

the balancing of legal burdens on immigrants through which Congress achieved its policy objectives.¹²⁶

The Court also used obstacle conflict preemption to strike down § 6 of the Arizona law.¹²⁷ That provision authorized state officers to make warrantless arrests of persons they had probable cause to believe had committed a public offense that would make that person removable.¹²⁸ Noting that “[a]s a general rule, it is not a crime for a removable alien to remain present in the United States,” the Court found Arizona’s law allowed state officers to make their own determination of whether a suspect was possibly removable.¹²⁹ This discretion was beyond the scope of what was delegated to state officers under federal law.¹³⁰ The Court used language, however, implying the law was also invalid under structural preemption, as an inappropriate usurpation of the power of removal by Arizona.¹³¹

The Supreme Court’s earliest immigration cases preempted state law under the federal government’s delegated Constitutional powers, vindicating those powers with relatively broad language. Since then, the Court has shifted toward a preference for preempting state immigration laws under federal statutes.¹³² In cases where state laws could be structurally preempted, the Court has preferred instead to use narrower statutory grounds.¹³³ *Chy Lung*, *The Chinese Exclusion Case*, *Fong Yue Ting*, and *Fok Young Yo*, however, remain good law and support structural preemption as a viable mechanism in striking down state immigration laws.¹³⁴ As discussed below, lower courts too have tended to focus on preemption under federal statutes.

D. Lower Court Decisions on AIHOs

Several circuit decisions have recently addressed preemption of AIHOs specifically. AIHOs generally operate by requiring prospective tenants of rented housing to pay a small fee and apply for an occupancy permit.¹³⁵ The tenant must provide requested information, in-

126. *Id.* at 2505.

127. *Id.* at 2507.

128. *Id.* at 2505.

129. *Id.* at 2505–06.

130. *Id.*

131. “A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. *Decisions of this nature touch on foreign relations and must be made with one voice.*” *Id.* at 2506–07 (emphasis added) (citations omitted).

132. *See* Gulasekaram, *supra* note 55.

133. *Id.*

134. *See supra* subsection II.C.1 and notes 93, 101.

135. *See*, Fremont, Neb., Ordinance 5165, § 1, Parts 2–4 (June 21, 2010), *archived at* <http://perma.unl.edu/B3M9-FSEG>; Farmers Branch, Tex., Ordinance 2952, §§ 1, 3 (Jan. 22, 2008), *archived at* <http://perma.unl.edu/3CAH-587P>; Hazleton, Pa., Ordinance 2006-18, § 5 (Sept. 21, 2006), *archived at* <http://perma.unl.edu/N75C->

cluding identification that proves citizenship or lawful status.¹³⁶ An occupancy permit is automatically issued upon completion of an application, but if the tenant does not provide proof of citizenship or lawful status, city authorities check with federal authorities for a determination of the tenant's immigration status.¹³⁷ If the check reveals a tenant is not lawfully present, the occupancy permit is revoked, and the landlord is liable for fines or revocation of his or her license to rent if he or she does not promptly evict the unlicensed tenant.¹³⁸ The landlord's liability arises from a provision that criminalizes the act of harboring undocumented immigrants.¹³⁹ Such harboring includes leasing property to those not lawfully present in the country and Fremont's AIHO makes lawful presence a condition precedent to entering into a lease.¹⁴⁰

As the decisions discussed below illustrate,¹⁴¹ lower courts have been almost unanimous in their determination that AIHOs are at odds with federal law.¹⁴² This has been paralleled in decisions strik-

4TXW; Hazleton, Pa., Ordinance 2006-13, § 7(b) (Aug. 15, 2006), *archived at* <http://perma.unl.edu/J3SE-42W2>.

136. *See*, Fremont, Neb., Ordinance 5165, § 1, Part 3(B), (E) (June 21, 2010), *archived at* <http://perma.unl.edu/B3M9-FSEG>; Farmers Branch, Tex., Ordinance 2952, §§ 1(B)(2), (5); 3(B)(2), (5) (Jan. 22, 2008), *archived at* <http://perma.unl.edu/3CAH-587P>; Hazleton, Pa., Ordinance 2006-13, § 7(b) (Aug. 15, 2006), *archived at* <http://perma.unl.edu/J3SE-42W2>.
137. *See*, Fremont, Neb., Ordinance 5165, § 1, Part 4(A) (June 21, 2010), *archived at* <http://perma.unl.edu/B3M9-FSEG>; Farmers Branch, Tex., Ordinance 2952, §§ 1(D)(1); 3(D)(1) (Jan. 22, 2008), *archived at* <http://perma.unl.edu/3CAH-587P>; Hazleton, Pa., Ordinance 2006-18, § 5(B)(3) (Sept. 21, 2006), *archived at* <http://perma.unl.edu/N75C-4TXW>.
138. *See*, Fremont, Neb., Ordinance 5165, § 1, Parts 3(j), 4(B), (D) (June 21, 2010), *archived at* <http://perma.unl.edu/B3M9-FSEG>; Farmers Branch, Tex., Ordinance 2952, §§ 1(C)(7), 1(D)(4)–(5); 3(C)(7), 3(D)(4)–(5) (Jan. 22, 2008), *archived at* <http://perma.unl.edu/3CAH-587P>; Hazleton, Pa., Ordinance 2006-18, § 5(B)(4)–(6), (8) (Sept. 21, 2006), *archived at* <http://perma.unl.edu/N75C-4TXW>; Hazleton, Pa., Ordinance 2006-13, § 10(b) (Aug. 15, 2006), *archived at* <http://perma.unl.edu/J3SE-42W2>.
139. *See*, Fremont, Neb., Ordinance 5165, § 1, Part 2(A) (June 21, 2010), *archived at* <http://perma.unl.edu/B3M9-FSEG>; Farmers Branch, Tex., Ordinance 2952, §§ 1(C)(7), 1(D)(4); 3(C)(7), 3(D)(4) (Jan. 22, 2008), *archived at* <http://perma.unl.edu/3CAH-587P>; Hazleton, Pa., Ordinance 2006-18, § 5 (Sept. 21, 2006), *archived at* <http://perma.unl.edu/N75C-4TXW>.
140. Fremont, Neb., Ordinance 5165, § 1, Part 2(A)(2) (June 21, 2010), *archived at* <http://perma.unl.edu/B3M9-FSEG>.
141. *See infra* subsections II.D.1–2.
142. *See* United States v. Alabama, 691 F.3d 1269, 1288 (11th Cir. 2012) (finding state anti-harboring law including a prohibition on renting to undocumented immigrants “effectuate[d] an untenable expansion of the federal harboring provision”); Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (granting temporary restraining order on anti-harboring provision proscribing leasing to undocumented immigrants on likelihood it was field and conflict preempted under INA); Reynolds v. City of Valley Park, Mo., No. 06-CC-3802, 2007 WL

ing down or enjoining state anti-harboring laws.¹⁴³ The reasoning and particular forms of preemption these decisions utilize, however, are less than consistent.

1. Lozano v. City of Hazleton

The Third Circuit has twice struck down as preempted a pair of 2006 Hazleton, Pennsylvania ordinances that include anti-immigrant housing provisions.¹⁴⁴ The court examined the Hazleton ordinances for the first time in *Lozano I* and found the housing provisions structurally preempted, statutorily field preempted, and obstacle conflict preempted.¹⁴⁵ The court rested the findings of both structural and field preemption on the “conclusion that Hazleton’s housing provisions regulate which aliens may live there.”¹⁴⁶ It began by concluding the police power presumption did not apply.¹⁴⁷ The court then reasoned that because Hazleton attempted, through the ordinances, to remove undocumented immigrants from its borders, the ordinances essentially expelled non-citizens and so intruded on a core area of immigra-

857320 (Mo. Cir. Ct. Mar. 12, 2007 (finding local prohibition on leasing to undocumented immigrants preempted by state law).

143. This class of state statutes generally prohibits, and provides penalties for, transporting, concealing, harboring, or shielding undocumented immigrants, or encouraging undocumented immigrants to enter the country, and allows for state officials to arrest and prosecute violations of these laws. They are generally struck down under the INA’s anti-harboring provision which not only provides a full set of standards for immigrant harboring, but limits the role of state officials to arresting violators, rather than prosecuting them. *See Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013) (finding state anti-harboring provisions field and conflict preempted by the INA); *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013) (same); *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250 (11th Cir. 2012) (likelihood of the same for preliminary injunction); *Alabama*, 691 F.3d 1269 (finding state anti-harboring law expressly, field, and conflict preempted and using language indicating structural preemption as well).
144. *Lozano v. City of Hazleton (Lozano I)*, 620 F.3d 170 (3d Cir. 2010), *vacated and remanded in light of Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 2958 (2011), *aff’d in part, rev’d in part*, 724 F.3d 297 (3d Cir. 2013). *Lozano I* was vacated because the part of that decision dealing with immigrant employment was affected by the Supreme Court’s ruling in *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011). Unsurprisingly, then, the Third Circuit maintained its position on the housing provisions upon rehearing. *Lozano v. City of Hazleton (Lozano II)*, 724 F.3d 297 (3d Cir. 2013).
145. *Lozano I*, 620 F.3d at 219–24.
146. *Id.* at 220.
147. *Id.* (“Although we realize that a state certainly can, and presumably should, regulate rental accommodations to ensure the health and safety of its residents, . . . Hazleton attempts to regulate residence based solely on immigration status. Deciding which aliens may live in the United States has always been the prerogative of the federal government.”).

tion.¹⁴⁸ Additionally, the comprehensive nature of the INA “plainly precludes state efforts, whether harmonious or conflicting, to regulate residence in this country.”¹⁴⁹

In holding the Hazleton housing provisions conflict preempted, the court introduced what may be termed the “snapshot” argument.¹⁵⁰ Federal immigration status is dynamic; an immigrant’s status is subject to change until the Immigration and Naturalization Service undertakes removal proceedings.¹⁵¹ There are procedural protections and exceptions that may apply to a decision about removal,¹⁵² and that decision lies solely within the discretion of the federal government.¹⁵³ Although an immigrant may have status indicating he or she is not lawfully present at a moment in time, it is only after a federal removal hearing that it is possible to know whether the federal government has attempted to initiate removal proceedings.¹⁵⁴ Thus, state laws that base removal from the city on a person’s federal immigration status at a particular point in time—on a “snapshot” of their status—conflict with the fluid nature of federal removal proceedings and Congress’s determination that fluidity best strikes the correct balance of policy outcomes.¹⁵⁵ The court also found the ordinances’ use of the term “harboring” conflicted with the INA because “[t]he federal prohibition against harboring has never been interpreted to apply so broadly as to encompass the typical landlord/tenant relationship.”¹⁵⁶

The Third Circuit reevaluated the case in *Lozano II* after the Supreme Court’s decision in *Arizona*.¹⁵⁷ Regarding the housing provisions, the court found “the Court’s language [in *Arizona*] reinforce[d] [its] view.”¹⁵⁸ It preempted Hazleton’s ordinance on each of the same

148. *Id.* “We also recognize that Hazleton’s housing provisions regulate presence only within its city limits, not the entire country. This does not change the analysis. To be meaningful, the federal government’s exclusive control over residence in this country must extend to any political subdivision.” *Id.* at 221.

149. *Id.* at 220.

150. *Id.* at 221.

151. INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) (2012) (providing limited circumstances in which an order for removal may be rescinded).

152. See sources cited *infra* notes 281, 283–84.

153. INA § 240(a)(3), 8 U.S.C. § 1229a(a)(3) (2012) (“Unless otherwise specified in this Act, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.”). Removable undocumented immigrants were never admitted in the first place, but INA § 237(a)(1), 8 U.S.C. § 1227(a)(1) (2012), identifies as a deportable class those aliens who at the time of entry into the country were *inadmissible*—a determination exclusive to the Federal government.

154. *Lozano I*, 620 F.3d at 222.

155. *Id.* at 221–22.

156. *Id.* at 223.

157. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

158. *Lozano II*, 724 F.3d 297, 314 (3d Cir. 2013).

grounds as used in *Lozano I* and also found the ordinances field preempted on a basis not discussed in *Lozano I*.¹⁵⁹ A series of recent decisions in the Fourth and Eleventh Circuits¹⁶⁰ persuaded the court the ordinances also entered the occupied field of immigrant harboring.¹⁶¹

2. Villas at Parkside Partners v. City of Farmers Branch

The Fifth Circuit also found an AIHO preempted in *Villas at Parkside Partners v. City of Farmers Branch, Texas (Farmers Branch I)*.¹⁶² The court in *Farmers Branch I* found the police power presumption inapplicable and held the ordinance preempted on each of the same grounds as in *Lozano I*.¹⁶³ On rehearing en banc, the Fifth Circuit affirmed in *Farmers Branch II*, but significantly narrowed the grounds for preemption.¹⁶⁴ The plurality in *Farmers Branch II* was silent on structural and field preemption and instead relied solely on conflict preemption.¹⁶⁵

The *Farmers Branch II* court first observed that the ordinance enforced the INA's anti-harboring provision. But by criminalizing the mere act by a landlord of renting to an undocumented immigrant, the ordinance did not include—as the INA does—a *mens rea* element or a requirement that one shield an undocumented immigrant from federal authorities.¹⁶⁶ In fact, the court noted, federal law contemplates residency by undocumented immigrants for purposes of service, and thus the anti-harboring provisions of the Farmers Branch ordinance “not only fail[ed] to facilitate, but obstruct[ed] the goal of bringing potentially removable non-citizens to the attention of the federal authorities.”¹⁶⁷ Furthermore, by allowing state officers to prosecute landlords for the federal crime of harboring, the ordinance allowed state officers to act as federal immigration officers in a manner not authorized under the INA.¹⁶⁸ These inconsistencies interfered with the delicate balance of federal priorities contained in the INA.¹⁶⁹

159. *Id.* at 314–21.

160. *See* cases cited *supra* note 143.

161. *Lozano II*, 724 F.3d at 316–17.

162. 675 F.3d 802 (5th Cir. 2012), *aff'd on reh'g en banc*, 726 F.3d 524 (5th Cir. 2013).

163. *Farmers Branch I*, 675 F.3d at 807–16.

164. *Villas at Parkside Partners v. City of Farmers Branch, Tex. (Farmers Branch II)*, 726 F.3d 524, 528–37 (5th Cir. 2013).

165. *Id.*

166. *Id.* at 529–30.

167. *Id.* at 530.

168. *Id.* at 530–31. As noted by the court here and in *Arizona*, federal immigration law allows state officers to perform the duties of federal immigration officers in a narrow set of circumstances, none here apposite. *See* INA § 287(g)(1), 8 U.S.C. § 1357(g)(1) (2012); *Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012).

169. *Farmers Branch II*, 726 F.3d at 530–31.

Second, the court found the ordinance's criminalization of tenancy without a permit conflict preempted because it "predicate[d] arrests, detentions, and prosecutions based on a classification—the ability to obtain rental housing—that does not exist under [8 U.S.C.] § 1621 or anywhere else in federal law."¹⁷⁰ The ordinance purported to aid in the enforcement of § 1621, which denies state and local public benefits to "unqualified" immigrants.¹⁷¹ The city argued that all licenses, including the proposed occupancy permits in the ordinance, were among the public benefits denied to undocumented immigrants under § 1621, and so the ordinance's criminal penalties—including arrest, detention, and prosecution by the state—aided in the enforcement of federal objectives.¹⁷² No federal designation of immigration status, however, is identified in federal law as a basis for precluding immigrants from renting housing.¹⁷³

Furthermore, of the many possible immigration classifications that exist under federal law, none are specifically identified by the ordinance as indicating an immigrant is unlawfully present.¹⁷⁴ Given this ambiguity, state officials would be left to make a determination—based on whatever federal designation they receive in response to an inquiry—as to whether a person is lawfully present, and may then arrest, detain, and prosecute an undocumented immigrant based on that determination.¹⁷⁵ By requiring state officials to make this determination, the Farmers Branch ordinance "would allow the State to achieve its own immigration policy" and would thereby "disrupt the federal framework."¹⁷⁶

Lastly, the court struck down a provision of the ordinance granting state judicial review to landlords and occupants.¹⁷⁷ Unless a federal immigration status would conclusively define an immigrant as lawfully or unlawfully present—something federal designation of status cannot always do—the state court would be left to make the determination, "opening the door to conflicting state and federal rulings on the question."¹⁷⁸ The court determined that these conflict-preempted

170. *Id.* at 532.

171. *Id.* at 531–32;

172. *Id.* at 531–32.

173. *Id.* at 532.

174. *Id.* "The Ordinance's 'generality stands at odds with the federal discreteness.'" *Id.* at 533 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000)). The city proposed to use the SAVE program (a federal program used to identify immigrants qualified to receive public assistance) to make its determination, but the head of the SAVE program testified that it does not identify whether a person's presence is lawful. *Id.*

175. *Id.* at 534–35.

176. *Id.* at 535 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2506, 2509 (2012)).

177. *Id.* at 536–37.

178. *Id.* at 536.

provisions were not severable and so struck down the entire ordinance.¹⁷⁹

Lozano II and *Farmers Branch II* have lent some certainty to the question of AIHOs' validity. But these decisions have not taken a uniform path and leave room for uncertainty as to the application of the preemption doctrine by the courts. Conflict preemption appears to be the form most often relied-upon, but as *Hazleton* demonstrates, others forms remain viable. Notably, neither circuit's decisions relied on structural preemption, although language in *Arizona* suggests that structural preemption is still an extant legal theory. Whatever certainty does exist, however, has been diminished by the Eighth Circuit's recent decision on a Fremont, Nebraska AIHO.

E. *Keller v. City of Fremont*

The Eighth Circuit's decision in *Keller v. City of Fremont*¹⁸⁰ put an end to AIHOs' track record of preemption. In reversing the district court, the split three-judge panel held that no form of preemption applied to the Fremont ordinance (the Ordinance) and acknowledged its disagreement with the Third and Fifth Circuits.¹⁸¹ First, the court reasoned that structural preemption did not apply because the Ordinance did not enter the core immigration area of removal.¹⁸² It distinguished between removal of aliens from the country, and "[l]aws designed to deter, or even prohibit, unlawfully present aliens from residing within a particular locality."¹⁸³

The court next addressed statutory field preemption, concluding that the Ordinance did not enter the field of alien registration or anti-harboring laws.¹⁸⁴ The court reasoned that because the Ordinance "does not apply to all aliens," excluding those who do not rent, it is unlike the sort of registration schemes preempted in *Hines* and *Arizona*.¹⁸⁵ If the Ordinance enters this field, the court speculated, then driver's licenses too could be seen as a preempted alien registration program.¹⁸⁶ As to the anti-harboring provision, the court relied on

179. *Id.* at 538–39.

180. 719 F.3d 931 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014).

181. *Id.* at 939–45.

182. *Id.* at 942 ("The rental provisions do not remove aliens from this country (or even the City), nor do they create a parallel local process to determine an alien's removability.").

183. *Id.* at 941. This will be referred to later in this Note as the *Keller* "locality distinction."

184. *Id.* at 942–43.

185. *Id.*

186. *Id.* at 493. *Lozano II* countered this argument: "Basing eligibility for certain state privileges on immigration status is distinct from requiring aliens to register." *Lozano II*, 724 F.3d 297, 322 (3d Cir. 2013).

language in *DeCanas* invoking the “clear and manifest purpose”¹⁸⁷ standard for areas within the states’ historic police powers.¹⁸⁸ Additionally, the court found that the Ordinance’s definition of harboring “does not purport to enforce the federal anti-harboring prohibition,” and so does not conflict with federal law’s narrower definition.¹⁸⁹

Turning lastly to conflict preemption, the court found its earlier conclusion that the Ordinance did not effectuate removal of undocumented immigrants instructive.¹⁹⁰ It reasoned that because the Ordinance does not remove anyone, there is no conflict with the federal scheme.¹⁹¹ The court found “federal immigration officials retain complete discretion to decide whether and when to pursue removal proceedings,” and the fact that no federal status designation would conclusively indicate an immigrant was “lawfully present” did not present a conflict because “the federal government has complete power to avoid the conflict.”¹⁹²

The *Keller* court was particularly wary of “expansive” notions of preemption, and it characterized the Ordinance as a local licensing scheme for housing within the municipality’s police powers.¹⁹³ It also noted Supreme Court dicta indicating that states may take action to deter undocumented immigrants.¹⁹⁴ But the court did not acknowledge, as the next Part argues, that the Ordinance in several aspects attempts to set Fremont’s own immigration policy. By lending legitimacy to the Ordinance’s form, the court ignored its substance and set the stage for a patchwork of similar laws across the country.

187. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

188. *Keller*, 719 F.3d at 943.

189. *Id.* This is a curious conclusion given that one of the recitals of the Ordinance states: “WHEREAS, United States Code Title 8, Section 1324(a)(1)(A) prohibits the harboring of illegal aliens. The provision of housing to illegal aliens is a fundamental component of the federal immigration crime of harboring” Fremont, Neb., Ordinance 5165 (June 21, 2010), *archived at* <http://perma.unl.edu/B3M9-FSEG>. It seems as though the ordinance’s use of the term “harboring,” which is defined in the recitals according to federal anti-harboring law, would indicate an intent to enforce that federal law.

190. *Keller*, 719 F.3d at 944.

191. *Id.*

192. *Id.* at 944–45. The court here relied, in part, on cases involving immigrant employment—specifically *DeCanas* and *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011)—to support its position. *Id.* The interchangeability of cases involving housing and employment provisions is problematic, not least because the federal government provides specific determinations of employment status to which local law can adhere; there is no equivalent for housing.

193. *Id.* at 943.

194. *Id.* at 941 (citing *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982)).

III. ARGUMENT—WHY THE FREMONT ORDINANCE IS PREEMPTED

Preemption, as rendered by *Keller*, is a doctrine too weak to achieve the uniformity it exists to accomplish. In the court's reticence to recognize full federal preemptive authority over AIHOs, *Keller* deferred to Fremont's own characterization of the Ordinance as "the regulation of rental accommodation."¹⁹⁵ Yet what the Ordinance effectuates in fact is immigrant removal, intruding upon areas structurally preempted. The Ordinance also regulates fields—alien removal, registration, and harboring—occupied by the complex and comprehensive structure of the INA. Lastly, the Ordinance is an obstacle to the policy objectives attained by the calibrated balance of ramifications contained in the INA's provisions. The Ordinance is too blunt an instrument for local interests to justify implementing; Fremont has other, more-precise tools with which to address its concerns.

A. The Police Power Presumption Against Preemption Should Not Apply

In discussing the Ordinance's anti-harboring provision and admonishing against an expansive view of field preemption, *Keller* invoked the "clear and manifest purpose" language without a discussion of the police power presumption.¹⁹⁶ This could simply mean the court did not apply the presumption despite referring to the heightened standard. But the court's evaluation of the INA's anti-harboring provision indicates otherwise.¹⁹⁷ That provision, which the court refers to as "one sub-part of one subsection,"¹⁹⁸ is part of a section of the INA dealing entirely with the "[b]ringing in and harboring [of] certain aliens,"¹⁹⁹ and it contains several other provisions that apply to the sub-part the court identifies.²⁰⁰ In a terse style, the *Keller* court searches for clearer Congressional intent without a thorough evaluation of the INA's anti-harboring section.²⁰¹ Searching for express pre-

195. Principal Brief of Appellees/Cross-Appellants the City of Fremont, *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013) (Nos. 12-1702, 12-1705, 12-1708), 2012 WL 2884121, at *22.

196. *Keller*, 719 F. 3d at 943 (quoting *DeCanas v. Bica*, 424 U.S. 351, 357 (1976)). See *supra* notes 61–64 and accompanying text for a discussion of the police power presumption and its heightened standard, under *Rice v. Santa Fe Elevator Company*, 331 U.S. 218, 230 (1947), of a clear and manifest purpose by Congress to preempt state law.

197. *Keller*, 719 F.3d at 943.

198. *Id.*

199. INA § 274, 8 U.S.C. § 1324 (2012).

200. *Id.* See *infra* notes 269–75 and accompanying text.

201. *Keller*, 719 F.3d at 942 ("Congress could put an end to any such practice, widespread or not, by exercising its express preemption powers.").

emption to the exclusion of less-explicit implied forms is just the sort of analysis to be expected under the police power presumption. The court's characterization of the Ordinance as a "local property licensing program" underscores the conclusion that it views Fremont as merely regulating within the traditional police powers of the city.²⁰²

The court's decision to invoke the clear and manifest purpose standard without a discussion of the presumption is, at the very least, problematic in interpreting the opinion. As a matter of precedent, the Supreme Court has squarely addressed the presumption and its heightened standard of a clear and manifest purpose in recent cases.²⁰³ The language *Keller* quoted was used in *DeCanas* in the context of states' "broad authority under their police powers" to implement "regulation designed to protect vital state interests."²⁰⁴ *Keller* did not, however, grapple with the assumption underlying application of the presumption in the case before it—the assumption that the Ordinance regulates housing. Indeed, one would be hard-pressed to contend that states have not traditionally done so. But the Ordinance does not regulate housing; it regulates immigrant residency.²⁰⁵

Aside from a negligible licensing fee and the cursory provision of basic information that a renter would already have to provide on a standard lease, the grant of an occupancy permit is conditioned *solely* on immigrant status. The regulatory effect of the Ordinance is not predicated on any aspect of the rental properties to which it applies—not the properties' quality, safety, location, availability, or affordability—but on the federal immigration status of the tenant.²⁰⁶

202. *Id.* at 943.

203. *See, e.g.*, *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 554 (2009) (Thomas, J., dissenting) (discussing presumption and *Rice's* heightened standard); *United States v. Locke*, 529 U.S. 89, 108 (2000) (same); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (same).

204. *DeCanas v. Bica*, 424 U.S. 351, 356–57 (1976). The court directly characterized the state law at issue as squarely within the states' historic police powers. *Id.* at 357 ("California's attempt in § 2805(a) to prohibit the knowing employment by California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation.").

205. The Third Circuit in *Lozano II* interpreted the Hazleton ordinances as "nothing more than a thinly veiled attempt to regulate residency under the guise of a regulation of rental housing." *Lozano II*, 724 F.3d 297, 315 (3d Cir. 2013). Similarly, the Fifth Circuit in *Farmers Branch I* found that "[t]he text of the [City of Farmers Branch, Texas ordinance], and the circumstances surrounding its adoption, show[ed] that its purpose and effect [were] to regulate immigration . . . rather than to regulate housing." *Farmers Branch I*, 675 F.3d 802, 809 (2012).

206. Fremont, Neb., Ordinance 5165 (June 21, 2010), archived at <http://perma.unl.edu/B3M9-FSEG>. The court in *Farmers Branch I*, makes this point as well:

[T]he [Farmers Branch] [o]rdinance has virtually nothing to say about the housing rental market, except for boilerplate language referencing the City's police power to protect its citizens. The regulatory scheme created by the Ordinance has none of the indicia one would expect of a hous-

Nor does the Ordinance cite any impact by undocumented immigrants on privately-rented housing.²⁰⁷ The primary—perhaps only—effect of the Ordinance is to regulate which immigrants may rent—and thus reside—in Fremont. As Justice Kennedy phrased it in *United States v. Locke*, “an ‘assumption’ of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.”²⁰⁸ The federal government has regulated the residency of immigrants in the United States for about 150 years at least,²⁰⁹ and has been present in the area of immigration generally since the nation’s inception.²¹⁰ The presumption should not apply given the Ordinance’s substance, whatever its nominal designation.

In contradistinction to the Ordinance, the California statute upheld in *DeCanas* was narrowly tailored to address the economic effects of additional labor supplied by undocumented migrant workers. It directly regulated employment and conditioned a penalty on an “adverse effect on lawful resident workers.”²¹¹ The law was what the state purported it to be—a regulation of California’s economic interests that, incident to its operation, affected undocumented immigrants.²¹² In this sense, it is distinguishable from the Ordinance, which invokes not a single concern for the private housing rental market in Fremont. The Ordinance’s use of the term “housing” to address perceived concerns about crime and the cost of public benefits is a fig leaf for its regulation of immigrant residency.

ing regulation. For example, the Ordinance says nothing about the location, design, construction, maintenance, ownership, or alteration of residential rental units. It also provides no regulation for the number of residents or the permitted uses of rental housing. The Ordinance creates an application process for an occupancy license, but the applicant is not required to submit information about his employment or credit history, his past residence information, or his criminal history. All that is required, besides standard information such as one’s name and address, is one’s citizenship information. Moreover, the only reason an occupancy license may be revoked is based on immigration status. On its face then the Ordinance hardly evinces a purpose to regulate rental housing in the City and instead points toward the real target of the regulation—the ferreting out and exclusion of undesirable illegal immigrants.

Farmers Branch I, 675 F.3d at 809–10 (5th Cir. 2012). All of these points apply equally well to the Fremont ordinance.

207. Fremont, Neb., Ordinance 5165, archived at <http://perma.unl.edu/B3M9-FSEG>.

208. 529 U.S. 89, 108 (2000).

209. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (Field, J., dissenting) (discussing regulation of residency of Chinese laborers under the 1868 Burlingame-Seward Treaty). See also INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2012) (defining “lawfully admitted for permanent residence”); INA § 245, 8 U.S.C. § 1255 (2012) (“Adjustment of status of nonimmigrant to that of person admitted for permanent residence”).

210. See *supra* section II.B.

211. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

212. *Id.* at 357.

The conclusion that the Ordinance's housing provisions lie outside the states' historic police powers is primarily a function of those provisions' methods, rather than the legitimacy of Fremont's concern for the fiscal impact of undocumented immigrants on the city. It is worth noting, however, that in *Plyler v. Doe*²¹³—as in *DeCanas*²¹⁴—the Supreme Court tied state regulatory power to deter undocumented immigrants to the economic impact they might have on “the State's economy generally, or the State's ability to provide some important service.”²¹⁵ In striking down a state anti-immigrant statute on equal-protection grounds, *Plyler* cited the district court's reliance on studies indicating “aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.”²¹⁶ This suggests that a few words on the economic impact of undocumented immigrants on Nebraska are appropriate.

The Ordinance claims an increased fiscal burden on the city due to an increased demand for public benefits and services.²¹⁷ The legitimacy of this concern, however, is not borne out any more convincingly here than it was in *Plyler*. Undocumented immigrants in Nebraska are already denied most public services by both federal and state law.²¹⁸ To the extent they utilize available services such as emergency room visits²¹⁹ or English-language education programs in local schools, the economic contributions of this population are ameliorative, if not greater. In 2010, undocumented immigrants provided \$43.3 million to Nebraska in state and local taxes.²²⁰ Of course, the available data is not comprehensive given the shadow status of un-

213. *Plyler v. Doe*, 457 U.S. 202 (1982).

214. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

215. *Plyler*, 457 U.S. at 228 n.23.

216. *Id.* at 228.

217. Fremont, Neb., Ordinance 5165 (June 21, 2010), archived at <http://perma.unl.edu/B3M9-FSEG>.

218. See Act of Apr. 8, 2009, LB 403, 2009 Neb. Laws 788 (codified as amended in scattered sections of NEB. REV. STAT. ch. 77 (Reissue 2009)) (denying public benefits for undocumented immigrants except for emergency medical and disaster relief, immunizations, and community services such as soup kitchens and crisis counseling centers); Tanya Broder and Jonathan Blazer, *Overview of Immigrant Eligibility for Federal Programs*, NATIONAL IMMIGRATION LAW CENTER (Oct. 2011), <http://www.nilc.org/overview-immeligfedprograms.html#note7>, archived at <http://perma.unl.edu/MM96-P4E4>. See also 8 U.S.C. § 1622 (2012) (authorizing States to limit eligibility of State public benefits for certain classes of immigrants).

219. The extent of this burden may not be as great as sometimes claimed. See, King, *supra* note 12.

220. Am. Immigration Council, *New Americans in Nebraska: The Political and Economic Power of Immigrants, Latinos, and Asians in the Cornhusker State*, IMMIGRATION POLICY CENTER 2 (May 2013), http://www.immigrationpolicy.org/sites/default/files/docs/new_americans_in_nebraska_2013_0.pdf, archived at <http://perma.unl.edu/6U4J-4CPJ>.

documented populations.²²¹ At the very least, the ambiguity of undocumented immigrants' economic impact on Nebraska fails to buttress any purported exercise of Fremont's police powers.

B. The Ordinance Is Structurally Preempted as a Removal Policy

Without the benefit of being characterized as a local law regulating local interests within Fremont's competency, the Ordinance is laid bare as an immigrant-removal policy. Removal falls squarely within the core area of immigration policies subject exclusively to federal authority.²²² This is the determination made in *Lozano I*, *Lozano II*, and *Farmers Branch I*, but rejected in *Keller*. The question for structural preemption, then, is whether the *effect* and the *purpose* of the Ordinance, irrespective of labels, is the removal of undocumented immigrants from Fremont's borders. If it is, then Fremont has essentially engaged in the removal function of federal immigration law enforcement.

Clearly, the effect of the Ordinance is the removal of undocumented immigrants. For many immigrants, being denied the ability to rent in a particular locality is functionally equivalent to being removed from that locality. An undocumented immigrant wishing to reside in Fremont is faced with few choices. While home ownership is not entirely unrealistic for some,²²³ for most it is not an option.²²⁴ The poverty rate for undocumented immigrants—over 20%—is more than double the national average for U.S.-born adults.²²⁵ In 2007, the median household income of undocumented immigrants was only \$36,000, and this amount was spread over an average household 40% larger than the average U.S.-born household.²²⁶ The only realistic option for most is to leave Fremont. As the dissent noted: “The Ordinance prevents undocumented persons from renting in Fremont,

221. See CONG. BUDGET OFFICE, *supra* note 11, at 1 (“It is important to note, though, that currently available estimates have significant limitations.”).

222. *Arizona v. United States*, 132 S. Ct. 2492, 2498–2500 (2012).

223. See Olivia Blanco Mullins, *Illegal Status No Bar to Immigrants Buying Homes*, HOUS. CHRONICLE (Aug. 4, 2006), <http://www.chron.com/business/real-estate/article/Illegal-status-no-bar-to-immigrants-buying-homes-1872974.php>, archived at <http://perma.unl.edu/P5CC-FMMP>.

224. See also *Lozano I*, 620 F.3d 170, 221 (3d Cir. 2010) (“Even if [purchasing a home or staying with others who have] were viable alternatives for [undocumented immigrants wishing to rent] . . . many others would be excluded, and that is sufficient for these provisions to be pre-empted.”)

225. See Jeffrey Passal & D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISPANIC CTR. 17 (Apr. 14, 2009), <http://www.pewhispanic.org/files/reports/107.pdf>, archived at <http://perma.unl.edu/3EV5-2RKT>.

226. *Id.* at 16.

which is tantamount to preventing them from living in the city at all.”²²⁷

The Ordinance, in its recitals, also purposes the removal of undocumented immigrants. These “WHEREAS” clauses cite the “fiscal burden on the City;” “[c]rimes committed” that “harm the health, safety and welfare” of citizens and lawfully present immigrants; and the displacement of authorized workers caused by the presence of undocumented immigrants.²²⁸ Clearly, what underlies this Ordinance is not a concern for the housing rental market, but a desire to rid the city of a population it does not want. The Ordinance, by effectively and purposefully removing persons from the city based on no other criterion than immigrant status, attempts to usurp the power of removal from federal control.

The *Keller* court was reluctant to find the Ordinance effectuates removal because there was “no record evidence that aliens denied occupancy licenses in the City will likely leave the country, as opposed to obtaining other housing in the City, renting outside the City, or relocating to other parts of the country.”²²⁹ Furthermore, the court found that whatever effect the Ordinance may have, it was not within the prescribed boundaries of structurally preempted regulation of immigration under the *DeCanas* test—whether a state or local law is “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”²³⁰ The *Keller* court also read the Supreme Court’s preference for preemption on narrower statutory grounds in *Chamber of Commerce of the U.S. v. Whiting*²³¹ as an implication that structural preemption was not applicable.²³²

As a matter of law, the Ordinance’s methods and purpose could only be interpreted as a removal policy, absent any factual record. By conditioning the ability to rent on immigration status, the Ordinance is a facial attempt to set a Fremont-specific immigration policy. The Ordinance is distinguishable from the California statute in *DeCanas* in that the latter affected immigration incident to a valid facial concern. The Ordinance’s facial focus on “housing” as opposed to “immigration” is so cursory and transparent as to make any interpretation of the law as anything other than an immigrant-removal policy untenable.

227. *Keller v. City of Fremont*, 719 F.3d 931, 954 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014) (Bright, J., dissenting).

228. Fremont, Neb., Ordinance 5165 (June 21, 2010), *archived at* <http://perma.unl.edu/B3M9-FSEG>.

229. *Keller*, 719 F.3d at 941.

230. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

231. 131 S. Ct. 1968 (2011).

232. *Keller*, 719 F.3d at 942.

Regarding the *DeCanas* test, the determination of removability itself requires a determination that an undocumented immigrant was inadmissible at the time he or she entered the country.²³³ To the extent, then, the Ordinance is a removal policy, it is, in fact, a determination of admissibility, and so lies within *DeCanas*'s limitations. Finally, the *Keller* court's reliance on *Whiting*'s absence of a discussion on structural preemption overemphasizes the Supreme Court's stance on the subject. The Supreme Court has indeed tended to shy away from vindicating the federal government's Constitutional and sovereignty-based justifications for preemption. But neither has the Court rejected those justifications. Not only are *The Chinese Exclusion Case* and its progeny good, binding law, but the Court—post-*Whiting*—explicitly referenced those Constitutional and sovereignty-based justifications in *Arizona*.²³⁴

Some scholars, it should be noted, have questioned the constitutional basis for structural preemption of state immigration laws.²³⁵ They argue that the federal government's power over foreign affairs is an arguable basis for extending the Constitution's grant to Congress of power over naturalization and foreign commerce to complete preemption of state immigration regulation.²³⁶ It may or may not be that the necessity of foreign nations to deal with one voice should eclipse the right of states, as sovereigns, from regulating foreign nationals. Indeed, it was not until the late nineteenth century that the Supreme Court recognized the structural nature of federal authority in immigration.²³⁷ Structural preemption may close the book, as one commentator phrased it, on "a more nuanced debate on the proper allocation of authority."²³⁸ A view of the architecture of federalism in immigration that recognizes a greater role for state and local governments would allow for a discussion of the merits of federalism, "such

233. See *supra* note 153.

234. *Arizona v. United States*, 132 S. Ct. 2492, 2506–07 (2012). See *supra* note 131 and accompanying text.

235. See, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792 (2008) ("[C]oncluding that the Constitution precludes state and local authority over pure immigration law casts a long shadow on any state or local conduct concerning immigration, even conduct that falls short of pure immigration law."); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 123 (arguing "the presumption of national uniformity and control over foreign relations matters—including immigration—no longer prevails in a post-national world order," and concluding "that state-level treatment of aliens could be more rationally measured and constrained by international norms relating to the treatment of aliens than by constitutional norms of uncertain application and legitimacy.").

236. See *supra* note 235.

237. See *supra* subsection II.C.1.

238. Huntington, *supra* note 235, at 792.

as balancing uniformity with experimentalism and participation with parochialism.”²³⁹

Yet the kind of removal policy enacted by the Ordinance must still be viewed as contrary to constitutional design. Restrictive policies toward undocumented immigrants in one state or locality may result in the influx of undocumented populations to other less restrictive areas, causing friction between states and increasing burdens on immigrants and their family members—some of whom were born in the United States. This concern for problems arising from non-uniform state policies underlay the Constitution’s Privileges and Immunities Clause and Naturalization Clause.²⁴⁰ With increased variability through experimentation in local immigration policies comes an increased risk of constitutional violations due to racial profiling or laws targeting certain classes of people. In any event, the Supreme Court has reaffirmed as recently as 2012 that the traditional justifications for structural preemption in immigration—uniformity and the implication of foreign affairs—still undergird prevailing immigration policy.²⁴¹ In some circumstances, it may be desirable to limit the policies used to achieve uniformity to allow for experimentation, but the wisdom of testing immigration policies in the states is far from compelling.²⁴²

C. *Keller’s* Locality Distinction Undermines the Objectives of Federal Authority over Immigration

In finding that the Ordinance does not remove immigrants, *Keller* relied on a distinction between removal of immigrants from the United States and removal from a particular locality. The court argued that federal authority over immigration pertains to the determination of admission into the United States as a whole—to the United States’ external boundaries—and does not extend to the presence of undocumented immigrants in a particular location.²⁴³ This distinction fails to recognize the objectives underlying the plenary nature of federal authority over immigration. As reiterated in *Arizona*, this authority exists, in part, out of the necessity of dealing with foreign na-

239. *Id.* at 793.

240. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492, 2511–12 (2012) (Scalia, J., dissenting); THE FEDERALIST NO. 42, *supra* note 69.

241. *Arizona*, 132 S. Ct. at 2498 (“It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.”).

242. *See, e.g., Huyen Pham, The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 998–1003 (2004).

243. *Keller v. City of Fremont*, 719 F.3d 931, 941 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014).

tionals with “one voice.”²⁴⁴ Yet while a decision on whether to remove an individual is pending with a federal agency, that individual—under *Keller*—is potentially faced with a motley patchwork of state and local policies. Rather than one voice, the locality distinction would present foreign nationals with a cacophony of varying policies and would thereby potentially undermine the United States’ ability to calculate its dealings in foreign affairs.

Federal authority over naturalization and admission serves an additional goal: the filtering out of individuals the United States does not want from those who are welcome. Yet local removal schemes run the risk of deterring both. An immigrant whose status is under agency adjudication is likely to be deterred from viewing Fremont, or any other place with an AIHO, as an option for residency. Furthermore, by forcing immigrants to migrate, local removal policies run the risk of making it difficult for the federal government to locate immigrants, thereby impeding the ability of federal agencies to separate the wheat from the chaff.²⁴⁵ Thus, the need to locate and select immigrants for admission or removal—like the need for uniformity in dealing with foreign nationals—counsels toward extending the national government’s control over admission and removal not only to national borders but also to all of the United States’ constituent localities.

In short, the locality distinction falls short of the practical requirements involved in determining immigration policy, the goal of uniform action sought under the Naturalization Clause, and the federal government’s power over foreign affairs. It may be true that a person removed from a state or political subdivision is not expelled from the larger whole, but the grant or denial of admission into the United States includes access to or exclusion from all of its constituent parts. Although admission—as described in *DeCanas* and in the INA—pertains to *lawful* entry of an immigrant, undocumented immigrants are not foreclosed from admission until a federal order for removal has been issued.²⁴⁶ The *DeCanas* test²⁴⁷ turned on admission precisely because it is solely the national government’s decision, and with that exclusivity must come a negative restriction on states and localities from making that determination for themselves. Thus, the fact that the Ordinance only affects undocumented immigrants within Fremont’s borders cannot be determinative of how it fares under federal preemption.

244. *Arizona*, 132 S. Ct. at 2506–07.

245. *See infra* section III.E.

246. *See supra* note 151–53 and accompanying text; *infra* notes 278–79 and accompanying text.

247. Under *DeCanas*, a regulation of immigration is “a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

Plyler made clear that states “might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population,”²⁴⁸ and they may take measures to deter undocumented immigrants.²⁴⁹ Nebraska has taken such measures by, for example, denying undocumented immigrants certain state public benefits or privileges and employment opportunities.²⁵⁰ Yet *Plyler* also maintained “illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State.”²⁵¹ Fremont may deter, but it—or any other locality within the United States—may not remove, even from only its own borders. As the court in *Lozano I* phrased it, “[t]o be meaningful, the federal government’s exclusive control over residence in this country must extend to any political subdivision.”²⁵²

If the Ordinance does indeed remove aliens from the city, and if *Keller’s* locality distinction illegitimately compromises federal authority to determine admission into the country, then the housing provisions certainly enter the structurally preempted area of regulation of immigration. The *Keller* decision can comport with the doctrine of structural preemption only with a blind eye to the purpose and effect of the Ordinance, and a conception of federal authority substantially weaker than what would be needed for that authority’s intended purpose—uniformity and a single national voice—to materialize.

D. The Ordinance Is Field Preempted by the Immigration and Nationality Act

The Immigration and Nationality Act (INA)²⁵³ sprawls across 160-odd sections and four titles. It provides the main statutory framework for federal regulation of immigration, and it has been repeatedly amended to address Congressional concerns over immigration. The INA’s provisions cover an array of immigration fields, including exclusion,²⁵⁴ admission,²⁵⁵ adjustment of status,²⁵⁶ alien registration,²⁵⁷ naturalization,²⁵⁸ and refugee assistance.²⁵⁹ The comprehensive na-

248. *Plyler v. Doe*, 457 U.S. 220, 228 (1982).

249. “[W]e cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.” *Id.* at 228 n.23.

250. *See supra* text accompanying notes 16–24.

251. *Plyler*, 457 U.S. at 227 n.22.

252. *Lozano I*, 620 F.3d 170, 221 (3d Cir. 2010).

253. INA §§ 101–507, 8 U.S.C. §§ 1101–1537 (2012).

254. *Id.* §§ 231–44, 8 U.S.C. §§ 1221–54.

255. *Id.* §§ 211–19, 8 U.S.C. §§ 1181–89.

256. *Id.* §§ 245–50, 8 U.S.C. §§ 1255–60.

257. *Id.* §§ 261–66, 8 U.S.C. §§ 1301–06.

258. *Id.* §§ 301–61, 8 U.S.C. §§ 1401–1504.

259. *Id.* §§ 411–14, 8 U.S.C. §§ 1521–24.

ture of the INA evinces intent by Congress to have the last word in determining immigration policy.

Turning first to removal, the INA specifies that ‘removable’ means, “in the case of an alien not admitted to the United States, that the alien is inadmissible.”²⁶⁰ It also provides that its removal proceedings are the “sole and exclusive” means of determining admissibility.²⁶¹ In addition, the INA provides an array of procedural protections and exceptions for these proceedings.²⁶² Federal officers are given a discrete set of authorities, and state officers are given particular delegated responsibilities limiting their role to arrest only.²⁶³ This statutory scheme is comprehensive in its scope, and to the extent the Ordinance is a removal policy, it encroaches a field occupied by pervasive Congressional regulation.

Looking next at alien registration, *Hines* and *Arizona* make clear that federal law occupies this field as well.²⁶⁴ The court in *Keller*, however, found the Ordinance was not a registration scheme.²⁶⁵ The court found the Ordinance distinguishable from the registration laws struck down in *Hines* and *Arizona* cases because it only applies to immigrants that rent and excludes those that do not. Yet the Ordinance aims its efforts at rental housing not only to remove but also to identify undocumented immigrants present in the city,²⁶⁶ contemplating the vast majority of that population as comprised of renters.²⁶⁷ If the Ordinance’s recitals are to be taken at face value, then Fremont intended to remove undocumented immigrants as a population by

260. *Id.* § 240(e)(2)(A), 8 U.S.C. § 1229a(e)(2)(A).

261. “[A] proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States.” *Id.* § 240(a)(3), 8 U.S.C. § 1229a(a)(3).

262. See sources cited *infra* notes 281, 283–84.

263. INA § 287, 8 U.S.C. § 1357 (2012).

264. See *id.* § 262, 8 U.S.C. § 1302(a) (requiring adult immigrants staying in the country more than thirty days who have not received visas to register within thirty days); *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (“[T]he Federal Government has occupied the field of alien registration.”); *Hines v. Davidowitz*, 312 U.S. 52, 72–74 (1941).

265. *Keller v. City of Fremont*, 719 F.3d 931, 942–43 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014).

266. The district court recognized the Ordinance as a “means for the Defendants to identify who is residing within the City’s boundaries and their immigration status.” *Keller v. City of Fremont*, 853 F. Supp. 2d 959, 979 (D. Neb. 2012) *aff’d in part, rev’d in part and remanded*, 719 F.3d 931 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014).

267. See *Lozano II*, 724 F.3d 297, 322 (3d Cir. 2013) (“The [Hazleton ordinance’s] rental registration scheme serves no discernible purpose other than to register the immigration status of a subset of the City’s population. It can only be viewed as an impermissible alien registration requirement.”). *Lozano II* also found AIHO’s distinguishable as a registration scheme from the granting of privileges like drivers’ licenses, a distinction *Keller* did not recognize. *Id.* See *supra* note 161 and accompanying text.

targeting those who rent. The obvious implication is that nearly all undocumented immigrants in Fremont are renters, otherwise the Ordinance would not have its intended effect. To the extent the Ordinance attempts to ascertain and identify a particular immigrant population, it should be preempted as an alien registration program.

Finally, the *Keller* court was also unconvinced of the Ordinance's intrusion into the field of harboring:

We find nothing in an anti-harboring prohibition contained in one sub-part of one subsection of 8 U.S.C. § 1324 that establishes a “framework of regulation so pervasive . . . that Congress left no room for the states to supplement it,” or evinces “a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”²⁶⁸

Despite the court's diminutive characterization of the INA's anti-harboring provision, that section (titled “Bringing in and *harboring* certain aliens”)²⁶⁹ provides for criminal penalties for harboring,²⁷⁰ exceptions for religious organizations to provide room and board,²⁷¹ enforcement authority,²⁷² rules of evidence,²⁷³ and a public outreach program.²⁷⁴ As recognized in *Hazleton II*, *South Carolina*, *Georgia Latino Alliance*, *Alabama*, and *Valle Del Sol*,²⁷⁵ federal anti-harboring provisions represent a comprehensive enactment pursuant to a dominant federal interest in uniformity.

E. The Ordinance Is an Obstacle to the INA's Objectives

Conflict preemption appears to be the form of preemption most widely used by courts in striking down state anti-immigrant laws.²⁷⁶ By attempting to use the federal removal process towards its own ends, the Ordinance creates inconsistencies with the INA that upend the “careful balance struck by Congress.”²⁷⁷ Although any of the conflicts with the INA noted in *Lozano I*, *Lozano II*, *Farmers Branch I*, and *Farmers Branch II* apply here as well, the discussion below fo-

268. *Keller*, 719 F.3d at 943 (quoting *Arizona*, 132 S. Ct. at 2501); see INA § 274(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(A)(iii) (2012).

269. INA § 274, 8 U.S.C. § 1324 (2012) (emphasis added).

270. *Id.* § 274(a)(1)(B)(i)–(iv), 8 U.S.C. § 1324(a)(1)(B)(i)–(iv).

271. *Id.* § 274(a)(1)(C), 8 U.S.C. § 1324(a)(1)(C).

272. *Id.* § 274(c), 8 U.S.C. § 1324(c).

273. *Id.* § 274(b)(3), (d), 8 U.S.C. § 1324(b)(3), (d).

274. *Id.* § 274(e), 8 U.S.C. § 1324(e).

275. See *supra* notes 142–43.

276. Conflict preemption was the sole ground for preemption in *Farmers Branch II*, 726 F.3d 524 (5th Cir. 2013), and for the underlying district court decision in *Keller*. *Keller v. City of Fremont*, 853 F. Supp. 2d (D. Neb. 2012), *aff'd in part, rev'd in part, and remanded*, 719 F.3d 931 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014).

277. *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012).

cuses on the more robust obstacles the Ordinance presents to federal law.²⁷⁸

The snapshot argument from *Lozano I* is equally applicable to *Keller*. The Ordinance's fixation on whether an immigrant is "lawfully present" at a moment in time presents an obstacle to the objectives underlying the federal government's determination that status should be fluid.²⁷⁹ *Plyler* again contains apposite language here:

[I]t is impossible for a State to determine which aliens the Federal Government will eventually deport, which the Federal Government will permit to stay, and which the Federal Government will ultimately naturalize. 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, perhaps even as a citizen. Indeed, even the Immigration and Naturalization Service cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course.²⁸⁰

Once the federal government initiates removal proceedings against an undocumented immigrant, or even after it orders the immigrant removed, a change to lawful status is still possible.²⁸¹ This removal system balances concerns including, on the one hand, the United States' interest in authorizing and inspecting entrants,²⁸² but on the other, preventing hardship to lawfully admitted family members,²⁸³ preventing harm to the immigrant,²⁸⁴ and more.²⁸⁵

278. This Note will not discuss the potential for conflict arising from state judicial review as discussed in *Farmers Branch II*. Such a discussion is warranted as part of a comprehensive review of the Ordinance. See *supra* text accompanying notes 176–78.

279. See *supra* text accompanying notes 149–55.

280. *Plyler v. Doe*, 457 U.S. 220, 240 n.6 (Powell, J., concurring) (citing 8 U.S.C. §§ 1252, 1253(h), 1254 (1976 ed. and Supp. IV)).

281. See, e.g., INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1) (2012) (giving discretion to an Immigration Judge (IJ) to determine admissibility); *id.* § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) (providing a removal order issued after a failure to appear may be later rescinded); *id.* § 242, 8 U.S.C. § 1252 (providing for judicial review of removal orders); *id.* § 244(a)(1)(A), 8 U.S.C. § 1254a(a)(1)(A) (granting temporary protected status (TPS) to aliens who may otherwise be removable). See also, *Erazo-Artica v. Ashcroft*, 81 Fed. Appx. 161 (9th Cir. 2003) (holding that although IJ may initiate removal proceedings against undocumented immigrant while TPS application is pending, IJ cannot execute removal order until final TPS determination is made).

282. *Supra* subsection II.B.1.

283. See INA § 240A, 8 U.S.C. § 1229b (2012) (authorizing Attorney General to change from deportable or removable to lawfully present status of certain classes of aliens, such as those for whom removal may place an undue hardship on lawfully admitted family members, or children of battered spouses); *id.* § 216(b)(2), 8 U.S.C. § 1186a(b)(2) (placing burden of proof on the Department of Homeland Security during review of removal proceedings for absence of qualifying marriage).

284. *Id.* § 208, 8 U.S.C. § 1158 (providing for asylum for political refugees); *id.* § 244, 8 U.S.C. § 1254a (providing TPS for nationals of countries with armed conflicts, national disasters, instability, or other conditions).

The majority in *Keller* responded to the snapshot argument:

It seems obvious that, if the federal government will be unable to definitively report that an alien is “unlawfully present,” then the rental provisions are simply ineffectual. Plaintiffs and the United States do not explain why a local law is conflict-preempted when the federal government has complete power to avoid the conflict.²⁸⁶

This passage inverts the operative structure of preemption, and puts the onus on the federal government to “avoid the conflict.” Within immigration law, this obligation should run the other direction. *Keller* proclaims that should the federal government fail to conform its law so as to provide a response to state inquiries amenable to the Ordinance’s operation, it must cede discretion for removal to local officials. If a local official decides a person who does not have lawful status is “unlawfully present,” and takes action based on that snapshot, they have effectively ignored the nature of federal procedures. The federal government’s failure to definitively report an alien is unlawfully present—rather than render the Ordinance ineffectual—would render the Ordinance effective in a manner that conflicts with federal removal procedures.

Citing *Arizona*’s treatment of § 2(B) of the Arizona law at issue in that case, the *Keller* court felt the potential for a non-decisive federal response to a status inquiry by state officials was too speculative to strike down the Ordinance on a facial challenge.²⁸⁷ The issue raised by § 2(B) in *Arizona*, however, was that that provision could be implemented in one of two ways—in a manner that conflicted with federal law and in a manner that did not.²⁸⁸ The Supreme Court was unwilling to hypothesize about how the law would be applied in order to determine whether it was preempted without a definitive interpretation from state courts.²⁸⁹ There is nothing like this kind of ambiguity in the Ordinance about which the *Keller* court can speculate. As discussed earlier in this section, it is a certainty that the federal government cannot give a definitive status on which local authorizes may rely until an order for removal has been entered.²⁹⁰ The only way

285. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (“Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation’s international relations.”).

286. *Keller v. City of Fremont*, 719 F.3d 931, 945 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014).

287. *Id.* at 945.

288. *Arizona*, 132 S. Ct. at 2534.

289. *Id.*

290. *See supra* text accompanying notes 278–81.

Fremont can implement the ordinance's housing provisions without conflicting with federal objectives is to not implement them at all.

The risk that state officials will determine removability also conflicts—as in *Arizona* and *Farmers Branch II*—with federal enforcement of the INA's removal provisions.²⁹¹ The INA leaves determinations of admissibility to immigration officers, yet the Ordinance puts Fremont's police department in the position of determining which federal designations do and do not indicate lawful presence. Upon a determination by state officials that an immigrant is not lawfully present, that official may effectively remove the tenant by denying them access to housing. This is a manner of removal nothing like the INA proceedings, and so conflicts with federal law in technique.²⁹²

The denial of undocumented immigrant residency by Fremont also conflicts with the INA. In many ways, the INA requires residency of undocumented immigrants in order to function correctly and to achieve its objectives. It specifies notice by mail as an acceptable form of service,²⁹³ and specifically requires an “alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting [removal proceedings].”²⁹⁴ An undocumented immigrant must also notify the Attorney General of any change in address.²⁹⁵ Failure, through no fault of the alien, to receive notice of a removal proceeding is a basis for rescinding a removal order and reopening proceedings.²⁹⁶ Clearly the INA has as an objective the proper disposition of removal proceedings, and facilitating undocumented immigrants' participation in those proceedings.

The INA also provides a definition for “harboring,” as it is used in the Ordinance. The majority in *Keller* dismissed this by noting, “Congress has not preempted use of the word ‘harboring.’”²⁹⁷ Yet the Ordinance openly confines itself to the federal meaning of this term in its recitals, stating “[t]he provision of housing to illegal aliens is a fundamental component of the federal immigration crime of harboring,” and “[t]his Ordinance is in harmony with the congressional objectives of

291. See *supra* text accompanying notes 126–28, 169–75.

292. See *Arizona*, 132 S. Ct. at 2505 (“The Court has recognized that a ‘[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.’”) (quoting *Amalgamated Assoc. of St., Elec. Ry., & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 287 (1971)).

293. INA § 239(a)(1), 8 U.S.C. § 1229(a)(1) (2012).

294. *Id.* § 239(a)(1)(F)(i), 8 U.S.C. § 1229(a)(1)(F)(i).

295. *Id.* § 239(a)(1)(F)(ii), 8 U.S.C. § 1229(a)(1)(F)(ii).

296. *Id.* § 240(b)(5)(C)(ii), 8 U.S.C. § 1229a(b)(5)(C)(ii).

297. *Keller v. City of Fremont*, 719 F.3d 931, 943 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014).

prohibiting the knowing harboring of illegal aliens.”²⁹⁸ In applying the INA’s use of harboring to a situation—private contracting between landlords and tenants—in which has never been applied, the Ordinance upsets the implementation of the harboring provision for the purposes Congress intended.

IV. CONCLUSION

Fremont’s attempt to regulate immigrant residency might reflect legitimate concerns over federal immigration policy and the effects of undocumented immigrants on state resources. State and local governments may deal with such concerns with policies tailored to the perceived evil. The attempt, however, to implement blanket policies that serve to indiscriminately remove an undesirable population based on immigration status falls short of such tailoring. Such an attempt can only be seen as Fremont’s own special immigration regime, and a detriment to the goals of national control over immigration.

AIHOs raise numerous other concerns besides issues of preemption. They raise possibilities of race-based discrimination and extra burdens placed on landlords and lawful immigrants. AIHOs also reflect a disconcerting xenophobia toward a portion of the population—immigrants—that take center stage in American history, culture, and identity. Although the full breadth of these concerns is beyond the scope of this Note, such implications are within the ambit of Congressional policies. Preemption, then, incorporates something more important than a technicality of federalism; it guards the values and priorities lawmakers have felt are best reified with a single national voice. If, however, the *Keller II* holding is left to stand, the efficacy of that guardianship will be diminished.

298. Fremont, Neb., Ordinance 5165 (June 21, 2010), archived at <http://perma.unl.edu/B3M9-FSEG>.