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# Changes in the Political Tide - An Examination of How the Courts Adapt Federal Pre-Emption Doctrine in Response to a Shift in Political Opinion on Immigration

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# CHANGES IN THE POLITICAL TIDE – AN EXAMINATION OF HOW THE COURTS ADAPT FEDERAL PRE-EMPTION DOCTRINE IN RESPONSE TO A SHIFT IN POLITICAL OPINION ON IMMIGRATION

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## I. INTRODUCTION

In June 2012, President Obama surprised the country when he announced that his administration, in cooperation with the United States Department of Homeland Security, would be implementing "Deferred Action for Childhood Arrivals" (commonly referred to as DACA).[1] The DACA program allows eligible foreign nationals to apply for and receive a temporary suspension of any deportation proceeding against them, and also makes them eligible for work authorization in the United States.

Leading up to and following the implementation of DACA, local governments across the United States responded to what critics perceived[2] as President Obama's refusal to enforce immigration law by passing various local ordinances aimed at prohibiting the rental of residential properties to undocumented foreign nationals.[3] Several of these ordinances were challenged shortly after their enactment with varying results.[4] To date, at least four circuit courts have considered such ordinances. Generally speaking, while the Fifth, Third, and Eleventh Circuits have held that such ordinances were pre-empted by federal law, the Eighth Circuit upheld the

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1. Press Release, U.S. Department of Homeland Security, Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (Jun. 15, 2012) http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low (last visited Feb. 16, 2015).

2. Andrew Stiles, *Obama's Immigration Non-Enforcement Actions*, NAT'L REVIEW, Feb. 5, 2014, http://www.nationalreview.com/article/370446/obamas-immigration-non-enforcement-actions-andrew-stiles.

3. Monica Davey, *Nebraska Town Votes to Banish Illegal Immigrants* N.Y. TIMES, http://www.nytimes.com/2010/06/22/us/22fremont.html?_r=0.

4. Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 539 (5th Cir. 2013) (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional); Lozano v. City of Hazleton, 724 F.3d 297, 323 (3d Cir. 2013) (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional); United States v. Alabama, 691 F.3d 1269, 1301 (11th Cir. 2012) (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional), *cert denied*, 133 S. Ct. 2022 (2013); *but see* Keller v. City of Fremont, 719 F.3d 931, 939 (8th Cir. 2013) (holding rental ordinance constitutional).

housing ordinance stating ". . . [l]aws designed to deter, or even prohibit, unlawfully present aliens from residing within *a particular locality* are not tantamount to immigration laws establishing who may enter or remain in the country."[5] Clearly, there are many political commentators and circuit judges who disagree with the Eighth Circuit.[6] However, as of this article's publication, the Supreme Court has yet to weigh in on and ultimately decide this issue.[7]

While the subject matter of this unresolved circuit court split undoubtedly cuts to the very heart of the political debate regarding immigration, it also presents a unique opportunity to consider the implications of the Supreme Court's recent decisions in *Arizona v. United States*[8] and *Chamber of Commerce v. Whiting*,[9] both of which address federal pre-emption analysis in the context of immigration law. In order to fully understand the implications of these recent landmark decisions, a brief review of the historical context from which they arise is necessary, for while *Arizona* represents a significant victory for those advocating undocumented workers' rights, the same case *also* signifies a strong break from past decisions in the field of immigration law, including *De Canas v. Bica*, 424 U.S. 351 (1977), which authorized the states to engage in a broad range of actions with respect to regulations pertaining to unlawfully present foreign nationals.

Therefore, in order to fully examine and understand the circuit court split decisions, Part II offers a summary and analysis of *De Canas* and provides a glimpse of the Supreme Court's jurisprudence concerning federal immigration law and pre-emption analysis prior to the *Whiting* and *Arizona* decisions. Part III summarizes and analyzes *Whiting* and *Arizona*, specifically considering the Supreme Court's efforts to reconcile *Arizona* with its past decisions. Part III concludes that the *Whiting* and *Arizona* decisions evidence the Supreme Court's trend to depart from the principles guiding the *De Canas* decision. Part IV presents a summary of the recent housing ordinance circuit court decisions and analyzes whether the Eighth Circuit's current minority view coincides with *Arizona* and *Whiting*. Part IV argues that the Eighth Circuit's position is invalid under current Supreme Court precedent as interpreted by *Arizona* and *Whiting*. Part V of this paper concludes that should the Supreme Court continue its trends in its pre-emption analysis, in the absence of an explicit savings clause,[10]

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

6. Press Release, ACLU, ACLU Condemns Divided Eighth Circuit Ruling in Freemont Immigration Case (June 28, 2013) http://www.aclu.org/immigrants-rights/aclu-condemns-divided-eighth-circuit-ruling-fremont-immigration-case (last visited Oct. 10, 2014).

7. *Villas at Parkside Partners*, 726 F.3d at 539 (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional); *Lozano*, 724 F.3d at 323 (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional); *Alabama*, 691 F.3d at 1301 (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional), *cert denied*, 133 S. Ct. 2022 (2013); *but see Keller*, 719 F.3d at 939 (holding rental ordinance constitutional).

8. Arizona v. United States, 132 S. Ct. 2462 (2012).

9. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1973 (2011).

10. A savings clause is defined as, "[i]n a statute, an exception of a special item out of the general things mentioned in the statute. A restriction in a repealing act, which is intended to save rights, while

nearly any state or local law that in any way impacts immigration law or immigrants will likely be struck down as pre-empted and unconstitutional. Therefore, states and localities should be cautious before passing such laws, for there are significant costs associated with the legal battles that ensue,[11] and Congress should be careful to include explicit and broad savings clauses, if its intent is to permit state and local authorities to regulate certain domains relating to immigration law.

## II. IMMIGRATION PRE-EMPTION ANALYSIS IN 1975: *DE CANAS V. BICA*

Thus far, each court that has recently considered whether local statutes are pre-empted by federal immigration law,[12] as well as both *Whiting*[13] and *Arizona,*[14] have heavily relied upon *De Canas*[15] in making their determinations. Given the great weight that many courts have granted the *De Canas* decision, a brief discussion of its facts and analysis is necessary to fully consider the now emerging circuit court split.

In *De Canas*, American farm workers brought a lawsuit against farm labor contractors arguing that the employer's refusal to offer the farm workers permanent employment was a direct result of the employer's hiring of undocumented foreign nationals and in direct violation of Cal. Lab. Code § 2805, which prohibited the employment of such workers.[16] The lower courts held that § 2805 was an unconstitutional attempt to regulate within the field of immigration and naturalization, and that this field was pre-empted from state regulation by federal law.[17] The Supreme Court reversed the lower courts, finding that a federal regulation should not be deemed pre-emptive of state regulatory power in the absence of a clear congressional intent to pre-empt, or unless the nature of the regulated subject matter permitted no other conclusion.[18] The Supreme Court concluded that respondents failed to demonstrate anything in the plain

proceedings are pending, from the obliteration that would result from an unrestricted repeal. The provision in a statute, sometimes referred to as the severability clause, that rescues the balance of the statute from a declaration of unconstitutionality if one or more parts are invalidated. With respect to existing rights, a saving clause enables the repealed law to continue in force." WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2005) *available at* http://www.encyclopedia.com/doc/1G2-3437703913.html.

11. Daniel B. Wood, *Nebraska town: Is illegal immigration crackdown worth the cost?* CHRISTIAN SCIENCE MONITOR, Jul. 27, 2010, *available at* http://www.csmonitor.com/USA/2010/0727/Nebraska-town-Is-illegal-immigration-crackdown-worth-the-cost.

12. *Villas at Parkside Partners*, 726 F.3d at 539 (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional); *Lozano*, 724 F.3d at 323 (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional); *Alabama*, 691 F.3d at 1301 (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional), *cert denied*, 133 S. Ct. 2022 (2013); *but see Keller*, 719 F.3d at 939 (holding rental ordinance constitutional); *see also* Valle Del Sol Inc. v. Whiting, 732 F.3d 1006, 1025-26 (9th Cir. 2013) (citing United States. v. South Carolina, 720 F.3d 518, 531-32 (4th Cir. 2013); Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250, 1267 (11th Cir. 2012).

13. *Whiting*, 131 S. Ct. at 1973.

14. *Arizona*, 132 S. Ct. at 2497.

15. De Canas v. Bica, 424 U.S. 351, 352 (1976).

16. *Id.*

17. *Id.* at 353-54.

18. *Id.* at 356.

language of 8 U.S.C. §1101 *et seq.*, or its legislative history that warranted the conclusion that it was intended to pre-empt harmonious state regulation touching on aliens in general, or the employment of undocumented foreign nationals in particular.[19]

The *De Canas* Court also noted that while the "[p]ower to regulate immigration is unquestionably exclusively a federal power . . . the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised."[20] The Court further elaborated that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[21] In further support of this proposition, the Court reasoned that if it were the case that any state statute of which an alien is subject is on its face a "regulation of immigration[,]" then "there would have been no need . . . even to discuss the relevant congressional enactments in finding pre-emption of state regulation if all state regulation of aliens was ipso facto regulation of immigration . . . ."[22]

With respect to the specific California statute at issue, the Court stated that "even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutional proscribed regulation of immigration that Congress itself would be powerless to authorize or approve."[23] The Court further acknowledged that a review of the Immigration and National Act (hereinafter "INA") and its legislative history did not evidence that "Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular."[24] "Nor can such intent be derived from the scope and detail of the INA."[25] In short, the Court narrowed the scope of the INA's "central purpose" to "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."[26] As such, the Court concluded that, while the INA was comprehensive as to the regulation of immigration and naturalization, "without more [the INA] cannot be said to draw in the employment of [undocumented foreign nationals]."[27]

As will be further discussed below, the narrow view of the scope of federal immigration law as only pertaining to "the terms and conditions of

19. *Id.* at 357-58.

20. *Id.* at 355 (internal citations omitted).

21. *Id.* at 355, *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* Chamber of Commerce of United States. v. Whiting, 131 S. Ct. 1968 (2011).

22. *De Canas*, 424 U.S. at 355.

23. *Id.* at 355-56.

24. *Id.* at 358.

25. *Id.* at 359.

26. *Id.*

27. *Id.*

admission to the country and the subsequent treatment of aliens lawfully in the country" adopted by the *De Canas* Court has largely been rejected by the Supreme Court's most recent decisions on the issue. This rejection seems to represent a departure from the Court's previously held belief that the INA did not prevent state or local action on issues that may relate to foreign nationals.

## III. IMMIGRATION PRE-EMPTION ANALYSIS IN 2011-2012: *CHAMBER OF COMMERCE OF UNITED STATES V. WHITING AND UNITED STATES V. ARIZONA*

In *Chamber of Commerce of the United States v. Whiting,* the Supreme Court considered "a recently enacted Arizona statute—the Legal Arizona Workers Act—[which] provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked."[28] This consideration was made in light of a "[f]federal immigration law [that] expressly pre-empts 'any State or local law [from] imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens.'"[29] In addition, the Court considered whether the Arizona statute's requirement that employers use the E-verify system was pre-empted under federal law.[30] The Court concluded that because the state's licensing law "fall[s] squarely within the federal statute's savings clause and the Arizona regulation does not otherwise conflict with federal law[,]" the Arizona law is not pre-empted by federal immigration law.[31]

Most illustrative of the Court's underlying rationale is the Court's consideration of the plaintiff's argument that Arizona's licensing provision is pre-empted because acceptance of the statute would enable fifty separate systems of prohibition concerning unauthorized workers "and that Congress instead wanted uniformity in immigration law enforcement."[32] While Justice Breyer's dissenting opinion considered this point to be highly relevant,[33] the majority opinion responds to this argument by stating that "Congress expressly preserved the ability of the States to impose their own sanctions through licensing; that – like our federal system in general – necessarily entails the prospect of some departure from homogeneity."[34] Interestingly, the Court relies upon the express savings clause[35] as the primary, if not sole, basis for the Court's rejection of Justice Breyer's argument concerning the "departure from one centralized enforcement scheme under federal law."[36]

28. Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968, 1973 (2011).
29. *Id.* (quoting 8 U.S.C. § 1324a(h)(2)).
30. *Id.*
31. *Id.*
32. *Id.* at 1979 (Breyer, J., dissenting).
33. *Id.* at 1979, 1991.
34. *Id.* at 1979-80.
35. *See supra* note 10.
36. *Whiting*, 131 S. Ct. at 1979-80 (Breyer, J., dissenting).

The fact that the majority opinion also relies upon the savings clause as the basis for upholding the Arizona law is supported by the Court's view that although the law is to be expressly pre-empted, it is *impliedly* pre-empted due to its conflict with federal law:

> At its broadest level, the Chamber's argument is that Congress intended the federal system to be exclusive, and that any state system therefore necessarily conflicts with federal law . . . But Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.[37]

While the Court later adds that because the Arizona statute was written to strictly comply with federal immigration law, *e.g.*, by never granting state and local authorities power to determine lawful immigration *status*, the Arizona statute does not conflict with the federal law. It appears that in the absence of the express savings clause present in 8 U.S.C. § 1324a(h), such state laws would likely be prohibited as they would undoubtedly impinge upon the uniform federal system established and enforced in *Arizona.*

In *Arizona*, the United States Supreme Court struck down as federally pre-empted several sections of Arizona statute S.B. 1070 which (1) required documented foreign nationals to carry registration documents at all times; (2) allowed state police to arrest an individual for suspicion of being an undocumented foreign national; and (3) made it a crime for an undocumented foreign national to search for a job (or to hold one) in the state."[38] The Court unanimously agreed to uphold the provision of the law allowing Arizona state police to investigate the immigration status of an individual stopped, detained, or arrested if there is reasonable suspicion that individual is in the country without immigration authorization.[39]

In making its decision, the Supreme Court first summarized the general principles of pre-emption doctrine, stating that "there is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express pre-emption provision[.]"[40] However, the Court noted that

> "[s]tate law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance . . . [which] can be inferred from a

37. *Id* at 1981.
38. Arizona v. United States, 132 S. Ct. 2492, 2497 (2012).
39. *Id.* at 2510-11.
40. *Id.* at 2500-01.

> frame of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Second, state laws are pre-empted when they conflict with federal law.[41]

With respect to Section 3 of S.B. 1070, which created a state misdemeanor for "willful failure to complete or carry an alien registration document[,]" the Court held that since alien registration is a complete and comprehensive federal system, "even a complementary state regulation is impermissible" and, as such, Section 3, regardless of whether it had the same aim as federal law, could not pass constitutional muster.[42] Furthermore, the Court noted that Section 3 in many ways conflicted with federal law. For example, "[w]ere § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies" or the fact that "[u]nder federal law, the failure to carry registration papers is a misdemeanor that may be punished by a fine, imprisonment, or a term of probation[ yet] State law, by contrast, rules out probation as a possible sentence."[43]

With respect to Section 5(c), the Court first notes that it "enacts a state criminal prohibition where no federal counterpart exists[ by] mak[ing] it a state misdemeanor for 'an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor.'"[44]

In considering Section 5(c), the Supreme Court states:

> When there was no comprehensive federal program regulating the employment of unauthorized aliens, this Court found that a State had authority to pass its own laws on the subject. In 1971, for example, California passed a law imposing civil penalties on the employment of aliens who were "not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." The law was upheld against a pre-emption challenge in *De Canas v. Bica*. *De Canas* recognized that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."[45]

41. *Id.* at 2501 (internal citations omitted).
42. *Id.* at 2502.
43. *Id.* at 2503 (internal citations omitted).
44. *Id.* (quoting ARIZ. REV. STATE. ANN. § 13-2928(C) (2011)).
45. *Id.* (quoting De Canas v. Bica, 424 U.S. 351, 365 (1976)).

However, the Court noted that "[a]t [the time *De Canas* was decided] . . . the Federal Government had expressed no more than 'a peripheral concern with the employment of illegal entrants."[46] The Court proceeded to argue and ultimately hold that employment of undocumented foreign nationals is *now* subject to a comprehensive federal framework,[47] but did not base its holding that the statute was unconstitutional on these grounds alone. Instead, the Court added that because the law added criminal penalties to what under *federal* law was only punished civilly, the law "stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress."[48] Nonetheless, a plain reading of the opinion indicates that *De Canas* is no longer valid law, at least insofar as it holds that states may pass additional regulations in the field of employment of undocumented foreign nationals.

Turning to Section 6 of S.B. 1070, which "provides that a state officer, 'without warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him or her] removable from the United States[,]'" the Court first notes that although under federal law it is a crime to be unlawfully present in the United States.[49] For an undocumented alien to be subject to a warrant for an arrest, first a lengthy federal procedure must be followed, including the issuance of a Notice to Appear and an opportunity to be heard with respect to the removal (i.e. deportation) proceeding.[50] In addition, the Court notes that in the event a warrant is issued, "warrants are executed by federal officers who have received training in the enforcement of immigration law."[51]

In contrast to the federal system referenced above, the Court found that the Arizona statute would allow officers to arrest an alien without federal warrant and regardless of whether an alien was likely to escape (as required under federal law).[52] The Court concluded that such authority exercised by the state "would allow the State to achieve its own immigration policy" and the "result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed [deported]."[53] The Court further held that "[b]y authorizing state officers to decide whether an alien should be detained for being removable [deportable], [Section] 6 violates the principle that the [deportation] process is entrusted to the discretion of the Federal Government."[54]

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46. *Id.*
47. *Id.* at 2504.
48. *Id.* at 2505.
49. *Id.*
50. *Id.* at 2505-06.
51. *Id.*
52. *Id.* at 2506.
53. *Id.*
54. *Id.* at 2507.

In summary, the Court held that Section 3, which created a state misdemeanor for "willful failure to complete or carry an alien registration document, was pre-empted as an attempt to regulate an area of federal law, *i.e.*, Alien Registration. The Court took the view that federal law comprehensively occupied the area of Alien Registration. It went on to decide that Section 5(c), which makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor[,]" conflicts with federal law because the field of employment immigration law is *also* pervasively regulated. Finally, the Court held that Section 6, which authorizes state officers to arrest persons suspected of unlawful presence, is pre-empted because while "Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances . . . [Section 6] authoriz[es] state and local officers to engage in these enforcement activities as a general matter" thereby "creat[ing] an obstacle to the full purposes and objectives of Congress."[55]

While on its face *Arizona* does not specifically nor explicitly *reverse* the immigration pre-emption analysis established by *De Canas*, in light of the majority of circuit courts' interpretation and application of the *Arizona* and *Whiting* decisions, it is reasonable to infer that a much more substantial shift in the Court's viewpoint of federal pre-emption has occurred, as demonstrated through the *Arizona* decision.

## IV. IMMIGRATION PRE-EMPTION ANALYSIS TODAY

Following a surge in public opinion against providing undocumented foreign nationals with state social services, local governments from several states responded by passing a number of ordinances which prohibited the rental of residential properties to this population. Several of these ordinances were challenged shortly after their enactment with varying results.[56] To date, at least four circuit courts have made decisions with respect to such ordinances. Generally speaking, while the Fifth, Third, and Eleventh Circuits have held that such ordinances are pre-empted by federal law, the Eighth Circuit, in *Keller v. City of Fremont*, upheld the housing ordinance stating "laws designed to deter, or even prohibit, unlawfully present aliens from residing within a particular locality are not tantamount to immigration laws establishing who may enter or remain in the country."[57] Before considering the rationale set forth by the majority opinions of the Fifth,

55. *Id.* at 2506.

56. *See, e.g.* Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 539 (5th Cir. 2013) (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional); Lozano v. City of Hazleton, 724 F.3d 297, 323 (3d Cir. 2013) (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional); United States v. Alabama, 691 F.3d 1269, 1301 (11th Cir. 2012) (holding ordinance prohibiting rental to undocumented foreign nationals is unconstitutional), *cert denied*, 133 S. Ct. 2022 (2013); *but see* Keller v. City of Fremont, 719 F.3d 931, 939 (8th Cir. 2013) (holding rental ordinance constitutional).

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

Third, and Eleventh Circuits, Part III will consider the analysis used in *Keller* in light of the *Arizona* and *Whiting* decisions. Part III will then summarize and analyze the Fifth Circuit Court's decision, which is nearly identical in rationale to the Third and Eleventh Circuits' decisions. Part III concludes that the Third Circuit's decision is better aligned with the *Arizona* and *Whiting* decisions.

In *Keller*, the plaintiff landlords and tenants sued to prevent the City of Fremont's enforcement of Ordinance No. 5165 (hereinafter "the Ordinance"), which prohibited the rental of housing units to undocumented foreign nationals.[58] Specifically, the Ordinance prohibits any person or business from renting to or permitting occupancy by an undocumented foreign national, who is defined as "an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, Section 1101 *et seq.*."[59] In order to enforce the Ordinance, the Ordinance further provided "that prospective renters over the age of 18 must obtain an occupancy license from the City, and must obtain a new license if they move to different rental properties."[60]

To obtain this license, the Ordinance required the applicant to provide personal information, including whether the applicant is lawfully present in the United States.[61] While an occupancy license is immediately issued, if local authorities later learn from the federal government that the renter is unlawfully present in the United States, the police are instructed to send the renter a deficiency notice, at which point the renter then has 60 days to establish lawful presence.[62] If upon the completion of the 60-day period the renter has yet to establish lawful presence, as determined and reported by the federal government pursuant to United States Code Title 8, Section 1373(c), then the occupancy license is revoked and violators of the ordinance face a $100 per violation, per day, fine.[63]

The plaintiffs challenged the Ordinance and contended that "the rental provisions are constitutionally pre-empted because they have the impermissible effect of regulating immigration by expelling from the City aliens who are not lawfully present in the United States."[64] In addition, the plaintiffs argued that "the rental provisions intrude on a federally occupied 'field,' alien removal, which is exclusively governed by complex removal procedures prescribed by Congress in the INA."[65]

In considering these broad arguments, the Eighth Circuit quickly dismissed the plaintiffs' contention that the rental ordinance constitutes removal, arguing that "these provisions neither determine 'who should or should not be admitted into the country,' nor do they more than marginally

58. *Id.* at 937.
59. *Id.*
60. *Id.* at 938.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 941.
65. *Id.*

affect 'the conditions under which a legal entrant may remain.'"[66] It is important to highlight that the Eighth Circuit's narrow view of what constitutes "removal" reflects the *De Canas* decision, where the Supreme Court held that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain,"[67] and that "even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutional proscribed regulation of immigration . . . ."[68]

In the alternative to the plaintiffs' contention that the rental ordinances impinged upon the field of federal removal, the plaintiffs argued that the "Ordinance's rental provisions are also pre-empted by federal legislation that wholly occupies two other fields, alien registration and anti-harboring."[69] In considering these arguments, the Court first noted as a general matter that "[e]very Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution."[70]

With respect to plaintiffs' argument that the Ordinance intruded upon the field of Alien Registration, the Court reasoned that while "Congress intended to create 'a single integrated and all-embracing system' for alien registration"[71] with the result that "even complimentary state regulation is impermissible," the occupancy Ordinance was "nothing like the state registration laws invalidated" in past decisions.[72] The Ordinance required all renters, not just aliens, to obtain an occupancy license, and "does not apply to all aliens [but instead] excludes non-renters."[73] Furthermore, while applicants for the occupancy license were required to disclose information aliens must disclose when complying with federal alien registration laws, "that does not turn a local property licensing program into a pre-empted alien registration regime."[74]

In short, the Court argued that to hold the Ordinance as pre-empted "would mean that any time a State collects basic information from its residents, including aliens – such as before issuing driver's licenses – it impermissibly intrudes into the field of alien registration."[75]

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66. *Id.* (quoting *De Canas v. Bica*, 424 U.S. 351, 355 (1976)).

67. *De Canas*, 424 U.S. at 355.

68. *Id.* at 355-56.

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

70. *Id.* (citing *De Canas*, 424 U.S at 360 n. 8).

71. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52. 70 (1941)).

72. *Id.* at 942-43 (quoting Arizona v. United States, 132 S. Ct. 2492, 2502 (2012)) (internal citations ommitted).

73. *Id.* at 943.

74. *Id.*

75. *Id.* at 943.

Turning to the plaintiffs' argument with respect to the anti-harboring provision, the Court "[found] 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.'"[76] As such, the Court declined to strike down the Ordinance as pre-empted by federal statutes and the federal anti-harboring field.[77]

Finally, the Court considered whether the Ordinance interferes with "'a principal feature of the [federal] removal system,' the broad discretion exercised by immigration officials to determine which aliens [illegally] present in the United States should be removed from the country."[78] While the Court conceded that the Ordinance would "indirectly effect the 'removal' of any alien from the [c]ity," it nonetheless held that such an indirect effect would be far too broad an interpretation of federal immigration law to reconcile it with cases such as *De Canas* and *Whiting*.[79] In those cases, the Supreme Court permitted states to deny employment to certain aliens, despite the fact that "denying aliens employment inevitably has the effect of 'removing' them from the State."[80] The Court added that "as the rental provisions do not 'remove' any alien from the United States (or even from the City), federal immigration officials retain complete discretion to decide whether and when to pursue removal proceedings."[81] The Court further distinguished the Ordinance by pointing out that unlike Section 6 of the law at issue in *Arizona*, the Ordinance does not require that local officials to assess whether an alien is removable from the United States.[82]

Thus, the Court dismissed the plaintiffs' contention that the effects of the Ordinance would be to "remove" an alien prior to a removal hearing, because the effect of the Ordinance was merely to deny a rental occupancy license in a particular locality.[83] Furthermore, the Court noted that because the challenge to the Ordinance was a facial challenge, it would not consider speculations regarding the manner in which state and local official would implement the regulations and the effects that such regulations will have on the nation at large, in assessing whether the Ordinance "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[84] The Court's refusal to consider the logical implications and likely long-term effects of State and local ordinances is not present in other recent circuit court decisions to consider similar issues;

76. *Id.*
77. *Id.*
78. *Id.* at 943-44.
79. *Id.* at 944.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 945.

neither can the Eighth Circuit's narrow approach be reconciled with *Arizona* nor *Whiting*.

Indeed, each court that has considered pre-emption questions presented in *Keller* has relied upon *Arizona* to expand the scope of all federal "fields" which involve immigration law. For example, in *Whiting*,[85] the Ninth Circuit considered whether an injunction was properly issued against the enforcement of an Arizona statute which criminalized the harboring and transporting of unauthorized aliens.[86] In contrast to the Eighth Circuit's view that "nothing in an anti-harboring prohibition contained in one sub-part of one subsection of 8 U.S.C. § 1324 [ ] establishes a 'framework of regulation so pervasive . . . [ ] Congress left no room for the States to supplement it,'"[87] the Ninth Circuit found that "the [statutory] scheme governing the crimes associated with the movement of unauthorized aliens in the United States . . . provides a full set of standards designed to work as a harmonious whole[.]"[88] The Ninth Circuit's broad interpretation of the anti-harboring provisions relied upon a number of federal decisions dispersed throughout the United States, including the Third, Fourth, and Eleventh Circuits, all of which used a much more expansive view of federal immigration law, and all of which resulted in the finding that each state statute or local ordinance was pre-empted.[89] Similar in approach to *Valle Del Sol Inc.*, the Third Circuit's decision in *Lozano* properly summarized the views set forth in the majority opinions regarding rental ordinances similar to those at issue in the Eighth Circuit's decision.

In *Lozano*,[90] the Third Circuit was compelled by the Supreme Court to reconsider its previous decision to strike down a rental ordinance which was substantially similar to the ordinance upheld in *Keller*, in light of the Supreme Court's decisions of *Whiting* and *Arizona*. However, upon reconsidering the matter, the Third Circuit nonetheless concluded that the "housing provisions of the Hazelton ordinances are pre-empted by federal immigration law."[91]

In summarizing *Whiting* and *Arizona*, the Third Circuit stated that while the Supreme Court permitted Arizona's efforts to "regulate the employment of unauthorized aliens through a business licensing law," it also "largely rejected Arizona's efforts to enact its own immigration policies."[92] Using this as the basis for its rationale, the Court first struck down the employment provisions which were also at issue in *Lozano* because the

85. Valle Del Sol Inc. v. Whiting, 732 F.3d 1006 (9th Cir. 2013).

86. *Id.*

87. *Id.* at 1026 n. 18.

88. *Id.* at 1024-25.

89. *Id.* at 1025-26. (citing Lozano v. City of Hazelton, 724 F.3d 297 (3d Cir. 2013); United States v. South Carolina, 720 F.3d 518, 531-32 (4th Cir. 2013); United States v. Alabama, 691 F.3d 1269, 1288 (11th Cir. 2012); Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250, 1267 (11th Cir. 2012)).

90. *Lozano*, 724 F.3d at 297.

91. *Id.* at 300.

92. *Id.* at 303.

state's definition of "employment" was far too broad and thus in contradiction with federal law.[93] The Court then turned to the rental ordinances at issue.

In contrast to *Keller*'s holding that local prohibition of occupancy licenses does not regulate immigration or constitute removal, the Third Circuit held that "[t]hrough its housing provisions, Hazleton attempts to regulate *residence based solely on immigration status*."[94] As such, the Third Circuit concluded "that enforcement of the housing provisions must be enjoined because '[d]eciding which aliens may live in the United States has always been the prerogative of the federal government.'"[95] The Third Circuit further adds that "although Hazleton's housing provisions do not control actual physical entry into, or expulsion from, Hazleton or the United States, 'in essence, that is precisely what they attempt to do.'"[96] Thus, the Third Circuit equates Hazleton's prohibition of rental licenses for undocumented persons with the actual removal of undocumented foreign nationals.

Such reasoning clearly breaks from the *De Canas* decision in that the Third Circuit considers the indirect consequences of the statute, rather than limiting itself to the immediate and concrete impact of the statute. For example, in *De Canas*, the obvious consequence of laws prohibiting the employment of undocumented foreign nationals is that this population as a whole would be less inclined to reside in California, if not the United States, but the Court was unwilling to consider such consequences sufficiently direct or conflicting with federal law to find that the California statute conflicted with the Federal government's broad authority over the removal power.[97] The *De Canas* decision states:

> In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration.[98]

The Supreme Court's reasoning in *De Canas* is in stark contrast to the Third Circuit's equating of the denial of occupancy licenses with federal removal. Justice Scalia's discussion of *De Canas* in his dissenting opinion in

93. *Id.* at 308.

94. *Id.* at 315 (quoting Lozano v. City of Hazleton, 620 F.3d 170, 220 (3d Cir. 2013)) (emphasis added).

95. *Id.* (quoting *Lozano*, 620 F.3d at 220).

96. *Id.* at 315-316 (quoting *Lozano*, 620 F.3d at 220) (internal citations omitted).

97. De Canas v. Bica, 424 U.S. 351, 355-56 (1976).

98. *Id.*

*Arizona* adds to this analysis.[99] Justice Scalia writes: "This Court concluded that the California law was not pre-empted, as Congress had neither occupied the field of 'regulation of employment of illegal aliens' nor expressed 'the clear and manifest purpose' of displacing such state regulation."[100] Scalia continued that "[t]he only relevant change" with respect to federal immigration law as it pertains to employment since the *De Canas* decision "is that Congress has since enacted its own restrictions on employers who hire illegal aliens, in legislation that also includes some civil (but no criminal) penalties on illegal aliens who accept unlawful employment."[101] Justice Scalia concluded that, "at the time *De Canas* was decided, [the Arizona Statute concerning the employment of illegal aliens] would have been indubitably lawful"[102] and found that the federal statutory changes since the *De Canas* decision have done nothing to change the Court's analysis of employment laws touching on illegal aliens.[103]

Thus, a close reading of the *De Canas* decision, as well as *Arizona*, *Whiting*, and *Lozano*, leads to the conclusion that while much has changed with respect to the interpretation of the reach of the INA since *De Canas* was decided, there is also a clear judicial trend toward broader definitions of federal authority, and limited views on state and local authority concerning aliens.[104] Not surprisingly, the only state statute to be both recently scrutinized by the Supreme Court and to survive such scrutiny was one which was explicitly protected by a savings clause – Arizona's Legal Arizona Workers Act.[105]

## V. CONCLUSION

In light of the overwhelming majority of courts having set forth similar analyses and conclusions to that which is presented in *Lozano*,[106] it appears that should the Supreme Court consider the issues raised by the Eighth Circuit's *Keller* decision and follow the *Whiting* and *Arizona* framework, the rental ordinance provisions will likely be struck down as federally pre-

99. Arizona v. United States, 123 S. Ct. 2492, 2519 (2012) (Scalia, J., dissenting).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. For example, at one point in the *De Canas* decision, the Court notes that the petitioner, arguing in favor of the local statute, "conceded at oral argument that, on its face [the statute preventing alien employment] would apply to aliens [not lawfully present, but authorized to work under federal law] and thus conflict with federal law." De Canas v. Bica, 424 U.S. 351, 364 (1976). Yet, the Court nonetheless tolerated this actual conflict with federal law on the basis that administrative regulations define "alien" as not only green card holders, but also those authorized by the federal government to work. *Id.*

105. Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968 (2011).

106. Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250, 1263-65 (11th Cir. 2012) (concluding that federal law occupies the field with respect to "the entry, movement, and residence of aliens within the United States" and state law proscribing, *inter alia*, harboring is field preempted); United States v. Alabama, 691 F.3d 1269, 1285-87 (11th Cir. 2012), *cert denied*, 133 S. Ct. 2022 (2013); United States v. South Carolina, 906 F. Supp. 2d 463, 468 (D.S.C. 2012) (concluding that the provisions of state law proscribing transporting of sheltering aliens lacking lawful status "infringe upon a comprehensive federal statutory scheme"), *aff'd*, 720 F.3d 518 (4th Cir. 2013).

empted. Furthermore, while it may be a premature forecast, it appears that should the Court continue its current trends with respect to pre-emption analysis in the field of immigration law, in the absence of an explicit savings clause, nearly any state or local law that in anyway impacts undocumented or documented foreign nationals will likely be struck down as pre-empted and unconstitutional. Therefore, states and localities should be cautious before utilizing such strategies, and Congress should be careful to include such explicit savings clauses, should its actual intent be to permit state authority in certain domains.