

NOTE

“THERE BE NO SHELTER HERE”*: ANTI-IMMIGRANT HOUSING ORDINANCES AND COMPREHENSIVE REFORM

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This Note examines anti-immigrant housing ordinances (AIHOs) that explicitly single out immigrants and facially-neutral AIHOs that local officials use to target immigrants. Lozano v. City of Hazleton (Lozano II) underscores how effective preemption-doctrine-based challenges can be against municipalities that have local ordinances singling out immigrants. On the other hand, immigrant-rights groups have had little success bringing legal challenges against municipalities that use facially-neutral housing ordinances to target immigrants because such ordinances are enacted pursuant to traditional state powers, and exempted from regulation under the Fair Housing Act. As a result, municipalities will circumvent preemption-doctrine-based challenges to their ordinances by moving towards facially-neutral ordinances that target immigrant housing patterns just as effectively (either by tightening household occupancy restrictions or discriminatorily enforcing the ordinances). This Note argues that the only effective way to challenge state and local anti-immigrant activism is to grapple with both kinds of AIHOs. An effective solution would work towards distinguishing federal interests in the regulation of immigration from state interests in housing and other traditional state powers. The federal government should extend its role in regulating immigration by expanding protection against discrimination based on alienage and legal status. The federal government should also circumscribe its role by providing states with greater latitude to craft housing regulations and policy. Although immigrants

* RAGE AGAINST THE MACHINE, *No Shelter*, on GODZILLA – THE ALBUM (Epic/Sony Music Soundtrax 1998).

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would face uneven state housing regulations, states would eventually clarify their housing policies under these new federal protections. Despite the temporary upheaval caused by such a legal regime change, it would eventually result in an increase in immigrant housing stability and encourage a market for immigrant labor.

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INTRODUCTION

Citing the presence of 11.9 million undocumented immigrants¹, American states and municipalities have passed a number of ordinances

¹ JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW i, (2008), available at <http://pewhispanic.org/files/reports/94.pdf>. In 2008, one California court explained why it preferred the term *illegal alien*. In *Martinez v. Regents of University of California*, 83 Cal. Rptr. 3d 518, 522 n.2 (Cal. Ct. App. 2008), the court explained that no authoritative source exists that effectively explains “the term ‘undocumented immigrants.’” However, defendants do not cite any authoritative definition of the term and do not support their assertion that the terms ‘undocumented immigrant’ and ‘illegal alien’ are interchangeable. We consider the term ‘illegal alien’ less ambiguous.” *Id.* The court’s reasoning notwithstanding, the terms *undocumented immigrant* and *undocumented worker* found their way into a Supreme Court decision for the first time in 2009. See *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 601, 603

targeting undocumented immigrants. Indeed, no less than 100 municipalities within the past five years have considered ordinances or statements aimed at undocumented immigrants.² A typical ordinance targets undocumented immigrants by restricting their ability to rent housing and congregate at day laborer centers, discouraging the speaking of languages other than English, penalizing their employers for hiring them, and eliminating their access to public benefits.³ Hazleton, Pennsylvania passed the most infamous of these municipal ordinances, the Illegal Immigration Relief Act Ordinance (IIRA), in 2006.⁴ The IIRA prohibited employing, harboring, and housing undocumented immigrants, and made English the “official language” of the city.⁵ Many cities followed Hazleton’s lead and passed similar local legislation.⁶

(2009). The National Association of Hispanic Journalists (NAHJ) maintains an insightful position on those phrases:

[u]sing . . . terms [like “illegal alien” and “illegals”] not only distorts the [immigration] debate, but it takes away [an immigrant’s] identit[y] as [an] individual[] and [as a] human being[]. When journalists do that, it’s that much easier to treat them unfairly and not give them an equal voice in the controversy. . . . In addition, NAHJ has always denounced the use of the degrading terms “alien” and “illegal alien” to describe undocumented immigrants because it casts them as adverse, strange beings, inhuman outsiders who come to the U.S. with questionable motivations.

National Association of Hispanic Journalists, *NAHJ Urges News Media to Stop Using the Term “Illegals” when Covering Immigration* (Sept. 15, 2009), <http://www.nahj.org/2009/09/nahj-urges-news-media-to-stop-using-the-term-illegals-when-covering-immigration>. For further discussion, see also *Lozano v. City of Hazleton (Lozano II)*, 620 F.3d 170, 176 n.1 (3rd Cir. 2010). This Note will use the term *undocumented immigrant*, *undocumented worker*, or *unauthorized immigrant* instead of *illegal alien* or *illegals* to describe individuals that municipalities target in anti-immigrant housing ordinances (AIHOs).

² See generally FAIR IMMIGRATION REFORM MOVEMENT, DATABASE OF RECENT LOCAL ORDINANCES ON IMMIGRATION, available at www.ailadownloads.org/advo/FIRM-LocalLegislationDatabase.doc [hereinafter LOCAL ORDINANCE DATABASE] (providing a comprehensive list of AIHOs as of 2007, when much of the litigation of Hazleton-style AIHOs took place).

³ See, e.g., Cherokee County, Ga., Ordinance 2006-003 (Dec. 5, 2006), available at <http://www.clearinghouse.net/chDocs/public/IM-GA-0001-0003.pdf> [hereinafter Cherokee County Ordinance]; Escondido, Cal., Ordinance 2006-38, available at <http://clearinghouse.wustl.edu/chDocs/public/IM-CA-0001-0002.pdf> (last visited Aug. 14, 2010) [hereinafter Escondido Ordinance]; Farmers Branch, Tex., Ordinance 2952, available at <http://www.ci.farmers-branch.tx.us/sites/default/files/Ordinance%20No%202952.pdf> (last visited Aug. 14, 2010) [hereinafter Second Farmers Branch Ordinance] (citing another draft of the same ordinance cited *infra*); Farmers Branch, Tex., Ordinance 2903 (May 22, 2007), available at <http://www.ci.farmers-branch.tx.us/sites/default/files/Ordinance%20No%202903.pdf> [hereinafter Farmers Branch Ordinance]; Riverside, N.J., Ordinance 2006-26 (July 26, 2006), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-NJ-0001-0006.pdf> [hereinafter Riverside Ordinance]; Valley Park, Mo., Ordinance 1721 (Feb. 14, 2007), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-MO-0001-0015.pdf>.

⁴ See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484–85 (M.D. Pa. 2007).

⁵ Hazleton, Pa., Ordinance 2006-18, *Illegal Immigration Relief Act Ordinance* (Sept. 12, 2006), available at <http://www.clearinghouse.net/detail.php?id=5472>; *Lozano*, 496 F. Supp. 2d at 484.

⁶ Rigel Oliveri points out the most noteworthy of these anti-immigrant ordinances. See Rigel Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant*

In addition to Hazleton-style IIRAs, this Note examines anti-immigrant housing ordinances (AIHOs) that do not contain language explicitly targeting immigrants. Although these AIHOs do not single-out undocumented immigrants the way IIRAs do, municipalities use housing provisions addressing “overcrowding,” “maximum occupancy,” and “family” to drive undocumented immigrants out of their communities. Such provisions are extremely common at the local level. Unlike IIRAs, however, these housing provisions do not, at first glance, directly implicate the immigration debate. One might characterize IIRAs, for example, as local immigration regulation ordinances, and occupancy ordinances (usually selectively-enforced) as backdoor immigration regulation.

Municipalities are shifting their strategies to exclude undocumented immigrants from their communities and so too must the immigration and public policy debate shift. Past scholarship has centered on whether anti-immigrant ordinances (AIOs), like IIRAs, are preempted by federal immigration laws. There is some logic to this approach given the long-standing precedence of *De Canas v. Bica*.⁷ With only a few exceptions,⁸

Ordinances, and Housing Discrimination, 62 VAND. L. REV. 55, 60 (2009). For Oliveri those included the ordinances in Farmers Branch, Texas, Cherokee County, Georgia, Valley Park, Missouri, Escondido, California, and Riverside, New Jersey. *Id.* at 60 & n.12; *see also* Cherokee County Ordinance, *supra* note 3; Escondido Ordinance, *supra* note 3; Second Farmers Branch Ordinance *supra* note 3; Farmers Branch Ordinance, *supra* note 3; Riverside Ordinance *supra* note 3; Valley Park Ordinance, *supra* note 3.

⁷ 424 U.S. 351 (1976). In *De Canas* the Court established a three-part test to determine whether a state or local provision was preempted by federal law as a “regulation of immigration” which the Court defined as “a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 764–65 (N.D. Tex. 2007) (quoting *De Canas*, 424 U.S. at 355 and citing *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995)). The court in *Villas at Parkside Partners* explains them:

Under the first test, the Court must determine whether a state statute is a regulation of immigration. Since the power to regulate immigration is unquestionably exclusively a federal power, any state statute which regulates immigration is constitutionally prescribed.

Under the second test, even if the state law is not an impermissible regulation of immigration, it may still be preempted if there is a showing that it was the clear and manifest purpose of Congress to effect a complete ouster of state power—including state power to promulgate laws not in conflict with federal laws with respect to the subject matter which the statute attempts to regulate. In other words, a statute is preempted where Congress intended to occupy the field which the statute attempts to regulate.

Under the third test, a state law is preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Stated differently, a statute is preempted under the third test if it conflicts with federal law making compliance with both state and federal law impossible.

Villas at Parkside Partners, 496 F. Supp. 2d at 765 (citing *Wilson*, 908 F. Supp. at 768).

⁸ *See generally* Oliveri, *supra* note 6 (examining anti-immigrant housing ordinances and the weakness of preemption doctrine as a basis for challenging such ordinances effectively);

however, no scholars have specifically considered the housing provisions. The most noteworthy exception, written by Professor Rigel Oliveri, focuses specifically on the six most litigated and highly publicized ordinances—those that were specifically challenged under preemption doctrine.⁹ Unlike the ordinances addressed by Professor Oliveri, occupancy ordinances that lack facially questionable language like *illegal alien* or *immigrant* or *citizenship* render preemption analysis ineffective. Given this complicated state of ordinances, an efficacious treatment of AIHOs must address the range of options at the disposal of states and municipalities including (1) AIOs that explicitly target immigrants like Hazleton’s IIRA and (2) facially neutral occupancy ordinances.

Many legal scholars have attempted to resolve the debate surrounding AIOs. Some, like Professor Oliveri, have argued that the best way to challenge AIOs is through a congressional expansion of the Fair Housing Act’s (FHA) suspect class protections to include alienage and legal status, in addition to national origin.¹⁰ This Note argues that even if Congress passed such legislation, which hardly seems likely, the legislation would fail to protect immigrants who are prohibited from living in certain communities by selectively-enforced occupancy ordinances. Moreover, expanding protected classifications under the FHA would offer little additional protection than the protection already afforded to legal immigrants. Notwithstanding the financial cost of litigating such new language in the FHA, congressional legislation offering more protection than courts have traditionally been willing to provide for classes might provoke a significant backlash in the judiciary.

For this reason, this Note argues that a superior alternative to the expansion of the FHA would take into account the role that both states and the federal government should play in the implementation of immigration policy. As Professor Cristina Rodríguez points out, subnational governments like municipalities play a central role in the immigration debate because they “integrate immigrants, legal and illegal alike, into the body politic.”¹¹ To offer a single federal solution to a problem with such a diverse set of factors involved would fail to address the uneven process that such integration would entail.

Mark S. Grube, Note, *Preemption of Local Regulations Beyond Lozano v. City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391 (2010) (discussing both local housing ordinances and employment sanctions and arguing that “courts should adopt a uniform framework for analyzing local employer sanctions and housing laws that focuses on whether the laws conflict with or would undermine federal immigration policy”).

⁹ See Oliveri, *supra* note 6, at 60 n.12.

¹⁰ See Oliveri, *supra* note 6, at 83–86.

¹¹ See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571 (2008).

Moreover, states and localities are likely to replace Hazleton-style IIRAs with facially-neutral ordinances or unevenly enforce ordinances already on the books. In July of 2007 when the District Court for the Middle District of Pennsylvania permanently enjoined Hazleton from enforcing its IIRA, cities with similar ordinances tabled their IIRAs in anticipation of the Third Circuit's decision in *Lozano v. City of Hazleton*.¹² Now that the Third Circuit has decided *Lozano* and concluded that federal law preempts the Hazleton ordinance, cities are unlikely to enforce such ordinances because enforcement means high legal fees and depressed municipal economies.¹³ Yet cities that remain interested in controlling or reducing immigrant housing access in their municipalities will likely revert to selectively enforcing their occupancy ordinances. Since enforcement of occupancy ordinances remains well within the realm of traditional state powers, both federal legislation and legal challenges addressing such housing ordinances face an uphill battle. Yet, any serious challenge to AIOs must confront the use of occupancy ordinances by city officials to reduce or control immigrant settlement.

Part I of this Note examines the most well-known AIOs—the Hazleton-style IIRAs, and the legal theories used to challenge them. This is followed by a discussion of the less conspicuous *maximum occupancy* or *overcrowding* ordinances, changes to definitions of family, and the few recent successful challenges to these AIOs. Part II reviews the previous legal theories used to challenge AIOs and their relative effectiveness. Unlike previous scholarship,¹⁴ this Note concludes that preemption doc-

¹² *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484–85 (M.D. Pa. 2007).

¹³ Rodríguez, *supra* note 11, at 595. Professor Rodríguez presciently stated:

IIRAs represent a temporary and actually quite limited outburst brought on by unusually high levels of unauthorized immigration and a hyperactive media during a period of heightened national awareness of immigration. But many states and localities, when faced with the consequences of their measures—namely, high legal fees, the disappearance of immigrant populations that had revitalized dying former industrial towns, and the high administrative costs of enforcement—will start reconsidering the extremity of their policies. Once the national debate has subsided (particularly if Congress passes meaningful immigration reform in the next two years) most local communities will revert to compromise positions of some sort, perhaps participating in 287(g) agreements while abandoning city-led enforcement measures such as landlord penalties.

Id.

As this Note goes to print, we await the Ninth Circuit's decision in *Arizona v. United States*. In the lower court decision, *United States v. Arizona*, 703 F.Supp.2d 980 (D. Ariz. 2010), the court concluded that federal law preempted much of Arizona's SB 1070 and preliminarily enjoined the law. *Id.* at 1008. Although the substantive legal questions in that case, like arrest, reasonable suspicion, and employment, are different from the narrow focus on housing provisions discussed here, the Ninth Circuit's decision is important because that court may apply *De Canas v. Bica* preemption analysis and reach a different conclusion with respect to whether SB 1070 is preempted. For further discussion, see *infra* Part II.A.

¹⁴ See Oliveri, *supra* note 6.

trine provides relatively stable ground for mounting challenges to AIOs like Hazleton’s IIRA. For reasons discussed in Part II, parties challenging occupancy ordinances have been less successful because preemption analysis does not apply. Part III offers alternative legal and public policy approaches to dealing with immigration and housing, such as increased protection for specific classes and decreased federal involvement in the housing sector. The final Part presents the Note’s conclusion: because AIHOs involve both individual rights and questions of federalism, all levels of government have a role to play.¹⁵

I. ANTI-IMMIGRANT HOUSING ORDINANCES

A. *Illegal Immigration Relief Acts*

Between 2006 and 2007, more than 120 municipalities and counties passed or considered passing AIOs similar to Hazleton’s IIRA.¹⁶ Federal courts struck down the few AIOs that activists challenged.¹⁷ The central legal doctrine that courts apply in invalidating these ordinances is preemption. Courts use three tests to determine whether a state or local ordinance is preempted by federal law:

Under the first test, the Court must determine whether a state statute is a regulation of immigration. Since the power to regulate immigration is unquestionably exclusively a federal power, any state statute which regulates immigration is constitutionally prescribed.

Under the second test, even if the state law is not an impermissible regulation of immigration, it may still be preempted if there is a showing that it was the clear and manifest purpose of Congress to effect a complete ouster of state power—including state power to promulgate laws not in conflict with federal laws with respect to the subject matter which the statute attempts to regulate. In other words, a statute is preempted where Congress intended to occupy the field which the statute attempts to regulate.

Under the third test, a state law is preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Stated differently, a statute is preempted under the third test if it

¹⁵ See generally Oliveri, *supra* note 6 (describing the interplay between the federal government and municipalities in dealing with housing discrimination). The federal government could pass legislation that, *inter alia*, clearly delineates the spheres of authority for federal action, and grants state and local actors authority in other areas.

¹⁶ See LOCAL ORDINANCE DATABASE, *supra* note 2.

¹⁷ See *infra* Part I.A

conflicts with federal law making compliance with both state and federal law impossible.¹⁸

Plaintiffs have successfully argued federal preemption of AIOs in four municipalities: Hazleton, Pennsylvania, Farmers Branch, Texas, Escondido, California, and Riverside, New Jersey.

1. Hazleton, PA

Hazleton's IIRA was undoubtedly the most influential because a majority of AIOs were drafted to resemble it.¹⁹ Passed in July of 2006, Hazleton's first version of the IIRA prohibited the employment and harboring of "illegal aliens."²⁰ A little over a month later, the city added to the IIRA the Tenant Registration Ordinance (RO), which required tenants to obtain an occupancy permit.²¹ The RO conditioned the granting of a permit upon the tenant's demonstration of citizenship or lawful residence.²² In pertinent part, the RO read: "Application for occupancy shall be made upon forms furnished by the Code Enforcement Office . . . and shall specifically require . . . [p]roper identification showing proof of legal citizenship or residency."²³

Citing a number of grounds for its decision, the District Court for the Middle District of Pennsylvania struck down the RO on July 26, 2007.²⁴ Applying preemption analysis, the court found that the RO was

in direct conflict with federal law because [it was] based upon the assumption that: 1) the federal government seeks the removal of all aliens who lack legal status and 2) 'a conclusive determination by the federal government that an individual may not remain in the United

¹⁸ *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 765 (N.D. Tex. 2007) (citing *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal.1995)).

¹⁹ See Oliveri, *supra* note 6, at 60.

²⁰ See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007).

²¹ *Id.*

²² *Lozano*, 496 F. Supp. 2d at 484.

²³ Hazleton, Pa., Ordinance 2006-13 § 7(b)(1) Establishing a Registration Program for Residential Rental Properties (Aug. 15, 2006), available at <http://www.clearinghouse.net/detail.php?id=5472>. Like other municipal occupancy ordinances, the Hazleton ordinance, as amended, makes reference to Hazleton's International Property Maintenance Code provisions regarding maximum occupancy. 2006-13 § 3(c) ("No Dwelling Unit shall be occupied, knowingly by the Owner or Agent, by a number of persons that is in excess of the requirements outlined in 2003 International Property Maintenance Code, Chapter 4, Light, Ventilation, and Occupancy Limits. Section PM-404.5, Overcrowding, or any update thereof, a copy of which is appended hereto and made a part hereof.").

²⁴ See *Lozano*, 496 F. Supp. 2d at 477; see also Oliveri, *supra* note 6, at 60.

States can somehow be obtained outside of a formal removal hearing.’²⁵

The court pointed out that documents proving citizenship or residency might be unattainable by *aliens* who were waiting for clarification of their status by the federal government.²⁶ Thus, such persons, although permitted to reside in the United States and to seek employment, would be denied housing in Hazleton.²⁷

After Hazleton appealed the decision, the Third Circuit upheld the lower court.²⁸ In its opinion’s preemption analysis, the Third Circuit specifically took issue with the housing provisions because the housing provisions, unlike the employment provisions, regulated the ability of individuals to enter “private contract for shelter.”²⁹ Although preemp-

²⁵ *Lozano*, 496 F. Supp. 2d at 530 (quoting plaintiff’s brief). I will expand my discussion of the court’s legal standard for determining if the ordinance is preempted later within this Note. In brief, the Court asks: where either (1) the local ordinance “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” or (2) it is not possible to comply with both the federal and state law. *See id.* (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)).

²⁶ *See Lozano*, 496 F. Supp. 2d at 530–31.

²⁷ *See id.* at 531. The court goes to great lengths to emphasize that a person *illegally* residing in the United States has many alternative routes in order to obtain relief from removal and requiring them to prove citizenship or residency would be a violation of Due Process. *See id.* at 532. For example, many unauthorized immigrants could request to stay in the United States based upon the person’s relationship with a spouse or close relative. *See id.* Some may seek to stay as victims of domestic violence or torture. *See id.* If all else fails, the person could seek permission of residency from the Attorney General. *See id.* The court also emphasizes that the RO calls upon clerks in the Hazleton Code Enforcement Office to determine whether someone is “properly in the country.” *Id.* at 533.

²⁸ *Lozano v. City of Hazleton (Lozano II)*, 620 F.3d 170, 224 (3rd Cir. 2010).

²⁹ *Id.* The court specifically attempted to distinguish the housing provisions and the employment provisions by noting that restrictions on employment fall squarely within state police powers. *Id.* The court went to great lengths to point this out by citing the most recent Farmers Branch decision (*Farmers Branch III*) for the proposition that “[l]ocal regulation that conditions the ability to enter private contract for shelter on federal immigration status is of a fundamentally different nature than . . . restrictions on employment.” *Id.* (quoting *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 855–56 (N.D. Tex. 2010)). Despite the effort to distinguish the employment and housing provisions, the court’s distinction remains unclear. Yet, the court attempted further clarification by noting the distinction drawn by the parties:

The parties characterize the housing provisions of the RO and the IIRAO in starkly different terms. Hazleton maintains that the housing provisions regulate rental accommodations, and thus, like the employment provisions, fall within the state’s historic police powers. Plaintiffs, on the other hand, argue that these provisions regulate who may live in Hazleton based on immigration status, and that regulating which aliens are permitted to reside in the United States is a historically federal function far beyond the police powers of any state.

Lozano II, 620 F.3d at 220. Siding with the plaintiffs, the court seemed to indirectly endorse the plaintiffs’ theory with respect to why federal immigration law preempts the housing provisions. *Id.* Namely, when a state or local government decides to regulate *who* will be renting in within its jurisdiction, and the *who* question is based on immigration status, a court will likely perform a more searching inquiry and, ultimately, side with the party attacking the provision.

tion analysis requires that a court presume non-preemption, the court rejected this presumption because Hazleton, through its housing provisions, had “[d]ecid[ed] which aliens may live in the United States,” and such a decision “has always been the prerogative of the federal government.”³⁰

Applying each form of preemption analysis, the court concluded that the housing provision of the Hazleton ordinance was an unquestionably impermissible regulation of immigration.³¹ Applying field preemption analysis, the court specifically cited the Immigration and Nationality Act’s (INA) “comprehensiveness” as “plainly excluding” state efforts.³² The court also rejected Hazleton’s argument that it merely enforces federal provisions—like anti-harboring laws—concurrently with the federal government.³³ Concurrent enforcement, for the court, was simply field preempted, and even if it was not, federal anti-harboring provisions have “never been interpreted to apply so broadly as to encompass the typical landlord/tenant relationship [as would be the case under the Hazleton ordinance].”³⁴ The court also concluded that the housing provision was conflict preempted because it was “fundamentally inconsistent” with the

In this respect the court’s analysis is not altogether different from traditional equal protection analysis. *See, e.g., id.* (“[W]e cannot bury our heads in the sand ostrich-like ignoring the reality of what these ordinances accomplish. Through its housing provisions, Hazleton attempts to regulate residence based solely on immigration status.”).

³⁰ *Lozano II*, 620 F.3d at 220.

³¹ *Id.* The court summarily concluded that Hazleton was in violation of the first prong of *De Canas v. Bica*, 424 U.S. 351 (1976), by stating that “it is clear that [Hazleton] has attempted to usurp authority that the Constitution has placed beyond the vicissitudes of local governments.” *Lozano II*, 620 F.3d at 220.

³² *Id.* The court recognized that Hazleton might draw a distinction between (1) forbidding people from renting and (2) excluding or physically expelling individuals from a community. *Id.* at 221. Hazleton would clearly argue its provision was merely performing the former in exercising its power to restrict certain people from renting. Yet, the court summarily rejected the distinction because, as the court concluded, despite its claims to the former, the city was clearly attempting to do the latter. *Id.*

At oral argument, Hazleton also sought to further narrow the argument that it restricted unauthorized immigrants from living in its community by pointing out that unauthorized immigrants could still reside in the community if they stayed with friends or purchased homes in Hazleton. *Id.* The court, again, summarily rejected this argument as well by pointing out that individuals affected by the provisions could not avail themselves of these alternatives and, even if they could, other provisions of the ordinance would ensure their exclusion from Hazleton. *Id.*

³³ *Id.* at 218–19.

³⁴ *Id.* at 223 (“We . . . define ‘harboring’ as conduct ‘tending to substantially facilitate an alien’s remaining in the United States illegally and to prevent government authorities from detecting the alien’s unlawful presence.’ Thus, we have held that ‘harboring’ requires some act of obstruction that reduces the likelihood the government will discover the alien’s presence. It is highly unlikely that a landlord’s renting of an apartment to an alien lacking lawful immigration status could ever, without more, satisfy this definition of harboring. Renting an apartment in the normal course of business is not in and of itself conduct that prevents the government from detecting an alien’s presence.” (internal citations omitted)). The court noted that it is not aware of a single case in which someone was convicted of harboring for merely

INA for a city to remove persons based on a “snapshot” of their immigration status rather than by a federal removal order.³⁵ Moreover, an unlawful immigration status, in most instances, does not lead to removal without a hearing pursuant to INA § 240.³⁶ The court added that because the government has complete discretion as to when to initiate such a hearing, it is impossible to predict when the government will initiate such a hearing, and the outcome once the government initiates it.³⁷ In short, unauthorized immigrants are not always removed after a hearing is initiated against them, and a judge can, if she chooses, adjust the status of the immigrant from *unauthorized* to *permanent resident*.³⁸

The Third Circuit also addressed the larger ramifications of a decision that would conclude that anti-immigrant provisions were not preempted. In particular, the court noted that, despite the Hazleton ordinance’s narrow geographical application to the city itself, a conclusion of non-preemption could extend Hazleton-like AIOs across the nation and ultimately “eviscerate” the federal government’s regulation of immigration.³⁹

2. Farmers Branch, TX

On June 19, 2007, the District Court for the Northern District of Texas, enjoined an ordinance, with similar provisions to Hazleton’s, in Farmers Branch, Texas.⁴⁰ Farmers Branch’s Ordinance 2903 required all tenants in a given household to show landlords proof of their citizenship

renting an apartment to someone not legally in the United States, and it distinguished all of the cases cited by Hazleton as involving more than mere renting. *Id.* at 223–24.

³⁵ *Id.* at 221. The court also dismissed Hazleton’s efforts to ensure that its housing provision complied with current immigration laws. *Id.* Although not explicit in its explanation, the court appears to argue, like other courts applying preemption analysis in the immigration context, that federal immigration statutes are not the end of the inquiry with respect to a person’s immigration status, and therefore any attempt to comply with the statutes would be futile. *See id.* (citing Justice Blackmun as stating that “‘the structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported.’” *Id.* (quoting *Plyler v. Doe*, 457 U.S. 202, 236 (Blackmun, J., concurring)). In short, only the federal government can effectively determine a person’s immigration status. *Lozano II*, 620 F.3d at 224.

³⁶ *Lozano II*, 620 F.3d at 221.

³⁷ *Id.* at 222.

³⁸ *Id.* The Third Circuit also noted that the ordinance is specifically in conflict with statutes that provide unauthorized immigrants access to relief in very specific situations like battered women and children. *Id.* (citing 8 U.S.C. § 1229b(b)(2)).

³⁹ *Id.* at 221. The court stated: “Again, it is not only Hazleton’s ordinance that we must consider. If Hazleton can regulate as it has here, then so could every other state or locality.” *Id.* (citing *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 373 (2008)).

⁴⁰ *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007). The “anti-illegal immigrant” ordinance was introduced by a Farmers Branch city councilman who stated that he “saw . . . property values declining . . . less desirable people mov[ing] into our neighborhoods, people who don’t value education, [and] people who don’t value taking care of their properties.” *See Oliveri, supra* note 6, at 80.

or immigration status.⁴¹ Unlike the Hazelton ordinance, the language of Ordinance 2903 also makes clear that it should not be interpreted as “promulgat[ing] new and additional [i]mmigration [l]aws or . . . conflict[ing] in any manner with . . . [f]ederal . . . [i]mmigration [l]aws.”⁴²

The district court failed to reach the implied preemption challenges of field and conflict preemption in determining whether to enjoin the Farmers Branch ordinance.⁴³ The court focused instead on Ordinance 2903’s usage of the Department of Housing and Urban Development’s (HUD) provisions regarding “eligible immigration status.”⁴⁴ Noting that “eligible immigration status” merely “define[s] which noncitizens are eligible for federal housing subsidies,” the court concluded that Ordinance 2903 prohibited landlords from providing housing to tenants who would be ineligible for federal housing subsidies under HUD provisions regardless of their legal status.⁴⁵ As the court emphasized, a number of noncitizens like workers, diplomats, and students, may be legally present in the United States and not qualify for federal housing subsidies.⁴⁶ Thus, in barring such legally present residents from residing in Farmers Branch, the ordinance “affect[ed] the ‘conditions under which a legal entrant may remain’” and constituted a regulation of immigration.⁴⁷ Moreover, landlords, who are unqualified and unauthorized to determine immigration status, would bear the responsibility of determining a tenant’s legal presence based upon inappropriate HUD regulations and es-

⁴¹ *Villas at Parkside Partners*, 496 F. Supp. 2d at 761–62. The Farmers Branch ordinance and the Hazelton ordinance because the Farmers Branch ordinance required that the tenants provide the landlords the evidence and not a government agency. *Id.* at 762. Evidence of citizenship or legal status included “the documents which must be submitted to evidence citizenship or eligible immigration status for residency in the United States.” *Id.* at 762. Although it is not entirely clear from the ordinance, the language seems to suggest that the landlord is responsible for determining whether the evidence is sufficient. *See Oliveri, supra* note 6, at 64.

⁴² *Villas at Parkside Partners*, 496 F. Supp. 2d at 762–63. A person violating the ordinance “shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in a sum not to exceed \$500 and a separate offense shall be deemed committed upon each day during or on which a violation occurs or continues.” *Id.* at 763 (internal quotations omitted).

⁴³ *See id.* at 777; Oliveri, *supra* note 6, at 67.

⁴⁴ *See Villas at Parkside Partners*, 496 F. Supp. 2d at 769 (internal quotations omitted); *see also Oliveri, supra* note 6, at 67–68. The City sent area apartment complexes a letter identifying the forms required to complete the verification form and comply with the ordinance. *See Villas at Parkside Partners*, 496 F. Supp. 2d at 768–69. All of the sample forms included in the letter, that landlords and tenants could use to verify legal status, were HUD forms. *Id.*

⁴⁵ *See id.* at 768; Oliveri, *supra* note 6, at 67.

⁴⁶ *See Villas at Parkside Partners*, 496 F. Supp. 2d at 768; Oliveri, *supra* note 6, at 67–68.

⁴⁷ *Villas at Parkside Partners*, 496 F. Supp. 2d at 768 (citing *De Canas v. Bica*, 424 U.S. 351, 355 (1976)); Oliveri, *supra* note 6, at 67–68.

establish a de facto set of standards.⁴⁸ Accordingly, the court found that the ordinance was a violation of the first *De Canas* test because it, effectively, regulated immigration.⁴⁹

Farmers Branch attempted to grapple with the problems of Ordinance 2903 by enacting Ordinance 2952 in January of 2008.⁵⁰ Like Ordinance 2903, Ordinance 2952 maintained a residential occupancy licensing scheme, but Farmers Branch removed the HUD-related regulations.⁵¹ Instead, city building inspectors were required to “verify with the federal government whether the occupant is an alien lawfully present in the United States.”⁵² The city contended that, pursuant to 8 U.S.C. § 1373(c), the federal government must provide the city with a report indicating the immigrant’s status.⁵³

On March 24, 2010, the district court permanently enjoined Ordinance 2952 and concluded that federal law preempted it.⁵⁴ Like *Lozano II*, the court refused to apply the presumption against preemption because the Ordinance regulated “an ‘area where there has been a history of significant federal power.’”⁵⁵ Applying preemption analysis, the court concluded that the ordinance was an impermissible regulation of immigration for multiple reasons. First, federal law preempted the ordinance because it placed another burden on “aliens” that was not authorized by Congress.⁵⁶ Secondly, the court rejected Farmers Branch’s attempt to use reports from the federal government as the basis for making a determination of immigrant status because § 1373 was an “inapplicable federal standard” for making such a decision, and because Congress never authorized an extension of federal immigration classifications with the provision.⁵⁷ Similarly, the court also concluded that the

⁴⁸ *Villas at Parkside Partners*, 496 F. Supp. 2d at 772; Oliveri, *supra* note 6, at 68. The district court found significant similarities between the duties that landlords in Farmers Branch would have to carry forth and the duties state agents in *De Canas* would have to carry forth. *Villas at Parkside Partners*, 496 F. Supp. 2d at 772. The district court in *Farmers Branch* ultimately found that Ordinance 2903 was in violation of the first *De Canas* test. *Id.* at 772.

⁴⁹ *Id.* at 772.

⁵⁰ *Villas at Parkside Partners v. City of Farmers Branch (Farmers Branch II)*, 701 F. Supp. 2d 835, 840 (2010).

⁵¹ *Id.* at 840.

⁵² *Id.* at 842 (citing Ordinance 2952 § D(1)). The court went on to note that the “Ordinance does not specify the method by which the City is to verify an applicant’s status with the federal government and instead conditions the City’s enforcement upon receipt of a report from the federal government that the ‘occupant is an alien not lawfully present in the United States.’” *Id.*

⁵³ *Id.* (citing 8 U.S.C. § 1373(c) which sets out the federal government’s obligation to respond to inquiries on the citizenship or immigration status of an individual).

⁵⁴ *Id.* at 861.

⁵⁵ *Id.* at 852 (citing *U.S. v. Locke*, 529 U.S. 89, 108 (2000)).

⁵⁶ *Villas at Parkside Partners*, 701 F. Supp. 2d at 855 (citing *Toll v. Moreno*, 458 U.S. 1, 12 (1982)).

⁵⁷ *Id.* at 856.

ordinance was impliedly preempted under both field and conflict preemption grounds because Farmers Branch used federal immigration classifications for purposes not contemplated by Congress.⁵⁸

3. Escondido, CA

The city of Escondido, California passed an AIO on October 18, 2006 that targeted housing with harboring provisions.⁵⁹ Ordinance 2006-38R penalized any owner of a dwelling unit who “harbors an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law.”⁶⁰ Applying field preemption analysis, the court found that federal immigration law would not likely preempt the ordinance.⁶¹ The “harboring” language was strikingly similar to 8 U.S.C. § 1324, which provides for penalties if a person “conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building.”⁶²

Unlike its conclusions with respect to field preemption, the court concluded that an application of conflict preemption would render the ordinance federally preempted because “it could stand as a burden or obstacle to federal law.”⁶³ The City intended to use the “federal government’s Systematic Alien Verification for Entitlements (SAVE) program” to determine whether the tenants were “illegal aliens.”⁶⁴ The court reasoned, however, that the SAVE program was not designed for making such determinations in private landlord-tenant relationships.⁶⁵ Moreover, the federal regulations clearly mandate that “the responsibility of determining an individual’s alienage status [would fall] on the local or state entities themselves.”⁶⁶ Cities using such resources in order to deter-

⁵⁸ *Id.* at 859.

⁵⁹ *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1047–48 (S.D. Cal. 2006).

⁶⁰ *Id.* at 1047–48.

⁶¹ *Id.* at 1055–56. The court granted a temporary restraining order (TRO) against the enforcement of the ordinance. *Id.* at 1060. The court’s TRO analysis considered the “likelihood of success on the merits,” the “possibility of irreparable harm,” and the “balance of hardships.” *Id.* at 1049. This required the court to consider issues going to the merits, like federal preemption of the ordinance. *Id.* at 1055–57; *see also* Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 *DENV. U. L. REV.* 1041, 1056–57 (2007) (arguing preemption of Illegal Immigration Relief Acts like the one in Hazleton and citing specific provisions of the Immigration and Nationality Act to support her argument).

⁶² *See* 8 U.S.C.S. § 1324(a)(1)(A)(iii) (LexisNexis 2009); *Garrett*, 465 F. Supp. 2d at 1056.

⁶³ *Garrett*, 465 F. Supp. 2d at 1057.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

mine legal status in a formal hearing would unquestionably burden Department of Justice and Homeland Security resources.⁶⁷

4. Riverside, NJ

In late July of 2006, the New Jersey Township of Riverside adopted the first of three versions of its AIHOs.⁶⁸ The first, Ordinance 2006-16, banned “renting to illegal aliens,” and stated that “any property owner or renter/tenant/lessee in control of property, who knowingly allows an illegal alien to use, rent or lease their property” would be violating the AIHO.⁶⁹ On October 18, 2006, multiple immigrant rights groups brought suit, alleging that Ordinance 2006-16 was unconstitutionally vague, unfairly put businesses at risk, and violated civil rights under state law.⁷⁰ On October 25, 2006, Riverside revised its ordinance to make it illegal to knowingly or recklessly harbor an “illegal alien.”⁷¹ Citing the district court decision in *Lozano v. Hazleton* and the substantial cost of litigation, however, the town council voted to repeal the ordinance.⁷²

⁶⁷ *Id.* The court also concluded that the Ordinance would violate due process because it would fail to provide landlords with any recourse with respect to the deprivation of their property, and the ordinance would also implicate their liberty interest because of the possibility of jail time. *Id.* at 1057–59. The court further concluded that the ordinance violated a tenant’s due process rights because it “fail[ed] to provide for notice or hearing of any kind prior to the deprivation of an illegal alien’s tenancy interest.” *Id.* at 1058–59. On December 14, 2006, the court approved a settlement between the two sides in which the Escondido City Council agreed to a permanent injunction and payment of plaintiff attorney fees. *See* Campbell, *supra* note 61, at 1057.

⁶⁸ James Katz, Verified Complaint at 4, *Riverside Coal. Bus. Pers. Landlords v. Twp. of Riverside* (Oct. 18, 2006), available at <http://www.aclu-nj.org/downloads/RiversideComplaint.pdf>.

⁶⁹ Township of Riverside, N.J., *Illegal Immigration Relief Act, Ordinance 2006-16 § 5(B)* (July 26, 2006), available at http://www.aclu.org/files/pdfs/immigrants/riverside_first_ordinance.pdf.

⁷⁰ *Businesses Sue Riverside, NJ over Vague, Discriminatory Anti-immigrant Ordinance*, AM. CIVIL LIBERTIES UNION (Oct. 18, 2006), <http://www.aclu.org/immigrants-rights/businesses-sue-riverside-nj-over-vague-discriminatory-anti-immigrant-ordinance>.

⁷¹ Riverside, N.J., *An Ordinance Amending Chapter 166, Referred to as the “Illegal Immigration Relief Act,” Ordinance 2006-26, § 166-5* (July 26, 2006), available at http://www.aclu.org/files/pdfs/immigrants/riverside_firstordinance.pdf; Campbell, *supra* note 61, at 1058.

⁷² *ACLU Applauds Repeal of Anti-Immigrant Ordinance in Riverside, NJ*, AM. CIVIL LIBERTIES UNION (Sept. 17, 2007), <http://www.aclu.org/immigrants-rights/aclu-applauds-repeal-anti-immigrant-ordinance-riverside-nj>; *see also* Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, <http://www.nytimes.com/2007/09/26/nyregion/26riverside.html> (“With the departure of so many people, the local economy suffered. . . . Meanwhile, the town was hit with two lawsuits challenging the law. Legal bills began to pile up, straining the town’s already tight budget. Suddenly, many people — including some who originally favored the law — started having second thoughts.”). In September of 2007 when the city council repealed the ordinance, Mayor George Conrad noted that the township failed to anticipate the “economic burden” of the original ordinance. *See* Belson & Capuzzo, *supra*. Indeed, after the ordinance was passed, immigrants left and the town became a “ghost town.” *See id.*

B. *Occupancy, Overcrowding, and Family*

AIHOs, however, are not limited to the AIOs that cropped up in 2006 and specifically targeted immigrants. Indeed, those ordinances represented only the most direct form of anti-immigrant laws. States and municipalities have long targeted immigrants in a variety of other ways.⁷³ Municipalities in particular have availed themselves of their powers pursuant to their respective property maintenance codes and have in some cases responded much more broadly than state governments.⁷⁴ Occupancy ordinances, in fact, represent the greatest challenge to contesting AIHOs because courts are deferential in their treatment of such ordinances.⁷⁵ Those ordinances have also been reasonably effective because studies have shown that immigrant families, and Latino immigrant families in particular, tend to maintain numerically larger households than the average American family.⁷⁶ This factor, along with many immigrant households being composed exclusively of male laborers, contributes to some immigrant households violating occupancy ordinances.⁷⁷

⁷³ In Georgia, for example, Governor Sonny Perdue signed the Georgia Security and Immigration Compliance Act (SB529), the state's most pervasive anti-immigrant legislation, in April of 2006. Stephanie A. Bohon, *Georgia's Response to New Immigration*, in IMMIGRATION'S NEW FRONTIERS, 67 (Greg Anrig, Jr. & Tova Andrea Wang eds., 2006). The bill targeted undocumented immigrants in the areas of employment, law enforcement, tax withholding, education, health care, and even emergency assistance. *Id.* Yet SB529, as legislation targeting unauthorized immigration, fails in comparison to the other bills proposed in the Georgia General Assembly that failed to gain approval. *Id.* at 75. The failed bills contained, among other things, provisions requiring immigrants to provide proof of citizenship, register to vote and apply for any public assistance, provide valid proof of legal residency for employment, attend public schools, and obtain valid driver's licenses. *See id.*

⁷⁴ *See* Bohon, *supra* note 73, at 78–79 (discussing response at Georgia local level to perceived unauthorized immigration). Cities in Georgia have diverged in their respective approaches to enforcement. *Id.* at 78. Some have limited their efforts to “English only” sign ordinances and the enforcement of old loitering statutes to target day laborers. *Id.* In Mecklenburg County, North Carolina, the state began a program in which Immigration and Customs Officials (ICE) will train Mecklenburg County deputies to screen for immigration violations. *See* McClain, *supra* note 73; *see also* Mark A. Grey, *State and Local Immigration Policy in Iowa*, in IMMIGRATION'S NEW FRONTIERS 44–64 (Greg Anrig, Jr. & Tova Andrea Wang eds., 2006) (describing measures taken at the state level in Iowa both positively and negatively affecting immigrant rights in the areas of language, housing, health care, education, identification, and law enforcement).

⁷⁵ *See generally* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 738 (1995) (declining to view the city ordinance's description of “family” as a maximum occupancy restriction).

⁷⁶ Even a cursory glance at the statistics demonstrates the significantly higher household size of Hispanic origin families. *See, e.g., Average Household Size by Race/Ethnicity*, DIVERSITYDATA.ORG, <http://diversitydata-archive.org/Data/Rankings/Show.aspx?ind=88> (last visited Nov. 5, 2010).

⁷⁷ Statistics support the greater rate of overcrowding in Hispanic households which we can infer would likely extend to Hispanic immigrant households. *See, e.g., Overcrowding Rate by Race/Ethnicity*, DIVERSITYDATA.ORG, <http://diversitydata-archive.org/Data/Rankings/Show.aspx?ind=92> (last visited Nov. 5, 2010).

More recently, with the encouragement of anti-immigrant activists, a number of municipalities, primarily in the South, have targeted immigrants by passing maximum occupancy ordinances or by enforcing pre-existing occupancy ordinances. No less than nine cities have passed maximum occupancy ordinances.⁷⁸ Others have attempted to circumvent the more straightforward language of the Hazleton-style ordinance and maximum occupancy ordinances.⁷⁹

1. Virginia

In Virginia, municipalities and counties have experimented with a variety of legal measures in order to manage their perceived unauthorized immigrant and overcrowding problems. The City of Manassas, Virginia, for example, implemented a Residential Overcrowding Code Enforcement Program (ROCEP) in 2004 complete with a telephone and email hotline for anonymous complaints.⁸⁰ As of December of 2005 the city found few overcrowding violations⁸¹ and decided to amend the definition of “family” in its housing ordinance by confining the meaning of family to “immediate relatives” and excluding extended family.⁸² The controversial definition remained in place until early 2006 when it was again abandoned by the city.⁸³ During the law’s short duration, as few as twenty-three home inspections—all Hispanic households—took place.⁸⁴ As Isabelle M. Thabault, the Director of the Fair Housing Project at the Washington Lawyers’ Committee pointed out, “When Manassas changed

⁷⁸ See LOCAL ORDINANCE DATABASE, *supra* note 2 (citing maximum occupancy ordinances in the Alabama towns of Hoover, Pelham, Northport and Gaston County, North Carolina); PRLDEF LIST OF LOCAL ORDINANCES, www.ailladownloads.org/advo/PRLDEF-ListOfLocalOrdinances.xls, (citing the towns listed above and also Defuniak Springs, Florida, Cobb County, Georgia, Gonzales, Louisiana, and Spotsylvania, Virginia).

⁷⁹ In Barnstable Town, Massachusetts, for example, the city passed an ordinance in 2006 that required landlords to note the occupants within their properties. See LOCAL ORDINANCE DATABASE, *supra* note 2, at 6 (stating that the list should be made available to “health officials and police”). Bridgeport, Pennsylvania not only passed a Hazleton-style ordinance, it also required landlords to register their housing units. See *id.* at 11 (the city also barred the employment of undocumented workers, and declared English the town’s only language).

⁸⁰ See News Release, City of Manassas, Virginia, Sept. 22, 2008, <http://www.manassas-city.org/DocumentView.aspx?DID=2358> (last visited Nov. 5, 2010) [hereinafter MANASSAS NEWS RELEASE]; *Civil Rights Lawsuit Filed Against the City of Manassas, VA and its School System for Discriminating Against Hispanic Residents*, THE EQUAL RIGHTS CTR. (Oct. 16, 2007), http://www.equalrightscenter.org/site/PageServer?pagename=p_r_07_10_16 [hereinafter EQUAL RIGHTS CENTER ACCOUNT].

⁸¹ *Id.*

⁸² *Activists Prepare to Challenge Va. Zoning Ordinance*, WTOPNEWS.COM, (Jan. 1, 2006, 10:47 AM) <http://www.wtopnews.com/index.php?nid=25&sid=662594>; EQUAL RIGHTS CENTER ACCOUNT, *supra* note 80. The family definition was one that Manassas had previously adopted in 1991, but shortly thereafter abandoned because the definition was possibly unconstitutional. See EQUAL RIGHTS CENTER ACCOUNT, *supra* note 80.

⁸³ EQUAL RIGHTS CENTER ACCOUNT, *supra* note 80.

⁸⁴ *Id.*

the definition of “family” to exclude extended families from living together, it essentially made a common Hispanic family structure illegal.”⁸⁵ On October 16, 2007, Washington, D.C.’s Equal Rights Center filed a complaint in the U.S. District Court for the Eastern District of Virginia alleging that, since 2005, approximately 92% percent of homes investigated under ROCEP were Hispanic-owned or occupied.⁸⁶ In September of 2008 the two sides settled out of court.⁸⁷ Pursuant to the settlement, Manassas agreed to eliminate its “overcrowding hotline, create a new overcrowding inspection procedure, and hire a housing manager to administer existing housing programs and address concerns by residents who claim they have been unfairly targeted.”⁸⁸

Like Manassas, numerous other cities in Virginia tinkered with their overcrowding ordinances. The City of Herndon, for example, stepped up enforcement of its overcrowding ordinances⁸⁹ and narrowed municipal definitions of family to include only immediate relatives—even if the total household, including extended relatives, failed to exceed occupancy

⁸⁵ *Id.* Manassas residents felt so threatened by the influx of undocumented immigrants that in early 2007 they formed “Help Save Manassas” (HSM) to “reduce the number of illegal aliens living in [the] community.” See AUDREY SINGER, JILL H. WILSON, & BROOKE DERENZIS, IMMIGRANTS, POLITICS, AND LOCAL RESPONSE IN SUBURBAN WASHINGTON, BROOKINGS INSTITUTION 15 (Feb. 2009), available at http://www.brookings.edu/~media/Files/rc/reports/2009/0225_immigration_singer/0225_immigration_singer.pdf [hereinafter IMMIGRANTS, POLITICS, AND LOCAL RESPONSE]. HSM grew quickly in 2007 from forty members to more than 1,500 by the fall of 2007. *Id.* In late 2007 the Ku Klux Klan, to the condemnation of officials and activists on both sides, made an anti-immigrant appeal to some of the ‘white, Christian’ residents of Manassas. See *id.* at 15 n.35; see also Pamela Constable, *Klan Leaflets Denounced in Manassas*, WASH. POST, Sept. 6, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/05/AR2007090502272.html>.

⁸⁶ See EQUAL RIGHTS CENTER ACCOUNT, *supra* note 80. Latinos make up only 15% of the Manassas population. *Id.* The complaint also alleged that the city used intimidation tactics and nighttime inspections solely against Hispanic residents. *Id.* The Equal Rights Center sued the Manassas school system, in addition to the city, alleging that the school system was working with the city by providing the names of fifty-two Hispanic students to city inspectors in order to determine which houses to target. See Jennifer Buske, *Suit Claiming Bias Against Hispanics is Settled*, WASH. POST, Sept. 25, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/24/AR2008092400088.html>.

⁸⁷ EQUAL RIGHTS CENTER ACCOUNT, *supra* note 80; Manassas News Release, *supra* note 80.

⁸⁸ See Buske *supra* note 86, Manassas News Release, *supra* note 87. The U.S. Department of Justice investigated the city based on the complaints brought against the school system and city and agreed to discontinue investigating the city after the settlement. See Buske, *supra* note 86.

⁸⁹ *Proposed Amendments to Chapter 1410 of the Codified Ordinances of Loudoun Cnty to Adopt Those Sections of the Virginia Uniform Statewide Building Code Dealing with the Enforcement of Occupancy Limitations in Existing Dwelling Units, Before the Loudoun Cnty Bd. of Supervisors* 3 (July 13, 2004), available at <http://www.loudoun.gov/controls/speeriol/resources/RenderContent.aspx?data=4c1077660e5d4e05a7ebd22bff455d35&tabid=313&fmpath=%2FBoard+Standing+Committees%2FFinance-Govt.+Services+Committee%2F2004%2F07-26-04+JT.+MEETING> [hereinafter *Loudoun County Hearing*].

restrictions.⁹⁰ Nearby Loudon County sought Herndon’s assistance in amending its municipal code to include Herndon’s overcrowding ordinances.⁹¹ In November 2007, Loudon County’s Board of Supervisors released a study of occupancy and overcrowding complaints for the county and made recommendations.⁹² The Loudon County Board found that the county’s zoning enforcement team responded to more than 1,000 complaints during the 2007 fiscal year.⁹³ Partly in response to these complaints, zoning enforcement staff conducted more than 7,246 residential inspections.⁹⁴ Overcrowding complaints for the same period totaled more than 200.⁹⁵ Loudon County amended its overcrowding and family ordinance provisions to limit the number of unrelated adults living together by restricting the number of people permitted to live in a single-family dwelling unit to four,⁹⁶ and requiring fifty feet or more per person per bedroom.⁹⁷ In fiscal year 2008, residents filed 178 overcrowding complaints.⁹⁸ Of the complaints, roughly 80% did not result in a single

⁹⁰ Stephanie McCrummen, *Manassas Ordinance Raises Cries of Bigotry*, WASH. POST, Jan. 1, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/31/AR2005123101069.html?referrer=emailarticle>. In addition to its housing ordinances, Herndon proposed a series of measures in August 2008 targeting day laborers including confiscation of bicycles chained to signs and trees, assigning a police officer and zoning inspector to the known day laborer area, creating a room rental permit program, creating a pedestrian “safe” zone prohibiting standing along a known strip where day laborers are known to congregate, revoking the ability of nearby convenience stores to serve alcohol, and removing pay phones in the area. See *Giving the Cold Shoulder to Laborers*, FAIRFAX COUNTY TIMES, Aug. 5, 2008, <http://www.fairfaxtimes.com/cms/archivestory.php?id=234746>.

⁹¹ See *Loudon County Hearing*, *supra* note 89, at 2–3. The zoning code that was adopted by both Herndon and Loudon is generally based on the International Property Maintenance Code. The specific family definition and enforcement frequency are local variations. Herndon informed Loudon County that enforcement of overcrowding ordinances could be quite time-consuming taking upwards of eight months. See *id.* at 3.

The relationship between the City of Herndon and Loudon County stems from the proximity of the locations to one another. See Sandhya Somashekhar, *Loudoun Approves Measure Targeting Illegal Immigrants*, WASH. POST, July 18, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071700797.html>. In fact, a day labor center in Herndon abuts the border of Loudon County. *Id.*

⁹² See *Illegal Immigration Issues, Board of Supervisors, Comm. of the Whole, Action Item 1*, Nov. 29, 2007, available at <http://www.loudoun.gov/controls/speerio/resources/RenderContent.aspx?data=b348209e0cb2456586a189158f157fb4&tabid=313&fmpath=%2FSpecial+Meetings%2F2007%2F11-29-07+Committee+of+the+Whole+Immigration+Issue> [hereinafter *Loudon County Immigration Issues*].

⁹³ See *id.* at 4.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *id.*

⁹⁷ See *id.* Neither basements nor recreation rooms count as sleeping areas unless they meet other requirements of the Maintenance Code. See *id.*

⁹⁸ See *Loudon County Immigration Issues, supra* note 92.

violation of the zoning ordinance pursuant to either the new family definition or the new overcrowding provisions.⁹⁹

In contrast to neighboring counties, Prince William County's crowding ordinances are less stringent.¹⁰⁰ The county's definition of family permits numerous nuclear families related to each other to live together with no more than two unrelated co-habitants.¹⁰¹ Like its neighbors, however, Prince William County took similar actions to stifle the county's perceived threat of undocumented immigrant overcrowding.¹⁰² Citing multiple vehicles and obvious co-habitation of multiple unrelated people,¹⁰³ native-born homeowners began reporting alleged overcrowding violations to the County's Property Code Enforcement (PCE) Group.¹⁰⁴ Overcrowding complaints increased from 128 in 2004 to 460 in 2007—a surge of more than 350%.¹⁰⁵ Complaints to PCE climbed, in general, from 2,271 in 2004 to 3,977 in 2007 and overwhelmed PCE.¹⁰⁶ PCE found fifty-seven occupancy violations in 2007—fifty-two more than they found in 2004.¹⁰⁷

⁹⁹ *See id.* Loudon County also contacted neighboring counties to determine what efforts they were undertaking to manage residential overcrowding. *See id.* The county learned that in 2007 Fairfax County added a multi-agency “strike force” to investigate overcrowding complaints. *See id.* Neighboring Henrico County also increased enforcement by creating the “Division of Community Maintenance” charged with zoning ordinance and property maintenance enforcement. *See id.*

¹⁰⁰ *See* IMMIGRANTS, POLITICS, AND LOCAL RESPONSE, *supra* note 85, at 14 n. 30.

¹⁰¹ *Id.* Some of the native-born residents found the definition of family to be too lenient. *Id.*

¹⁰² *See* IMMIGRANTS, POLITICS, AND LOCAL RESPONSE, *supra* note 85, at 12. Residents in Prince William County responded to the growing Latino population as changing the “feel” of many of the county's neighborhoods. *Id.* The native-born residents pointed to “more Spanish being spoken, less personal interaction among neighbors, [an]increase in outdoor activities and noise levels, and in some cases, a rise in street crime.” *Id.* at 14.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 14.

¹⁰⁵ *Id.*

¹⁰⁶ IMMIGRANTS, POLITICS, AND LOCAL RESPONSE, *supra* note 85. In order for a county official to investigate an overcrowding complaint by entering a home, the county official needs evidence indicating that co-habitants are not related. *Id.*

¹⁰⁷ *Id.* Like other communities proposing anti-immigrant legislation, Prince William County's Board of County Supervisors, often working with members of HSM in Manassas, passed a number of resolutions targeting immigrants. *Id.* at 15–17. In July of 2007, the Board voted unanimously for Resolution 07-609, ordering police to inquire into a person's legal status if the person is detained for violating a state law or county ordinance, and if the police officer has probable cause to believe the person is unlawfully present in the United States. *Id.* at 16, 17; *cf.* United States v. Arizona, 703 F. Supp. 2d 980, 988 (2010) (concluding that federal law would preempt ARIZ. REV. STAT. ANN. § 11-1051 (2010) that “require[ed] that an officer make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States, and requiring verification of the immigration status of any person arrested prior to releasing that person”).

Local activists in Prince William County were incapable of organizing enough support to counter the HSM-backed resolution. *Id.* at 17. One resident in September 2007, however,

2. Georgia

Like Virginia, Georgia counties and municipalities experimented with occupancy ordinances and other traditional property maintenance code powers to restrict the so-called problem of *camas calientes*.¹⁰⁸ *Camas calientes* refers to overcrowded living quarters in which people use beds in shifts.¹⁰⁹

In Gwinnett County, for example, housing officials increased their enforcement of existing occupancy limits in response to a surge in residential overcrowding complaints.¹¹⁰ One zoning enforcement inspector from the city of Duluth stated that approximately ninety-eight percent of

erected a twelve-by-forty foot sign in Manassas that stated "Prince William County stop your racism to Hispanics." *Id.* A number of people opposing the resolution demonstrated at the sign. IMMIGRANTS, POLITICS, AND LOCAL RESPONSE, *supra* note 85, at 17. The sign survived a failed Molotov cocktail attack, but unknown figures eventually ripped it in half. *Id.* at 17; Nick Miroff, *Raw Look at Immigration Crucible*, WASH. POST, Nov. 3, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/02/AR2007110202158.html?sid=ST2007110202179>. Some filmmakers, using the sign and its address, ironically 9500 Liberty, produced a documentary on the immigration debate in Prince William County. See Kevin R. Johnson, *9500 Liberty: Prince William County, VA*, IMMIGRATIONPROF BLOG (May 20, 2009), <http://lawprofessors.typepad.com/immigration/2009/05/9500-liberty-prince-william-county-va.html>. On October 16, 2007, the Board further expanded its efforts at eliminating unauthorized immigrants from the community by passing Resolution 07-894. IMMIGRANTS, POLITICS, AND LOCAL RESPONSE, *supra* note 85, at 17. The resolution created, *inter alia*, a Criminal Alien Unit within the police department, and directed staff to implement policies consistent with current state and federal law to prevent business licenses from being issued to illegal immigrants. *Id.* Despite staggering costs, the resolution remained in place and the Board only slightly modified the resolution in April 2008 to eliminate the probable cause language, which incurred racial profiling suspicions, and directed police to check the legal status only after the person has been arrested. *Id.* at 16, 18; *cf.* ARIZ. REV. STAT. ANN. § 11-1051 (2010) ("For any lawful stop, detention or arrest made by a law enforcement official . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation.").

¹⁰⁸ Bohon, *supra* note 73, at 80–81. Some municipalities and counties, at least initially, began restricting occupancy in dwellings by using anachronistic bordello laws. *Id.* at 78.

¹⁰⁹ *Id.* at 80–81; see also Jorge H. Atilas & Stephanie A. Bohon, *Camas Calientes: Housing Adjustments and Barriers to Social and Economic Adaptation among Georgia's Rural Latinos*, 19 S. RURAL SOC. 97, 100–01 (2003) (describing *camas calientes* as "indicative of Latino immigrants" dissatisfaction with their current housing and desire for living conditions closer to the American housing norms").

¹¹⁰ Mary E. Odem, *Unsettled in the Suburbs: Latino Immigration and Ethnic Diversity in Metro Atlanta*, in TWENTY-FIRST CENTURY GATEWAYS: IMMIGRANT INCORPORATION IN SUBURBAN AMERICA 105, 126 (Audrey Singer et al. eds., 2008). Like Cherokee County, Gwinnett County also took non-housing restriction measures to limit the number of undocumented immigrants. See Tom Opdyke, *Cobb Toughens Law on Occupants in One Home*, ATLANTA J.-CONST., July 25, 2007, at B5 [hereinafter *Cobb Toughens Law*]. County officials passed laws requiring all businesses that enter into contracts with the county to verify that all of their employees are legal residents. *Id.*

the complaints were about immigrants.¹¹¹ In 2009, Gwinnett County took further steps to limit housing occupancy by changing its definition of family.¹¹² The former definition of family stated: “One or more persons related by blood, marriage, adoption, or guardianship; or not more than three persons not so related who live together in a dwelling unit . . . or not more than two unrelated persons and any minor children related to either of them.”¹¹³ The change focused on how to obtain a Special Use Permit if a household consisted of “groups of more than three persons who are not related by blood or marriage.”¹¹⁴ As justification for the change, the county cited its 300 complaints per year regarding overcrowding in single-family residential areas, and the effect on these complaints by the newly established Gwinnett State College.¹¹⁵

In neighboring Cobb County, many residents complained of the emergence of overcrowded boarding houses occupied by immigrant workers, their families, and their friends.¹¹⁶ One code enforcement officer noted that at least 95% of the complaints were made by white residents complaining about Latino residents.¹¹⁷ In response to these complaints, Cobb County commissioners altered the housing ordinance.¹¹⁸ The old housing ordinance allowed for unlimited residents in the same house, so long as the members of the household were related to one another.¹¹⁹ The new housing ordinance required a minimum of fifty square feet of sleeping space per person regardless of relationship between the members of the household.¹²⁰ In 2007, Cobb County passed a

¹¹¹ Odem, *supra* note 110, at 126. Some of the code enforcement officers are armed police officers. Tom Opdyke, *Armed Police Enforce Codes: Cobb Targets Quality of Life*, ATLANTA J.-CONST., Sept. 16, 2007, at ZH1 [hereinafter *Armed Police Enforce Codes*].

¹¹² See Gwinnett County, Ga., Ordinance to Amend the 1985 Zoning Resolution of Gwinnett County to Redefine the Term “Family” and to Revise Provisions Concerning Variances From the Definition of the Term “Family” 2 (May 26, 2009) [hereinafter *Gwinnett County Zoning Resolution*] available at http://www.gwinnettcountry.com/static/departments/planning/pdf/zoning_resolution_amendment_2009_001.pdf.

¹¹³ *Id.*

¹¹⁴ *Id.* The county added the right to obtain a variance from this definition of family if an applicant faces unnecessary hardship because of the ordinance, if the group requesting the variance is between four and eight persons who live as a single housing unit and would find it economically prohibitive to live in a group of three or fewer, the housing unit contains at least eighty square feet of bedroom space per occupant, the housing unit has functioning utilities, and the area the housing unit is built upon contains at least one-half acre and at least 1,200 square feet of paved parking. *Id.* at 3.

¹¹⁵ *Id.* at 1–2.

¹¹⁶ Odem, *supra* note 110, at 126. Cobb County residents attempted to deflect any criticism that they were targeting undocumented immigrants or singling out Latinos by stating that the county wanted to limit college-student-occupied boarding houses and noting that there are white, black and Hispanic boarding houses. See *Cobb Toughens Law*, *supra* note 110.

¹¹⁷ *Id.*

¹¹⁸ Odem, *supra* note 110, at 126.

¹¹⁹ *Id.*

¹²⁰ *Id.*

more restrictive housing ordinance requiring at least 390 square feet of space for each adult occupant, and for each car parked overnight at the residence.¹²¹ “Family” was also restricted to include only parents, children, siblings, grandparents, and grandchildren.¹²²

The City of Roswell in Fulton County took measures similar to both Gwinnett and Cobb counties. The city council narrowed its definition of persons qualifying as a family and adopted a more restrictive housing ordinance in order to eliminate boarding houses in single-family neighborhoods.¹²³ In July 2006 the city council approved a new housing ordinance restricting each residence to no more than three unrelated occupants in one single-family home and eliminating cousins as relatives in the definition of family.¹²⁴

Municipal ordinances targeting overcrowding through square-footage mandates and family definitions represent, arguably, a greater obstacle to immigrant communities than Hazleton-style IIRAs. First, municipal overcrowding ordinances that fail to include any specific references to undocumented immigrants do not capture the attention of rights groups the way traditional AIHOs like Hazleton-style IIRAs do because they are technically applicable to *any* resident in violation. As we have seen, however, occupancy ordinances are generally used to target undocumented immigrants, and county and municipal officials have revised their respective property maintenance codes to make the regulations more restrictive. Potential challenges to housing ordinances also face an uphill battle in court because courts are deferential to property maintenance codes so long as they fail to implicate federal powers directly or trigger more searching judicial inquiries by implicating fundamental rights questions. In short, state powers provide counties and municipalities broad legal cover and deferential treatment in court as long as a municipality can show that the ordinances are enacted for the purposes of protecting the health and safety of the community. As a result, while Hazleton-style IIRAs are challenged around the nation, rights groups are scrambling for legal tools and struggling to gain com-

¹²¹ *Cobb Toughens Law*, *supra* note 110; Odem, *supra* note 110, at 126. For example, no more than four adults would be permitted to legally live in a 1,600-square-foot home. *Cobb Toughens Law*, *supra* note 110.

Cobb County police officers involved in code enforcement are members of the “Quality of Life” unit. *Armed Police Enforce Codes*, *supra* note 111. The Cobb code enforcement officials also conduct criminal checks and have arrested more than sixty individuals for misdemeanor or felonies. *Armed Police Enforce Codes*, *supra* note 111. As of September 7, 2007, Cobb enforcement officers had issued at least two citations and more than forty warnings pursuant to its overcrowding ordinance. *Id.*

¹²² Odem, *supra* note 110, at 126.

¹²³ *Id.*

¹²⁴ *Id.* at 127. An editorial in the *Atlanta Journal-Constitution* applauded the efforts to restrict undocumented immigrants in suburbs like Roswell. Odem, *supra* note 110, at 127.

munal support in order to properly confront what they perceive as selective property maintenance code enforcement.

II. THE CURRENT LEGAL REGIME

A. *The Current Legal Regime*

The current legal regime is replete with litigation strategies to contest both kinds of AIHOs. Yet the legal doctrines that form the basis to challenge AIHOs like Hazleton-style IIRAs are much more successful than those used to challenge the occupancy ordinances, and the legal doctrines do not cross-apply to one another.

1. Preemption

As the court rulings in Hazleton, Farmers Branch, and Escondido demonstrate, preemption doctrine is an effective tool against AIHOs like Hazleton-style IIRAs.¹²⁵ However, some scholars, like Professor Oliveri, argue that preemption is an unstable doctrine incapable of consistently invalidating IIRAs.¹²⁶ Succinctly, “there is no guarantee that future courts will find these ordinances preempted.”¹²⁷ He points to the Farmers Branch decision as being limited to its facts and that decisions on local IIRAs, with respect to housing, may not be consistent with Hazleton because housing is traditionally a state interest and thus an application of field preemption doctrine is much more questionable.¹²⁸ Professor Oliveri specifically points to occupancy restrictions for single-family residences because courts have consistently upheld such restrictions where “family” definitions do not run afoul of *Village of Belle Terre v. Boraas*.¹²⁹

Professor Oliveri also argues that conflict preemption is unstable ground on which to base an attack on IIRAs.¹³⁰ He notes that preemption requires the “‘impossibility of dual compliance’ with both state and federal law.”¹³¹ Moreover, IIRAs simply target people who already have the burden of proving their legal status under federal immigration law.¹³²

¹²⁵ For a similar perspective, see Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. Chi. Legal F. 27, 29 (arguing that “here is no compelling reason to discard the preemption power, as it retains its common law and statutory vitality”).

¹²⁶ See Oliveri, *supra* note 6, at 68.

¹²⁷ *Id.*

¹²⁸ See *id.* at 68–69.

¹²⁹ See *id.* (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).

¹³⁰ See *id.* at 70.

¹³¹ *Id.* (quoting *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 143 (1963)).

¹³² *Id.*

They merely prevent individuals from entering into a lease until their legal status has been verified.¹³³

Although Professor Oliveri expresses important reservations about preemption doctrine as a basis for challenging IIRAs, his fears have not yet been realized. With the exception of Valley Park, Missouri’s ordinance, preemption challenges to local AIHOs have not failed.¹³⁴ Yet, even in Valley Park, the court dismissed the case with respect to the housing-related aspects of the ordinance after the city removed all such references.¹³⁵ The provisions that the court concluded were not preempted were related to business licensing laws.¹³⁶

Although some confidence is warranted with respect to the successful application of preemption doctrine in the immigration and housing context, the Ninth Circuit’s decision in the appeal of *United States v. Arizona*,¹³⁷ if contrary to the Third Circuit decision in *Lozano II*, may force the Supreme Court to revisit preemption doctrine yet again.¹³⁸ During its October 2010 term, the Supreme Court heard argument in *Chamber of Commerce v. Whiting*, which was an appeal from the Ninth Circuit decision in *Chicanos Por La Causa, Inc. v. Napolitano*.¹³⁹ In *Chicanos Por La Causa*, the Ninth Circuit held that the Immigration Re-

¹³³ See *id.*

¹³⁴ See *Gray v. City of Valley Park*, 2008 U.S. Dist. LEXIS 7238, at *59–60 (E.D. Mo. Jan. 31, 2008). Without conducting any substantive studies of the local immigrant population, Valley Park’s all-white board stated that the city found “that illegal immigration leads to higher crime rates, contributes to overcrowded classrooms and failing schools, and destroys our neighborhoods and diminishes our overall quality of life.” See Kristen Hinman, *Valley Park to Mexican Immigrants: “Adios, Illegals!”*, RIVERFRONT TIMES, Feb. 28, 2007, available at <http://www.riverfronttimes.com/2007-02-28/news/valley-park-to-mexican-immigrants-adios-illegals> (quoting Valley Park, Mo., Ordinance No. 1708 (July 17, 2006), available at <http://www.valleyparkmo.org/docs/Ordinances/Ordinance%201708.pdf>). The mayor, Jeffery Whitteaker, declared that the ordinance’s purpose was to stem the flow of immigrants into the community—stating, “You got one guy and his wife that settle down here, have a couple kids, and before long you have Cousin Puerto Rico and Taco Whoever moving in.” Oliveri, *supra* note 6, at 80; see Hinman, *supra*. The mayor also made sure to distinguish Valley Park’s Asian community by pointing out their friendly disposition. See Hinman, *supra*. Despite the legislation, Valley Park’s Latino community barely comprises two percent (a relatively stable percentage) of a population of 6,518, with little indication of growth. *Id.*

¹³⁵ See Oliveri, *supra* note 6, at 61 n.16; see also Margo Schlanger, *Case Summary: Gray v. City of Valley Park*, CIVIL RIGHTS LITIG. CLEARINGHOUSE (Feb. 16, 2008), <http://www.clearinghouse.net/detail.php?id=9476&search=source—general;caseName—valley%20park;orderby—caseState,%20caseName>.

¹³⁶ *Gray*, 2008 U.S. Dist. LEXIS 7238, at *55–60.

¹³⁷ 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010) (granting in part and denying in part the United States’ motion for preliminary injunction).

¹³⁸ During its October 2010 term the Supreme Court heard argument in *Chamber of Commerce v. Whiting*, which was an appeal from the Ninth Circuit decision in *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2008), holding that the Immigration Reform and Control Act did not expressly or impliedly preempt an Arizona statute that made the use of E-Verify mandatory. *Id.* at 864–66.

¹³⁹ 558 F.3d 856 (9th Cir. 2008).

form and Control Act was not an express preemption of an Arizona statute that made the use of E-Verify, an employment registration program, mandatory.¹⁴⁰ The court also concluded that Congress did not impliedly preempt the Arizona statute either.¹⁴¹

A thorough discussion of the relationship between *Lozano II*, *Chicanos Por La Causa*, and *Arizona* is beyond the scope of this Note. Yet, a cursory review of all three cases demonstrates the variety of contexts in which a court could apply preemption doctrine. Moreover, *Chicanos Por La Causa* and *Arizona* (especially if the Ninth Circuit follows its own lead in *Chicanos Por La Causa* and concludes that SB 1070 is not preempted) are, at least superficially, distinguishable from *Lozano II*. First, the Supreme Court may give deference to state-level decisions to enter the field of immigration regulation, especially since field preemption analysis is the most permissive of the three standards. And secondly, by targeting immigrant housing, municipalities like Hazleton, at least arguably, go much farther than the Arizona statutes. Succinctly, a community that bars people from living within its borders does more to banish them from a given geographical place than a community that bars them from working there. Employment laws engender debates that have gone on in U.S. history since the last quarter of the nineteenth century. On the other hand, AIHOs are from a much more recent tradition in U.S. history with roots in the 1950s: housing discrimination.

B. *Occupancy Ordinances*

Immigrant rights activists challenging occupancy ordinances that are ordinarily a part of property maintenance codes are unable to make use of preemption doctrine in their challenges because occupancy ordinances do not specifically single out any group of people.¹⁴² Instead, occupancy ordinances are either selectively-enforced or amended so the enforcement can be tailored to single out a select group of people, like immigrants.¹⁴³ Although the examples above clearly show the usage of such ordinances for anti-immigrant purposes, immigrant rights activists and immigrant communities have more difficulty garnering attention and support for this cause.¹⁴⁴ Undoubtedly, the prevalence of Hazleton-style ordinances make challenges to occupancy ordinances far less likely because they, arguably, represent a less critical threat to immigrant communities. Yet, any serious analysis of AIHOs fails to provide a clear picture

¹⁴⁰ *Id.* at 864–66.

¹⁴¹ *Id.* at 866–67.

¹⁴² See discussion *infra* Parts II.B.1.a.–2.

¹⁴³ See *supra* note 142 and accompanying text.

¹⁴⁴ See discussion *infra* Part II.B.1 and accompanying notes.

if it avoids examining occupancy ordinances and their respective underlying legal doctrines.

1. Fair Housing Act

The Fair Housing Act (FHA), at first blush, appears to be where parties challenging occupancy ordinances could turn in order to bring their claims. Yet despite its significant protection against discrimination, the Fair Housing Act (FHA) is not a very effective tool against occupancy ordinances.¹⁴⁵ Section 3604(a) makes it unlawful to refuse to negotiate the price of, sell, rent, receive offers, deny, or otherwise make unavailable "a dwelling to any person because of race, color, religion, sex, familial status, or national origin."¹⁴⁶ The federal provision also applies to eviction.¹⁴⁷ Like subsection (a) of § 3604, subsection (b) prohibits discrimination against persons in the negotiation of, sale, or rental, of a dwelling, or in the provision of services to that dwelling on the basis of "race, color, religion, sex, familial status, or national origin."¹⁴⁸ Section 3604(b)'s extension of 3604(a) ensures that both provisions apply to the most common forms of discriminatory actions in housing, such as offering different lease terms on the basis of race or different levels of service to renters or owners.¹⁴⁹

The provisions in § 3604 are extended further by § 3617's protections. Section 3617 specifically reinforces § 3604 by making it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of" their rights under § 3604, because they have already exercised their rights under § 3604, or because someone else has assisted a person in exercising their rights under § 3604.¹⁵⁰ According to Professor Rigel Oliveri, § 3617 thus protects "[h]ousing providers or their employees" who often bring claims against persons attempting to coerce or intimidate them as a result of their assistance of housing buyers, renters, or sellers.¹⁵¹

Most courts have used the FHA as a basis for recognizing a cause of action for disparate impact in the housing sector.¹⁵² There is a split among the circuits, however, with the Second Circuit adopting a less rigorous test than other circuits.¹⁵³ In *Tsombanidis v. West Haven Fire*

¹⁴⁵ See 42 U.S.C. §§ 3601–3619, 3631 (2006).

¹⁴⁶ 42 U.S.C. § 3604(a) (2006).

¹⁴⁷ See *id.*; Oliveri, *supra* note 6, at 82.

¹⁴⁸ § 3604(b).

¹⁴⁹ See *id.*; Oliveri, *supra* note 6, at 82.

¹⁵⁰ 42 U.S.C. § 3617 (2000).

¹⁵¹ Oliveri, *supra* note 6, at 83.

¹⁵² ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 727 (3d ed. 2005).

¹⁵³ See Oliveri, *supra* note 6, at 94–95.

Dept.,¹⁵⁴ the Second Circuit characterized disparate impact analysis as a doctrine applicable to “facially neutral policies or practices that may have a discriminatory effect.”¹⁵⁵ A plaintiff basing a discrimination claim on disparate impact doctrine must demonstrate “(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant’s facially neutral acts or practices.”¹⁵⁶ Noticeably absent from the Second Circuit’s analysis is the need for a plaintiff to prove that the discrimination was intentional.¹⁵⁷ The plaintiff must, however, prove that the “practice ‘actually or predictably results in . . . discrimination’”¹⁵⁸ and that the facially neutral policy and discriminatory effect are causally connected.¹⁵⁹ A plaintiff will not meet her burden by simply raising an “inference of discriminatory impact.”¹⁶⁰ A plaintiff that successfully meets her burden “shifts [the burden] to the defendant to ‘prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect.’”¹⁶¹ If a defendant proves that its actions furthered a legitimate, bona fide governmental interest and that it had no alternative that would serve the same purposes, a court is not at liberty to balance the discriminatory impact against the importance of the government’s rationale; the plaintiff simply loses the argument.¹⁶²

In the Fourth, Sixth, Seventh, and Ninth Circuits, courts follow a more complex disparate impact analysis as set forth in *Metropolitan Housing Development Corp. v. Village of Arlington Heights (Arlington Heights II)* that tends to disfavor plaintiffs bringing such claims.¹⁶³ Professor Oliveri succinctly described the *Arlington Heights II* test as requiring that a court balance four factors:

- (1) whether there is a disparate impact on a protected group;
- (2) whether there is any evidence that the municipal action is, in fact, intentional, or motivated in any part

¹⁵⁴ 352 F.3d 565, 575 (2d Cir. 2003).

¹⁵⁵ *Tsombanidis v. W. Haven Fire Dep’t.*, 352 F.3d 565, 575 (2d Cir. 2003).

¹⁵⁶ *Id.* at 574–75.

¹⁵⁷ *Id.* at 575 (citing *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934–36 (2d Cir. 1988)).

¹⁵⁸ *Id.* at 575 (quoting *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 90 (2d Cir. 2000)).

¹⁵⁹ *Id.* at 575 (citing *Hack*, 237 F.3d at 90).

¹⁶⁰ *Id.* at 575 (citing *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997)).

¹⁶¹ *Tsombanidis*, 352 F.3d at 575 (quoting *Huntington Branch*, 844 F.2d at 936). The *Huntington Branch* Court decided that they would not require defendants to prove that their actions furthered a compelling state interest—the standard for cases of intentional discrimination. ELLICKSON & BEEN, *supra* note 152 at 708.

¹⁶² ELLICKSON & BEEN, *supra* note 152 at 708 (citing *Langlois v Abington Hous. Auth.*, 207 F.3d 43 (1st Cir. 2000), as an example).

¹⁶³ 558 F.2d 1283, 1290 (7th Cir. 1977); Oliveri, *supra* note 6, at 94–95.

by discriminatory animus; (3) whether there is a legitimate economic or public safety rationale for the municipality's action; and (4) whether the plaintiff is requesting that the municipality provide her with housing, or whether she merely wishes for the municipality to stop interfering with her ability to obtain housing for herself.¹⁶⁴

Unlike the Second Circuit test, the second prong of the *Arlington Heights* test makes a plaintiff's evidence of intentional discrimination relevant to the analysis of whether she has proven disparate impact.¹⁶⁵

Although both tests make it exceedingly difficult to make out a claim of disparate impact, the *Arlington Heights II* test narrows the class of plaintiffs capable of proving disparate impact much more so than the Second Circuit's test. For example, plaintiffs establish a prima facie case under the FHA if they fall under one of the FHA's protected classes.¹⁶⁶ Yet, for legal immigrants or Latinos challenging municipal overcrowding ordinances that “appear” to single out the Latino community, proving that the discrimination was based on race or national origin would be nearly impossible if courts applied the *Arlington Heights II* test and interpreted the second prong to mean that the plaintiff has to provide evidence of intentional discrimination. On the other hand, a court applying the Second Circuit test to stepped-up enforcement efforts in Virginia would provide a plaintiff with a much more viable legal claim because increased enforcement would arguably satisfy the Second Circuit's second prong of disproportionate impact, and Second Circuit plaintiffs do not need to prove intentional discrimination. Yet, applying the Second Circuit test to stepped-up enforcement efforts in Georgia might be only marginally more successful because the increased enforcement would satisfy the second prong of the disproportionate impact test, and plaintiffs do not need to prove that the discrimination was intentional.

Yet, for unauthorized immigrants, the situation is much more perilous because the FHA does not protect against discrimination based on alienage or legal status.¹⁶⁷ Therefore, unless unauthorized immigrant claims could be attached to claims against Latinos (which they cannot), unauthorized immigrants challenging an ordinance on a disparate impact theory based on race or national origin discrimination would hardly be taken seriously in a court of law. Therefore, the current state of the law leaves unauthorized immigrants precariously relying on legal immigrant

¹⁶⁴ See Oliveri, *supra* note 6, at 95; see also *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290–93 (7th Cir. 1977).

¹⁶⁵ ELLICKSON & BEEN, *supra* note 152 at 707.

¹⁶⁶ *Id.*

¹⁶⁷ See generally 42 U.S.C. §§ 3601–3619, 3631 (2006); Oliveri, *supra* note 6, at 83–84.

challenges to discriminatory municipal ordinances and practices, already a monumental hurdle under a disparate impact analysis, instead of asserting their own legal claims.

a. The FHA, Maximum Occupancy, and Family

The FHA's legal utility is even further eviscerated against occupancy ordinances and restrictive familial definitions by the FHA's § 3607(b)(1). Section 3607(b)(1) of Title 42 renders unchallengeable (via exemption) state and local laws that are "reasonable . . . restrictions" on the maximum occupancy of a dwelling.¹⁶⁸ Courts have given meaning to the reasonableness language of 3607(b)(1) by stating that city ordinances are reasonable (and thus exempt from FHA challenges) if the ordinance appears to "apply *uniformly* to all residents of all dwelling units."¹⁶⁹ The Supreme Court has interpreted this language to include maximum occupancy restrictions that are "plainly and unmistakably" used to prevent overcrowding.¹⁷⁰ Thus, plaintiffs challenging total occupancy limits designed to protect municipalities against overcrowding in dwellings face an insurmountable obstacle in § 3607.¹⁷¹ Moreover, a state's enactment of economic or social welfare regulations as an exercise of its police powers is presumptively valid.¹⁷² Courts also give deferential treatment to state and municipal legislative decisions specifying the maximum number of individuals or the minimum number of feet for the occupancy provision.¹⁷³ On the other hand, the § 3607(b)(1) exemption does not apply to an ordinance "designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants living quarters can contain."¹⁷⁴ Also, parties seeking to use the § 3607(b)(1) exemption from the FHA's restrictions bear the burden of demonstrating that they are

¹⁶⁸ 42 U.S.C. § 3607(b)(1) (2006).

¹⁶⁹ *Id.* at 636 (emphasis added) (quoting *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996) (reasoning that municipalities have "a legitimate interest in decreasing congestion, traffic, and noise in residential areas, and ordinances restricting the number of unrelated individuals who may occupy a single family residence are reasonably related to these legitimate goals").

¹⁷⁰ *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 734 (1995) ("Section 3607(b)(1)'s language-'restrictions regarding the maximum number of occupants permitted to occupy a dwelling'-surely encompasses maximum occupancy restrictions. . . . In sum, rules that cap the total number of occupants in order to prevent overcrowding of a dwelling 'plainly and unmistakably,' fall within § 3607(b)(1)'s absolute exemption from the FHA's governance." (citations omitted)); ELLICKSON & BEEN, *supra* note 152, at 728.

¹⁷¹ *Fair Hous. Advocates Ass'n, Inc. v. City of Richmond Heights*, 209 F.3d 626, 633 (6th Cir. 2000).

¹⁷² *Id.* at 635.

¹⁷³ *Id.* at 636 ("Every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." (quoting *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996)).

¹⁷⁴ *Oxford House*, 514 U.S. at 735.

entitled to the exemption.¹⁷⁵ Thus, parties are more likely to lead successful challenges against newly enacted local-level ordinances if local authorities mix maximum occupancy and family in their definitions, and local officials appear to be attempting to preserve the family character of their neighborhood.

In *City of Edmonds v. Oxford House, Inc.*,¹⁷⁶ for example, the Supreme Court concluded that an ordinance that stated “occupants of single-family residence units must compose a ‘family,’” which was defined as “an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage,” was not entitled to the § 3607(b)(1) exemption from FHA regulations.¹⁷⁷ Other serious challenges to maximum occupancy ordinances would also have to be litigated on facts that suggest that the ordinances would unreasonably restrict the use of single-family residences by protected groups.

Challenging ordinances based on § 3607(b)(1) would therefore have mixed results, at best. Before Manassas abandoned its 2006 family definition, the city likely would have qualified for the § 3607(b)(1) exemption because its familial definition appeared to apply to *all* residents in *all* dwelling units and did not appear to mix both familial limits and total occupancy restrictions (even if it looked like an attempt to preserve the “family” character of the neighborhood). A party challenging Herndon, Virginia’s restrictions, on the other hand, might be more successful. Herndon’s restriction on the number of family members living in one household irrespective of household size could conceivably run afoul of the FHA’s guidelines and not be exempt under § 3607(b)(1) because it appears to be an attempt to preserve the family character of Herndon, and the ordinance fastens on the composition of households rather than on the total number of occupants in living quarters. Loudon County’s restrictions both limiting the number of individuals to four per single-family dwelling unit and at least fifty square feet per person, per bedroom would easily meet the standards under § 3607(b)(1). Increased enforcement in Prince William County, although selective, would also fail to create a cause of action under the FHA because the county’s more permissive definitions remain the basis for the enforcement. Although Georgia’s Gwinnett County also increased enforcement of existing occupancy limits in response to a surge in residents complaining of overcrowding,¹⁷⁸ an FHA-based cause of action would need substantially

¹⁷⁵ *Fair Hous. Advocates Ass’n*, 209 F.3d at 634.

¹⁷⁶ *Oxford House*, 514 U.S. at 729.

¹⁷⁷ *Id.* at 725.

¹⁷⁸ See Odem, *supra* note 110, at 126. Like Cherokee County, Gwinnett County also took non-housing measures to limit the number of undocumented immigrants. See *Cobb Toughens*

more in order to be a meritable claim. Cobb County, Georgia's requirement of 390 feet of space per person¹⁷⁹ would be worthy of more attention under § 3607(b)(1) because the 390-foot requirement is substantially higher than most square foot restrictions. A court likely would uphold Roswell's restrictions to three persons¹⁸⁰ unless the plaintiff could prove that the ordinance's restrictions were tied to some other form of discrimination prohibited under § 3604(a). It is important to note that the hypothetical success predicted above in this paragraph is little more than speculation. Thus, the FHA and the caselaw interpreting it provide few successful challenges to overcrowding ordinances that appear to be selectively enforced against immigrants. These ordinances likely represent the new direction of AIHOs due to their robust ability to withstand legal challenges.

2. Equal Protection

Like FHA restrictions on occupancy ordinances, equal protection challenges to occupancy ordinances are also not very effective. In *Village of Arlington Heights v. Metropolitan Housing Development Corp. (Arlington Heights I)*,¹⁸¹ the Supreme Court held that judicial deference to a legislative decision is unjustified if "there is [] proof that a discriminatory purpose" is a motivating factor.¹⁸² Evidence of discriminatory purpose may provide a "starting point" if an official action "bears more heavily on one race than another."¹⁸³ Despite facially-neutral state action, a pattern may emerge that is "unexplainable on grounds other than race."¹⁸⁴ The court added, however, that such cases are rare.¹⁸⁵ According to Professors Robert Ellickson and Vicki Been "[t]he small numbers of plaintiffs who successfully prove discriminatory intent might suggest that the problems of proof *Arlington Heights I* poses are virtually *insurmountable*."¹⁸⁶ Even proving discriminatory purpose on the part of leg-

Law, *supra* note 110. County officials passed laws requiring all businesses that enter contracts with the county to verify that all of their employees are legal residents. *Id.*

¹⁷⁹ Odem, *supra* note 110, at 126.

¹⁸⁰ *Id.*

¹⁸¹ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (Arlington Heights I)*, 429 U.S. 252 (1977).

¹⁸² *Id.* at 265–66.

¹⁸³ *Id.* at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* For an assessment of the challenges of proving legislative motive, see Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 120–24; see also Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 9 (1988) (examining illicit legislative motive and creating a framework for determining whether an analysis of motive should take place based on (1) the need, (2) feasibility, (3) practical and political consequences, and (4) value).

¹⁸⁶ ELLICKSON & BEEN, *supra* note 152, at 702 (emphasis added).

islators only shifts the burden to the defendant to establish that the defendant would have reached the same decision had the discriminatory purpose not been a motivating factor.¹⁸⁷

Applying those standards to the changes to family definitions and occupancy ordinances, a Court *might* conclude that some of the claims have merit, but such cases would be difficult to prove unless legislators discussing the ordinance in legislative hearings prior to its enactment included especially targeted rhetoric towards immigrants or Latinos. Even if legislators made substantial references to *illegal aliens* in the legislative history, and a court found discriminatory intent, a municipality could still cite social, economic, and public safety reasons for enacting the ordinance and ensure for their ordinance less exacting judicial scrutiny.

III. ALTERNATIVE LEGAL AND PUBLIC POLICY STRATEGIES

The limited utility of the challenges above to AIHOs demonstrates that alternative legal and public policy strategies might significantly contribute to neutralizing anti-immigrant actions at the local level. Legal alternatives, in addition to preemption doctrine, must challenge occupancy ordinances specifically enforced against immigrants while respecting local control over property maintenance. Likewise, effective public policy strategies must balance national interests in neutralizing anti-immigrant legislation and sentiment while respecting state police power—an undoubtedly Herculean feat.¹⁸⁸

A. *Legal Alternatives*

1. Hazleton-style AIOs

Although courts have applied preemption doctrine to invalidate Hazleton-style AIOs with relative consistency, Congress and courts should make preemption a more robust doctrine. Although it would be a decidedly difficult solution, congressional legislation placing immigration squarely within the first or second test under preemption doctrine would substantially improve faith in the doctrine with respect to challenges to state and local ordinances accused of regulating immigration. Congressional language *clearly* stating that any state or local ordinance that *plainly* implicates immigrants (both legal and undocumented), targets immigrants, or attempts to police immigration, is invalid and explicitly functions as an impermissible regulation of immigration pursuant to the

¹⁸⁷ Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (*Arlington Heights I*), 429 U.S. 252, 271 n.21 (1977).

¹⁸⁸ Cristina Rodríguez has advanced a similar argument in her article but she goes much farther by arguing that immigration should be seen as a state interest. See *infra* note 212 and accompanying text. My argument here is much narrower because I focus on anti-immigrant housing ordinances (AIHOs).

first test in preemption doctrine.¹⁸⁹ As an alternative, Congress could use the second test, field preemption, to declare its intent to “effect a complete ouster of state power—including state power to promulgate laws not in conflict with federal laws with respect to the subject matter which the statute attempts to regulate.”¹⁹⁰ If court and administrative agency interpretation of such legislation could withstand the inevitable challenges, reinforcing preemption doctrine with congressional action might prove very effective.

2. Occupancy Ordinances

Although the disparate impact test is not a reliable tool in challenging occupancy ordinances, the more permissive Second Circuit disparate impact test should be adopted by *all* circuits. This would eliminate the confusion of the *Arlington Heights II* test by removing the question of whether or not evidence of intentional discrimination would be necessary to prove a claim of disparate impact.¹⁹¹

¹⁸⁹ *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 765 (N.D. Tex. 2007) (citing *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995)). Professor Oliveri makes a similar argument: “Congress should enact legislation explicitly preempting states and localities from enacting such restrictions.” Oliveri, *supra* note 6, at 121. But Professor Oliveri’s reasoning for such a policy is based on his argument that preemption doctrine is inherently unstable and not very effective as a tool for challenging anti-immigrant housing ordinances. He states, in pertinent part:

[P]reemption is a risky and unsatisfying approach for several reasons. First, there is no guarantee that future courts will find these ordinances preempted. The Farmers Branch ruling appears to be limited to its facts, and it is entirely possible that future courts will break with Hazleton and find that local AI housing provisions are not preempted at all. Express field preemption is clearly out of the question given the absence of federal law on immigration-related housing restrictions. Implied field preemption is also problematic because while the power to regulate immigration has historically been a federal prerogative, states and municipalities have long been recognized to possess the authority to regulate housing as part of their police power.

Oliveri, *supra* note 6, at 68–69. Courts have proven his conclusions, with respect to Farmers Branch, incorrect based on the most recent decision. *See supra* note 50–58 and accompanying text. Mark Grube argues that an expansion of preemption doctrine with respect to the first *De Canas* test, express preemption, would be “an overly expansive view of what constitutes immigration regulation” and “could lead to the federal immigration power preempting a wide variety of local legislation, such as sanctuary laws and day-labor centers.” Grube, *supra* note 8, at 425. This is, without question a reasonable concern, but in the express preemption context, it is difficult to see an alternative.

¹⁹⁰ *Villas at Parkside Partners*, 496 F. Supp. 2d at 765 (citing *Wilson*, 908 F. Supp. 755 at 768). By contrast, Grube argues that “courts should not rely on a field-preemption theory to strike down local immigration ordinances: courts could only accomplish this with an overly expansive field definition that would result in localities’ losing the ability to regulate in a wide variety of areas in which they have a strong interest.” Grube, *supra* note 8, at 424. Although an important concern, courts have shown themselves more than capable of using field preemption and applying it in a fairly reasonable manner. *See discussion supra* Part I.A.

¹⁹¹ *See Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights* [hereinafter *Arlington Heights II*], 558 F.2d 1283, 1290 (1977); Oliveri, *supra* note 6, at 95.

Although equal protection challenges under *Arlington Heights I* are rarely effective, the Equal Protection Clause provides other grounds to challenge discrimination. Class-of-one claims, a relatively new cause of action,¹⁹² and a wider application of them in the housing context, would provide yet another tool to challenge discriminatory application of maximum occupancy ordinances. In a class-of-one analysis, plaintiffs must "show (1) that they were treated differently from other similarly situated individuals, and (2) that [a] [d]efendant unequally applied a facially neutral ordinance for the purpose of discriminating against [p]laintiffs."¹⁹³ Plaintiffs need not be a member of a protected class to assert a class-of-one claim.¹⁹⁴ If applied with greater frequency, class-of-one claims could conceivably mitigate the difficulty of bringing a cause of action on a disparate impact theory. Although courts apply rational basis review to class-of-one claims, a plaintiff would not have the difficulty of offering evidence of a "significantly adverse or disproportionate impact on persons of a particular type" mandated by the second prong of the Second Circuit disparate impact test.¹⁹⁵

B. Public Policy Solutions

A successful public policy strategy involving housing and immigration must grapple with (1) state and federal interests and (2) the effect that AIOs, especially AIHOs, have on lawfully-present immigrants. Although we could dismiss AIOs as ephemeral strategies by provincial, isolated communities, we cannot deny that local concerns like property values and safety merit at least *some* attention.¹⁹⁶ Moreover, state and

¹⁹² See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (recognizing a class-of-one claim: "Our cases have recognized successful equal protection claims brought by a 'class-of-one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.").

¹⁹³ *Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006) (referencing *Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996)). See generally David S. Cheval, *Student Works, By the Way – The Equal Protection Clause Has Always Protected a "Class-of-One": An Examination of Village of Willowbrook v. Olech*, 104 W. VA. L. REV. 593 (2002) (examining *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), and its possible effect on litigation). As David Cheval notes, courts apply rational basis to a "class-of-one" claim. Cheval, *supra*, at 606; see also *Olech*, 528 U.S. at 564 ("Our cases have recognized successful equal protection claims brought by a 'class-of-one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.").

¹⁹⁴ See *Campbell*, 434 F.3d at 1314.

¹⁹⁵ *Tsombanidis v. W. Haven Fire Dep't.*, 352 F.3d 565, 574–75 (2d Cir. 2003).

¹⁹⁶ See CONG. BUDGET OFFICE, PUB. NO. 2500, *THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 9–10* (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf> [hereinafter UNAUTHORIZED IMMIGRANTS AND STATE AND LOCAL BUDGETS] (noting that despite federal assistance to state and local governments, the costs that state and local governments incur for the services that they provide unauthorized immigrants are not outweighed by the tax revenue that they gener-

local governments that pass AIHOs, or reinforce existing occupancy ordinances, potentially impose both negative and positive externalities on their neighbors.¹⁹⁷

One useful solution would be to further separate the spheres of federal and state control in our federalist system. Congress could accomplish this by increasing the role of the federal government in protecting classes of individuals prone to harassment and abuse, and decreasing the federal government's role in housing by giving states greater latitude to govern such matters pursuant to their traditional state powers. One way of implementing such a solution would be for Congress to mandate that states implement fair housing acts that extend protection to individuals based on alienage and legal status.¹⁹⁸ States could also adopt statewide housing codes or occupancy ordinance provisions that limit amendments on the local level.

Professor Oliveri has argued that the only way to truly mitigate the discrimination that accompanies Hazleton-style AIOs would be to add alienage and legal status as protected classes under the FHA because failing to protect those classes leaves national origin minorities exposed.¹⁹⁹ He observed that:

neither alienage (whether or not a person is a U.S. citizen) nor legal status (whether or not a noncitizen is legally present in the United States, and, if so, under what type of status) are specified in the [FHA]. As a result, both public and private actors are largely free to discriminate on these bases, at least as far as the FHA is concerned.²⁰⁰

ate from unauthorized immigrants). The Congressional Budget Office study narrowly focuses on the effect of unauthorized immigrants on state and local government budgets in the education, health care, and law enforcement sectors. A more interesting study might broaden its analysis of the fiscal effects unauthorized immigrants create by also discussing the impact unauthorized immigrants have on the local economy. Compare UNAUTHORIZED IMMIGRANTS AND STATE AND LOCAL BUDGETS, *supra*, with Belson & Capuzzo, *supra* note 72 (discussing the effect of AIHOs on the Riverside, New Jersey economy: "With the departure of so many people, the local economy suffered. Hair salons, restaurants and corner shops that catered to the immigrants saw business plummet; several closed. Once-boarded-up storefronts downtown were boarded up again.").

¹⁹⁷ See Rodríguez, *supra* note 11, at 572 (arguing that both local and federal government have authoritative roles to play in the immigration process).

¹⁹⁸ Professor Oliveri suggests a similar argument, but argues that protection for alienage and national origin classifications should be extended through the FHA. See Oliveri *supra* note 6, at 122–23.

¹⁹⁹ Oliveri, *supra* note 6, at 86. Professor Oliveri also rightfully observes that approximately one-third of families with immigrants are "mixed status families" that have both undocumented immigrants and legal immigrants. *Id.* at 98 (citing JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 2 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>).

²⁰⁰ Oliveri, *supra* note 6, at 83–84.

The result is that “landlord[s] who [wish] to discriminate against national origin minorities may adopt a ‘citizens only’ policy.”²⁰¹ Professor Oliveri’s observation that national origin minorities remain exposed without further protection is compelling.

Still, a superior approach would be congressional legislation mandating that states implement fair housing acts as noted above, or amend state fair housing acts (SFHAs) already on the books, to include alienage and legal status as protected from discrimination. For example, Virginia’s Fair Housing laws, like the FHA, prohibit discrimination with respect to “race, color, religion, national origin, sex, elderliness, familial status, or handicap.”²⁰² An amended formulation would add “alienage and legal status.” SFHAs that extend protection to alienage and legal status would effectively end AIHOs as long as states did not promulgate their own insurmountable legal doctrines like *Arlington Heights II*. Municipalities and counties would no longer be able to pass AIHOs without being directly challenged by SFHA actions. Ironically, state-level causes of action, at least with respect to AIHOs, would effectively mirror their federal counterparts. Plaintiffs could argue that an AIHO runs afoul of the SFHA. Similarly, aggrieved parties could also argue that state law preempts a municipal AIHO.²⁰³

State preemption is, indeed, an effective argument in circumstances where states adopt uniform housing codes and limit the ability of local officials to amend those codes. These actions are not without precedent. In *Briseno v. City of Santa Ana*,²⁰⁴ for example, a Santa Ana resident challenged the city’s occupancy requirements for dwelling units on preemption grounds because the ordinance was stricter than the state occupancy requirements. The court concluded that the state legislature intended to preempt local occupancy ordinances.²⁰⁵

State law enacted with these changes would further the interests of immigrants, and authorities at the federal, state, and local level. On the one hand, immigrants would be afforded substantially more protection than the current legal regime provides them. More importantly, greater protection could conceivably resolve the current mess that is the intersec-

²⁰¹ *Id.* at 84–85.

²⁰² V.A. CODE ANN. § 36-96.1 (2009).

²⁰³ *See, e.g.,* *Briseno v. City of Santa Ana*, 8 Cal. Rptr. 2d 486, 489 (Cal. Ct. App. 1992) (concluding that the state’s Uniform Housing Law generally preempts local occupancy ordinances).

²⁰⁴ *See id.*

²⁰⁵ *See Briseno*, 8 Cal. Rptr. 2d at 489. States did, however, provide local authorities with the power to amend local occupancy ordinances, but only if “‘local climatic, geological, or topographical conditions’ exist, and only if the municipality makes an express finding that such conditions exist.” *See Briseno*, 8 Cal. Rptr. 2d at 489. This might be considered conflict preemption because a local government that failed to follow these procedures would clearly inhibit the state’s ability to exercise state law.

tion between immigration and housing and remove at least one element of the immigration controversy.²⁰⁶

States adopting these reforms would also benefit immigrants by not interfering with state and local policy that already works to protect immigrant rights. California, for example, responded to the proliferation of AIHOs by enacting legislation barring landlords from asking tenants their legal status,²⁰⁷ and prohibiting municipalities from passing ordinances forcing landlords to take such actions.²⁰⁸ New York City also has an ordinance prohibiting landlords from questioning tenants about their legal status or discriminating against them based on alienage or citizenship.²⁰⁹

Other scholars argue that a federal policy allowing states and localities more variation in their legal regimes with respect to their immigration populations could have potentially positive effects. Professor Howard Chang argues that “federal authorization of divergent state policies [could be viewed as] creating laboratories of generosity toward immigrants.”²¹⁰ Professor Peter Spiro advances a similar argument under his “steam-valve” theory.²¹¹ Professor Cristina Rodríguez argues that

²⁰⁶ It goes without saying that housing is only one small piece of the immigration controversy. State and local authorities target undocumented immigrants through employment restrictions, law enforcement, language restrictions, and limited health care, to name a few examples. Some scholars like Professor Rodríguez argue that the present anti-immigrant climate at the local legislative level “represent[s] a temporary and actually quite limited outburst brought on by unusually high levels of unauthorized immigration and a hyperactive media during a period of heightened national awareness of immigration.” Rodríguez, *supra* note 11, at 595. She adds that “[o]nce the national debate has subsided (particularly if Congress passes meaningful immigration reform in the next two years) most local communities will revert to compromise positions of some sort, perhaps participating in 287(g) agreements while abandoning city-led enforcement measures such as landlord penalties.” *Id.* The present economic crisis, on the other hand, may make our present anti-immigrant climate permanent.

²⁰⁷ See Cal. Civ. Code § 1940.3(b) (2007); Oliveri, *supra* note 6, at 123.

²⁰⁸ See *id.*

²⁰⁹ N.Y. City Admin. Code § 8-107(5); Oliveri, *supra* note 6, at 123. Speaking to the Senate Judiciary Committee in the summer of 2006 as the committee debated a house bill that would penalize so-called sanctuary cities, New York City Mayor Michael Bloomberg stated that “[a]lthough they broke the law by illegally crossing our borders or overstaying their visas, our City’s economy would be a shell of itself had they not, and it would collapse if they were deported.” Rodríguez, *supra* note 11, at 577 n.35.

²¹⁰ Rodríguez, *supra* note 11, at 576 n.8; see also Grube, *supra* note 8, at 395 (“Courts should resist the temptation to announce an overly broad preemption doctrine that would undermine local governments’ ability to legislate in areas where they have strong interests.”).

²¹¹ See generally Peter J. Spiro, *Learning to Live With Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (arguing that states that have strong anti-immigrant sentiments should be allowed to pass such legislation on the local level so that the federal government could avoid enacting such sentiments at the national level, and that under such a system of competitive federalism state governments would have to weigh the benefits of such legislation against the costs associated with them). Professor Olivas contrasts Professor Spiro’s steam-valve theory with his “hydraulic principle,” in which power “flows between states and the federal government: there is a constant tug between the two levels, in an almost-hydraulic relationship. As

states and local governments are critical to the immigration debate because they are already tasked with the duty of integrating immigrants into the “body politic.”²¹² Thus, promoting public policy that both respects the rights of immigrants and that also acknowledges the important role of the states would go a long way towards rectifying the shortcomings of the current legal regime.

CONCLUSION

Although preemption doctrine has been relatively successful against ordinances that specifically implicate immigration policy, it remains deeply flawed because it fails to address back door immigration enforcement like restrictive overcrowding and family ordinances in property maintenance codes. And, as the case of Manassas has shown us, plaintiffs will not effectively challenge occupancy ordinances without widespread organization by immigrants’ rights activists. Beyond their blatant effort to eliminate immigrants from their communities, municipalities and counties in Virginia and Georgia fail to grasp the effect their efforts have on surrounding communities.

Local efforts to curb immigrant-friendly housing may simply force both the positive and negative externalities of immigration onto other communities.²¹³ On the one hand, those communities might be rid of the ills they associate with undocumented immigrants. Succinctly, the legal regime in which local immigration regulation currently takes place allows states to take advantage of the labor and economic benefit that immigrants bring to communities without bearing any of the costs that families moving into a community incur—like housing, education, medical, and traffic congestion. Put more plainly, cities that pass Hazleton-

the federal piston pulls, state powers are accordingly diminished; as the state powers increase, the federal piston correspondingly decreases.” See Olivas, *supra* note 125, at 30.

²¹² Rodríguez, *supra* note 11, at 571. More specifically, Rodríguez argues that “immigration regulation should be included in the list of quintessentially state interests, such as education, crime control, and the regulation of health, safety, and welfare, not just because immigration affects each of those interests, but also because managing immigrant movement is itself a state interest.” *Id.* Much smaller cities have also adopted innovative policies towards immigrants. *Id.* at 578–79. New Haven, Connecticut, for example, has adopted a municipal identification card that immigrants can use for access to both city and private services. *Id.* at 579.

²¹³ See *id.* at 572. Scholars have conducted multiple studies on the benefits of immigration. The Third Circuit in *Lozano v. City of Hazleton* made a similar observation by first noting that Hazleton clearly could not have intended to make undocumented immigrants homeless:

No municipality would benefit from forcing any group of residents (“legal” or “illegal”) onto its streets. Rather, it appears plain that the purpose of [Hazleton’s] housing provisions is to ensure that aliens lacking legal immigration status reside somewhere other than Hazleton.

620 F.3d 170, 224 (3rd Cir. 2010).

style AIOs or restrictive housing ordinances are attempting to free ride on the labor and economic benefit of immigrants by forcing other cities and counties with less restrictive property maintenance codes to bear all or most of the costs. However, as Professor Rodríguez argues, cities that pass AIOs are more likely to suffer economically from the absence of immigrants.²¹⁴ Thus, a more prudent approach would be for Congress to pass legislation mandating that states pass SFHAs protecting alienage and legal status in addition to national origin, and for states to pass occupancy ordinances with reasonable requirements that allow for little deviation. This would accommodate the current legal regime that traditionally grants states police power over matters like housing.

Although many immigrants and immigrant communities would be adversely affected by such a policy in the short term and be forced to “vote with their feet,” few states would craft housing policies hostile to immigrants in the long term because of the overwhelming economic cost communities incur from AIO litigation and loss of business.²¹⁵ According to Professor Rodríguez, “many states and localities, when faced with the consequences of their measures—namely, high legal fees, the disappearance of immigrant populations that had revitalized dying former industrial towns, and the high administrative costs of enforcement—will start reconsidering the extremity of their policies.”²¹⁶

Moreover, instead of being caught moving from community to community as neighboring counties copy one another in passing AIOs or narrower AIHOs, immigrants entering different states would have a better perception of where native-born residents and communities would be more hostile to their presence if immigration were regulated at the state level.²¹⁷ For example, states with the greatest need for labor and economic development would be more likely to promulgate immigrant-friendly legislation. Thus, the proposed state laws would also ensure that the distribution of externalities would flow not from fear and harassment,

²¹⁴ Rodríguez, *supra* note 11 at 595; Belson & Capuzzo, *supra* note 72 (quoting the mayor, who stated that the city failed to consider the economic burden of the original ordinance). Professor Spiro advances a similar argument and illustrates nicely how states that try to pass anti-immigrant legislation often suffer a significant backlash in his discussion of California’s Proposition 187. See Spiro, *supra* note 211, at 1641–43. Arizona, no doubt, faces similar problems because of the passage of SB1070.

²¹⁵ For an expanded discussion of this argument, see generally Spiro, *supra* note 211 (arguing that state and local governments should be allowed to pass legislation so that strong anti-immigrant sentiments are not visited upon the entire country, and that allowing state and local action would create an environment of competitive federalism).

²¹⁶ Rodríguez, *supra* note 11, at 595; Spiro, *supra* note 211, at 1640–41.

²¹⁷ See Spiro, *supra* note 211, at 1640–41 (“Most important are the concrete economic interests which would militate against adopting anti-alien measures. Leaving aside presumed across-the-board corporate preferences for a greater supply of labor (rendered cheaper thereby), foreign corporations might have an aversion to locating in states that appear unreceptive to aliens in general, or to their nationals in particular.”).

but from a community’s competitive advantage relative to its surrounding communities.²¹⁸ Until meaningful reform takes place, however, “the frontline [truly] is everywhere.”²¹⁹

²¹⁸ *Id.*

²¹⁹ RAGE AGAINST THE MACHINE, *No Shelter*, on GODZILLA – THE ALBUM (Epic/Sony Music Soundtrax 1998).

