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No Vacancy: Why Immigrant Housing Ordinances Violate FHA and Section 1981

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NOTES

No Vacancy: Why Immigrant Housing Ordinances Violate FHA and Section 1981

I. INTRODUCTION

> Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door![1]

The United States has always faced immigration challenges. After the Pilgrims established the first U.S. colony in New England,[2] an ensuing immigration stream grew the U.S. population to over 300 million people within 386 years.[3] This population growth has increased the demands for social services and the costs required to maintain infrastructure.[4] As one response to these rising costs and other immigration concerns, state and municipal governments have enacted local laws to regulate immigrant housing.[5]

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[1] EMMA LAZARUS, *The New Colossus*, *in* 1 THE POEMS OF EMMA LAZARUS, at 203 (Cambridge, The Riverside Press 1888). These words have adorned the Statue of Liberty for over a century, welcoming millions of immigrants to the United States. *See* Statue of Liberty Nat'l Monument—History & Culture (U.S. Nat'l Park Serv.), http://www.nps.gov/stli/historyculture/index.htm (follow "*The New Colossus* Sonnet at Statue of Liberty" hyperlink) (last visited Sept. 5, 2008) (noting history of the Statue of Liberty and providing background on the sonnet).

[2] *See United States of America*, 29 ENCYCLOPEDIA BRITANNICA 149, 203-04 (noting that the Pilgrims established the first permanent U.S. colony in New England in 1620).

[3] The U.S. Census Bureau estimates that the U.S. population surpassed 300 million people on October 17, 2006. Additionally, the bureau estimates that international migration adds one person to the population every thirty-one seconds. Press Release, U.S. Census Bureau News, Nation's Population to Reach 300 Million on Oct. 17 (Oct. 12, 2006), http://www.census.gov/Press-Release/www/releases/archives/population/007616.html (last visited Sept. 5, 2008).

[4] *See* Marshall Coover, Comment, *Put Me in the Game, Coach: Texas Should Accept the Invitations from Congress, the Federal Judiciary, and the U.S. Department of Justice for States to Join the Immigration Law Enforcement Team*, 39 TEX. TECH L. REV. 315, 317 (2007) (arguing that states should supplement federal enforcement of immigration laws due to the costs that immigrants impose on states).

[5] At least six municipalities have passed immigrant housing ordinances. FARMERS BRANCH, TEX., CODE OF ORDINANCES ch. 26, art. IV, § 26-116(f) (2006) [hereinafter Farmers Branch Ordinance], *invalidated by* Villas at Parkside Partners v. Farmers Branch, 496 F. Supp. 2d 757 (N.D. Tex. 2007), *available at* http://www.ci.farmers-branch.tx.us/Communication/Ordinance%20No%202892.html; Escondido, Ca., Ordinance No. 2006-38 R (Oct. 18, 2006) [hereinafter Escondido Ordinance], *available at* http://www.aclu.org/pdfs/immigrants/escondido_

Yet while Congress has exclusive power to regulate immigration, there is no per se federal preemption of every state and municipal immigration law.[6] Rather, federal immigration laws only preempt those state and municipal laws that specify which immigrants may enter the United States and the conditions under which those immigrants may remain.[7] In *Villas at Parkside Partners v. City of Farmers Branch*,[8] the Northern District of Texas enjoined a municipal

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ordinance.pdf; Cherokee County, Ga., Ordinance No. 2006-003 (Dec. 5, 2006) [hereinafter Cherokee County Ordinance], *available at* http://www.aclu.org/pdfs/immigrants/cherokeecounty_ordinance.pdf; Valley Park, Mo., Ordinance No. 1715 (Sept. 26, 2006) [hereinafter Valley Park Ordinance], *available at* http://www.aclu.org/pdfs/immigrants/valleypark_amendedordinance.pdf; Riverside, N.J., Ordinance No. 2006-16 (July 26, 2006) [hereinafter Riverside Ordinance], *available at* http://www.aclu.org/pdfs/immigrants/riverside_firstordinance.pdf; Hazleton, Pa., Ordinance No. 2006-10 (July 13, 2006), *available at* http://clearinghouse.wustl.edu/chDocs/public/IM-PA-0001-0003.pdf (regulating employment and harboring of unlawful immigrants); Hazleton, Pa., Ordinance No. 2006-13 (Aug. 15, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_firstordinance.pdf (requiring apartment dwellers to obtain occupancy permits after establishing citizenship or lawful residence); Hazleton, Pa., Ordinance No. 2006-18 (Sept. 21, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf (regulating employment and housing of unlawful immigrants and together with Ordinance No. 2006-19, replacing Ordinance No. 2006-10); Hazleton, Pa., Ordinance No. 2006-19 (Sept. 21, 2006), *available at* http://www.smalltowndefenders.com/090806/2006-19%20_Official%20English.pdf (declaring English as the official language of Hazleton); Hazleton, Pa., Ordinance No. 2006-40 (Dec. 28, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_thirdordinance.pdf (amendment to provide "implementation and process" section) [hereinafter, collectively, Hazleton Ordinances].

While statutes have not generally regulated immigrant housing, Oklahoma recently enacted House Bill 1804, the "Oklahoma Taxpayer and Citizen Protection Act of 2007," which regulates harboring, employing or providing housing to unlawful immigrants. OKLA. STAT. ANN. tit. 21, § 446 (West Supp. 2008) (effective Nov. 1, 2007). Anyone who violates this section is guilty of a felony and punishable by at least one-year imprisonment and/or a $1000 fine. § 446(D). The statute also restricts organizations' abilities to issue identification documents to unlawful immigrants. § 1550.42(B)-(D). Further, when an individual is confined in jail or questioned by the police, law enforcement has the authority to make reasonable efforts to determine an arrestee's immigration status. Tit. 22, § 171.2; *see also* tit. 25, § 1313 (prohibiting public employers from contracting with any unlawful immigrants); tit. 56, § 71 (prohibiting unlawful immigrants from receiving any federal, state or municipal benefits).

[6] U.S. CONST. art. I, § 8, cl. 4 (vesting in Congress the power to establish a "uniform Rule of Naturalization"); DeCanas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); *id.* at 355 ("[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted . . . .").

[7] *DeCanas*, 424 U.S. at 355 (Regulation of immigration is "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.").

[8] 496 F. Supp. 2d 757 (N.D. Tex. 2007). The facts of the *Farmers Branch* case are as follows: the plaintiffs included both property renters and property owners. *Id.* at 763 n.3. The property renters included two permanent residents and five U.S. citizens. Verified Complaint for Declaratory and Injunctive Relief ¶¶ 7-8, 10-12, Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757 (N.D. Tex. 2007) (No. 06-CV-2376) [hereinafter Farmers Branch Verified Complaint]. Both permanent residents lived in an apartment complex with some family members who were neither U.S. citizens nor resident immigrants. *Id.* ¶¶ 7-8. The five U.S. citizens were children who lived with their families in apartment complexes. *Id.* ¶¶ 10-12. Some of the family members were neither U.S. citizens nor resident immigrants. *Id.* ¶¶ 10-12.

The property managers operated two apartment complexes in Farmers Branch. *Id.* ¶¶ 15-16. They did not know the immigration status of their tenants and did not require proof of citizenship or immigration status before renting tenants an apartment. *Id.* ¶ 17. Further, their leases with tenants comprehensively stated the circumstances under which they may evict a tenant or

ordinance that regulated immigrant housing.[9] The court held that federal authority preempted the municipal ordinance because the ordinance enacted a locally prescribed framework to determine which immigrants could rent apartments.[10] However, the court suggested that it would affirm an ordinance that deferred to federal immigration standards.[11]

Such deference is problematic because while border communities might prioritize immigration concerns, regulation of immigrant housing is a national problem that requires a uniform, federal approach.[12] It directly implicates political functions involving foreign affairs and relations,[13] an area where federal courts typically defer to the Executive Branch.[14] When state and municipal governments regulate immigrant housing, local policies proclaim who is and is not welcome in the local jurisdiction.[15] These actions encumber the United States' ability

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terminate the tenancy. These circumstances did not include provisions regarding immigration status. *Id.* ¶ 18.

[9] *Farmers Branch*, 496 F. Supp. 2d at 777.

[10] *Id.* ("Farmers Branch . . . has created its own classification scheme for determining which noncitizens may rent an apartment in that city . . . [b]ecause Farmers Branch has attempted to regulate immigration differently from the federal government, the Ordinance is preempted by the Supremacy Clause.").

[11] *See id.* The court explained:

> Farmers Branch has failed to adopt federal immigration standards. The Ordinance adopts federal housing regulations that govern which noncitizens may receive housing subsidies from the federal government, not federal immigration standards that determine which noncitizens are legally in this country. Because Farmers Branch has attempted to regulate immigration differently from the federal government, the Ordinance is preempted by the Supremacy Clause.

Id.

[12] The federal government has uniformly regulated many social welfare programs with an initial disparate impact on Border States. As the Supreme Court has noted:

> It is significant that the Federal Government has seen fit to exclude undocumented immigrants from numerous social welfare programs, such as the food stamp program, the old-age assistance, aid to families with dependent children, aid to the blind, aid to the permanently and totally disabled, and supplemental security income programs, the Medicare hospital insurance benefits program, and the Medicaid hospital insurance benefits for the aged and disabled program.

Plyler v. Doe, 457 U.S. 202, 251 (1982) (Burger, C.J., dissenting) (citations omitted).

[13] Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) ("It is pertinent to observe that any policy toward immigrants is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . [S]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").

[14] Immigration and Naturalization Serv. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" (quoting Immigration and Naturalization Serv. v. Abudu, 485 U.S. 94, 110 (1988))).

[15] *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 528 (M.D. Pa. 2007) (Since "[e]xcessive enforcement [of immigration laws] jeopardizes our alliances and cooperation with regard to matters such as immigration enforcement, drug interdiction and counter-terrorism investigations," the federal government is responsible for achieving balanced enforcement of immigration laws.).

Additionally, statements from residents in Riverside, New Jersey, demonstrate that the goal of anti-immigrant ordinances may be to drive out unlawful immigrants, regardless of whether

to speak with one voice, affect perceptions of federal immigration policies, and affect the national welfare.[16] Further, the local officials responsible for the actions are not politically accountable to the entire nation.[17] For these reasons, this Note argues that state and municipal governments should refrain from regulating immigrant housing and producing inconsistent approaches to a common problem.

This Note also argues that the most practical challenges to these state and municipal anti-immigrant laws arise under both the Fair Housing Act ("FHA")[18] and Section 1981 of the Civil Rights Act of 1866 ("Section 1981").[19] FHA prohibits property owners and managers from engaging in practices that discriminate against tenants based on race, color, or national origin.[20] Section 1981 provides anyone within U.S. jurisdiction, regardless of race, ethnicity, or national origin, the right to contract and to receive full and equal treatment under the laws.[21] Since it is unlikely that Congress will expeditiously enact federal regulation of immigrant housing, local residents must challenge these anti-immigrant laws through the judicial process.[22]

In this Note, Part II analyzes common problems and legal deficiencies with state and municipal efforts to regulate immigrant housing. Part III argues that the most practical challenges to these state and municipal laws arise under both FHA and Section 1981, and Part IV concludes that comprehensive regulation would address the immigration problem, while avoiding fundamental legal deficiencies.

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the federal government decided to remove the immigrants. *See* Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1.

[16] Zadvydas v. Davis, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting) ("[J]udicial orders requiring release of removable aliens, even on a temporary basis, have the potential to undermine the obvious necessity that the Nation speak with one voice on immigration and foreign affairs matters."). Further, negative perceptions of the United States might reduce tourist revenues, reduce foreign demand for U.S. products, hinder national efforts to negotiate favorable trade agreements, and hinder national abilities to build coalitions to address global issues.

[17] *Cf.* McCulloch v. Maryland, 17 U.S. 316, 428 (1819) (accountability to constituents is a "sufficient security against erroneous and oppressive taxation"). In *McCulloch*, the Court prohibited states from taxing non-constituents. For similar reasons, only nationally accountable officials should legislate on issues affecting immigration and foreign affairs.

[18] Fair Housing Act, 42 U.S.C. §§ 3601-31 (2000).

[19] Civil Rights Act of 1866, 42 U.S.C. § 1981 (2000).

[20] 42 U.S.C. § 3604; *see also* Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1051-53 (2007) (arguing that "immigrant restriction bills" violate FHA).

[21] 42 U.S.C. § 1981; *see also* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) ("Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295 (1976) (Section 1981 "proscribe[s] discrimination in the making or enforcement of contracts against, or in favor of, any race."); Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 546 (M.D. Pa. 2007) (striking down the Hazleton Ordinances, *supra* note 5, as violations of Section 1981).

[22] Immigration reform is a controversial subject in Congress. In June 2007, the U.S. Senate killed the latest efforts for reform. Senate Immigration Bill Suffers Crushing Defeat, http://www.cnn.com/2007/POLITICS/06/28/immigration.congress/index.html (last visited Sept. 5, 2008).

II. LOCAL EFFORTS TO REGULATE IMMIGRANT HOUSING UNDERMINE SUPERIOR POWERS, VIOLATE DUE PROCESS AND EQUAL PROTECTION RIGHTS, AND DAMAGE LOCAL COMMUNITIES

State and municipal efforts to regulate immigrant housing have increased due to the expense that immigrants impose on local governments.[23] Frustrated by the perceived apathy of the federal government, state and municipal governments are using the state's police power to regulate immigrant housing.[24] The police power permits states to regulate "the public health, the public morals [and] the public safety."[25] These local efforts, however, do not comprehensively address the national problem. Rather, they produce piecemeal regulation with fundamental legal deficiencies. For instance, municipal efforts are inconsistent with many federal and state laws.[26] Additionally, they infringe on due process and equal protection rights, destroy local camaraderie and stifle economic development.[27] These deficiencies affect the national welfare and obstruct efforts for comprehensive reform. For many of these reasons, local residents have challenged and defeated many of these anti-immigrant ordinances.

A. *Federal and State Sovereignty Preempt Local Efforts to Regulate Immigrant Housing*

The Constitution establishes the supremacy of federal laws, which preempt all inconsistent state and municipal laws.[28] Since the federal government has the exclusive power to regulate immigration[29] and foreign affairs,[30] state and municipal efforts to regulate immigrant

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[23] *See* Coover, *supra* note 4, at 317.

[24] *Id.* at 318; American Civil Liberties Union: Immigrant Rights: Discrimination, http://www.aclu.org/immigrants/discrim/index.html (last visited Sept. 5, 2008) (noting local attempts at "punishing" people who rent housing to immigrants).

[25] Chicago, Burlington & Quincy Ry. Co. v. Illinois, 200 U.S. 561, 592 (1906).

[26] *See infra* Part II.A.

[27] *See infra* Part II.B (due process deficiencies), Part II.C (equal protection deficiencies), Part II.D (impacts on local camaraderie and economic development); *see also* Campbell, *supra* note 20, at 1041 (Local measures "violate the Constitution, and pit neighbor against neighbor. Immigration policy must be established and enforced at the federal level, as local ordinances threaten to discriminate against all Latinos . . . .").

[28] The Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 1, cl. 2.

[29] *See supra* note 6.

[30] *See generally* Hines v. Davidowitz, 312 U.S. 52 (1941) (discussing federal supremacy over foreign affairs).

matters often conflict with federal power. Likewise, state constitutions[31] and supreme court decisions[32] establish the supremacy of state laws over all inconsistent municipal ordinances. Since state property laws govern the landlord-tenant relationship, municipal regulations of immigrant housing conflict with state power, as the municipal regulations compel property owners and managers to contravene state property laws.[33] For these reasons, several courts have held that federal and state laws preempt municipal anti-immigrant ordinances.

In *Farmers Branch*, the Northern District of Texas held that federal immigration laws preempted a municipal ordinance that effectively determined which immigrants could enter the United States and under which conditions those immigrants could remain.[34] The town of Farmers Branch enacted an ordinance under its municipal police power to protect the health, safety, and well-being of its residents.[35] The ordinance required property owners and managers to document prospective tenants' citizenship or eligible immigration status[36] prior to entering rental arrangements.[37] The ordinance further required that every

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[31] *See, e.g.*, IOWA CONST. art. XII, § 1 ("This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void."); ME. CONST. art. X, § 6 ("And the Constitution, with the amendments made thereto . . . shall be the supreme law of the State.").

[32] *See, e.g.*, Jacob B. v. County of Shasta, 154 P.3d 1003, 1013 (Cal. 2007) (Kennard, J., concurring) ("The California Constitution is 'the supreme law of the state' to which all statutes must conform." (citations omitted)); Dickson v. Strickland, 265 S.W. 1012, 1021 (Tex. 1924) ("The Constitution is the supreme law of the state.").

[33] *See generally* Reynolds v. City of Valley Park, No. 06-CC-3802 (Mo. 21st Jud. Cir. Ct. Mar. 12, 2007), *available at* http://www.aclu.org/pdfs/immigrants/valleypark_opinion.pdf. In *Reynolds*, the court enjoined the enforcement of a local ordinance that authorized penalties that conflicted with state law. Further, the ordinance penalized property owners who did not evict immigrants within five days. Missouri housing laws require property owners to provide at least thirty days notice and to use the judicial process to evict a tenant. *See infra* notes 65 & 67.

[34] Villas at Parkside Partners v. Farmers Branch, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007).

[35] Farmers Branch Ordinance, *supra* note 5, § 26-116(f). While Farmers Branch enacted the ordinance under its police power, the ordinance's first declaration states that there is a need to protect its citizens from September 11th-like terrorist attacks. Farmers Branch, Tex., Ordinance No. 2892 (Nov. 13, 2006), http://www.aclu.org/pdfs/immigrants/farmersbranch_ordinance.pdf ("Whereas, in response to the widespread concern of future terrorist attacks following the events of September 11, 2001, landlords and property managers throughout the country have been developing new security procedures to protect their buildings and residents . . . ."). The complaint states facts leading up to the ordinance's enactment, which suggest the ordinance targets Latinos. There is no evidence in the record suggesting a link between immigrants renting housing and propensities to commit terrorist attacks. *See* Farmers Branch Verified Complaint, *supra* note 8, ¶¶ 26-32.

[36] Farmers Branch Ordinance, *supra* note 5, § 26-116(f)(3). U.S. citizens and nationals must provide a signed declaration of citizenship or nationality and confirm eligibility by providing either a U.S. passport or other acceptable form as designated by Immigration and Customs Enforcement ("ICE"). Other non-citizens must provide a signed declaration of eligibility, an acceptable form as designated by ICE, and a signed verification consent form.

[37] Farmers Branch Ordinance, *supra* note 5, § 26-116(f)(2) ("The owner and/or property manager shall require as a prerequisite to entering into any lease or rental arrangement, including any lease or rental renewals or extensions, the submission of evidence of citizenship or eligible immigration status for each tenant family . . . .").

family member provide eligibility documentation, regardless of age.[38] Then, the ordinance burdened property owners by requiring them to enforce the municipal ordinance.[39] The ordinance authorized the city to fine violators up to $500 for each day that a violation occurred or continued.[40]

Yet the Farmers Branch Ordinance had two fundamental legal deficiencies. First, the ordinance was inconsistent with the political accountability doctrine.[41] The goal of political accountability is to protect state legislators and executives from bearing the public disapproval for federal decisions while denying federal officials political insulation.[42] The Farmers Branch Ordinance presented a reverse political accountability problem—the local officials were insulated. Regulation of immigrant housing sends a reverberating message of who is and is not welcome in communities. Naturally, these actions implicate political functions involving foreign affairs and relations.[43] Yet since local officials are only accountable to the local electorate, they have little incentive to consider the national well-being before acting. Consequently, this lack of political accountability creates a perverse incentive to export immigration costs to neighboring communities. Such actions obstruct national efforts to address a common problem.

Second, by adopting U.S. Department of Housing and Urban Development ("HUD") subsidy classifications and utilizing them to specify who could and could not rent housing, the ordinance de facto regulated immigration and was preempted by federal law.[44] Under the ordinance, property owners and managers could only rent to U.S. citizens, nationals, and non-citizens with eligible immigration status.[45]

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[38] *Id.* § 26-116(f)(3) ("Each family member, regardless of age, must submit [evidence of citizenship or eligible immigration status] to the owner and/or property manager.").

[39] *Id.* § 26-116(f)(4)(i). The property owner or manager must review the original documents for each tenant or family member and retain copies for at least two years following the end of a lease. Every tenant and family member must provide evidence of citizenship and a property owner or manager may not allow any unverified person to occupy the premises. *Id.*

[40] *Id.* § 26-116(f).

[41] Political accountability is the doctrine that legislators and executives should answer to the electorate. The electorate should only hold those persons enacting or enforcing a law accountable for that law. Accordingly, the political process should not hold persons who did not enact laws or who are not responsible for enforcing laws accountable for those laws. *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 428 (1819) (invalidating a state tax on the national bank because the persons that paid the tax lacked representation in the political body enacting the tax); *see also* Printz v. United States, 521 U.S. 898 (1997) (the federal government cannot compel state law enforcement officers to enforce federal law); New York v. United States, 505 U.S. 144 (1992) (the federal government cannot compel state legislatures to participate in a federal regulatory program).

[42] *New York*, 505 U.S. at 169 ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.").

[43] *See supra* note 13 and accompanying text.

[44] Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 769 (N.D. Tex. 2007).

[45] Farmers Branch Ordinance, *supra* note 5, § 26-116(f).

The ordinance defined eligible immigration status as those persons eligible for federal housing subsidies.[46] Yet federal housing subsidies are not available to several lawfully admitted immigrant groups, such as tourists, diplomats, and students.[47] Since the ordinance would exclude these persons from renting apartments in Farmers Branch, the ordinance was a regulation of immigration and preempted by federal law.[48] By excluding lawfully admitted persons from renting housing, Farmers Branch had disregarded a federal regulatory scheme and obstructed efforts for a comprehensive, national approach to a common problem.

In another case, *Lozano v. City of Hazleton*,[49] the Middle District of Pennsylvania held that federal preemption was one reason to invalidate local anti-immigrant ordinances.[50] The Hazleton Ordinances regulated both immigrant employment and housing, while authorizing civil sanctions for violations.[51] However, the Immigration Reform and Control Act of 1986 ("IRCA") expressly preempts any state or municipal law that imposes civil or criminal sanctions for violations of a local immigrant employment regulatory scheme.[52] Under the Hazleton Ordinances,[53] the city could suspend a business permit for violations of the local ordinance.[54] While IRCA allows local governments to suspend business permits for violations of IRCA, it prohibits local governments

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[46] *Farmers Branch*, 496 F. Supp. 2d at 767. Federal housing subsidies constitute various forms of financial assistance that the United States government provides lower income households to make housing more affordable. These subsidies include programs such as privately owned subsidized housing, public housing, housing choice voucher programs and tax incentives for home purchases or improvements. *See, e.g.*, U.S. Department of Housing and Urban Dev., Programs of HUD, *available at* http://www.huduser.org/resources/hudprgs/ProgOfHUD06.pdf (last visited Sept. 6, 2008).

[47] *See, e.g.*, 42 U.S.C. § 1436a(a)(1) (2000) (HUD may not provide federal housing subsidies to "alien visitors, tourists, diplomats, and students who enter the United States temporarily with no intention of abandoning their residence in a foreign country . . . .").

[48] *See Farmers Branch*, 496 F. Supp. 2d at 768.

[49] 496 F. Supp. 2d 477, 477 (M.D. Pa. 2007) (invalidating an anti-immigrant ordinance with a sweeping opinion that explores many of the available challenges to these types of ordinances).

In *Lozano*, the court invalidated the ordinances on several grounds, including federal preemption, procedural due process, and Section 1981. *Id.* at 556. The court rejected challenges under the Equal Protection Clause of the Fourteenth Amendment and FHA. The court held that the plaintiffs failed to demonstrate that the city adopted the facially neutral policy because of its adverse effects upon an identifiable group. *Id.* at 540-41. Disparate impact alone is insufficient to invalidate a statute under the Fourteenth Amendment. *Id.* at 541.

[50] *Id.* at 554 ("Federal law pre-empts [the ordinance provisions]. The ordinances disrupt a well-established federal scheme for regulating the presence and employment of immigrants in the United States. They violate the Supremacy Clause of the United States Constitution and are unconstitutional.").

[51] *See supra* note 5.

[52] Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(h)(2) (2000) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

[53] *See supra* note 5.

[54] *Lozano*, 496 F. Supp. 2d at 520 ("In the instant case, Hazleton suspends the business permit of those who violate its Ordinance, not those who violate IRCA.").

from suspending business permits for violations of a *local* ordinance.[55] Therefore, IRCA preempted the Hazleton Ordinances that regulated employment.[56]

Additionally, the court held that federal law preempted the Hazleton Ordinances' housing provisions because the ordinances conflicted with federal officials' sole discretion to determine when to remove unlawful immigrants.[57] The federal government allows certain unlawful immigrants to work and live in the United States. These immigrants include those who have completed asylum or withholding of removal applications, those who have applied for permanent residency, those who have applied to suspend their deportation, those temporarily paroled in the United States for emergency or public interest reasons, and those granted a deferred action of administrative convenience.[58] The Hazleton Ordinances would deny these immigrants housing and employment. Additionally, the Hazleton Ordinances obstructed federal processes for determining citizenship or eligible immigration status, interfering with the federal government's ability to address a national problem comprehensively.[59]

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[55] *Id.* at 519-20.

[56] The court also rejected Hazleton's claims that the ordinance was constitutional because it only applied to unlawful immigrants, who had no right to be in the United States. *Id.* at 529. The court noted the ordinance would affect everyone and contained no antidiscrimination provisions. *Id.*

[57] *Id.* at 533. For example, the Hazleton Ordinances, *supra* note 5, assume that the federal government removes all unlawful immigrants. *Id.* at 531. However, federal law authorizes the U.S. Attorney General to cancel the removal of an inadmissible or deportable immigrant under certain circumstances. 8 U.S.C. § 1229b(a)-(b) (2000). Under § 1229b(a), first, the United States must have lawfully admitted the immigrant as a permanent resident for at least five years. Second, the immigrant must have continuously resided in the United States for at least seven years, regardless of the admission status. Third, the immigrant cannot be a convicted aggravated felon. If a party establishes these elements, the Attorney General can cancel an immigrant's removal, but the Hazleton Ordinances would prohibit the immigrant from securing employment or housing. *See* Hazleton Ordinances, *supra* note 5. Thus, Hazleton's actions would directly conflict with the Attorney General's policy decision.

[58] *Lozano*, 496 F. Supp. 2d at 530-31. The federal government may also permit immigrants with a final order of deportation to work under supervised release. *Id.* Further, the federal government may release from detention immigrants who are sanctioned with a "final order[] of removal" if it appears unlikely that immigration enforcement will promptly deport them. *Id.*

[59] When an unlawful immigrant initiates the process to adjust his or her immigration status, the immigrant typically lacks any documentation regarding his or her ability to remain in the country. *Lozano*, 496 F. Supp. 2d at 531.

The Hazleton Ordinances, *supra* note 5, prohibited tenants from renting to these immigrants, even though the immigrants made a conscious decision to seek eligible status for remaining in the United States. Since federal law preempts laws that regulate who can and cannot remain in an area, local governments have no authority to determine which immigrants are entitled to reside in the United States. DeCanas v. Bica, 424 U.S. 351, 355 (1976). As a result, local governments must allow unlawful immigrants in their jurisdiction until the federal government orders their deportation. *See* Plyler v. Doe, 457 U.S. 202, 236 (1982) (Blackmun, J., concurring) ("[T]he structure of immigration statuses makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported."); *Plyler*, 457 U.S. at 241 n.6 (Powell, J., concurring) ("Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country . . . ."). Thus, the ordinance would prohibit individuals the federal government allowed to remain in the United States from remaining in Hazleton. *Lozano*, 496 F. Supp. 2d at 532.

Not only do immigrant housing ordinances conflict with federal laws, they often conflict with state laws by compelling property owners and managers to violate state-imposed duties.[60] Property leases expressly specify the conditions under which a property owner or manager may terminate a tenancy.[61] These leases also specify the processes for terminating a tenancy.[62] Most lease provisions do not address a tenant's immigration status.[63] Therefore, to evict a tenant because of immigration

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Additionally, immigration judges have exclusive authority to determine immigration status. 8 U.S.C. § 1229a(a)(1) (2000) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."); § 1229a(a)(3) (stating that the proceeding before an immigration judge is the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States"); *Lozano*, 496 F. Supp. 2d at 533. The Hazleton Ordinances, *supra* note 5, compelled local officials to determine a person's immigration status and to determine whether the immigrant was in the United States lawfully. Since immigration judges retain this exclusive power, federal law preempted the ordinance. *Lozano*, 496 F. Supp. 2d at 555.

[60] *See generally* Reynolds v. City of Valley Park, No. 06-CC-3802 (Mo. 21st Jud. Cir. Ct. Mar. 12, 2007) (invalidating a municipal ordinance due to conflicts with state law). In *Valley Park*, the city exercised its police power to regulate employment and housing of immigrants. *Id.* at 2. The enforcement provisions of the ordinance required Valley Park to suspend a property owner's occupancy permit, forbade the property owner from collecting rents during the suspension period, and prohibited the city from issuing new or renewal occupancy permits to property owners during the suspension period. Valley Park Ordinance, *supra* note 5, § 5(B)(5); *Valley Park*, No. 06-CC-3802, slip op. at 3.

Several parties, including property owners and a local equal housing opportunity council, challenged the ordinance in state court. First Amended Petition for Declaratory and Injunctive Relief ¶¶ 10-13, Reynolds v. City of Valley Park, No. 06-CC-3802 (Mo. Jud. Cir. Ct. 2007), *available at* http://www.aclu.org/pdfs/immigrants/valleypark_1stamendedpet.pdf (last visited Sept. 11, 2008). The plaintiffs alleged that the ordinance compelled local employers and property owners to act as federal immigration officers and impeded local businesses' ability to operate. For example, most property owners do not know their tenants' immigration status, do not want to consider immigration status in rental decisions, and do not know how to enforce immigration ordinances. *Id.* ¶¶ 10-12.

[61] *See, e.g.*, Farmers Branch Verified Complaint, *supra* note 8, ¶ 18. The complaint noted that:

> [The property owner plaintiffs] rent their apartments pursuant to written lease agreements that expressly state the terms and conditions under which they can evict a tenant or terminate a tenancy. Their lease agreements do not provide that they cannot renew current leases, many of which are month-to-month leases, on the ground that any occupant of the apartment lacks "eligible immigration status."

Id. ¶ 18; *see also* Complaint, Stewart v. Cherokee County, No. 07-CV-0015 (N.D. Ga. Jan. 4, 2007) [hereinafter Cherokee County Complaint], *available at* http://www.aclu.org/pdfs/immigrants/cherokee_complaint.pdf. According to the complaint in *Stewart*:

> [The plaintiff property owner] rents its units under written lease agreements that expressly state the terms and conditions under which [the property owner] can evict a tenant or terminate a tenancy. [The] lease agreements do not provide that [the property owner] can evict any tenant on the ground that the tenant is an "illegal alien," nor do the lease agreements provide for an eviction proceeding that is five (5) business days or less.

Id. ¶ 13.

[62] *See supra* note 61.

[63] *Id.*

status, property owners and managers would breach leases with their tenants and subject themselves state property remedies.[64]

In addition to lease provisions, state property laws also specify a minimum notice that property owners and managers must provide tenants before terminating a tenancy.[65] Yet most ordinances compel property owners and managers to evict an unlawful immigrant within several days.[66] Likewise, state property laws often require property owners and managers to utilize the judicial process to terminate a tenancy.[67] Yet again, many ordinances require property owners and managers to independently determine a tenant's immigration status and promptly evict any unlawful immigrant.[68] Thus, to comply with the municipal ordinances, property owners and managers must violate state property laws.

B. *Many Local Efforts to Regulate Immigrant Housing Violate Due Process Rights*

Local efforts to regulate immigrant housing violate procedural due process rights[69] because they do not provide affected parties

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[64] For example, if a property owner or manager deprives a tenant of the lease in contravention to the agreement, the tenant can sue for wrongful eviction. As one court explains:

> [The property owner] had not reserved the right to terminate the lease, under any reserved privilege, before the expiration, upon any ground whatever. . . . There is an obligation in every contract of lease to deliver the property to the [property owner] at the expiration of the lease, but it is an infringement upon personal rights, protected by law, to require a tenant to vacate before expiration.

Waller & Edmonds v. Cockfield, 35 So. 778, 778-79 (La. 1904). Property owners and managers that wrongfully evict a tenant may be subject to treble damages, N.D. CENT. CODE § 32-03-29 (1996) ("For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is three times such a sum as would compensate for the detriment caused to the person by the act complained of."), or punitive damages. Robinson v. Sarisky, 535 A.2d 901, 906 (D.C. 1988) ("Punitive damages are available in actions for intentional torts such as wrongful eviction.").

[65] *E.g.*, MO. ANN. STAT. § 441.060 (West 2000) (requiring at least one month notice before terminating certain leases); N.Y. REAL PROP. LAW § 232-b (McKinney 2006) ("A monthly tenancy or tenancy from month to month . . . may be terminated by the landlord or the tenant upon his notifying the other at least one month before the expiration of the term of his election to terminate."); TEX. PROP. CODE ANN. § 91.001 (Vernon 2007) (requiring advance notice equivalent to at least one rental period).

[66] *E.g.*, Hazleton, Pa., Ordinance No. 2006-18, § 5(B) (Sept. 21, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf; Valley Park Ordinance, *supra* note 5, § 5(B) (compelling property owners to resolve violations within five business days).

[67] *E.g.*, MO. ANN. STAT. § 441.233 (West 2000) (requiring use of the judicial process to remove a tenant).

[68] *See, e.g.*, Farmers Branch Ordinance, *supra* note 5, § 26-116(f); Valley Park Ordinance, *supra* note 5, § 5 (requiring property owners and managers to verify a tenant's eligible immigration status prior to entering a lease).

[69] The Constitution provides that no person may be "deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V (providing due process protection against the federal government); U.S. CONST. amend. XIV, § 1 (providing due process protection against state governments). Housing is property and procedural due process encompasses the doctrine that the government must provide adequate safeguards when depriving a person of life, liberty, or property to ensure that the process is fair. *See* 16B AM. JUR. 2D *Constitutional Law* § 901 (1998)

sufficient notice[70] or processes to review housing decisions. The right to be heard is a cornerstone of due process. In order to protect this right, the government must provide affected parties sufficient notice before depriving them of a constitutional right.[71] Yet these anti-immigrant ordinances fail to provide adequate notice either to property owners and managers or to tenants. A comprehensive regulatory approach would protect this right through an all-inclusive regulatory program, rather than piecemeal legislation with fundamental legal deficiencies.

Immigrant housing ordinances fail to provide property owners and managers with any guidance on how to interpret ordinance provisions or to determine citizenship or eligible immigration status.[72] The ordinances are often too vague for property owners and managers to interpret core terms, such as occupancy.[73] Thus, property owners and managers lack sufficient notice of their legal responsibilities and face uncertainty regarding their exposure to civil and criminal penalties. Such uncertainty interferes with due process rights to be notified of legal obligations and expectations before being penalized for failing to meet those obligations and expectations.

Additionally, the ordinances fail to provide tenants any notice when a party challenges their housing eligibility. Under most ordinances, there is no requirement to notify an affected tenant that someone has filed a complaint.[74] Other than providing initial eligibility documentation, an affected tenant has no role in the process to determine initial or continued housing eligibility.[75] Thus, it is possible that an affected tenant

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(general discussion of procedural and substantive due process, noting that "[p]rocedural due process guarantees that a state proceeding which results in a deprivation of property is fair").

[70] *See generally* 16B AM. JUR. 2D *Constitutional Law* § 931 (1998) ("As a matter of due process, parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified. Consequently, notice is an essential element of due process . . . .").

[71] *See supra* notes 69-70.

[72] Farmers Branch Verified Complaint, *supra* note 8, ¶ 34.

[73] The Farmers Branch ordinance states that:

> For each family member, the family shall be required to submit evidence of citizenship or immigration status only once during continuous occupancy. The owner and/or property manager is prohibited from allowing the occupancy of any unit by any family which has not submitted the required evidence of citizenship or eligible immigration status [required by the ordinance].

Farmers Branch Ordinance, *supra* note 5, § 26-116(f)(4)(b). However, there is no procedure to determine whether a property owner would violate the ordinance by merely permitting a resident to allow a visiting friend or family member to stay with them.

[74] As the court in *Lozano v. City of Hazleton* explained:

> First and foremost, the Ordinance does not provide any notice whatsoever to a tenant who is the subject of a challenge. An ordinance which could cause people to lose their residences but provides them no notice before eviction certainly does not meet the requirements of due process. Thus, the determination [of the tenant's housing eligibility] can be made without the challenged individual's participation at all.

Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 538 (M.D. Pa. 2007).

[75] *See id.*

would have no knowledge of a challenge until the housing complex evicted the tenant. This lack of notice deprives tenants of their property without due process of law.

Further, local efforts to regulate immigrant housing fail to provide sufficient process to either deprive people of their protected rights or review the decisions made under the ordinances. Since procedural due process seeks to assure that deprivations of protected rights are justified,[76] it requires fair procedures to both deprive immigrants of the right and to review the final decision. Three factors affecting the process the government must provide include: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) the government's interest.[77]

With immigrant housing ordinances, the jeopardized private interest is substantial. First, the Fourteenth Amendment protects property rights for the duration of a lease.[78] Second, sustained housing is critical to individual well-being. The Fourteenth Amendment also protects property owners' and managers' interest in rental income from the property.[79] Rental income may be critical to property owners and managers who rely on the income for their own well-being. Yet immigrant housing ordinances jeopardize these private rights.

There is also a high risk of erroneously depriving immigrants of these rights. The ordinances do not restrict who may file a complaint.[80] Thus, there are no safeguards to keep persons from abusing the housing ordinances and harassing tenants or property owners and managers. The ordinances also provide no procedure for establishing a complaint's validity.[81] When a complaint is "valid," the ordinance requires the property owner or manager to provide the city with the tenant's immigration documentation.[82] Yet there is neither a procedure for

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[76] *See supra* note 69.

[77] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[78] *Lozano*, 496 F. Supp. 2d at 537 ("[T]enants have a property interest in their apartments for the term of their lease." (citing Lindsey v. Normet, 405 U.S. 56, 72 (1972))).

[79] *Id.* ("[T]he landlords also have an interest . . . in the rights to income on the property.").

[80] *Id.* at 534-35 ("A complaint can be filed by 'any official, business entity, or City resident.'" (quoting Hazleton, Pa., Ordinance No. 2006-18, § 5(B)(1) (Sept. 21, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf)).

[81] As the *Lozano* court explained:

> If the complaint is considered valid – the Ordinance does not indicate how the validity of a complaint is determined, it merely states that a complaint [that] alleges a violation based upon national origin[], ethnicity, or race is invalid – the city obtains identity information from the landlord and verifies with the federal government . . . the immigration status of the person at issue.

Id. at 537.

[82] *Id.*

verifying a tenant's immigration status, nor an explanation of what "identity data" a property owner or manager must provide the city.[83] Thus, while there may be a hearing, such a procedure is inadequate if the parties cannot adequately prepare.[84] Moreover, while these ordinances provide *property owners and managers* a secondary hearing, the ordinances do not provide *tenants* additional safeguards.[85] Additionally, even though the ordinances provide a hearing, a hearing is inadequate because it seeks to determine an alien's eligible immigration status without jurisdiction.[86] Immigration judges have exclusive power to determine an alien's immigration status.[87]

For these reasons, immigrant housing ordinances produce a high risk of erroneously depriving an immigrant of constitutionally protected rights. The ordinances do not provide immigrants or property owners and managers either sufficient notice of their legal obligations or adequate review of judicial determinations.[88]

Additional procedural safeguards would provide tenants, as well as property owners and managers, adequate protection. For example, if tenants knew that someone was challenging their immigration status, they could work with the property owner or manager to make sure all current documentation was on file. Additionally, they would have some advance notice of the housing threat. While this advance notice would not safeguard against the loss of housing, it would allow tenants to begin seeking alternative housing arrangements.[89] Further, if property owners and managers knew what documentation was required, they could better prepare for a hearing that might deprive them of valuable rental incomes. Judicial review in a court with jurisdiction, which the federal government could provide through a national regulatory program, would safeguard

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[83] *Id.* at 538.

[84] For example, the *Lozano* court reasoned:

> [T]he statute . . . does not state the nature of the "identity data" that is needed to verify the tenant's immigration status. Therefore, the [property] owners are left not knowing what documents they need for the "hearing." To provide for a hearing for which an interested party cannot adequately prepare is a violation of due process.

Id.

[85] *Id.* ("The owner/landlord can request a second or additional verification, however, no such right is provided to the affected tenant.").

[86] *See id.* ("[T]he Pennsylvania courts do not have the authority to determine an alien's immigration status. Such status can only be determined by an immigration judge. Once again, the [ordinance] seeks to provide a remedy in a court that lacks jurisdiction.").

[87] *See id.*

[88] Thus, the *Lozano* court stated:

> Because the [ordinance] does not provide notice to challenged . . . tenants, does not inform the . . . owners/landlords of the types of identity information needed, and provides for judicial review in a court system that lacks jurisdiction, [the ordinance] violates the due process rights of . . . tenants and owners/landlords. It is therefore unconstitutional.

Id.

[89] *See infra* text accompanying notes 107-109.

both tenants' and property owners' and managers' rights to be heard. These additional procedural safeguards would significantly reduce the risk of erroneously depriving immigrants of constitutionally protected rights. While local governments have a legitimate interest in protecting the welfare of local citizens, that interest does not supersede individual, constitutionally protected rights.

C. *Many Local Efforts to Regulate Immigrant Housing Violate Equal Protection Rights*

While local efforts to regulate immigrant housing infringe on equal protection rights,[90] an equal protection challenge is not likely to succeed because the courts provide rational basis[91] deference to equal protection challenges of immigrant housing ordinances.[92] The United States ratified the Fourteenth Amendment and its Equal Protection Clause following the Civil War.[93] The purpose of the clause was to require that government classifications separating people for different treatment be justified by a sufficient purpose.[94] While the original purpose of the Equal Protection Clause was to provide oversight of classifications based on race, the Supreme Court eventually expanded the clause's protections.[95]

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[90] The Constitution prohibits state governments from "deny[ing] . . . any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The use of the word "persons" extends protections to all people within a state's jurisdiction, not just to United States or state citizens. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 767 (3d ed. 2006) ("Aliens are protected from discrimination because the equal protection clause explicitly says that no 'person' shall be denied equal protection of the laws. The clause does not mention the word 'citizen' . . . .").

The basic concept of equal protection mandates state governments to treat all similarly situated persons equally. 16B AM. JUR. 2D *Constitutional Law* § 777 (1998). Thus, equal protection deals with classifications of persons that are either included or excluded from a statutory program. *Id.* § 778. An equal protection challenge has three questions: "What is the classification? What level of scrutiny should be applied? Does the particular government action meet the level of scrutiny?" CHEMERINSKY, *supra*, at 670.

[91] Rational basis is one of the three applicable levels of equal protection scrutiny. *See* CHEMERINSKY, *supra* note 90, at 671-73. The rational basis test is minimal and the court will uphold the law "if it is rationally related to a legitimate government purpose." *Id.* at 672. Courts generally apply strict scrutiny to laws based on race, national original, and alienage. *Id.* at 671. In contrast to rational basis deference, under strict scrutiny the government bears the burden of proof and courts will only uphold the law if it is "necessary to achieve a compelling government purpose." *Id.*

[91] *See, e.g.*, *Lozano*, 496 F. Supp. 2d at 542 (rejecting plaintiffs' equal protection challenge after applying the rational basis test).

[93] CHEMERINSKY, *supra* note 90, at 13. ("The Fourteenth Amendment was enacted in 1868 largely to protect the rights of the newly freed slaves and in its most important provisions says that no state can deny any person [the] equal protection of the laws . . . .").

[94] *Id.* at 669 ("All equal protection cases pose the same basic question: Is the government's classification justified by a sufficient purpose?").

[95] *See id.* at 695 ("The Court long has recognized that the primary purpose of the Fourteenth Amendment was to protect African-Americans; in fact, the initial Supreme Court decisions construing the equal protection clause suggested that it could be used only to protect blacks."); *id.* at 766-77 (reviewing the protections recognized against classifications based on alienage).

Yet because classifications based on unlawful presence in the United States are not suspect,[96] courts apply the deferential rational basis test to equal protection challenges.[97] However, immigrant housing ordinances hurt unintended victims—unlawful immigrants' children. Many of these children are U.S. citizens,[98] and their circumstances as children of illegal immigrants draw striking parallels to the situation in *Plyler v. Doe*.[99]

In *Plyler*, the Supreme Court held that states cannot limit funding for public education to children lawfully present in the United States.[100] Although the Court did not apply strict scrutiny, it applied more than a rational basis review.[101] The Court stated that it was wrong to punish blameless children for their parents' wrongdoings,[102] acts over which the children had no control.[103] The Court recounted the reasoning of the district court, which stated that "the illegal alien of today may well be the legal alien of tomorrow," and that refusing these children education would permanently condemn them to the "lowest socio-economic class."[104] After Texas claimed that its purpose in excluding the

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[96] *See* Plyler v. Doe, 457 U.S. 202, 223 (1982) ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'").

[97] *See, e.g.*, Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 542 (M.D. Pa. 2007) ("[O]ur equal protection analysis must only explore whether [the ordinance] has 'a rational relationship to a legitimate state interest.' We agree with the [city] that the ordinances meet this standard.") (citation omitted).

[98] Several of the plaintiffs challenging immigrant housing ordinances have been United States citizen-children of unlawful immigrants. Farmers Branch Verified Complaint, *supra* note 8, ¶¶ 10-12 (five plaintiffs were United States citizen-children living in apartment complexes with family members, some of whom were neither United States citizens nor resident immigrants); Cherokee County Complaint, *supra* note 61, ¶ 17 (five of the seven anonymous plaintiffs were parents with minor children that were United States citizens).

[99] *See Plyler*, 457 U.S. at 220, 230 (invalidating a Texas statute that prohibited funding for public education to unlawful immigrant children).

[100] *Id.* at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").

[101] *See* CHEMERINSKY, *supra* note 90, at 775-76 (commenting that while the court did not apply strict scrutiny, it was "clear that [the Court] was using more than a rational basis review" because the state's arguments would otherwise have satisfied a rational basis test).

[102] *Plyler*, 457 U.S. at 220 ("Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.").

[103] *Id.* ("[T]he children . . . in these cases 'can affect neither their parents' conduct nor their own status.'" (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977))).

[104] Doe v. Plyler, 458 F. Supp. 569, 577 (E.D. Tex. 1978). In its entirety, the Supreme Court noted that the district court had concluded that:

> [U]nder current laws and practices "the illegal alien of today may well be the legal alien of tomorrow," and that without an education, these undocumented children, "[a]lready disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class.

Plyler, 457 U.S. at 207-08 (quoting *Doe*, 458 F. Supp. at 577) (footnote omitted).

children of unlawful immigrants was to reduce public education costs,[105] the Court held that the means were not rational for accomplishing the stated purpose.[106]

With immigrant housing ordinances, the impact on immigrants' children is profound. For instance, when someone challenges a family's housing eligibility, the property owner or manager must evict the family with little notice.[107] An affected family is unlikely to find convenient, suitable housing alternatives because all housing complexes face the same legal obligations to verify eligibility.[108] Further, the short notice provides the family little time to locate housing shelters. Even if shelters were available, the ordinances provide no exceptions to verification requirements.[109] Thus, by accepting homeless immigrant families, housing shelters would subject themselves to civil and criminal penalties.

It follows that a displaced family's only option may be to relocate to another jurisdiction. Yet moving a family has its own problems. By nature of being unlawfully present in the United States, many of these immigrants work illegally. Their wages are dismal,[110] and families may lack the financial resources to move. For these families, there is no way out. Once a family loses shelter, the income-generators are likely to be too preoccupied finding replacement shelter to continue working. Once the family's income ceases, the family will lose the ability to sustain itself, and the only choice may be to look to the U.S. government to initiate deportation proceedings.[111] Deportation may result in removing parents or other family members from the United States, while leaving the U.S. citizen children behind. It is an injustice to tear families apart because of their immigration status.

While these immigrant housing cases parallel *Plyler*, a critical distinction allows courts to apply the rational basis review. In *Plyler*, the

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[105] *Plyler*, 457 U.S. at 227 (noting that the purpose of the ordinance was to preserve the "state's limited resources for the education of its lawful residents").

[106] *See supra* note 100.

[107] *E.g.*, *supra* Part II.B.

[108] Some of the ordinances provide limited exemptions for single-family homes. For example, the Farmers Branch Ordinance, only applies to complexes with three or more apartments. Farmers Branch Ordinance, *supra* note 5, § 26-111. It does not apply to single-family rental homes or buildings with less than three apartment units. Farmers Branch Verified Complaint, *supra* note 8, ¶ 36.

[109] Some ordinances only apply to apartment complexes with a minimum number of units. *See supra* note 108.

[110] *See generally* David Crary, *Immigrants Face Low Wages, Poor Treatment in Obscurity: Some are Exploited as They Work as Nannies, Maids for the Wealthy*, THE GRAND RAPIDS PRESS, Nov. 4, 2007, at A14 (discussing the poor working conditions and treatment of many female immigrants).

[111] The housing ordinances would continue to prohibit complexes from renting housing to unlawful immigrants that had turned themselves in to the U.S. government and initiated the process to adjust their immigration status. *See supra* note 59.

classifications directly targeted children.[112] The state distinguished among *children* based on their immigration status to determine educational funding.[113] With immigrant housing ordinances, in contrast, the classification rests with immigration status alone, and the classification does not single out children.[114] Because the classifications only distinguish persons on immigration status, which targets both adults and children, the rational basis review applies.[115]

Clearly, local efforts to regulate immigrant housing have drastic affects not only on unlawful immigrants, but also on U.S. citizens. The best way to confront these problems is through comprehensive and uniform federal regulation, not through piecemeal local efforts.

D. *Local Efforts to Regulate Immigrant Housing Are Costly, Destroy Local Camaraderie, and Stifle Economic Development*

Immigrant housing ordinances are extremely costly, destroy local camaraderie, and stifle economic development. These unanticipated results factored into the eventual abolishment of ordinances in Escondido, California[116] and Riverside, New Jersey.[117] After Escondido enacted an immigrant housing ordinance, it quickly realized that the litigation costs associated with the challenge were astronomical. The city

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[112] Plyler v. Doe, 457 U.S. 202, 205 (1982) (noting that the Texas law withheld "from local school districts any state funds for the education of children who were not 'legally admitted' into the United States").

[113] *See id.*

[114] *E.g.*, Cherokee County Ordinance, *supra* note 5, § 3(a) (prohibiting property owners and managers from letting, leasing or renting housing to an "illegal alien," or permitting an "illegal alien" to occupy any housing).

[115] *See supra* note 49.

[116] Escondido enacted an immigrant housing ordinance under its police power in response to concerns that renting housing to immigrants caused problems in the city. Escondido Ordinance, *supra* note 5, § 1; Statement Regarding Escondido Actions Approving Stipulation for Final Judgment and Permanent Injunction 1 (Dec. 13, 2006) [hereinafter Escondido Statement], http://www.ci.escondido.ca.us/immigration/Statement.pdf ("[T]he rental of housing to undocumented immigrants . . . result[s] in a number of problems for the City."). The ordinance prohibited property owners from renting housing to illegal aliens and from permitting unlawful immigrants to occupy any dwelling. Escondido Ordinance, *supra* note 5, § 3. The ordinance authorized a separate violation for each adult on each day and authorized fines, suspension of the business license, and a prohibition on collecting any rents. *Id.*

[117] Riverside enacted an immigrant housing ordinance under its police power, claiming that the local community demanded the township combat illegal immigration. Riverside Ordinance, *supra* note 5, § 2(B) (claiming to be "empowered and mandated by the people . . . to abate the nuisance of illegal immigration"). The Riverside Ordinance regulated employment and housing of immigrants. *Id.* §§ 4, 5.

While the Riverside Ordinance was similar to other immigrant housing ordinances, its reach went much further. The ordinance stated that any violation *within the United States* was a violation under the ordinance. *Id.* § 4(B). The ordinance made it a violation to hire, or attempt to hire, or to rent or lease property to unlawful immigrants, or to fund or aid in the establishment of a day laborer center that does not verify legal work status. *Id.* § 4(A). Thus, if a Riverside entity rented an apartment to an unlawful immigrant in California, or funded a day laborer center that did not verify legal work status in Texas, the entity would violate the Riverside Ordinance and would be subject to extreme penalties. *Id.* §§ 4, 5.

attorney's fees could have exceeded $1 million, a figure that excluded the risk of liability for plaintiff-attorney's fees.[118] This cost was a major factor persuading the Escondido City Council to settle the litigation that challenged the ordinance.[119] In addition to litigation costs, cities must pay for administering ordinances, and many cities lack the necessary funding to do so.[120] Thus, by enacting an immigrant housing ordinance, cities subject themselves to significant litigation and administrative costs that the city could better spend elsewhere.

Immigrant housing ordinances also destroy local camaraderie and stifle economic development. After Riverside enacted an immigrant housing ordinance, nearly 20% of the population left the town within two weeks.[121] This mass exodus forced many local businesses to close, and some of the remaining businesses experienced sales drops of nearly

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[118] *See* Escondido Statement, *supra* note 116, at 2.

[119] Another problem with the Escondido Ordinance, *supra* note 5, was that the enforcement provisions lacked any supportable process to determine an immigrant's status. *See* Escondido Statement, *supra* note 116, at 1 (listing one of the serious problems with the ordinance as its "lack of an assured federal database to determine the status of individuals for housing purposes").

Unfortunately, the City Council and district court stated that the decision on the ordinance was not precedential and did not bind future Escondido City Councils or other United States municipalities. *See* Escondido Order, *supra* note 116, at 2 ("[The] stipulated judgment is not an admission or finding of liability and shall not constitute a final determination on the merits of any issue. Nor shall this judgment have any res judicata, collateral estoppel, or preclusive effect as to any third party claim, action or proceeding."); Escondido Statement, *supra* note 116, at 3 (noting that "abandoning the present litigation . . . leaves . . . the Council . . . with complete future legislative discretion" and that "the decisions made with respect to this Ordinance and this litigation have no binding effect whatsoever on any other litigation or measures which may be pending in other parts of the country"). For this reason, the Escondido City Council could change its mind in the future and reenact another anti-immigrant ordinance.

Yet the lack of precedential power averts several problems, most importantly that of prohibiting a decision without any fact-finding from becoming precedential. Seemingly, the court reached its decision on the joint stipulation of all parties without any fact-finding. *See* Escondido Order, *supra* note 116. The adversarial process is central to the United States judicial system. *In re* Miller, 584 S.E.2d 772, 785-86 (N.C. 2003) (discussing the adversarial system and its concern for judging the rights of parties on the truth alone). This adversarial process provides for adverse parties to fully explore and argue issues. The process increases the likelihood of reaching a legitimate and fair end-result. It would not be good policy to view a decision on an unexplored issue as precedential. As such, the district court averted these problems by expressly limiting the impact of its decision.

[120] *See, e.g.*, Stephanie Sandoval, *Campaigns Close to Closure in FB: Rival Farmers Branch Committees Sound Off on Rental Ordinance*, DALLAS MORNING NEWS, Apr. 29, 2007, at 1B (local political action committee commenting that "Farmers Branch doesn't have the training, expertise or financial resources to handle the issue of illegal immigration. That's why tax money goes to Washington").

While it is definitely possible for a city or county to have better resources than the federal or state governments, it is unlikely. The federal and state governments typically have a much larger tax base than cities or counties. Yet when enacting an immigrant housing ordinance, Cherokee County, Ga. stated that "[t]he state and federal government lack the resources to properly protect the citizens of Cherokee County from the adverse effects of the harboring of illegal aliens, and the criminal activities of some illegal aliens." Cherokee County Ordinance, *supra* note 5, § 1(6).

[121] Maria Panaritis & Sam Wood, *Riverside to Repeal Immigrant Laws: After an Exodus of Brazilian Residents, Officials Plan to End Penalties Sought for Hiring and Housing Those Here Illegally*, PHILA. INQUIRER, Aug. 23, 2007, at B01.

50%.[122] When residents, whether legal or illegal, leave a community in response to these ordinances, the local population suffers because of reduced business and tax revenue.[123]

III. CHALLENGING IMMIGRANT HOUSING ORDINANCES IS MOST PRACTICAL UNDER THE FAIR HOUSING ACT AND SECTION 1981

This Note argues that because of the legal deficiencies with immigrant housing ordinances,[124] the most practical challenges to them arise under FHA and Section 1981. FHA prohibits housing practices that have a discriminatory *effect* on parties because of race, color, or national origin.[125] Thus, while an equal protection challenge requires proof of discriminatory *intent*,[126] courts have interpreted FHA more broadly.[127] Additionally, Section 1981 prohibits parties from restricting *any* person's right to enter a contract because of race, ethnicity, or national origin.[128] As a result, Section 1981 prohibits any state or municipal law that forbids a property owner or manager from entering leases with unlawful immigrants.[129] This Note argues that in comparison to a preemption, due process or equal protection challenge, plaintiffs face a lower bar to establish wrongdoing under FHA and Section 1981. It follows that the most practical means to challenge these immigrant housing ordinances are FHA and Section 1981. By doing so, plaintiffs can defeat local piecemeal efforts to regulate immigrant housing and thereby encourage a uniform, national approach to a common problem.

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[122] Press Release, American Civil Liberties Union, Businesses Sue Riverside, NJ Over Vague, Discriminatory Anti-Immigrant Ordinance (Oct. 18, 2006), http://www.aclu.org/immigrants/discrim/27107prs20061018.html.

[123] *See* Dwight Ott & Sam Wodd, *Riverside Twp. Repeals Illegal-Immigrant Law*, PHILA. INQUIRER, Aug. 24, 2007, http://www.philly.com/inquirer/local/nj/9350767.html; *see also* Belson & Capuzzo, *supra* note 15 (discussing local housing ordinances regulating immigration, the impacts on local businesses, and the high costs of continued litigation).

[124] *See supra* Part II.

[125] *E.g.*, Erdman v. City of Fort Atkinson, 84 F.3d 960, 963 (7th Cir. 1996) ("[A] procedure, neutral on its face, may not be applied in a discriminatory manner . . . .") (citing United States v. Village of Palatine, Ill., 37 F.3d 1230, 1233 (7th Cir. 1994)); *see generally* John E. Theuman, Annotation, *Evidence of Discriminatory Effect Alone as Sufficient to Prove, or to Establish Prima Facie Case of, Violation of Fair Housing Act (42 U.S.C.A. §§ 1601 et seq.)*, 100 A.L.R. FED. 97 (1990) (surveying federal court decisions on whether discriminatory effect or intent is required to recover under FHA).

[126] *See supra* Part II.C.

[127] *See supra* note 116.

[128] *See infra* Part III.B.

[129] Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 548 (M.D. Pa. 2007) ("[S]ection 1981 forbids the defendant from prohibiting undocumented aliens from entering into leases. Thus, [the Hazleton Ordinances], which forbid such contracts, are in violation of section 1981.").

A. *Fair Housing Act*

Congress enacted FHA[130] to provide fair housing throughout the nation and to prohibit all public and private racial discrimination in the sale and rental of real property.[131] The reach of FHA is broad, covering

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[130] FHA provides:

> [I]t shall be unlawful:
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color . . . or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color . . . or national origin.
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color . . . or national origin, or an intention to make any such preference, limitation, or discrimination.
>
> (d) To represent to any person because of race, color . . . or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
>
> (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color . . . or national origin.

42 U.S.C. § 3604 (2000).

[131] United States v. Hunter, 459 F.2d 205, 214 (4th Cir. 1972) ("The Fair Housing [Act] was designed to provide fair housing throughout the nation and is a valid exercise of congressional power under the Thirteenth Amendment to eliminate badges and incidents of slavery."); *see also* 15 AM. JUR. 2D *Civil Rights* § 380 (2000) (reviewing the general purpose and goal of FHA).

While Congress enacted the Thirteenth through Fifteenth Amendments in response to widespread racial evils prior to the Civil War, many Southern states eroded the Amendments' impact through other segregation practices. *See Civil Rights Movement*, 3 THE NEW ENCYCLOPEDIA BRITANNICA MICROPÆDIA READY REFERENCE 339, 339 (2005). In response to continued discrimination, the Civil Rights movement went on the offensive to challenge these discriminatory practices. *See id.* The movement exploded in the late 1950s, and in response, Congress passed FHA as one of several pieces of legislation targeted at eradicating racial discrimination. *See id.* Congress had previously passed the Civil Rights Act of 1964, which was one of the most important civil rights laws in United States history. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (2000); *see Civil Rights Movement*, *supra*, at 339.

Congress passed FHA under its Thirteenth Amendment enumerated power to eradicate the evils of slavery and involuntary servitude. U.S. CONST. amend. XIII, § 2; *Hunter*, 459 F.2d at 214 ("The Fair Housing [Act] was designed to provide fair housing throughout the nation and is a valid exercise of congressional power under the Thirteenth Amendment to eliminate badges and incidents of slavery."); *see* 15 AM. JUR. 2D *Civil Rights* § 380 (reviewing the general purpose and goal of FHA). In order to affect Congress' intent to ban racial discrimination in the sale and rental of real property, courts must give generous construction to FHA's broad and inclusive language. Samaritan Inns, Inc. v. District of Columbia, 114 F.3d 1227, 1234 (D.C. Cir. 1997) ("[W]e recognize that the language of the Act is 'broad and inclusive' and must be given a 'generous construction.'" (quoting Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972))); *see also* 15 AM. JUR. 2D *Civil Rights* § 380 (reviewing the general purpose and goal of FHA). Thus, any state or municipal law that encourages racial discrimination in the sale and rental of real property is invalid. 42 U.S.C. § 3615 (2000) ("[A]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid."); *see also* 15 AM. JUR. 2D *Civil Rights* § 380 (reviewing the general purpose and goal of FHA).

most dwellings and protecting any person seeking to rent or purchase a dwelling, regardless of immigration status.[132] While there is a limited exemption for single-family homes, the exemption does not extend to apartment complexes.[133] Thus, apartment complex owners and managers must comply with FHA provisions.

Immigrant housing ordinances injure both tenants and property owners, and both groups have standing to challenge the ordinances under FHA.[134] The ordinances harm tenants because they disparately impact minority renters. Further, the ordinances infringe on tenants' rights to enjoy a diverse community.[135] They harm property owners and managers, in contrast, because they are too vague.[136] Property owners and managers lack sufficient notice and guidance regarding their new legal obligations.[137]

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[132] *See* 42 U.S.C. § 3602(d) (2000) (defining "person" as "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries"); *id.* § 3603(a) (dwellings affected by FHA); *id.* § 3604 (defining unlawful practices under the statute).

[133] *Id.* § 3603(b)(1) (providing the limited single-family home exemption, which depends on how many single-family homes the owner owns at one time, and limiting the owner to only one exemption during any twenty-four month period, excluding properties sold or rented through the assistance of an estate broker, agent or salesman, and others).

[134] FHA provides a cause of action to any aggrieved person, including both those already injured by a discriminatory housing action or those that a discriminatory housing action threatens with imminent injury. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 12A:1 (2008). FHA defines an aggrieved person as anyone who: "(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i). Additionally, FHA provides broad standing:

> Standing under the Fair Housing Act is as broad as permitted by Article III of the Constitution .... To satisfy the Article III standing requirement, a party must establish three elements: (1) injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) likelihood that the injury will be redressed by a favorable decision.

Wilson v. Glenwood Intermountain Properties, Inc., 98 F.3d 590, 593 (10th Cir. 1996); *see also* 15 AM. JUR. 2D *Civil Rights* § 460 (reviewing the general standing requirements to challenge an action under FHA).

A challenge under FHA generally follows the *McDonnell Douglas* burden shifting regime, which the Supreme Court established for Title VII employment discrimination claims. SCHWEMM, *supra*, § 10:6; *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804 (1973) (establishing the burden shifting regime, under which: (1) the plaintiff must make out the prima facie case of unlawful conduct; (2) upon which the burden shifts to the defendant to articulate a legitimate, lawful reason for the action; (3) upon which the burden shifts back to the plaintiff to articulate reasons that the defendant's justifications are pretext).

[135] As the Supreme Court has explained:

> They—the two tenants—claimed they had been injured in that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being "stigmatized" as residents of a "white ghetto."

Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208 (1972).

[136] *See supra* Part II.B.

[137] *See supra* Part II.B.

Thus, in an effort to comply with local regulations, they may incidentally violate federal laws. Property owners and managers face a basic dilemma: they may abide by federal laws and risk violating local ordinances, or they may abide by local ordinances and risk violating federal laws.

1. Tenants

FHA provides tenants with broad protection by prohibiting property owners and managers from engaging in discriminatory housing practices, including practices that disparately impact minority tenants.[138] Immigrant housing ordinances do not facially discriminate against minority tenants. In fact, most ordinances include provisions that expressly prohibit complaints based on race, color, or national origin.[139] Rather, the ordinances draw distinctions between lawful and unlawful immigrants.[140] Yet these ordinances violate FHA because they have a disparate impact on minority tenants.

Under a disparate impact challenge, tenants must show that a policy, procedure, or practice disparately impacts members of a protected class.[141] A municipal housing ordinance is an official policy because it dictates which persons are eligible to rent housing. The ordinances also disparately impact members of a protected class. The housing ordinances only apply to apartment complexes, exempting single-family homes and small-scale apartments.[142] Yet minorities often disproportionately reside in apartment complexes.[143] For example, 42% of Latino families in Farmers Branch live in apartment complexes,[144] compared to 14% of white non-Hispanic families.[145] Clearly, where Latino families are three times more likely to reside in an apartment complex, an ordinance regulating those complexes will produce a disparate impact. Statistical

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[138] *See* SCHWEMM, *supra* note 134, § 10:1 (noting the similarity between Title VII and FHA claims, and that both provide causes of action for "disparate treatment . . . (discriminatory intent)" and for "disparate impact . . . (discriminatory effect)").

[139] *E.g.*, Farmers Branch Ordinance, *supra* note 5, § 26-116(f)(4)(c) ("These provisions shall be applied uniformly and in a nondiscriminatory manner. The owner and/or property manager's application of these provisions must not differ based on the person's race, color, religion, sex, national origin, disability, or familial status.").

[140] *E.g.*, *id.* § 26-116(f) (requiring property owners and managers to document a prospective tenant's eligible immigration status prior to entering a lease with the prospective tenant).

[141] Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996) ("The relevant question in a discriminatory effects claim . . . is whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on members of a protected class.").

[142] For example, the Farmers Branch Ordinance applies to "apartment complexes," and Farmers Branch defines an apartment complex as "any building or portion thereof which is rented, leased or let to be occupied for compensation as three or more dwelling units or which is occupied as a home or place of residence by three or more families living in independent dwelling units located in the city." Farmers Branch Ordinance, *supra* note 5, § 26-116(f). The ordinance would not cover single-family homes or buildings with less than three apartments or families.

[143] Farmers Branch Verified Complaint, *supra* note 8, ¶ 25.

[144] *Id.*

[145] *Id.*

evidence is essential to establish a disparate impact claim.[146] FHA thus provides a practical tool for challenging immigrant housing ordinances, so long as there is sufficient statistical evidence to support the claim.

While immigrant housing ordinances do not facially discriminate, there is a significant risk that property owners and managers will enforce the ordinances in a discriminatory manner.[147] Faced with new legal obligations to comply with local ordinances and insufficient guidance on these new legal responsibilities, property owners and managers will likely implement a blanket policy to decline housing to certain types of renters.[148] Such action will inherently consider a person's race, color, or national origin, which FHA expressly prohibits.[149] Since FHA prohibits discriminatory enforcement of facially neutral ordinances, property owners and managers who implement a blanket "no rent" policy would violate federal law.

Additionally, through both the disparate impact on minorities and the risk of discriminatory enforcement, immigrant housing ordinances prevent tenants from enjoying a diverse community.[150] Exposure to diversity provides people with a competitive advantage.[151]

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[146] *See* SCHWEMM, *supra* note 134, § 10:6 ("The key to proving a disparate impact claim is statistical evidence showing that the defendant's policy or practice has a greater impact on protected class members than on others.").

[147] *See, e.g.*, Erdman v. City of Fort Atkinson, 84 F.3d 960, 963 (7th Cir. 1996); *see generally* Smith & Lee Assoc., Inc. v. City of Taylor, 13 F.3d 920, 924-25 (6th Cir. 1993) (explaining that FHA prohibits discriminatory application of an ordinance).

[148] Property owners and managers might decline to rent to any person who appears to be an unlawful immigrant. Further, if a property owner is unsure of a person's immigration status or simply does not want to go through the trouble to verify the person's status, the property owner might decline to enter a lease with the prospective tenant.

[149] *See* SCHWEMM, *supra* note 134, § 10:2 ("Discrimination based on intentional consideration of [race, color, or national origin] is illegal, even if the defendant was not motivated by personal prejudice or racial animus.").

Under FHA, injured parties may use either direct or circumstantial evidence to establish their claim. *See id.* Disparate treatment claims also follow the *McDonnell Douglas* burden-shifting framework. *See id.*

[150] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208 (1972) ("The [FHA] definition of 'person aggrieved' . . . is defined as '(a)ny person who claims to have been injured by a discriminatory housing practice.'" (citation omitted)). In *Trafficante*, two tenants sued their landlord for discriminating against nonwhite rental applicants, depriving them of the benefits of living in an integrated community. *Id.* The district court dismissed the claim, holding that the plaintiffs were not within the protected class, and the Ninth Circuit affirmed. *Id.* The Supreme Court reversed, noting that FHA defines aggrieved persons broadly. *Id.*

[151] Corporate America was one of the first groups to realize the benefits of diversity. For example, Target Corporation states:

> Our ability to recruit and hire people from diverse backgrounds to create a team with a rich variety of strengths, perspectives and lifestyles is a key factor in our performance as a company. Our ability to "know our guest" is greatly enhanced by employing team members who reflect the diversity of the communities that we serve. We are committed to diversity because it is the right thing to do and because it gives us a competitive advantage.

Target Corporate Responsibility Report 2007, at 10 (2007), *available at* http://sites.target.com/images/corporate/about/responsibility_report/responsibility_report_full.pdf (last visited June 15, 2008).

The Supreme Court, accordingly, has recognized the importance of diversity in education, stating that "[t]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[152] A diverse community includes all types of persons, including those of a different race, color, ethnic origin, and immigration status. More importantly, exposure to diversity in a community setting allows residents to interact with neighbors informally in a familiar environment. This type of interaction is more likely to foster valuable learning relationships.

Yet immigrant housing ordinances prohibit communities from enjoying the diversity that immigrants provide.[153] Such ordinances, for example, deprive the local community of social, business, and professional advantages.[154] With an ever-increasing immigrant population, tomorrow's leaders need the skills to empathize and communicate with all immigrants, both lawful and unlawful. However, immigrant housing ordinances deprive tenants of the opportunity to develop these skills.

These discriminatory housing practices are what Congress intended to eradicate with FHA.[155] The housing ordinances[156] would injure minorities and their neighbors by preventing eligible renters from obtaining housing because of race, color, or national origin.

2. Property Owners and Managers

Property owners and managers will likely violate FHA when complying with immigrant housing ordinances. FHA prohibits property owners and managers from refusing to sell or rent a dwelling to a person because of race, color, or national origin.[157] Likewise, property owners and managers cannot refuse to negotiate for the sale or rental of property to a person because of race, color, or national origin or otherwise make the dwelling unavailable.[158] Yet local ordinances mandate, without guidance, that property owners and managers refuse housing to unlawful immigrants.

Property owners and managers face difficulties complying with these ordinances because they are vague and do not provide sufficient

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[152] Grutter v. Bollinger, 539 U.S. 306, 308 (2003).

[153] Diversity includes exposure to both lawful and unlawful immigrants. After all, "the illegal alien of today may well be the legal alien of tomorrow." Doe v. Plyler, 458 F. Supp. 569, 577 (E.D. Tex. 1978). In an increasingly global world, those people who have experiences with and understandings of unlawful immigrant concerns will have a competitive advantage over their peers.

[154] *Trafficante*, 409 U.S. at 208.

[155] *See* SCHWEMM, *supra* note 134, § 5:2 (reviewing the legislative history of FHA).

[156] In addition to private parties, FHA applies to federal, state, and municipal governments. SCHWEMM, *supra* note 134, § 12B:4.

[157] 42 U.S.C. § 3604(a) (2000) (noting that it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . a dwelling to any person because of race, color, . . . or national origin").

[158] *Id.* (noting that it is unlawful "to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color . . . or national origin").

guidance on how to determine housing eligibility.[159] While the ordinances specify some types of documentation and processes that property owners may use to determine a person's immigration status, the ordinances are far from comprehensive. Faced with insufficient guidance on how to determine a prospective renter's immigration status, property owners will likely resort to a blanket decision to refuse housing to someone that *might* be an unlawful immigrant.[160] Such an action would inherently consider race, color, or national origin and violate FHA.[161]

Further, property owners and managers have no authority to determine a prospective tenant's immigration status.[162] Under the supremacy doctrine, federal immigration judges have the sole authority to determine a person's immigration status.[163] Immigrant housing ordinances injure property owners and managers because the ordinances create legal obligations that these parties cannot satisfy without violating federal law.

B. Section 1981

Section 1981 forbids any public or private party from interfering with unlawful immigrants' right to enter a lease.[164] Congress enacted

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[159] *See supra* Part II.B.

[160] *See* Campbell, *supra* note 20, at 1052 (arguing that local anti-immigrant ordinances encourage "racial and ethnic profiling of persons seeking to contract with landlords").

[161] FHA subjects a property owner that violates FHA to actual compensatory damages, punitive damages, and opposing counsel's attorney fees. 42 U.S.C. § 3613(c) (2000).

[162] *See supra* note 59.

[163] *See supra* Part II.A.

[164] 42 U.S.C. § 1981 (2000). Section 1981 provides that:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Id.; *see also* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 548 (M.D. Pa. 2007). Unlike the Fifth and Fourteenth Amendments, which only apply to governmental parties, Section 1981 applies to both the government and private parties. Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 387-88 (1982); *see also* 15 AM. JUR. 2D *Civil Rights* § 27 (2000) (reviewing the general characteristics of Section 1981). Thus, there is no requirement for an act to be under color of law to fall within Section 1981 prohibitions. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 387; *see also* 15 AM. JUR. 2D *Civil Rights* § 27 (2000) (reviewing the general characteristics of Section 1981).

Certain federal causes of action, such as Section 1983, require a party to act under color of law to impose liability. 42 U.S.C. § 1983 (2000). "Color of law" is a legal term of art. The

Section 1981 with the limited intent to eradicate widespread racial discrimination following the Civil War.[165] While Section 1981 mandates that all persons within U.S. jurisdiction be treated the same as "white persons," Congress intended that Section 1981 protect all persons from intentional discrimination because of race, ancestry, or ethnicity.[166] Since Section 1981 applies to all persons within the jurisdiction of the United States, at a minimum it protects lawfully admitted resident aliens.[167] While the Supreme Court has not decided whether Section 1981 applies to unlawful immigrants, the Middle District of Pennsylvania held it applies to all aliens, regardless of immigration status.[168]

While immigrant housing ordinances appear facially neutral and only restrict housing arrangements with unlawful immigrants, the ordinances disproportionately target minorities.[169] The ordinances have a disparate impact on minorities, and there is a high probability that property owners and managers will enforce the ordinances in a discriminatory manner.[170] Because Section 1981 prohibits any party from distinguishing persons based on ethnicity[171] when contracting, federal law prohibits the ordinances.

Thus, since immigrant housing ordinances interfere with unlawful immigrants' statutory rights to enjoy the same contractual privileges as "white citizens,"[172] Section 1981 bars the ordinances. Further, Section 1981 bars the ordinances because it would be impossible for property owners and managers to comply with both the local ordinance and federal laws concurrently.[173]

Supreme Court explains that, "[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." United States v. Classic, 313 U.S. 299, 326 (1941) (citations omitted); *see also* James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 415 n.99 (2003) (reviewing the definition of the term "color of law").

[165] Georgia v. Rachel, 384 U.S. 780, 791 (1966) ("The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality."); *see also* 15 AM. JUR. 2D *Civil Rights* § 28 (2000) (commenting on the limited scope of Section 1981).

[166] 42 U.S.C. § 1981(a) (2000); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987).

[167] § 1981(a); Graham v. Richardson, 403 U.S. 365, 371 (1971) ("It has long been settled, and it is not disputed here, that the term 'person' in this context encompasses lawfully admitted resident aliens as well as citizens of the United States . . . .").

[168] *Lozano*, 496 F. Supp. 2d at 547 ("[W]e find that aliens, regardless of their status under the immigration laws, are persons under section 1981.").

[169] *See supra* Part III.A.1; *see also generally* Campbell, *supra* note 20 (discussing local immigration ordinances and their impact on Latinos).

[170] *See supra* Part III.A.1.

[171] *Saint Francis Coll.*, 481 U.S. at 613 ("[W]e have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.").

[172] § 1981.

[173] *See supra* Part II.A.

IV. CONCLUSION

State and municipal governments may neither slam their front doors shut, nor gate-keep their communities by determining which immigrants may enter and remain.[174] Unlawful immigration does impose costs on state and municipal governments, and border communities may very well bear those costs disproportionately. However, exporting immigration costs to neighboring communities is no solution.[175] Rather, state and municipal governments should coalesce around a unified plan and lobby Congress to address the immigration problem comprehensively. A comprehensive regulatory framework would avoid inconsistent regulation from state and local governments. The framework would be more likely to provide tenants and property owners notice of their legal obligations, and would provide adequate and meaningful review. Congress has the power to articulate a standard of scrutiny that addresses equal protection concerns for immigrants. A federal statute, moreover, would represent the cooperation and contributions of the nation as a whole. Since immigration policies directly implicate political functions involving foreign affairs and relations,[176] a nationally accountable Congress is the appropriate body to address these concerns.

Congress may take longer to act than state and municipal governments would like. Thus, in the interim, state and municipal communities are likely to elect at least some politicians running "tough on immigration" campaigns. These politicians are likely to encourage state and municipal regulations of immigrant housing. Yet this Note has discussed the legal deficiencies with local regulations.[177] Because of these legal deficiencies, local residents must challenge immigrant housing ordinances under FHA and Section 1981.[178] In the end, a comprehensive, well-reasoned approach to immigration will best address the national problem, while ensuring that the United States' doors to the "tempest-tost"[179] remain open.

Todd Donnelly Batson[†]

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[174] *See supra* note 7.

[175] For an argument that courts should analyze state immigration laws under the Dormant Commerce Clause, see generally Erin F. Delaney, Note, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. 1821 (2007).

[176] *See supra* note 13 and accompanying text.

[177] *See supra* Part II.

[178] *See supra* Part III.

[179] *See supra* note 1.

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