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"Hispanics in the Heartland: The Fremont, Nebraska Immigration Ordinance and the Future of Latino Civil Rights"

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"We want to be the voice of those who have no voice, in order to cry out against every assault of our human rights so that justice is done." – Archbishop Oscar Romero[2]

Introduction

As individuals drive from outside of Nebraska to within its state's borders, a large sign greets motorists with a friendly slogan: "Nebraska: The Good Life."[3] With its traditions, history, and friendly Midwestern image, the billboards around the state are well-deserved. Nebraska has been independently rated to be one of the "happiest" states in the nation.[4] It is an environmentally conscious state and is the home of Arbor Day.[5] Like many other states in the Midwest, it has traditionally been a state which has fostered the development of civil rights for women and minorities. In the landmark case of *Standing Bear v. Crook*, in 1879 the federal

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[2] MARIE DENNIS, RENNY GOLDEN & SCOTT WRIGHT, OSCAR ROMERO: REFLECTIONS ON HIS LIFE AND WRITINGS 49 (Orbis Books, 2000).

[3] Ben Nelson, U.S. Senator for Nebraska, "Nebraska: The Good Life," 2012, http://www.bennelson.senate.gov/explore/

[4] Stephen Dalton, "Happiness Index: Nebraska Nabs Top Spot," Apr. 6, 2009, http://www.mainstreet.com/article/moneyinvesting/news/happiness-index-nebraska-nabs-top-spot

[5] Arbor Day Foundation, "The History of Arbor Day," 2012, http://www.arborday.org/arborday/history.cfm

district court for the District of Nebraska held that a Native American is a "person" within the meaning of United States law.[6] In 1986, a century later, another landmark event would occur – Democrat Helen Boosalis and Republican Kay Orr won their respective primaries in the race for the Nebraska Governorship. For the first time in American electoral history, the nominees of the two major parties would be women in a race for Governor.[7] Finally, since 1972, the state has had a Latino American Commission[8] whose role is to create linkages between the Nebraska state government and Hispanic community of Nebraska and foster greater chances for access to education, social, political and economic opportunities in the state.[9]

However, storm clouds hover over "The Good Life." Nebraska, like a number of states around the United States, has seen a serious erosion of the legal and civil rights of Latinos. The general erosion of the legal and civil rights of Latinos within the past three years has received much media and scholarly attention concerning laws passed in two states: Alabama and Arizona. In Arizona, S.B. 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act," gave state and local law enforcement officials the duty to detain individuals whom they have "reasonable suspicion" to believe are unlawfully present within the United States.[10] While the

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[6] United States ex. rel. Standing Bear v. Crook, 25 F. Cas. 695, 700-701 (C.C. Neb. 1879) (stating "an Indian is a 'person' within the meaning of the laws of the United States, and has, therefore, the right to sue out a writ of habeas corpus in a federal court, or before a federal judge, in all cases where he may be confined or in custody under color of authority of the United States, or where he is restrained of liberty in violation of the constitution or laws of the United States").

[7] Ken Rudin, "On this Day in 1986: Nebraska Gov Race First to Have 2 Women," May 2009, http://www.npr.org/blogs/politicaljunkie/2009/05/on_this_day_in_1986_nebraska_g.html

[8] Latino American Commission, "About," 2011, http://www.latinoac.nebraska.gov/about.htm (In 1972, with the passage of LB1081, the Nebraska Legislature authorized the creation of the Mexican-American Commission. In 2010, with the enactment of LB139, the name of the Mexican-American Commission was formally changed to the Latino American Commission).

[9] *Id.*

[10] 2010 Ariz. Sess. Laws 113; Kristina Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America,* 14 HARV. LATINO L. REV. 1 (2011).

United States Supreme Court in *Arizona v. United States* largely struck down S.B. 1070 as unconstitutional, the Court did leave intact the provision which permitted law enforcement officials the ability to detain an individual if there was a "reasonable suspicion" the individual was undocumented.[11] Before the decision, numerous academic commentators criticized the law on constitutional grounds.[12] Approximately one year later, in 2011, Alabama enacted what has

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[11] Arizona v. United States, 567 U.S. _____ (2012). In this monumental decision, the Supreme Court of the United States largely struck down S.B. 1070 as unconstitutional, with the exception of the provision which made it a duty of a law enforcement official to detain an individual whom they believe is unlawfully present within the United States.

[12] George A. Martínez, *Arizona, Immigration and Latinos: The Epistemology of Whitness, the Geography of Race, Interest Convergence, and the View from the Perspective of Critical Theory,* 44 ARIZ. ST. L.J. 175 (2012) (contending that the newly enacted laws in Arizona concerning immigration reflect "an epistemology of whiteness and operates to transform the State of Arizona into a white geographical landscape"); Campbell, *supra* note 10, at 20 (arguing that "the manner in which Arizona has attempted to regulate immigration – by trampling on the civil rights of U.S. citizens, legal residents, Latinos, and other communities of color – is a form of state-sanctioned vigilantism that, left unchecked, resulted in one of the most egregious and unconstitutional laws in modern history"); Kristina M. Campbell, *The High Cost of Free Speech: Anti-Solicitation Ordinances, Day Laborers, and the Impact of "Backdoor" Local Immigration Regulations,* 25 GEO. IMMIGRATION L.J. 1 (2010); David Harris, *Immigration and National Security: The Illusion of Safety Through Local Law Enforcement Action,* 28 ARIZ. J. INT'L & COMP. L. 383, 400 (2011) (stating "the existence of the law gives us a chance to consider what might happen to our national security as a result of S.B. 1070's central operating principle: local police should enforce immigration law. Given what experts tell us about fighting terrorism – that the collection and use of intelligence is all important to our success, and that terrorist-defeating intelligence can only come from those living in close, physical, cultural and linguistic proximity to potential terrorists – there is every reason to think that getting local police into the fight against illegal immigration represents exactly the wrong strategy"); Gabriel J. Chin and Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law,* 61 DUKE L.J. 251 (2011); Andrea Christina Hill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement,* 14 HARV. LATINO L. REV. 35 (2011); Karla Mari McKanders, *Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status,* 12 LOY. J. PUB. INT. L. 331, 362-363 (2011) (concluding "State trespass laws that criminalize unlawful presence of immigrants are unconstitutional regulations of immigration and are a preempted exercise of state power. State and local governments cannot cite the failure of the federal government to pass comprehensive immigration reform as the rationale for adopting state immigration laws. As U.S. immigration history demonstrates, immigration laws can arbitrarily exclude certain races, religions and "undesirable" populations); Frank Melone, Elizabeth Pitrof, and Ann Schmidt, *Arizona 1070: Straw Man Law Enforcement,* 14 HARV. LATINO L. REV. 23 (arguing that S.B. 1070 is not a serious crime-fighting tool, but targets a particular population); Scott Nakama, *Senate Bill 1070: The Implications of Arizona's Immigration Law Upon MLB,* 8 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 23, 60-61 (2011) (stating "Latino baseball players have contributed significantly to MLB. Some of the best players over the last thirty years have been Latinos. The enforcement of S.B. 1070 puts Latino and other immigrant baseball players at risk of being wrongfully arrested, harassed, and detained. The majority of Latino players enter the U.S. unable to speak much English. It is likely that players whose knowledge of the English language is deficient and who do not carry their alien registration documents might provide officers with a reasonable suspicion they are undocumented. Players can be harassed and detained (if probable cause exists to arrest them for being an unlawful immigrant) until representatives of their team provide law enforcement officials with documentation proving the player is a lawfully present immigrant"); L. Darnell Weeden, *It is Discriminatory for Arizona or Society to Engage in the Anti-Immigration Practice of Profiling Hispanics for Speaking Spanish,* 12 LOY. J. PUB. INT. L. 109, 132 (2010) (stating "English-only rules and other language discrimination policies, when applied in a hostile anti-immigration environment, may constitute national

been described as the nation's "strictest" anti-illegal immigration law.[13] The legislation, H.B. 56, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, imposes criminal penalties for the willful failure to complete or carry alien registration documents, applying for work if one is unauthorized to do so, for concealing unauthorized aliens, and for dealing in fraudulent immigration documents.[14] Similar to the Arizona law, it places a duty upon state and local law enforcement officials to detain individuals when they have a "reasonable suspicion" they are unlawfully present within the United States.[15] On a motion by the United States for preliminary injunction seeking to prevent enforcement of various provisions of the law, a federal judge in the Northern District of Alabama granted the motion as to four provisions of the law.[16] The case is currently on appeal before the 11th Circuit.

While the Arizona and Alabama laws have received much scholarly attention and criticism, the legal and civil rights of Latinos are also under fire in the Midwest. Latinos in Nebraska, the state of "The Good Life," face great challenges. In Fremont, Nebraska, a city of

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origin discrimination because people Hispanic in appearance are likely to suffer from cultural identity harassment. The United States Constitution does not permit Arizona to implement an anti-immigration law that creates a presumption that speaking Spanish by a Hispanic person is reasonable suspicion in Arizona that she entered America without documentation. Once Arizona police officers use speaking the Spanish language to generate reasonable suspicion regarding a person's immigration status, they are required under S.B. 1070 to target or profile the person who is Hispanic in appearance by requesting alien registration papers to verify immigration status. This practice violates federal law").

[13] Richard Fausset, "Alabama Enacts Anti-Illegal-Immigration Law Described as Nation's Strictest," Jun. 10, 2011, http://articles.latimes.com/2011/jun/10/nation/la-na-alabama-immigration-20110610

[14] John W. Hargrove and Jennifer J. McGahey, *Alabama's New Immigration Law: Nuts and Bolts for Alabama Employers*, 73 ALA. LAW. 122, 124 (2012).

[15] Fausset, *supra* note 13.

[16] United States v. Alabama, 813 F. Supp.2d 1282 (N.D. Ala. 2011) (finding the following four provisions to be either conflict or expressly preempted – 1. Statute which set forth misdemeanor offenses in connection with the concealing, transporting, and harboring of unlawfully-present aliens, and encouraging them to come to Alabama (conflict preempted); 2. Statute which provided for the detention of illegal aliens following an arrest and verification inquiry (conflict preempted); 3. Statute prohibiting allowance of wages paid to unauthorized aliens as deductible business expense for state income or business tax purposes (expressly preempted); and 4. Statute providing for a civil action based on an employer's failure to hire or discharge of United States citizen while retaining or hiring an unauthorized alien (expressly preempted).

25,000 with a Latino population of less than 10 percent,[17] an ordinance was passed in 2010 which made it illegal for any person or business in the city to "harbor" an illegal alien in a dwelling unit by leasing or renting a unit to them,[18] among other provisions.[19] In *Keller v. City of Fremont*, the United States District Court for the District of Nebraska invalidated the provision of the ordinance which provided penalties for the "harboring" of illegal aliens on the basis that it was preempted by federal law[20] and violated the Fair Housing Act.[21] Although the case is currently on appeal before the Eighth Circuit, the *Keller* decision by the federal district court was described as "a good day in Nebraska and a good day in America."[22]

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[17] Monica Davey, "City in Nebraska Torn as Immigration Vote Nears," June 17, 2010, http://www.nytimes.com/2010/06/18/us/18nebraska.html?pagewanted=all

[18] Fremont, NE., Ordinance No. 5165 (2010). The ordinance states as follows:

2. Harboring Illegal Aliens:

A. It is unlawful for any person or business entity that owns a dwelling unit in this City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.

    1. For the purpose of this section, to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall be deemed to constitute harboring. To suffer or permit the occupancy of the dwelling unit by an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall also be deemed to constitute harboring.

[19] *Id.* The ordinance also provided that each occupant, prior to occupying any leased or rented dwelling unit, must pay a fee of $5 to the City of Fremont for an occupancy license, which contains, among other items, a declaration that the applicant is a United States citizen or national on a form provided by the City of Fremont.

The ordinance also contained provisions which required all agencies of the City to register in the E-Verify Program and use the program to verify the authorization of employment status of each employee hired.

[20] Keller v. City of Fremont, No. 8:10CV270, 2012 WL 537527, at *10 (D. Neb. Feb. 20, 2012).

[21] *Id.* at *16.

[22] Leslie Reed, "Part of Fremont Immigration Law Tossed," Feb. 21, 2012, http://www.omaha.com/article/20120220/NEWS97/702209899 (Quotation of Shirley Mora James, Nebraska attorney of the Mora James Law Office, and who was co-counsel with the Mexican American Legal Defense and Educational Fund.)

While Arizona has been labeled as a "modern-day Selma"[23] in the struggle for Latino civil rights, Nebraska has become a state which is a quiet, but promising, state in the movement for Latino civil rights that should not be overlooked. This Article examines not only the issues surrounding the Fremont ordinance, particularly with housing, but other recent legislative attempts at the state level to curtail the rights of Latinos in Nebraska. While many such legislative attempts to curtail the rights of Latinos in Nebraska have taken place in the past several years, the ruling in the *Keller* case and the Legislature's April 2012 approval of Nebraska taxpayer funding for prenatal health care benefits for undocumented immigrants[24] places rays of sunshine of hope over a Nebraska landscape which has been increasingly covered with clouds over the civil rights of Latinos.

Part I of this Article provides a brief background of the Latino culture in Nebraska and discusses the increasing diversity of the state. To better compare the legal issues and effects of the Fremont ordinance, two other cities who passed similar ordinances which faced legal challenges as to housing provisions, Hazleton, Pennsylvania and Farmers Branch, Texas, are examined in Part II. Part III then discusses the Fremont ordinance and the *Keller* decision. Part IV examines other legislative attempts to restrict the rights of Latinos in Nebraska as well as the prenatal health care debate, which has turned the state into another battleground in the national movement for Latino civil rights.

Finally, Part V contends that the story of the Fremont ordinance, the efforts to protect Latino civil rights in Nebraska, and the *Keller* decision contain several important lessons for the future of Latino civil rights nationwide. First, the success of the restoration of taxpayer funding for prenatal care by the Nebraska Legislature, care for the most vulnerable in society, was a

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[23] Campbell, *supra* note 10, at 2-3.
[24] Mark Guarino, "Nebraska Approves Prenatal Care for Illegal Immigrants," Apr. 19, 2012, http://www.csmonitor.com/USA/Society/2012/0419/Nebraska-approves-prenatal-care-for-illegal-immigrants

reflection of bipartisan coalition building between immigrants' rights groups, pro-life groups, and even conservative Republicans. Such coalition-building of diverse groups, particularly the inclusion of religious organizations, is vital for the future of the movement to restore and protect Latino civil rights nationwide. Second, as seen with the Fremont ordinance, unconstitutional local efforts to deny undocumented immigrants the right to housing comes with a great cost to municipalities. The costs of the defense of the ordinances and the possibility of a city to be mandated to pay the attorney's fees of Plaintiffs who successfully challenge these ordinances is a powerful economic disincentive for cities to pursue such unnecessary measures. Finally, insurers have not yet provided coverage for a city to pay the attorney's fees, costs, or expenses awarded against a municipality relating to litigation of a housing ordinance which criminalizes the "harboring" of undocumented immigrants. In conclusion, this Article briefly offers a discussion of the possible effects of the *Arizona v. United States* Supreme Court decision on *Keller* as it awaits its fate before the Eighth Circuit Court of Appeals.

I. A Brief History of Latino Immigration to Nebraska and the Midwest and a Future of Increasing Diversity

The contributions of Latino culture in Nebraska and the Midwest essentially extend back a century to the early 1900's. Professor Rogelio Saenz, a sociologist and now Dean of the College of Public Policy at the University of Texas at San Antonio, has noted that the violence of the Mexican Revolution resulted in the first major wave of Mexican immigrants to the United States in the early twentieth century.[25] Labor shortages during World War I also contributed to

[25] Rogelio Saenz, *The Changing Demography of Latinos in the Midwest*, in RUBÉN O. MARTINEZ, ED., LATINOS IN THE MIDWEST 35 (Michigan State University Press, 2011).

this trend.[26] The agricultural sector also particularly attracted many workers of Mexican-origin,[27] and the growth in manufacturing led to opportunities for Latinos to work in the steel and auto industries between the 1940s and 1960s.[28]

Latino immigration to the Midwest increased once again in the 1980s with congressional passage of the Immigration Reform and Control Act (IRCA) of 1986, which granted amnesty to many undocumented immigrants. Through the 1965 amendments to the Immigration and Nationality Act, the undocumented immigrant workers who were granted amnesty were able to sponsor additional family members to become legal residents of the United States.[29] Professor Eileen McConnell also notes that IRCA influenced greater dispersion of immigrants to the Midwest as widespread legalization under IRCA began to influence the labor market.[30]

In the 1990s, companies began to relocate their meatpacking plants away from large, urban cities to rural communities in Kansas, Nebraska, and Iowa, resulting in even more employment opportunities for Latino immigrants.[31] These employment opportunities, coupled

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[26] *Id.* ("Labor shortages associated with World War I and the 1921 and 1924 immigration quota acts resulted in midwestern capitalists turning to new sources of cheap labor. Recruiters – known as *enganchistas* (contractors) – made their way to the Texas-Mexico border and even further south into Mexico in search of cheap labor. Recruiters hailed the better working conditions and higher wages found in the Midwest, comparing them favorably to the working conditions and pay in the border area and in Mexico. Persons of Mexican origin were recruited to work primarily in the agricultural, railroad, and manufacturing industries").

[27] *Id.*

[28] Eileen Diaz McConnell, *Latinos in the Rural Midwest: The Twentieth-Century Historical Context Leading to Contemporary Challenges*, in ANN V. MILLARD AND JORGE CHAPA, EDS., APPLE PIE & ENCHILDAS: LATINO NEWCOMERS IN THE RURAL MIDWEST 33-34 (University of Texas Press, 2004) ("As they had in agriculture, American employers aggressively recruited Mexican immigrants and Mexican Americans to work in the steel and auto industries of Indiana, Michigan and Illinois during and after World War II ….. All in all, the largest flows of Latinos to the Midwest before the 1980s occurred between 1916-1918 and 1942-1964").

[29] *Id.* at 34.

[30] *Id.* at 35.

[31] *Id.* at 36. ("Several factors explain the relocation of meatpacking operations to rural areas. Most importantly, rural areas have cheaper land for building factories and rural workers are less likely to be unionized and more willing to accept lower wages than their urban peers. In addition, technological improvements, such as vacuum packing and

with growing social networks for the incoming immigrants,[32] made the Midwest an attractive place where Latinos could grow.

With more opportunities in the Midwest, the Latino community in Nebraska grew rapidly from 1990 to the present. Between 1990 and 2007, the Latino population in Douglas County, where Omaha is located, grew 310.6%.[33] The Latino population in the state of Nebraska during that same time period grew 258.3%.[34] This growth is reflected in rural towns like Lexington, Nebraska, a "Cornhusker's-loving community" which is located geographically approximately halfway through the state.[35] Lexington's population is now more than 50% Latino.[36] And Fremont, Nebraska, which once only had 165 Hispanic residents in 1990, now has a Latino population which approaches nearly 10 percent.[37]

While the growing Latino population has made Nebraska more diverse state, significant tension and hostility to immigration has led to measures, including the Fremont ordinance, which

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refrigerated trucks, make it possible for meatpacking operations to be located far from metropolitan markets. Consequently, many plants have relocated to areas closer to the source of feed for animals. At the same time, increased mechanization has limited the need for highly skilled workers. Therefore, plants can draw from locals or recruit low-skilled persons from elsewhere to fill the plant floor").

[32] *Id.* at 37. ("Employers offered incentives to draw more workers, a strategy that is especially effective for attracting Latinos, who often are members of extensive social networks composed of relatives and friends").

[33] Jonathan Benjamin-Alvarado, *Immigrant Population Growth and Its Impact on Integration and Political Mobilization: A First Look*, in THE OMAHA SITE: MIGRANT CIVIL SOCIETY UNDER CONSTRUCTION 15 (Woodrow Wilson International Center for Scholars, 2010).

[34] *Id.*

[35] Elizabeth Merrill, "Changing the Games for Hispanic Girls," Mar. 25, 2009, http://sports.espn.go.com/espn/womenshistory2009/news/story?id=4012596

[36] *Id.*

[37] Davey, *supra* note 17.

restrict the civil rights of Latinos. Worse yet, it has even led to hurtful and violent acts.[38] And tragically, a number of Latino residents have expressed they do not feel welcome in the city.[39]

Prior to the debate over the ordinance in Fremont, two other cities, Hazleton, Pennsylvania and Farmers Branch, Texas, attempted to restrict the ability of undocumented immigrants to obtain housing, one of the most basic and fundamental of all human needs. Unfortunately for Fremont, the majority of voters who voted for the ordinance did not follow the lead of two federal courts which struck down the Hazleton and Farmers Branch ordinances.

II. The Road to the Fremont Ordinance: Ordinances in Hazleton, Pennsylvania and Farmers Branch, Texas

A. The Hazleton, Pennsylvania Ordinance

In 2006, Hazleton, Pennsylvania became the first municipality in the United States to enact an ordinance targeting illegal immigration.[40] Three separate ordinances were actually

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[38] *Id.* ("Wanda Kotas, who pushed for the special election, said her family's cat, Mr. Sippi, was killed by a pellet gun not long after her efforts, an act she suspects is related. Kristin Ostrom, who has spoken against the referendum, said a rock was heaved through her front window, an old barbecue grill was dumped at her doorstep, and, this week, an e-mail message arrived promising in red letters to "shed blood" to take back the country. And Alfredo Velez, who once worked at one of Fremont's meatpacking plants and now owns a Mexican grocery, received an anonymous letter accusing him of harboring illegal immigrants, and said someone screamed at him on these neatly kept streets: "Go back to Mexico!").

[39] *Id.*

[40] Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It,* 39 LOY. U. CHI. L.J. 1, 3 (2007). A number of other legal commentators have discussed the Hazleton ordinance, including the following: Jamie Longazel and Benjamin Fleury-Steiner, *Exploiting Borders: The Political Economy of Local Backlash Against Undocumented Immigrants,* 30 CHICANA/O – LATINA/O L. REV. 43 (2011); Mark S. Grube, Note, *Preemption of Local Regulations Beyond Lozano v. City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy,* 95 CORNELL L. REV. 391 (2010); Daniel Eduardo Guzmán, Note, *"There Be No Shelter Here": Anti-Immigrant Housing Ordinances and Comprehensive Reform,* 20 CORNELL J.L. & PUB. POL'Y 399 (2010); John Ryan Syllaios, *The Future of Discriminatory Local Ordinances Aimed at Regulating Illegal Immigration,* 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 639 (2010); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination,* 62 VAND. L. REV. 55 (2009); L. Darnell Weeden, *Standing and Speaking Constitutional Truth to Local Power Regarding Undocumented Immigrant Residents Dwelling With We the People of the United States,* 34 S. ILL. U. L.J. 55 (2009); Todd Batson, Note, *No Vacancy:*

approved by voters in Hazleton – one suspended the licenses of those who hired undocumented workers, one made English the city's official language, and the final ordinance imposed fines on landlords who rent to undocumented immigrants.[41] In particular, the ordinances in general prohibited the "harboring"[42] of illegal immigrants in dwelling units and noncompliance with the ordinance could result in a denial or suspension of the dwelling unit's rental license[43] and the

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Why Immigrant Housing Ordinances Violate FHA and Section 1981, 74 BROOK. L. REV. 131 (2008); Jason Englund, Note, *Small Town Defenders or Constitutional Foes: Does the Hazleton, PA Anti-Illegal-Immigration Ordinance Encroach on Federal Power?,* 87 B.U. L. REV. 883 (2008); Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing,* 39 U. MIAMI INTER-AM. L. REV. 529 (2008); Helen Harnett, *State and Local Anti-Immigrant Initiatives: Can They Withstand Legal Scrutiny?,* 17 WIDENER L.J. 365 (2008); Garrett Kennedy, Comment, *Illegal is Not Simply Illegal: The Broad Ramifications of a Pennsylvania Town's Attempt at Immigration Control, and the Inherent Problems of Racial Discrimination,* 10 U. PA. J. BUS. & EMP. L. 1029 (2008); Jason Luther, Note, *A Tale of Two Cities: Is Lozano v. City of Hazleton the Judicial Epilogue to the Story of Local Immigration Regulation in Beaufort County, South Carolina?,* 59 S.C. L. REV. 573 (2008); Hayden O'Byrne, Note, *Municipal Overreaching: Federal Preemption as it Applies to Town Ordinances Outlawing the Rental of Housing to Undocumented Aliens,* 14 TEX. HISP. J. L. & POL'Y 69 (2008); L. Darnell Weeden, *Local Laws Restricting the Freedom of Undocumented Immigrants as Violations of Equal Protection and Principles of Federal Preemption,* 52 ST. LOUIS U. L.J. 479 (2008); Jacqueline Wolfert, Note, *Reality v. Rhetoric: Lozano v. Hazleton and the State and Local Tax Contributions Made by Undocumented Immigrants,* 6 PITT. TAX REV. 83 (2008); Eric L'Heureux Issadore, *Is Immigration Still Exclusively a Federal Power? A Preemption Analysis on Legislation by Hazleton, Pennsylvania Regulating Illegal Immigration,* 52 VILL. L. REV. 331 (2007).

[41] *Id.*

[42] Hazleton, PA., Ordinance 2006-18, Illegal Immigration Relief Act Ordinance. Section 5(A) of the ordinance states as follows:

"It is unlawful for any person or business entity that owns a dwelling unit in this City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.

(1) For the purposes of this section, to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall be deemed to constitute harboring. To suffer or permit the occupancy of the dwelling unit by an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall also be deemed to constitute harboring.
(2) A separate violation shall be deemed to have been committed on each day that such harboring occurs, and for each adult illegal alien harbored in the dwelling unit, beginning one business day after receipt of a notice from the Hazleton Code Enforcement Office.
(3) A separate violation of this section shall be deemed to have been committed for each business day on which the owner fails to provide the Hazleton Code Enforcement Office with identity data needed to obtain a federal verification of immigration status, beginning three days after the owner receives written notice from the Hazleton Code Enforcement Office."

[43] *Id.* Section 5(B)(4) of the ordinance states as follows:

imposition of significant fines.[44] Every individual who sought to occupy a dwelling unit in the city was required to obtain an "occupancy" permit[45] and failure to comply with the ordinance would result in the owner or agent of the dwelling unit incurring financial penalties.[46]

Almost immediately following the enactment of the ordinance concerning housing, the Community Justice Project, Puerto Rican Legal Defense and Education Fund, and American Civil Liberties Union filed a lawsuit in federal court on behalf of 11 Hazleton residents and business owners.[47] In *Lozano v. Hazleton* ("Lozano I"), the District Court of the Middle District

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"If after five business days following receipt of written notice from the City that a violation has occurred and that the immigration status of any alleged illegal alien has been verified, pursuant to United States Code Title 8, section 1373(c), the owner of the dwelling unit fails to correct a violation of this section, the Hazleton Code Enforcement Office shall deny or suspend the rental license of the dwelling unit."

[44] *Id.* Section 5(B)(8) of the ordinance states as follows:

"Any dwelling unit owner who commits a second or subsequent violation of this section shall be subject to a fine of two hundred and fifty dollars ($250) for each separate violation. The suspension provisions of this section applicable to a first violation shall also apply."

[45] Hazleton, PA., Ordinance 2006-13. Section 6(a) of the ordinance states as follows:

"No Person shall hereafter occupy, allow to be occupied, advertise for occupancy, solicit occupants for, or let to another person for occupancy any Rental Unit within the City for which an application for license has not been made and filed with the Code Enforcement Office and for which there is not an effective license. Initial application and renewal shall be made upon forms furnished by the Code Enforcement Office for such purpose and shall specifically require the following minimum information:

1) Name, mailing address, street address and phone number of the Owner, and if the Owner is not a natural person, the name, address and phone number of a designated representative of the Owner.
2) Name, mailing address, street address and phone number of the Agent of the Owner, if applicable.
3) The street address of the Premises being registered.
4) The number and types of units within the Premises (Dwelling Units or Rooming Units)

The Owner or Agent shall notify the Code Enforcement Office of any changes of the above information within thirty (30) days of such change."

[46] *Id.* Section 10(b) of the ordinance states as follows:

"Any Owner or Agent who shall allow any Occupant to occupy a Rental Unit without first obtaining an occupancy permit is in violation of Section 7.b and shall, upon conviction thereof after notice and a hearing before the Magisterial District Judge, be sentenced to pay a fine of $1,000 for each Occupant that does not have an occupancy permit and $100 per Occupant per day for each day that Owner or Agent continues to allow each such Occupant to occupy the Rental Unit without an occupancy permit after Owner or Agent is given notice of such violation."

[47] American Civil Liberties Union, "Hazleton Residents Sue to Halt Harsh Anti-Immigrant Law," Aug. 15, 2006, http://www.aclu.org/immigrants-rights/hazleton-residents-sue-halt-harsh-anti-immigrant-law

of Pennsylvania agreed with the plaintiffs' arguments that the housing provisions were preempted by federal law.[48] In addition, the Court also held that the provisions of the ordinance which regulated the employment of undocumented workers were also preempted.[49] With regard to housing, the Court noted that the decision of whether to remove an alien from the United States is exclusively within the discretion of federal officials.[50] In addition, the Court reasoned that the ordinance contradicted the federal government's policy of permitting a number of individuals who may not necessarily be lawfully present in the United States to nevertheless live and work in the country.[51] Finally, the Court approvingly quoted Justice Harry Blackman's concurring opinion in *Plyler v. Doe*[52] where he stated that the "structure of the immigration statuses makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported."[53]

On appeal, in *Lozano v. City of Hazleton* ("Lozano II"), the Third Circuit Court of Appeals agreed with the holding of the Court in *Lozano I* that the provisions of the ordinance

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[48] Lozano v. City of Hazleton, 496 F.Supp.2d 477, 533 (M.D. Pa. 2007) (hereinafter "Lozano I").

[49] *Id.* at 523-524. ("Immigration is a national issue. The United States Congress has provided complete and thorough regulations with regard to the employment of unauthorized aliens including anti-immigration discrimination provisions. Allowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives").

[50] *Id.* at 530.

[51] *Id.* at 530-531. ("Indeed, the federal government permits several categories of persons who may not be technically lawfully present in the United States to work and presumably live here. For example, the following can receive permission from the federal government to work in the United States: 1) aliens who have completed an application for asylum or withholding of removal; 2) aliens who have filed an application for adjustment of status to lawful permanent resident; 3) aliens who have filed an application for suspension of deportation; 4) aliens paroled into the United States temporarily for emergency reasons or reasons deemed strictly in the public interest; 5) aliens who are granted deferred action "an act of administrative convenience to the government which gives some cases lower priority").

[52] Plyler v. Doe, 457 U.S. 202, 236 (U.S. 1982).

[53] *Lozano I, supra* note 48, at 532.

regulating employment[54] and housing[55] were preempted by federal law. Hazleton had argued specifically with the housing provisions that despite the restrictions against undocumented immigrants renting or leasing housing, immigrants could "purchase a home" or "stay with friends."[56] The Third Circuit Court of Appeals refuted this argument, characterizing it as "unrealistic" but more significantly, "disingenuous."[57]

For the first time at the federal circuit court of appeal level, a court had invalidated an ordinance that regulated housing based on current immigration status.[58] Subsequent to *Lozano II*, the United States Supreme Court in *Chamber of Commerce of the U.S. v. Whiting* upheld an Arizona law which allowed the state of Arizona to suspend and revoke the business licenses of employers who employed unauthorized aliens and which required employers to verify the employment eligibility of workers through the E-Verify system.[59] The Third Circuit Court of Appeals' opinion in *Lozano II* has since been vacated due to the Supreme Court's decision in *Whiting*.[60] Despite the *Whiting* decision, it appears that the holding of the Third Circuit concerning the housing provisions of the Hazleton ordinance would not differ as *Whiting* addressed a state statute regulating employment, and not housing. Quite significantly, a diverse

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[54] Lozano v. City of Hazleton, 620 F.3d 170, 219 (3rd Cir. 2010), *vacated* 131 S. Ct. 2958 (U.S. 2011) (hereinafter "Lozano II").

[55] *Id.* at 224.

[56] *Id.* at 21.

[57] *Id.*

[58] *Id.*

[59] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (U.S. 2011).

[60] Kent Jackson, "Appeals Court Hearing on Hazleton's Immigration Law Postponed Until August," Jun. 14, 2012, http://republicanherald.com/news/appeals-court-hearing-on-hazleton-s-immigration-law-postponed-until-august-1.1329553 (explaining that the rehearing of the Hazleton ordinance before the Third Circuit Court of Appeals in light of the *Whiting* decision will take place on August 15, 2012).

range of groups opposed the ordinance. Business groups and groups which traditionally advocated positions contrary to organized business worked on the same side of this issue. Groups as diverse as the U.S. Chamber of Commerce, the labor union coalition Change to Win, and religious groups such as the American Jewish Committee, Capuchin Franciscan Friars, and Lutheran Children and Family Services all filed *amicus* briefs before the Third Circuit opposing the ordinance.[61] Notwithstanding the *Whiting* decision, the overall effect of *Lozano II* should not be overlooked as a landmark decision in the movement for Latino civil rights and the right to housing.

B. The Farmers Branch, Texas Ordinance

Following the lead of Hazleton, and presumably aware of the *Lozano I* decision, the City Council of Farmers Branch, Texas passed a similar ordinance (Ordinance 2952) on January 22, 2008.[62] The ordinance required all adults living in Farmers Branch to obtain a "residential occupancy license"[63] which was conditioned upon the occupant's citizenship or immigration

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[61] American Civil Liberties Union, "Hazleton, PA Anti-Immigrant Law is Unconstitutional, Federal Appeals Court Rules," Sept. 9, 2010, http://www.aclu.org/immigrants-rights/hazleton-pa-anti-immigrant-law-unconstitutional-federal-appeals-court-rules ("Friends-of-the-court briefs opposing the Hazleton law were filed by numerous civil rights, religious, labor and business organizations, including the U.S. Chamber of Commerce, the labor union collation Change to Win, the American Jewish Committee, Capuchin Franciscan Friars, Lutheran Children and Family Services, the Friends Committee on National Legislation, Legal Momentum, the Lawyers' Committee for Civil Rights Under Law, the Southern Poverty Law Center, the Asian Pacific American Legal Center, the Anti-Defamation League and the Mexican American Legal Defense and Educational Fund").

[62] Villas at Parkside v. City of Farmers Branch, 701 F. Supp. 2d 835, 840 (N.D. TEX. 2010) (hereinafter "Villas at Parkside I").

[63] Farmers Branch, TX, Ordinance No. 2952. Section 1(B)(1) of the ordinance states that "Prior to occupying any leased or rented single-family residence, each occupant must obtain a residential occupancy license." Section 1(B)(5) detailed the requirements of an application for the residential occupancy license, which are the following:

"An application for a residential occupancy license shall be made on a form furnished by the building inspector for such purpose. The form shall require the following information:

(a) full legal name of the occupant;
(b) mailing address of the occupant;

status.[64] Similar to Hazleton, failure to comply with the ordinance would potentially result in the suspension of the lessor's rental license[65] and the incurring of fines.[66] Almost immediately, the American Civil Liberties Union, American Civil Liberties Union of Texas, and Mexican American Legal Defense and Educational Fund challenged the ordinance.[67]

(c) address of the single family residence for which the occupant is applying, if different from the mailing address;
(d) name and business address of the lessor;
(e) date of lease or rental commencement;
(f) date of birth of the occupant;
(g) the occupant's country of citizenship;
(h) if the applicant is a United States citizen or national, a signed declaration that the applicant is a United States citizen or national; the form shall state that it is a crime under Title 18, United States Code, Section 1015(e), for a person to knowingly make any false statement or claim that it is a crime under Title 18, United States Code, Section 1015(e), for a person to knowingly make any false statement or claim that he or she is, or at any time has been, a citizen or national of the United States, with the intent to obtain on behalf of himself or herself, or any other person, any Federal or State benefit or service;

or

(i) if the applicant is not a United States citizen or national, an identification number assigned by the federal government that the occupant believes establishes his or her lawful presence in the United States (examples include, but are not limited to: resident alien card number, visa number, "A" number, I-94 registration number, employment authorization number, or any other number on a document issued by the U.S. Government). If the applicant does not know of any such number, he or she shall so declare. Such a declaration shall be sufficient to satisfy this requirement").

[64] *Id.*

[65] *Id.* Section 1(D)(5) and (6) state the following:

"5. If a landlord or the landlord's agent commits an offense under paragraph (C)(7) of this section, the building inspector shall suspend the landlord's rental license.

6. During the period of suspension, the landlord shall not collect any rent, payment, fee, or any other form of compensation from, or on behalf of, any occupant or tenant in the single family residence."

[66] *Id.* Section 5: Penalty states: "Upon conviction, any person committing any act or omission declared to be an offense under the provisions of this ordinance shall be fined in a sum not to exceed $500. A separate offense shall be deemed committed upon each day during or on which a violation occurs or continues."

[67] Mexican American Legal Defense and Educational Fund, "Fifth Circuit Affirms Farmers Branch Housing Ordinance as Unconstitutional Targeting of Undocumented Immigrants," Mar. 21, 2012, http://www.maldef.org/news/releases/fifth_circuit_affirms_fb_housing_ordinance/

Finding that the ordinance was essentially a "regulation of immigration,"[68] and that the authority to regulate immigration was "exclusively a federal power,"[69] the District Court for the Northern District of Texas held that ordinance was preempted by federal law in *Villas at Parkside v. City of Farmers Branch* ("Villas at Parkside I"). In reaching its decision, the District Court focused on the purposes of the ordinance. Although it noted that the ordinance did not particularly solely apply to undocumented immigrants, the Court stated that the scheme "imposed additional local restrictions based on federal immigration classifications on those who wish to remain in Farmers Branch."[70] In conclusion, the ordinance was held to be an invalid regulation of immigration.[71]

In March 2012, in a result that mirrored the Third Circuit Court of Appeals decision in *Lozano II*, the Fifth Circuit Court of Appeals affirmed the decision of the District Court in *Villas at Parkside v. City of Farmers Branch* ("Villas at Parkside II").[72] Similar to the District Court's opinion, the Court in *Villas at Parkside II* also examined the purposes of the ordinance. Noting that the ordinance had "none of the indicia one would expect of a housing regulation,"[73] the Court heavily focused on the fact that the only reason which would revoke an occupancy license

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[68] *Villas at Parkside I*, 701 F.Supp.2d at 860.

[69] *Id.*

[70] *Id.* at 855.

[71] *Id.*

[72] Villas at Parkside v. City of Farmers Branch, 675 F.3d 802, 817 (5th Cir. 2012) (hereinafter "Villas at Parkside II").

[73] *Id.* at 809-810. ("The regulatory scheme created by the Ordinance has none of the indicia one would expect of a housing regulation. For example, the Ordinance says nothing about the location, design, construction, maintenance, ownership, or alteration of residential rental units. It also provides no regulation for the number of residents or the permitted uses of rental housing. The Ordinance creates an application process for an occupancy license, but the applicant is not required to submit information about his employment or credit history, his past residence information, or his criminal history").

was based on immigration status.[74] The Fifth Circuit agreed with the District Court that the purported denial of undocumented immigrants to housing was an area of federal, not state, concern, and the ordinance was preempted by federal law.[75]

While the Court in *Villas at Parkside II* followed the previous lead of the courts in *Villas at Parkside I*, *Lozano I* and *Lozano II* in holding that ordinances which penalized the "harboring" of undocumented immigrants and also which required an applicant for rental housing to obtain an occupancy license were preempted by federal law, the *Villas at Parkside II* Court meaningfully went far beyond discussion of the legal issues in its opinion. Significantly, the Court recognized the often-silent contributions of Latinos in society and characterized the ordinance as verbal and legal "discrimination." The Court stated:

> "This country has a large Latino population and millions of Latinos live here without legal permission. However, the great majority live quietly, raise families, obey the law daily, and do work for our country. For all that they contribute to our welfare, they live in constant dread of being apprehended as illegal aliens and being evicted, perhaps having their families disrupted. As unsatisfactory as this situation is it is the immigration scheme we have today. Any verbal and legal discrimination against these people, as Farmers Branch exemplifies by this ordinance, exacerbate the difficulty of that immigration scheme. This is a national problem, needing a national solution. And it impacts the nation's relations with Mexico and other nations."[76]

Despite the judicial decisions in *Lozano I* and *Villas at Parkside I*, the majority of participating voters of Fremont, Nebraska passed an ordinance in June 2010 which essentially established the same regulatory schemes for penalizing the "harboring" of undocumented immigrants as Hazleton and Farmers Branch.[77] The movement for Latino civil rights in America

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[74] *Id.* at 810. ("The only reason an occupancy license may be revoked is based on immigration status. On its face then the ordinance hardly evinces a purpose to regulate rental housing in the City and instead points toward the real target of the regulation – the ferretting out and exclusion of undesirable illegal immigrants").

[75] *Id.* at 810; Truax v. Raich, 239 U.S. 33, 42 (U.S. 1915).
[76] *Villas at Parkside II*, 675 F.3d at 816.

[77] City of Fremont, "June 22 – Fremont Passes Local Immigration Ordinance," Jun. 22, 2010, http://www.fremontne.gov/CivicAlerts.aspx?AID=76

quietly has shifted to an unlikely state deep in the heartland of the United States: the plains of Nebraska.

III. The Fremont Ordinance: Legal Discrimination in Nebraska?

A. The Road to the Fremont Ordinance

It can be stated that the road to the Fremont ordinance prohibiting the "harboring" of undocumented immigrants started well before its passage in 2010. According to one observer, the emergence of immigration as a major issue in Nebraska started in 2006 with the state's Republican primary for Governor.[78] In 2004, then-Governor Mike Johanns was appointed by President George W. Bush to become the next United States Secretary of Agriculture.[79] When he was confirmed for the post, Lieutenant Governor Dave Heineman became Governor.

In 2006, then-Congressman Tom Osborne, the legendary former Nebraska Cornhusker football coach, announced his intention to challenge Heineman in the GOP primary.[80] In the race, Heineman utilized immigration as a key issue and attacked Osborne's support of the Nebraska DREAM Act, which granted in-state tuition to some undocumented Nebraska students.[81] The bill had been passed into law before the May 2006 primary, over a veto of Governor Heineman.[82] Osborne, who lost in the primary in a dramatic 50 percent to 44 percent

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[78] John Wenz, "Six Degrees North of Arizona: Nebraska's War on Immigration," Apr. 11, 2011, http://www.theawl.com/2011/04/six-degrees-north-of-arizona-nebraskas-war-on-immigration

[79] The White House – President George W. Bush, "President Nominates Governor Mike Johanns as Secretary of Agriculture," Dec. 2, 2004, http://georgewbush-whitehouse.archives.gov/news/releases/2004/12/20041202-6.html

[80] Scott Bauer, "Neb. Governor Deflects Osborne Challenge," May 10, 2006, http://www.boston.com/news/politics/governors/articles/2006/05/10/neb_governor_deflects_osborne_challenge/

[81] Paige Cornwell, "Both Nebraska and Federal DREAM Acts Face Scrutiny," Dec. 5, 2010, http://www.dailynebraskan.com/news/both-nebraska-and-federal-dream-acts-face-scrutiny-1.2423307#.T-NO-0fm6Zg

[82] *Id.*

upset, [83] acknowledged the immigration issue as one of the two key issues which swung Nebraska Republican voters toward Heineman.[84]

Thus, the issue of immigration was certainly not a unique one to Fremont in 2010 and was key on the mind of many residents. The New York Times reported that some in the community blamed undocumented immigrants for a perceived "rise in crime" and the "loss of good jobs."[85] And the advocates for restrictions of immigration in Fremont had an ally in Kris Kobach,[86] the Kansas Secretary of State who had a major role in the drafting of Arizona S.B. 1070 and the housing ordinance in Hazleton, Pennsylvania. Similar to the case of both Hazleton and Farmers Branch, the Fremont ordinance has found its fate in the courts.

B. The Fremont Ordinance and the Keller Decision: A Promising Moment for Latino Civil Rights

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[83] Bauer, *supra* note 80.

[84] *Id.*

[85] Davey, *supra* note 17. ("The Hispanic population, while growing, still makes up less than 10 percent of Fremont, yet some say they blame illegal immigrants for what they see as a rise in crime here, the loss of good jobs for local residents and a shift in the culture ….. Some complain about shoppers speaking Spanish at the Wal-Mart, businesses with phone messages saying "Press 1 for English," and the need for two interpreters last fall at the annual "kindergarten-round-up" where children meet their teachers").

[86] Kris Kobach is also the author of a number of law review articles on the issue of immigration, including *Why Opponents are Destined to Lose the Debate on Photo ID and Proof of Citizenship Laws: Simply Put – People Want Secure and Fair Elections,* 62 SYRACUSE L. REV. 1 (2012); *Arizona's S.B. 1070 Explained,* 79 UMKC L. REV. 815 (2011); *Fact or Fiction?: Setting the Record Straight on S.B. 1070,* 23 REGENT U. L. REV. 353 (2010-2011); *A Response to Margaret Stock,* 23 REGENT U. L. REV. 375 (2010-2011); *Administrative Law: Immigration, Amnesty and the Rule of Law, 2007 National Lawyers Convention of the Federalist Society,* 36 HOFSTRA L. REV. 1323 (2008); *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration,* 22 GEO. IMMIGRATION L.J. 459 (2008); *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law,* 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473 (2006-2007); and *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests,* 69 ALB. L. REV. 179 (2005-2006).

At the heart of Fremont Ordinance 2951 was the provision making it a violation to "harbor" any undocumented immigrant.[87] In addition, the ordinance mandated that landlords could only rent to tenants who would procure a city occupancy license and required prospective tenants to make a declaration that the applicant is a United States citizen or national on a form provided by the City.[88] Finally, the ordinance contained provisions which required all agencies of Fremont to register in the E-Verify program and use the program to verify the authorization of employment status of each employee hired.[89]

Within one month of passage of the ordinance, lawsuits by two separate sets of plaintiffs were filed in the District Court for the District of Nebraska to enjoin Fremont from enforcing the ordinance.[90] In finding that the United States Supreme Court had resolved the circuit split in authority concerning whether a local or state government could mandate employers to utilize E-Verify in the *Whiting* decision, the Court upheld the ordinance's provisions concerning employment.[91]

Similar to the decisions involving the ordinances in Hazleton and Farmers Branch, the District Court for the District of Nebraska held that the provisions making it a violation of the ordinance to "harbor" an undocumented immigrant conflicted with the objectives of the Immigration and Nationality Act.[92] The Court noted that if states or local governments were able to take independent actions when to remove undocumented immigrants from their jurisdiction,

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[87] Fremont, NE., Ordinance No. 5165 (2010).

[88] *Id.*

[89] *Id.*

[90] *Keller*, 2012 WL 537527, at *3.

[91] *Id.* at *8.

[92] *Id.* at *9-10.

then the structure Congress had implemented for the "classification, adjudication, and potential removal" of undocumented immigrants would be impaired.[93]

However, the Court in *Keller* did not go as far as the Court most recently in *Villas at Parkside II* concerning the residential occupancy requirement. The Court in *Keller* did not find an inconsistency between the residential occupancy license requirement and federal objectives concerning immigration policy "regarding the identification of individuals who may be in the United States unlawfully."[94] The *Keller* Court, unlike the Court in *Villas at Parkside II,* completely overlooked the primary purpose of the ordinance concerning the residential occupancy requirement – to exclude undocumented immigrants from living in Fremont. The only reason for revocation of a residential occupancy license with the Fremont ordinance, the same reason as the Farmers Branch ordinance, is based on immigration status. Despite the District Court's upholding of the residential occupancy license requirement, the Eighth Circuit Court of Appeals, which is presently hearing an appeal of *Keller,*[95] now has the opportunity to reverse course on this particular requirement.

The *Keller* Court's upholding of the residential occupancy license requirement should not necessarily be viewed as a serious setback in the movement for Latino civil rights – in its complete context, the *Keller* Court did go one step further than the Courts in *Lozano I, Lozano II,*

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[93] *Id.* at *9. ("If states or political subdivisions take independent action to remove aliens from their jurisdiction, essentially forcing them from one state or community to another where their identity and whereabouts may be obscured, the structure Congress has established for the classification, adjudication, and potential removal of aliens will be impaired").

[94] *Id.*

[95] Chris Zavadil, "ACLU Will Appeal Ruling; City Will Enforce Employment Provisions of Ordinance," http://fremonttribune.com/news/aclu-will-appeal-ruling-city-will-enforce-employment-portions-of/article_2f45f644-624c-11e1-9a5a-001871e3ce6c.html

Villas at Parkside I, and *Villas at Parkside II* relating to claims against the ordinances based on the Fair Housing Act.

The Fair Housing Act generally prohibits discrimination in housing on the basis of race and/or national origin.[96] In particular, the Fair Housing Act prohibits an individual or entity to "refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny" a dwelling to any individual because of race and/or national origin.[97] Prior to the *Keller* decision, some commentators specifically addressed the possibility that the immigrant housing ordinances violate the provisions of the Fair Housing Act.[98] The Courts in *Lozano I, Lozano II, Villas at*

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[96] 42 U.S.C. § 3601 (2012).

[97] 42 U.S.C. § 3604 (2012). The Fair Housing Act states the following:

"As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it 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, religion, sex, familial status, 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, religion, sex, familial status, 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, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
(d) To represent to any person because of race, color, religion, sex, handicap, familial status, 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, religion, sex, handicap, familial status, or national origin.

[98] *See eg.,*Todd Batson, Note, *No Vacancy: Why Immigrant Housing Ordinances Violate FHA and Section 1981,* 74 BROOK. L. REV. 131, 151 (2008) (stating that the "ordinances harm tenants because they disparately impact minority renters. Further, the ordinances infringe on tenants' rights to enjoy a diverse community."); Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing,* 39 U. MIAMI INTER-AM. L. REV. 529, 537 (2008) (contending that the " local ordinances place landlords in a position where they must make decisions on whether to rent property to certain individuals based almost exclusively on race and national origin. Landlords generally are not trained immigration authorities. Consequently, they do not possess the skills or the resources to determine the legal status of individuals they suspect as being an "illegal alien" under the ordinances. Therefore, in order to avoid the fines, landlords are forced to make judgments based on easily ascertainable indicators of nationality. This will almost inevitably lead to landlords denying rental properties to prospective clients based on race and national origin").

Parkside I, and *Villas at Parkside II* did not specifically hold the ordinances in question violated the Fair Housing Act. But the Court in *Keller* did.

Perhaps the key reason why the *Keller* decision stands as a promising moment for Latino civil rights is the Court in *Keller* is the first federal court to find that an immigrant housing ordinance violates the Fair Housing Act. While the *Keller* Court found that the plaintiffs did not proffer any evidence showing a discriminatory *intent* on the part of Fremont to satisfy a Fair Housing Act claim,[99] the plaintiffs were successful in establishing a case under the *disparate impact* cause of action under the Fair Housing Act.[100]

Similar to cases involving a claim of disparate impact employment discrimination, to be successful on a disparate impact claim under the Fair Housing Act, a plaintiff must first show a policy which is neutral on its face has a negative impact on members of a protected minority class.[101] Then, there is a burden shifting to the defendant. The defendant must show that the policy has a manifest relationship to a legitimate governmental objective and/or interest.[102] If the defendant makes it required showing, the analysis does not end at that point. Instead, the burden shifts back to the plaintiff, which can prevail on a disparate impact claim despite the defendant's showing by proffering evidence that a different policy would accomplish the defendant's objectives without causing discriminatory effects.[103]

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[99] *Keller*, 2012 WL 537527, at *14. ("While it is apparent that the Ordinance is likely to affect persons of Latino or Hispanic ethnicity more than persons of other races and national origins, the Plaintiffs have not met their burden of proving that Fremont voters *intended* to develop a scheme of unlawful discrimination, nor have they presented sufficient evidence to demonstrate a genuine issue of material fact as to whether discriminatory animus was a motivating factor in the vote").

[100] *Id.* at *16.

[101] Oti Kaga, Inc. v. South Dakota Housing Development Authority, 342 F.3d 871, 883 (8th Cir. 2003).

[102] *Id.*

[103] *Id.*

In *Keller*, the Court found the plaintiffs satisfied the first prong since it agreed Plaintiffs that undocumented immigrants in Fremont would more likely be of Latin American origin than other countries.[104] The Court then found the ordinance on its face had a sufficient relationship to legitimate, nondiscriminatory objectives of the City of Fremont, so the defendant's showing was met.[105] Interestingly, on the third shift, the plaintiffs weren't able to produce evidence that a different policy would accomplish the objectives of the City of Fremont in identifying the immigration status of residents.[106] However, the Court stated that "once the City's legitimate interest in knowing the immigration status of its residents is satisfied, the revocation of occupancy permits does nothing to further that legitimate interest."[107] Thus, the *Keller* Court found that the plaintiffs sustained a cause of action under the Fair Housing Act.[108]

As most housing ordinances relating to immigration have come under attack on federal preemption grounds, the *Keller* Court's recognition of a cause of action under the Fair Housing Act is significant. For the first time, the cause of action was sustained in a federal ruling. And this development, along with the Court's striking of the ordinance's provisions relating to revocation of residential occupancy licenses, helps make Nebraska currently a promising center in the movement for Latino civil rights. But after the passage of the Fremont ordinance in June 2010, and before the release of the *Keller* decision in February 2012, Latino civil rights in

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[104] *Keller*, 2012 WL 537527, at *15. ("Because the Ordinance will have a disparate impact on Hispanic/Latino residents by virtue of the fact that undocumented aliens in the Fremont community are more likely to have origins in Latin American countries than in other countries, however, the Plaintiffs satisfy the first prong of the three-prong analysis for disparate impact claims under the FHA").

[105] *Id.*

[106] *Id.* at *16.

[107] *Id.*

[108] *Id.*

Nebraska would remain largely in limbo with the presence of other efforts to chip away at rights at the state level.

IV: The Storm Beats: Other Attempts to Limit the Civil Rights of Latinos in Nebraska

Civil rights issues have been among the most crucial of social, legal and political issues throughout the history of the United States. In 1872, Senator Charles Sumner, a champion in the movement for civil rights for African-Americans throughout his senatorial career, faced essentially a political crossroads. Sumner was torn on the question of whether to endorse Republican President Ulysses S. Grant, whom he immensely distrusted, and Horace Greeley, the leader of a coalition of Democrats and former Republicans who was the standard-bearer of the Liberal Republican[109] movement. Ultimately, Sumner endorsed Horace Greeley and the Liberal Republican movement.[110] In a letter to his friend Henry Wadsworth Longfellow after his endorsement, Sumner wrote "The storm beats, but I could not do otherwise."[111]

Unfortunately, the political storm that approached in 1872 brought many challenges to the ideals of equality which Sumner fought so ardently for in his career. And today, in 2012, such a storm continues to hover around the civil rights of Latinos nationwide. In the wake of the passage of the Fremont Ordinance, storm clouds would continue to hover in Nebraska concerning the rights of Latinos.

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[109] For more information on and excellent historical discussion and history of the Liberal Republican movement, see JOHN G. SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE (Oxford University Press, 1968).

[110] For a complete discussion of Senator Sumner's decision to endorse the Liberal Republican movement in 1872, see Chad G. Marzen, *Charles Sumner: History's Misunderstood Idealist*, 35 OKLA. CITY U. L. REV. 607 (2010).

[111] Letter from Charles Sumner to Henry Wadsworth Longfellow (August 2, 1872) in BEVERLY WILSON PALMER, ED., THE PAPERS OF CHARLES SUMNER (Chadwyck – Healy, 1988).

A. Legislation Concerning Immigration at the Nebraska State Level in 2011

Efforts aimed at curtailing immigration to Nebraska did not stop with the ordinance in Fremont. Following the passage of the ordinance, a number of immigration-related bills were introduced in the Legislature. And with this legislation, an alarming general trend has been reported in Nebraska – that there is a growing hostility against the Latino population in the state.[112]

In the wake of Fremont's passage of its ordinance in 2010, a number of state senators in the Nebraska Unicameral Legislature introduced legislation in 2011 which would restrict the rights of Latinos in the state of Nebraska. One major bill passed – LB 465.[113] Until 2011, the state of Nebraska offered public benefits such as Medicaid to legal immigrants who had lived in the United States fewer than five years.[114] With the passage of LB 465, this policy ended, adversely affecting approximately 2,000 legal immigrants in Nebraska.[115]

Several others bills were introduced in 2011 which would have further restricted the opportunities of Latinos in Nebraska. Despite the California Supreme Court's decision in *Martinez v. The Regents of the University of California,*[116] which upheld a California state law which exempted specific undocumented immigrants from paying nonresident tuition and fees at

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[112] Benjamin-Alvarado, *supra* note 33, at 16. ("As the Latino population grows and becomes increasingly visible in areas they were never to be found before, so does the hostility against it. A small – but increasingly loud and organized – number of nativist groups are at the forefront of this anti-immigrant campaign. Politicos, seeking to prove their anti-immigrant *bona fides,* have joined them and become increasingly bold in their support of symbolic and real barriers to civic and social integration. State senators and members of local city councils have been promoting local and enforcement-heavy "solutions" to the immigration problem in the last couple of years").

[113] Deborah Tuff, "Brakes on Benefits for Nebraska Legal Immigrants," Jun. 24, 2011, http://www.1011now.com/home/headlines/Brakes_on_Benefits_for_Nebraska_Legal_Immigrants_124461049.html

[114] JoAnne Young, "Bills Would Downgrade Public Assistance," Feb. 3, 2011, http://journalstar.com/news/unicameral/article_caae661f-283d-5341-881a-2b467cb3b3ab.html

[115] *Id.*

[116] Martinez v. The Regents of the University of California, 241 P.3d 855 (Cal. 2010).

California state colleges and universities,[117] Senator Charlie Janssen introduced a bill (LB 657) which would prohibit Nebraska state colleges and universities from offering in-state tuition to the sons and daughters of undocumented immigrants.[118] The President of the University of Nebraska, J.B. Milliken, testified in opposition to the measure.[119] The bill died in the Education Committee, where a 6-1-1 vote tabled it from proceeding before the full Unicameral Legislature.[120]

The education bill was not the only bill which was introduced but not passed by the Legislature. Following the lead of Arizona, a bill similar to Arizona S.B. 1070 (LB 48, the "Illegal Immigration Enforcement Act") was introduced.[121] The bill was modeled closely after Arizona's legislation and would have required Nebraska police officers to stop and check an individual's immigration status if the officer(s) had reasonable suspicion the person was in the country illegally.[122] After a contentious debate in the Judiciary Committee,[123] the bill was eventually tabled.[124]

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[117] L. Darnell Weeden, *The Supremacy Clause Preemption Rationale Reasonably Restrains an Individual State Pursuing its Own Separate But Unequal Immigration Policy*, 14 SCHOLAR 679 (2012) ("For instance in Martinez v. Regents of the University of California, the California Supreme Court held a California law exempting specific undocumented immigrants from paying nonresident tuition and fees at state colleges and universities does not violate the preemption doctrine because the state law does not regulate immigration").

[118] JoAnne Young, "Committee Kills Bill to Halt In-State Tuition for Children of Illegal Immigrants," Feb. 14, 2011, http://journalstar.com/news/unicameral/article_449f9452-edd8-52f7-b6a8-4d80aceb5e44.html

[119] Nebraska Legislature Unicameral Update, "Bill Would Repeal In-State Tuition for Immigrants," Feb. 11, 2011, http://update.legislature.ne.gov/?p=3304 ("J.B. Milliken, president of the University of Nebraska, also opposed LB657. The ability of undocumented young people to contribute to the state's economy depends on their education, Milliken said in a letter to the committee. The state claims that education is a priority, he said, so repealing a law that promotes education is counterproductive").

[120] Young, *supra* note 118.

[121] Kevin O'Hanlon, "Janssen Introduces Arizona-Style Immigration Bill," Jan 6, 2011, http://journalstar.com/news/unicameral/article_d920820a-5455-57ed-92b2-0a815ad0220f.html

[122] Kevin O'Hanlon, "Senators Grill Janssen Over Immigration Bill," Mar. 3, 2011, http://fremonttribune.com/news/local/senators-grill-janssen-over-immigration-bill/article_89c8c0f0-45bb-11e0-8b63-001cc4c002e0.html ("It would require police officers who stop or arrest a person to check whether he or she is

Unfortunately, the various bills involving immigration in Nebraska in the wake of the Fremont ordinance which have been introduced in the Unicameral Legislature affect not only to the rights of undocumented immigrants and legal immigrants, but all Latinos and even Native Americans. In another sign that Nebraska has become a key state in the movement for the civil rights of all Latinos nationwide, a bill (LB 172) was introduced which would eliminate the Latino-American Commission of Nebraska.[125] The Latino-American Commission, created in 1972, provides an important voice for Latinos in the implementation of state public policy and promotes civic engagement among Latinos.[126] Each of the Midwestern states has such a commission,[127] and the proposal in Nebraska would have merged the Commission on Indian Affairs with the Latino-American Commission.[128] The proposed action in Nebraska would not only have hurt Latinos throughout the state, but Native Americans as well, as the Commission on Indian Affairs is entrusted "to do all things which it may determine to enhance the cause of

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in the country legally if the officers have "reasonable suspicion" to think otherwise. Anyone who cannot prove he or she is here legally would be held, and federal immigration authorities would be notified").

[123] *Id.*

[124] Timberly Ross, "Nebraska Lawmakers Won't Debate Illegal Immigration," Mar. 9, 2011, http://siouxcityjournal.com/news/state-and-regional/nebraska/article_771827b4-4a9f-11e0-a33e-001cc4c03286.html

[125] Kevin O'Hanlon, "Legislative Committee Discusses Doing Away with Native American, Latino Commissions," Jan. 27, 2011, http://journalstar.com/news/unicameral/article_fcb1f0fc-bb3c-5949-b35c-23eee4425bd0.html

[126] Ricardo Parra, *Latinos in the Midwest: Civil Rights and Community Organization* in GILBERTO CÁRDENAS, ED., LA CAUSA: CIVIL RIGHTS, SOCIAL JUSTICE, AND THE STRUGGLE FOR EQUALITY IN THE MIDWEST 11 (Arte Público Press, 2004).

[127] *Id.* ("In the Midwest, Latino leadership was remarkably successful in convincing state legislatures to establish Latino state commissions in each of the Midwestern States. These unique commissions were initially designed to provide guidance to elected officials and appointees regarding policies and legislation affecting Latinos. The establishment of these state commissions provided Latino leadership with the benefits of access and input into state public policy. It also provided an important training ground for cultivating community leadership in the field of public policy and politics").

[128] O'Hanlon, *supra* note 125.

Indian rights and to develop solutions to problems common to all Nebraska Indians."[129] However, similar to the fate of LB 48 and LB 657, LB 172 did not make it through the Committee level as it died in the Government, Military and Veterans Affairs Committee.

Amidst the Fremont ordinance and state legislation involving Latino rights which has been debated in Nebraska in the past two years is the *Keller* decision, which provides great promise for Latino civil rights in Nebraska. But a 2012 legislative bill involving immigrants and prenatal care provides a promising glimpse of bipartisan action in Nebraska which protects the most vulnerable in society.

B. Prenatal Care and Promise in Nebraska

Despite the Nebraska Legislature's contentious debates over immigration in 2011, in 2012 the Nebraska Legislature took action on a prenatal care bill which provides hope for Latinos in Nebraska and throughout the country. Two years earlier, in 2010, a Medicaid policy change excluded prenatal care coverage for undocumented immigrants.[130] In 2012, a bill (LB 599) was introduced to restore the benefit by switching the administration of the coverage to the state's Children Health Insurance Program.[131]

The legislation deeply divided politicians throughout the state. Governor Dave Heineman contended the providing of prenatal care would make Nebraska a "magnet" for undocumented immigrants.[132] But other conservative politicians, such as State Senator Mike Flood, the Speaker of the Unicameral Legislature, supported the measure.[133]

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[129] Nebraska Commission on Indian Affairs, "NCIA Home," 2011, http://www.indianaffairs.state.ne.us/
[130] Gaurino, *supra* note 24.

[131] *Id.*

[132] Paul Hammel, "Prenatal Care a 'Magnet' for Illegal Immigrants?," Apr. 10, 2012, http://www.omaha.com/article/20120410/NEWS01/704109923

Groups from across the political spectrum worked together in support of the legislation. Pro-life groups stood beside social justice organizations and teachers' unions in support of LB 599. The Nebraska Right to Life,[134] Nebraska State Education Association,[135] and the Appleseed Center for Law in the Public Interest all supported the bill.[136]

The efforts of all of the organizations were successful. Despite opposition from the Governor, who vetoed the bill, the Unicameral Legislature overrode the veto by a 30-16 vote, not along party lines, and restored prenatal care for immigrants.[137] In a time of increasing polarization on the immigration issue,[138] and when Latino civil rights are under fire in Nebraska and throughout the country, state legislators and organizations from diverse interests and backgrounds can work together on immigration issues to protect the most vulnerable in society. The Fremont ordinance, the story of Nebraska, and the *Keller* decision provide a number of important lessons in today's immigration debate.

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[133] *Id.* ("A group of pro-life senators, led by State Sen. Mike Flood of Norfolk, the Speaker of the Legislature, argue that a healthy start for these children – who automatically become American citizens upon birth and qualify for taxpayer-funded health care – outweighs the legal considerations of whether their mothers are legal residents").

[134] *Id.* ("Nebraska Right to Life, the state's largest pro-life group, issued a statement Monday calling on six pro-life senators who voted "no" on LB 599 to switch and support the bill. "It is sad and alarming that we have come to this point where some of the major pro-life leaders in the Legislature are choosing to put the illegal immigration issue, and who pays for what, over the life and health of babies in the womb," said Executive Director Julie Schmit-Albin in a letter to the six. "When did it become important to pick and choose which babies deserve prenatal care and which babies don't, by virtue of whose womb they reside in?").

[135] *Id.* ("The state's teachers union, the Nebraska State Education Association, came out in favor of LB 599, saying that investing in prenatal care will save taxpayer money over time and prevent children from entering school "developmentally disabled").

[136] *Id.*

[137] Guarino, *supra* note 24.

[138] Doug Schoen, "The Supreme Court's Mixed Ruling on Immigration Could Divide Us Further as a Nation," Jun. 25, 2012, http://www.forbes.com/sites/dougschoen/2012/06/25/the-supreme-courts-mixed-ruling-on-immigration-ruling-could-divide-us-further-as-a-nation/ ("By striking down many components of the Arizona immigration law that sought to deter illegal immigration, while leaving in place the controversial provision requiring that authorities check the immigration status of anyone they detain who's reasonably suspected of being in the United States illegally – the Court ruling has effectively mobilized both supporters and opponents of the Arizona law – further polarizing the electorate on the issue of immigration").

V: Lessons from the Fremont Ordinance, Nebraska, and the Future of Latino Civil Rights in Nebraska and Beyond

A. The Importance of Coalition Building

For the future of Latino civil rights, one of the most significant national lessons of the debate over immigration in Fremont and Nebraska is the importance of coalition building. Just as religious groups such as the Capuchin Franciscan Friars and pro-business organizations such as the Chamber of Commerce worked together successfully against the ordinance in Hazleton, in Nebraska diverse groups worked together at a critical moment to protect the most vulnerable in society. In the wake of many legislative bills the previous year which would have significantly harmed Latinos in Nebraska and would have made the state less welcome for immigrants, progressive organizations worked with more conservative organizations, such as the Right to Life, to ensure all of the unborn receive adequate prenatal care.

Moving forward, with regard to local immigration ordinances related to housing, progressive organizations dedicated to ensuring discrimination does not occur in housing have a potential ally and partner with Catholic organizations and other religious institutions. In particular, along with such as the American Civil Liberties Union and MALDEF, which have been at the forefront of the political and legal challenge against Arizona S.B. 1070, the United States Conference of Catholic Bishops (USCCB) has stood alongside these groups in filing an *amicus curiae* brief before the Supreme Court in opposition to the law.[139] In the brief, the USCCB and several other religious organizations cited the institutional missions of their

[139] Brief for *Amicus Curiae* United States Conference of Catholic Bishops, The Evangelical Lutheran Church in America, Lutheran Immigration and Refugee Service, and Rev. Gradye Parsons as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), Arizona v. United States, 567 U.S. _____ (2012) (No. 11-182).

organizations to provide charity and assistance to the most vulnerable and those in need, including immigrants.[140] The USCCB argued that the provisions criminalizing the "harboring" of undocumented immigrants in S.B. 1070 would intrude upon religious exercise and threaten the very essence of their mission to serve immigrants.[141]

These arguments are critical in the case of Fremont and *Keller*, as well as the ordinances involving Hazleton, Farmers Branch, and any other future local ordinances which attempt to criminalizing the "harboring" of undocumented immigrants. Such unnecessary ordinances place not only religious institutions which provide assistance to the most vulnerable in society in a precarious position, but also potentially place people of faith in an untenable position of whether to choose to shelter the homeless or to fully comply with the ordinances and prevent undocumented immigrants from renting. A landlord of strong Catholic faith, for example, should never have his or her conscience placed in the position of whether to follow the mission of the Gospels and provide housing to an immigrant he or she knows to be undocumented or to follow local laws which are preempted by federal immigration law and violative of the Fair Housing Act.

Organizations whose missions chiefly advocate for the rights of Latinos and other minorities can and should work closely and build coalitions with religious organizations, people

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[140] *Id.*, at 9. ("The Catholic Church, like other religious institutions, believes that it has a moral and religious duty to help all in need. Numerous Catholic organizations thus offer wide-ranging charity, running soup kitchens, pregnancy counseling centers, and homeless shelters, to name a few. This duty of service extends to immigrants, which has led the Church to create institutions designed specifically to assist them").

[141] *Id.*, at 9-10. ("If allowed to stand, these state laws would burden the religious liberty of Catholic institutions in many ways that the federal regime does not. They go further in criminalizing aid to undocumented immigrants than does current federal law. Indeed, the Religious Freedom Restoration Act prohibits the federal government, but not the states, from enforcing the immigration laws in a manner that imposes substantial burdens on religious exercise. Moreover, the federal law has a specific exemption for religious ministers, an exemption is absent in the state enactments. And, even if they were not coextensive with federal law (which they are not), these varied state laws need not be enforced in the same manner. Allowing a multitude of state and local prosecutors to set their own enforcement priorities would equally chill religious exercise").

of faith, labor unions and business organizations such as the Chamber of Commerce to ensure a bright future for the protection of the rights of Latinos and all individuals.

B. The Costs of Housing Ordinances

Many cities are facing difficult financial times in the wake of the aftermath of the toughest economic recession to hit the United States since the era of the Great Depression. In June 2012, Stockton, California, a city of approximately 292,000 residents, became the largest city in United States history to file for Chapter 9 bankruptcy protection.[142] Other cities, such as North Las Vegas, Nevada, have officially declared financial emergencies and are on the brink of bankruptcy.[143] Litigation over the ordinance in Fremont, as well as those in Hazleton and Farmers Branch, could potentially cost these cities millions of dollars in litigation costs, attorney's fees, and other expenses.

The rulings of three federal courts concerning the Fremont, Hazleton and Farmers Branch ordinances have not only led to three results where the provisions of ordinances that criminalize the "harboring" of undocumented immigrants were struck down, but the ongoing litigation in all three cases has led to enormous litigation expenses. Litigation over Ordinance No. 2952 in Farmer's Branch, Texas has cost the city approximately $4.85 million in legal fees through May 2012.[144] In Hazleton, the plaintiffs in the *Lozano I* and *Lozano II* cases have introduced motions

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[142] Steven Church and Alison Vekshin, "Stockton, California, Seeks Bankruptcy After Talks Fail," Jun. 29, 2012, http://www.businessweek.com/news/2012-06-28/stockton-california-files-for-bankruptcy-protection

[143] Cristina Silva, "Financially Strapped North Las Vegas Declares State of Emergency," Jun. 22, 2012, http://www.rgj.com/viewart/20120622/NEWS07/306220052/Financially-strapped-North-Las-Vegas-declares-state-emergency

[144] Dianne Solís, "Ruling on Arizona's Immigration Law Could Affect Farmers Branch Rental Ordinance Case," Jun. 17, 2012, http://www.dallasnews.com/news/community-news/carrollton-farmers-branch/headlines/20120617-ruling-on-arizonas-immigration-law-could-affect-farmers-branch-rental-ordinance-case.ece

to recover their attorney's fees of over $2 million from the city.[145] And in Fremont, the main attorneys for the plaintiffs in the *Keller* case have sought for $709,000 from Fremont in attorney's fees.[146]

In a time when cities are struggling to maintain quality services, meet financial obligations, and preserve and protect the pensions of police officers, firefighters, and other city employees, local ordinances which criminalize the "harboring" of undocumented immigrants and discriminate against Latinos bring unnecessary financial costs for all citizens. Great financial costs are likely to be incurred by any other cities which attempt to follow the examples of Fremont, Hazleton, and Farmers Branch. Thus, one of the key lessons of the Fremont, Hazleton, and Farmers Branch examples is that the costs of pursuing such ordinances stand as a powerful economic disincentive for cities to pursue such unnecessary measures.

C. Insurance as a Silent Regulator of Immigration Ordinances

One of the key lessons from Fremont, Hazleton and Farmers Branch is the role of insurance as a regulator of local immigration ordinances. In the wake of *Lozano I, Lozano II, Villas at Parkside I, Villas at Parkside II,* and *Keller,* legal arguments and preemption have regulated the enforceability of ordinances. But a significant silent regulator in all of these cases has come from an unlikely source: insurance.

Insurance traditionally has been understood as a system for the transferring and distribution of risks.[147] Liability insurance is also a means by which individuals and entities can

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[145] Jackson, *supra* note 15.

[146] Art Hovey, "ACLU Claims Reach $709,000," Mar. 27, 2012, http://fremonttribune.com/news/local/aclu-claims-reach/article_4f80049e-781e-11e1-b1c6-001871e3ce6c.html

[147] ROBERT E. KEETON AND ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINE, AND COMMERCIAL PRACTICES 2-3 (West Publishing Co., 1988).

compensate those who are injured, and thus "meeting that responsibility rather than shirking it."[148] Moreover, insurance, particularly for public entities, can potentially protect the entities from the high costs of litigation and attorney's fees as well as costs.

As the litigation over local immigration ordinances has cost the cities of Fremont, Hazleton and Farmers Branch great financial costs, these cities cannot look to insurance to help defray the costs of attorney's fees, costs or expenses that may be charged against the city if the ordinances are struck down. The case of *Scottsdale Insurance Co. v. Hazleton*, an insurance coverage case which recounts the City of Hazleton's litigation with its insurer concerning coverage of attorney's fees and costs relating to its immigration ordinance, is a telling example.[149]

In *Scottsdale Insurance Company v. Hazleton*, the liability insurer for Hazleton, Scottsdale Insurance Company, sought a declaratory judgment stating that it had no duty to indemnify the city for any attorney's fees, costs or expenses incurred related to the litigation concerning the immigration ordinance[150] as well as a declaration stating it had no duty to pay attorney's fees, costs or expenses of attorney Kris Kobach, who was retained by the city without the express written approval of Scottsdale.[151]

Following the filing of the complaint in *Lozano I*, the city of Hazleton sent timely notice of the claim to Scottsdale.[152] The Second Amended Complaint of the plaintiffs sought only

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[148] Kenneth S. Abraham, *Liability Insurance and Accident Prevention: The Evolution of an Idea*, 64 MD. L. REV. 573, 585 (2005).

[149] Scottsdale Insurance Co. v. Hazleton, No. 09-4176, 2010 WL 4375911 (3rd Cir. Nov. 5, 2010) ("hereinafter "Scottsdale Insurance Co. II").

[150] Scottsdale Insurance Co. v. Hazleton, No. 3:07-CV-3704, 2009 WL 1507161 (M.D. Pa. May 28, 2009), at *7 (hereinafter "Scottsdale Insurance Co. I").

[151] *Id.*, at *11.

[152] *Id.*, at *1.

declaratory and injunctive relief, but not monetary damages.[153] After the filing of the first Complaint, and approximately two months prior to the filing of the Second Amended Complaint, Scottsdale sent a letter to the city[154] which provided notice it would provide a defense to the city subject to a reservation of rights.[155]

While insurance policies cover many occurrences and claims, exclusions in policies exclude coverage.[156] Scottsdale relied upon an exclusion[157] in the policy it issued to Hazleton which excluded coverage for fees, costs, or expenses in the event the insured (Hazleton) incurred a judgment against it for declaratory or injunctive relief.[158]

The federal district court for the Middle District of Pennsylvania agreed with Scottsdale and the enforceability of the exclusion. Reasoning that attorney's fees are considered "costs" in the context of a civil rights suit, payment of attorney's fees in the case were the burden of Hazleton since the exclusion unambiguously excluded coverage for costs in a situation where an

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[153] *Id.*, at *2.

[154] *Id.*

[155] Leo P. Martinez, *Coverage Advice: The Missing Piece of the Cumis Puzzle*, 44 TORT TRIAL & INS. PRAC. L.J. 63, 76 (2008) ("A reservation of rights is essentially an insurer's unilateral decision under which it "agrees to defend the policyholder but reserves its right to assert coverage defenses").

[156] Jacquelyn A. Beatty, *Exclusions Exclude: Let the Pollution Mean What It Says*, 28 GONZ. L. REV. 401, 404-405 (1992-1993) ("Exclusions in an insurance policy are meant to exclude and they must be interpreted on the basis of their independent effect on the coverage provided by the policy ….. Though exclusions are to be read narrowly, courts are not licensed to read exclusions out of a policy and create coverage where none exists and when none was purchased").

[157] *Scottsdale Insurance Co. I*, 2009 WL 1507161 at *3 (In its reservation of rights letter it sent to Hazleton, Scottsdale stated that "Pursuant to Exclusion 9, there is no coverage for any fees, costs or expenses, which the City of Hazleton may become obligated to pay as a result of any adverse judgment for declaratory relief or injunctive relief").

[158] *Id.*, at *8. The exclusion stated the following language:

"For "claim(s)," demands, or actions seeking relief or redress in any form other than monetary damages, or for any fees, costs or expenses which the insured may become obligated to pay as a result of any adverse judgment for declaratory relief or injunctive relief; however, we will afford defense to the insured for "suit(s)" in which monetary damages are requested if not otherwise excluded."

adverse judgment was incurred for declaratory or injunctive relief.[159] Furthermore, the Middle District of Pennsylvania also ruled against Hazleton on reimbursement of attorney's fees, expenses, and costs associated with the services of Kris Kobach, since Hazleton did not obtain the express written authorization of Scottsdale for retaining his services.[160] The Court of Appeals for the Third Circuit affirmed both holdings.[161]

The exclusion of insurance coverage has not only occurred with Hazleton, but Fremont as well. Fremont's insurer, the League Association of Risk Management, notified Fremont prior to the onset of the litigation in the *Keller* case that it likely would deny coverage to Fremont as its policy excludes injunctive relief.[162] If plaintiffs in cases challenging local immigration ordinances focus their prayers for relief on declaratory and injunctive relief, such exclusions are likely to apply. Exclusions for injunctive and declaratory relief, which are commonly included within the policies of insurance for cities and municipalities, make insurance the silent regulator and deterrent of local immigration ordinances moving forward in a post *Arizona v. United States* environment.

D. The Impact of Arizona v. United States on Keller

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[159] *Id.*, at *9. ("Exclusion Nine unambiguously places the burden of costs awarded to an opposing party on the insured where they result from an adverse judgment for declaratory or injunctive relief, as will be the case regarding any attorney's fees awarded to plaintiffs in the underlying action").

[160] *Id.*, at *13. ("Having determined that Scottsdale is not obligated to pay for Mr. Kobach's services pursuant to a duty to defend the city, the express terms of the policy control. It provides: "The insured, except at its own cost and for its own account, will not, without our written consent, make any payment, admit any liability, settle any "claim," assume any obligation, or incur any expense." (Policy, Section I, ¶ 2.) Citing this policy language, Scottsdale specifically declined to give consent for payment of Mr. Kobach's fees in its reservation of rights letter. Therefore, the insurer has no obligation to make such payments under the policy and the Court will grant Scottsdale's motion for summary judgment").

[161] *Scottsdale Insurance Co. II*, 2010 WL 4375911, at *2.

[162] Chris Zavadil, "City's Provider May Not Cover Ordinance Suits," Jun. 10, 2010, http://fremonttribune.com/news/local/article_a4bc0c7a-74a4-11df-bc9b-001cc4c03286.html

The fate of the *Keller* decision now lies before the Eighth Circuit Court of Appeals. One of the most anticipated rulings of the Supreme Court in 2012, *Arizona v. United States*, resulted in the Court striking down three major portions of Arizona S.B. 1070.[163] While the Court upheld a provision which requires officers conducting a stop, detention, or arrest to verify the immigration status of individuals they have a "reasonable suspicion" to believe are unlawfully present within the United States,[164] three major provisions were struck down as unconstitutional: 1) first, a provision which made the failure of an individual to comply with federal alien registration requirements a state criminal misdemeanor; 2) second, a provision which authorizes state and local law enforcement officials to arrest an individual if they have probable cause to believe the individual has committed a removable offense; and 3) lastly, a provision which makes it a criminal misdemeanor for an undocumented immigrant to seek or engage in work within Arizona.[165]

In particular, the Supreme Court struck down the provision of S.B. 1070 which made it a state misdemeanor for an individual to complete or carry an alien registration document which is currently proscribed by federal law through 8 U.S.C. §1304(e).[166] The Supreme Court found that the framework established by Congress in requiring that aliens carry proof of registration has led to the conclusion that the federal government "has occupied the field of alien registration."[167]

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[163] *Arizona v. United States*, *supra* note 11.
[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

The State of Arizona's argument that the registration requirements provide a state complement to the federal system of alien registration[168] is an argument that is even less applicable within the context of a city's argument that a local immigration ordinance related to housing "complements" federal immigration law. Local immigration ordinances which create occupancy license requirements do not have an analogous "sister" in federal immigration law.

The Eighth Circuit Court of Appeals in *Keller* now squarely has the opportunity to follow the spirit of *Arizona v. United States* and hold the housing provisions in Fremont's immigration ordinance unconstitutional as preempted by federal law. In *Arizona v. United States,* the Supreme Court specifically stated that "Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders."[169] The efforts of Fremont, Hazleton, Farmers Branch in regulating immigration through housing ordinances runs contrary to *Arizona v. United States.* The cloudy era of regulation of immigration through housing ordinances at the state and local level now should become a relic of the past, not to be revived in the future.

VI: Conclusion

In *Arizona v. United States*, the Supreme Court of the United States recognized the diversity and contributions of all immigrants in our country and reaffirmed the federal government's role in shaping immigration policy, guided by a thoughtful and rational discourse of all Americans. The Court stated:

> "The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.

[168] *Id.*
[169] *Id.*

> The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law."[170]

Moving forward, there is much progress to be made so that all people in the country can realize their dreams, hopes and aspirations. The Eighth Circuit Court of Appeals now has the opportunity in the *Keller* case to follow the spirit of the *Arizona v. United States* decision and ensure the federal government retains its responsibility to guide immigration policy. While Nebraska has seen its share of divisions over immigration and has become a central state in the movement for Latino civil rights, the history of the debate over immigration, the fact that diverse organizations can work together, and the guidance from the courts should lead policymakers at the federal level to seek solutions that are responsible, just, humane and protect the civil rights and liberties of all Latinos and all Americans. And finally, solutions can be sought nationally which reflect the state motto of Nebraska, which can shine across the entire landscape of the United States : "Equality before law."[171]

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[170] *Id.*

[171] Neb. Rev. Stat. § 84-501 (2012).