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2013

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

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“HISPANICS IN THE HEARTLAND: THE FREMONT, NEBRASKA IMMIGRATION ORDINANCE AND THE FUTURE OF LATINO CIVIL RIGHTS”

Chad G. Marzen, J.D.¹

“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 Romero²

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 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

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2. Marie Dennis et al., *OSCAR ROMERO: REFLECTIONS ON HIS LIFE AND WRITINGS* (Orbis Books, 2000).
3. Personally viewed by author.
4. Stephen Dalton, *Happiness Index: Nebraska Nabs Top Spot*, Main Street (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>.
6. *United States v. Crook*, 25 F. Cas. 695, 700-701 (C.C.D. 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”).

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 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.⁸

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.⁹ While the 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.¹⁰ Before the decision, numerous academic commentators criticized the law on constitutional grounds.¹¹ Approximately

7. Ken Rudin, *On this Day in 1986: Nebraska Gov Race First to Have 2 Women*, NPR POL. JUNKIE BLOG, (May 2009), http://www.npr.org/blogs/politicaljunkie/2009/05/on_this_day_in_1986_nebraska_g.html.

8. *About*, Latino American Commission (2011), <http://www.latinovac.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. ARIZ. REV. STAT. ANN. § 11-1051 (2010).

10. *Arizona v. United States*, 132 S. Ct. 2492 (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 law enforcement officials to detain an individual whom they believe is unlawfully present within the United States.

11. Kristina M. 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, 20 (2011) (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”); see also Gabriel J. Chin and Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. . 251 (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 (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); L. Darnell

one year later, in 2011, Alabama enacted what has been described as the nation's "strictest" anti-illegal immigration law.¹² 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.¹³ 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.¹⁴ 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.¹⁵ Most recently, in August 2012, the Court of Appeals for the Eleventh Circuit struck down as unconstitutional several key provisions of the law, including provisions that imposed criminal penalties for the willful failure to complete or carry alien registration documents as well as the provisions that imposed criminal penalties for concealing unauthorized aliens.¹⁶

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 25,000 with a Latino

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 "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").

12. Richard Fausset, *Alabama Enacts Anti-Illegal-Immigration Law Described as Nation's Strictest*, L.A. TIMES (Jun. 10, 2011) <http://articles.latimes.com/2011/jun/10/nation/la-na-alabama-immigration-20110610>.
13. H.B. 56, 2011 Leg. Sess. (Ala. 2011). See John W. Hargrove and Jennifer J. McGahey, *Alabama's New Immigration Law: Nuts and Bolts for Alabama Employers*, 73 ALA. LAW. 122, 124 (2012).
14. Fausset, *supra* note 12.
15. *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 setting 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 providing 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)).
16. *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012).

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 law²⁰ 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

While Phoenix has been labeled as a “modern-day Selma”²³ in the struggle for Latino civil rights, Nebraska has become a quiet, but promising, state in the movement for Latino civil rights. 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 Nebraska Legislature’s April 2012 approval of Nebraska taxpayer funding for prenatal health care benefits for undocumented immigrants²⁴ 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 cities that passed similar ordinances and 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,

17. Monica Davey, *City in Nebraska Torn as Immigration Vote Nears*, N.Y. TIMES (June 17, 2010) <http://www.nytimes.com/2010/06/18/us/18nebraska.html?pagewanted=all>.

18. FREMONT, NEB., ORDINANCE NO. 5165 (2010).

19. *Id.* (providing 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, including a declaration that the applicant is a United States citizen or national on a form provided by the City of Fremont, and requiring that all agencies of the City 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*, 853 F. Supp. 2d 959, 973 (D. Neb. 2012).

21. *Id.* at 979.

22. Leslie Reed, *Part of Fremont Immigration Law Tossed*, OMAHA WORLD-HERALD (Feb. 21, 2012) <http://www.omaha.com/article/20120220/NEWS97/702209899> (quoting Shirley Mora James, a Nebraska attorney with the Mexican American Legal Defense and Educational Fund).

23. Campbell, *supra* note 11, at 3.

24. Mark Guarino, *Nebraska Approves Prenatal Care for Illegal Immigrants*, THE CHRISTIAN SCIENCE MONITOR (Apr. 19, 2012) <http://www.csmonitor.com/USA/Society/2012/0419/Nebraska-approves-prenatal-care-for-illegal-immigrants>.

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 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 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

25. Rogelio Saenz, *The Changing Demography of Latinos in the Midwest*, in *LATINOS IN THE MIDWEST* 33, 35 (Ruben O. Martinez, ed., 2011).

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 *APPLE PIE & ENCHILADAS: LATINO*

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 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 community that is located geographically approximately halfway through the state. Lexington's population is now more than 50% Latino.³⁵ Fremont, Nebraska, which once only had 165 Hispanic

NEWCOMERS IN THE RURAL MIDWEST 26, 33-34 (Ann V. Millard and Jorge Chapa, eds., 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 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 (Lourdes Gouveia et al. eds., 2010).

34. *Id.*

35. Joseph C. Farnsworth, *White Flight in Rural America: The Case Study of Lexington, Nebraska* (May 2011) (unpublished Ed.D. dissertation, Arizona State University) (on file with ASU Libraries Digital Repository).

residents in 1990, now has a Latino population that approaches nearly 10 percent.³⁶

While the growing Latino population has made Nebraska a more diverse state, significant tension and hostility to immigration has led to measures, including the Fremont Ordinance, which restrict the civil rights of Latinos. Worse yet, it has even led to hurtful and violent acts.³⁷ And tragically, a number of Latino residents have expressed that they do not feel welcome in the city.³⁸

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 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.³⁹ Three separate ordinances were actually 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.⁴⁰ In particular, the ordinances prohibited the “harboring”⁴¹ of illegal immigrants in dwelling units. Noncompliance with the ordinance could result in a denial or suspension of the dwelling unit’s rental license⁴² and the imposition of significant fines.⁴³ Every individual who sought to occupy a

36. Davey, *supra* note 17.

37. *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 . . . an e-mail message arrived promising in red letters to ‘shed blood’ to take back the country. And Alfredo Velez, . . . received an anonymous letter accusing him of harboring illegal immigrants, and said someone screamed at him . . . ‘Go back to Mexico!’”).

38. *Id.*

39. 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).

40. *Id.*

41. HAZLETON, PA., ORDINANCE 2006-18, § 5(A), *Illegal Immigration Relief Act Ordinance* (2006).

42. *Id.* § 5(B)(4).

43. *Id.* § 5(B)(8) (“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.”).

dwelling unit in the city was required to obtain an “occupancy” permit⁴⁴ and failure to comply with the ordinance would result in the owner or agent of the dwelling unit incurring financial penalties.⁴⁵

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.⁴⁶ In *Lozano v. Hazleton* (“Lozano I”), the District Court of the Middle District of Pennsylvania agreed with the plaintiffs’ arguments that the housing provisions were preempted by federal law.⁴⁷ In addition, the court also held that the provisions of the ordinance that regulated employment of undocumented workers were also preempted.⁴⁸ 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.⁴⁹ 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.⁵⁰ The court noted that this policy primarily extends to persons within the following categories: 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; and 5) aliens who are granted deferred action “an act of administrative convenience to the government which gives some cases lower priority.”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

44. HAZLETON, PA., ORDINANCE 2006-13, § 6(a).

45. *Id.* at § 10(b).

46. Press Release, 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>.

47. *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 532 (M.D. Pa. 2007), *aff’d in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted, judgment vacated sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958.

48. *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”).

49. *Id.* at 530.

50. *Id.* at 530-531.

51. *Id.* at 531.

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

53. *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 532 (M.D. Pa. 2007), *aff’d in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted, judgment vacated sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958.

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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 regulating employment⁵⁴ and housing⁵⁵ were preempted by federal law. Hazleton argued 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 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. *Lozano II* differs from *Whiting* not only because of what it addressed, but also in the community’s response to the enactment of 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 ordi-

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

55. *Id.* at 224.

56. *Id.* at 221.

57. *Id.*

58. *Id.*

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

60. *Id.*

61. See Brief for Pennsylvania Chamber of Business and Industry as Amici Curiae Supporting Appellees and Urging Affirmance, *Lozano v. City of Hazleton*, 620 F.3d 170 (2008) (No. 07-3531); Brief for Interfaith Groups as Amici Curiae Supporting Appellees and Urging Affirmance, *Lozano v. City of Hazleton*, 620 F.3d 170 (2008) (No. 07-3531); Brief for the Chamber of Commerce of the United States of America and the Arizona Chamber of Commerce and Industry et al. as Amici Curiae Supporting Appellees, *Lozano v. City of Hazleton*, 620 F.3d 170 (2008) (No. 07-3531).

nance 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 status.⁶⁴ Similar to Hazleton, failure to comply with the ordinance would potentially result in the suspension of the lessor’s rental license⁶⁵ 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 (MALDEF) challenged the ordinance.⁶⁷

The District Court for the Northern District of Texas held that the ordinance was preempted by federal law as established in *Villas at Parkside Partners v. City of Farmers Branch* (“Villas at Parkside I”) because it was essentially a “regulation of immigration,”⁶⁸ and the authority to regulate immigration was “exclusively a federal power.”⁶⁹ 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 “impose[d] 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 concluded that the City would only revoke an occupancy license on the basis of immigration status.⁷⁴ The

62. *Villas at Parkside Partners v. City of Farmers Branch*, Tex., 701 F. Supp. 2d 835, 855 (N.D. Tex. 2010) aff’d, 675 F.3d 802 (5th Cir. 2012).

63. FARMERS BRANCH, TX, ORDINANCE NO. 2952, § B (2008).

64. *Id.*

65. *Id.* at § (D)(5) and (6).

66. *Id.* at § F(5).

67. Press Release, 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/.

68. *Villas at Parkside Partners v. City of Farmers Branch*, Tex., 701 F. Supp. 2d 835, 860 (N.D. Tex. 2010) aff’d, 675 F.3d 802 (5th Cir. 2012).

69. *Id.*

70. *Id.* at 855.

71. *Id.*

72. *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802, 817 (5th Cir. 2012).

73. *Id.* at 809-810 (“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”).

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

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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 held that the ordinance was preempted by federal law.⁷⁵

While the court in *Villas at Parkside II* followed the lead of the courts in *Villas at Parkside I*, *Lozano I*, and *Lozano II* in holding that federal law preempted the ordinances, it went 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 that 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 had quietly 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 nominated by President George W. Bush to become the next United States

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; see e.g., *Truax v. Raich*, 239 U.S. 33, 42 (1915).

76. *Villas at Parkside Partners*, 675 F.3d at 816.

77. See FREMONT, NEB. ORDINANCE NO. 5165 (2010).

78. John Wenz, *Six Degrees North of Arizona: Nebraska’s War on Immigration*, THE AWL (Apr. 11, 2011), <http://www.theawl.com/2011/04/six-degrees-north-of-arizona-nebraskas-war-on-immigration>.

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 upset,⁸³ acknowledged the immigration issue as one of the two key issues swinging 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 would find its fate in the courts.

79. Press Release, George W. Bush, President, Roosevelt Room, 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. See Scott Bauer, *Nebraska Governor Deflects Osborne Challenge*, ASSOCIATED PRESS (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*, THE DAILY NEBRASKAN (Dec. 6, 2010), <http://admin.collegepublisher.com/preview/mobile/2.3308/2.3911/1.2423307>.

82. *Id.*

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 (2010-11); *A Response to Margaret Stock*, 23 REGENT U. L. REV. 375 (2010-11); *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 (2006-07); and *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005-06).

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

At the heart of Fremont Ordinance 3139 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 that 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, 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 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

87. FREMONT, NEB., ORDINANCE NO. 3139 (2010).

88. *Id.* § 3.

89. *Id.* § 5.

90. *See, e.g., Keller v. City of Fremont*, 853 F. Supp. 2d 959 (D. Neb. 2012).

91. *Id.* at 970.

92. *Id.* at 973-83.

93. *Id.* at 973.

94. *Id.* at 972.

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*, *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 person because of race . . . or national origin."⁹⁷ Prior to the *Keller* decision, some commentators specifically addressed the possibility that the immigrant housing ordinances violated the provisions of the Fair Housing Act.⁹⁸ The courts in *Lozano I*, *Lozano II*, *Villas at Parkside I*, and *Villas at Parkside II* did not specifically hold the ordinances in question violated the Fair Housing Act; however, 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 sufficient evidence showing a discriminatory *intent* on the part of Fremont to satisfy a Fair Housing Act claim,⁹⁹ the plaintiffs were successful in estab-

95. Chris Zavadil, *ACLU Will Appeal Ruling; City Will Enforce Employment Provisions of Ordinance*, FREMONT TRIBUNE (February 28, 2012), http://fremonttribune.com/news/aclu-will-appeal-ruling-city-will-enforce-employment-portions-of/article_2f45f644-624c-11e1-9a5a-001871e3ce6c.html.

96. See Fair Housing Act, 42 U.S.C. § 3601-3631 (2012).

97. *Id.* § 3604.

98. See, e.g., Todd Donnelly Batson, Note, *No Vacancy: Why Immigrant Housing Ordinances Violate FHA and Section 1981*, 74 BROOK. L. REV. 131, 152 (2008) ("[O]rdinances 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) ("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.").

99. *Keller v. City of Fremont*, 853 F. Supp. 2d 959, 977-78 (D. Neb. 2012). ("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.").

lishing 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, a successful disparate impact claim under the Fair Housing Act must first show a policy that is neutral on its face but has a negative impact on members of a protected minority class.¹⁰¹ Then, the burden shifts to the defendant who must show that the policy has a manifest relationship to a legitimate governmental objective and/or interest.¹⁰² Even if the defendant makes the required showing, the analysis does not end at that point. Instead, the burden shifts back to the plaintiff, who 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

In *Keller*, the court held that the plaintiffs satisfied the first prong because 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, "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 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 Ne-

100. *Id.* at 978.

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

102. *Id.*

103. *Id.*

104. *Keller*, 853 F. Supp. 2d at 978 ("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 979.

107. *Id.*

108. *Id.*

braska would remain largely in limbo with the presence of other efforts to chip away at their 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 movement.¹⁰⁹ 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 that 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.

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 state 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 that would restrict the rights of Latinos in the state of Nebraska.

109. See JOHN G. SPROAT, “THE BEST MEN”: LIBERAL REFORMERS IN THE GILDED AGE (Oxford Univ. 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. David Herbert Donald, CHARLES SUMNER AND THE RIGHTS OF MAN 554 (First Da Capo Press 1996).

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”).

Despite the California Supreme Court's decision in *Martinez v. The Regents of the University of California*, which upheld a California state law that exempted specific undocumented immigrants from paying nonresident tuition and fees at California state colleges and universities,¹¹³ 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.¹¹⁴

The President of the University of Nebraska, J.B. Milliken, testified in opposition to the measure.¹¹⁵ The bill died in the Education Committee, where a 6-1-1 vote tabled it from proceeding before the full Unicameral Legislature.¹¹⁶ The education bill was not the only bill that 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.¹¹⁷ The bill was modeled closely after Arizona's legislation and would have required Nebraska "police officers who stop or arrest a person to check whether he or she is in the country legally if the officers [had a] 'reasonable suspicion' to think otherwise."¹¹⁸ After a contentious debate in the Judiciary Committee,¹¹⁹ the bill was eventually tabled.¹²⁰

Unfortunately, the various bills involving immigration in Nebraska that have been introduced in the Unicameral Legislature in the wake of the Fremont Ordinance affect not only 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.¹²¹ The Latino-American Commission, created in 1972, provides an important voice for Latinos in the implementation of state public policy and

113. *Martinez v. The Regents of the Univ. of Cal.*, 50 Cal.4th 1277 (Cal. 2010).

114. L.B. 657, 102nd Leg., 1st Sess. (Neb. 2011).

115. 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").

116. JoAnne Young, *Committee Kills Bill to Halt In-State Tuition for Children of Illegal Immigrants*, LINCOLN JOURNAL STAR (Feb. 14, 2011), http://journalstar.com/news/unicameral/article_449f9452-edd8-52f7-b6a8-4d80aceb5e44.html.

117. L.B. 48, 102nd Leg., 1st Sess. (Neb. 2011).

118. Kevin O'Hanlon, *Senators Grill Janssen Over Immigration Bill*, LINCOLN JOURNAL STAR, (Mar. 3, 2011), http://fremonttribune.com/news/local/senators-grill-janssen-over-immigration-bill/article_89c8c0f0-45bb-11e0-8b63-001cc4c002e0.html.

119. *Id.*

120. *Nebraska Lawmakers Won't Debate Illegal Immigration*, SIOUX CITY JOURNAL (Mar. 9, 2011), http://siouxcityjournal.com/news/state-and-regional/nebraska/article_771827b4-4a9f-11e0-a33e-001cc4c03286.html.

121. L.B. 172, 102nd Leg., 1st Sess. (Neb. 2011).

promotes civic engagement among Latinos.¹²² Each of the Midwestern states has such a commission,¹²³ and the proposal in Nebraska would have merged the Commission on Indian Affairs with the Latino-American Commission.¹²⁴ 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 Indian rights and to develop solutions to problems common to all Nebraska Indians.”¹²⁵ 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.

In spite of the Fremont Ordinance and state legislation involving Latino rights that has been debated in Nebraska in the past two years, the *Keller* decision provides great promise for Latino civil rights in Nebraska. Moreover, a 2012 legislative bill involving immigrants and prenatal care also provide a promising glimpse of bipartisan action in Nebraska to protect 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 legislature took action on a prenatal care bill that 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.¹²⁶ 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.¹²⁷

This law deeply divided politicians throughout the state. Governor Dave Heineman argued that providing prenatal care would make Nebraska a “magnet” for undocumented immigrants.¹²⁸ But other conservative politicians, such as State Senator Mike Flood, the Speaker of the Unicameral Legislature, supported the measure.¹²⁹

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. For instance, the Nebraska

122. Ricardo Parra, *Latinos in the Midwest: Civil Rights and Community Organization*, in *LA CAUSA: CIVIL RIGHTS, SOCIAL JUSTICE, AND THE STRUGGLE FOR EQUALITY IN THE MIDWEST* 1, 11 (Gilberto Cárdenas, ed., 2004).

123. *Id.*

124. Kevin O’Hanlon, *Legislative Committee Discusses Doing Away with Native American, Latino Commissions*, *LINCOLN JOURNAL STAR*, (Mar. 3, 2011), http://journalstar.com/news/unicameral/article_fcb1f0fc-bb3c-5949-b35c-23eee4425bd0.html.

125. Nebraska Commission on Indian Affairs, *NCIA HOME* (2011), <http://www.indianaffairs.state.ne.us/>.

126. Gaurino, *supra* note 24.

127. *Id.*

128. Paul Hammel, *Prenatal Care a ‘Magnet’ for Illegal Immigrants?*, *OMAHA WORLD-HERALD* (Apr. 10, 2012), <http://www.omaha.com/article/20120410/NEWS01/704109923>.

129. *Id.*

Right to Life, Nebraska State Education Association, and the Appleseed Center for Law in the Public Interest all supported the bill.¹³⁰

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.¹³¹ In a time of increasing polarization on the immigration issue,¹³² and when Latino civil rights are under fire in Nebraska and throughout the country, state legislators and organizations from diverse interests and backgrounds came 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.

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 derived from 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 made the state less welcome for immigrants, progressive organizations worked with more conservative organizations, such as the Right to Life, to ensure all unborn children receive adequate prenatal care.¹³³

130. *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?" Also, 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").

131. Guarino, *supra* note 24.

132. See Doug Schoen, *The Supreme Court's Mixed Ruling on Immigration Could Divide Us Further as a Nation*, FORBES (Jun. 25, 2012) <http://www.forbes.com/sites/doug-schoen/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").

133. Hammel, *supra* note 128.

Moving forward with regard to local immigration ordinances related to housing, progressive organizations have a potential ally and partner with Catholic organizations and other religious institutions. In particular, along with groups like 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 organizations in filing an amicus curiae brief before the Supreme Court in opposition to the law.¹³⁴ In the brief, the USCCB and several other religious organizations cited the institutional missions of their organizations to provide charity and assistance to the most vulnerable and those in need, including immigrants.¹³⁵ 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.¹³⁶

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 that attempt to criminalize the “harboring” of undocumented immigrants. Such unnecessary ordinances, in some ways, place religious institutions and people of faith in the precarious and untenable position of choosing whether 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 of faith, labor unions, and business organizations such as the Chamber of Commerce to ensure 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 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.¹³⁷ Other cities, such as North

134. Brief for United States Conference of Catholic Bishops et al. as Amici Curiae Supporting Respondents, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182).

135. *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.”).

136. *Id.* at 9-10.

137. Steven Church and Alison Vekshin, *Stockton, California, Seeks Bankruptcy After Talks Fail*, BUSINESS WEEK (Jun. 29, 2012), <http://www.businessweek.com/news/2012-06-28/stockton-california-files-for-bankruptcy-protection>.

Las Vegas, Nevada, have officially declared financial emergencies and are on the brink of bankruptcy.¹³⁸ 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 cost the city approximately \$4.85 million in legal fees through May 2012.¹³⁹ Hazleton, Pennsylvania has already spent in excess of \$2 million in defending its ordinance.¹⁴⁰ And in Fremont, the main attorneys for the plaintiffs in the *Keller* case have sought \$709,000 from the city in attorney's fees.¹⁴¹

In a time when cities are struggling to maintain quality services, meet financial obligations, and preserve 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 other cities that 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 federal preemption have regulated the enforceability of discriminatory ordinances. But a significant silent regulator in all of these cases has come from an unlikely source: insurance.

138. Cristina Silva, *Financially Strapped North Las Vegas Declares State of Emergency*, YAHOO! NEWS (Jun. 22, 2012), <http://news.yahoo.com/financially-strapped-nevada-city-declared-disaster-164138976.html>.

139. Dianne Solís, *Ruling on Arizona's Immigration Law Could Affect Farmers Branch Rental Ordinance Case*, THE DALLAS MORNING NEWS (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>.

140. Center for American Progress, *Local Immigration Enforcement Costs by the Numbers* (Jan. 25, 2011), <http://www.americanprogress.org/issues/immigration/news/2011/01/25/88655/local-immigration-enforcement-costs-by-the-numbers/>.

141. Art Hovey, *ACLU Claims Reach \$709,000*, FREMONT TRIBUNE (Mar. 27, 2012), http://fremonttribune.com/news/local/aclu-claims-reach/article_4f80049e-781e-11e1-b1c6-001871e3ce6c.html.

Insurance traditionally has been understood as a system for transferring and distributing risks.¹⁴² Liability insurance is also a means by which individuals and entities can compensate those who are injured, and thus meet the “responsibility rather than shirking it.”¹⁴³ Moreover, insurance, particularly for public entities, can potentially protect them from the high costs of litigation and attorney’s fees as well as costs.

Fremont, Hazleton and Farmers Branch all incurred great financial costs in litigating local immigration ordinances and these cities may not be able look to insurance to help defray the costs of attorney’s fees, costs or expenses if the ordinances are struck down. A telling example is *Scottsdale Insurance Co. v. Hazleton*, an insurance coverage case that recounts the City of Hazleton’s litigation with its insurer concerning coverage of attorney’s fees and costs relating to its immigration ordinance.¹⁴⁴

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 ordinance¹⁴⁵ 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.¹⁴⁶

Following the filing of the complaint in *Lozano I*, the city of Hazleton sent timely notice of the claim to Scottsdale.¹⁴⁷ The Second Amended Complaint of the plaintiffs sought only declaratory and injunctive relief, but not monetary damages.¹⁴⁸ 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 city¹⁴⁹ that provided notice that it would provide a defense to the city subject to a reservation of rights.¹⁵⁰

While insurance policies cover many occurrences and claims, exemptions in policies exclude coverage.¹⁵¹ Scottsdale relied upon an exclusion¹⁵² in the policy it issued to Hazleton which excluded coverage for

142. INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINE, AND COMMERCIAL PRACTICES 3 (Robert E. Keeton and Alan I. Widiss eds., 1988).

143. Kenneth S. Abraham, *Liability Insurance and Accident Prevention: The Evolution of an Idea*, 64 MD. L. REV. 573, 584 (2005).

144. *Scottsdale Insurance Co. v. Hazleton*, 400 F. App’x 626 (3rd Cir. Nov. 5, 2010).

145. *Scottsdale Insurance Co. v. Hazleton*, No. 3:07-CV-3704, 2009 WL 1507161 (M.D. Pa. May 28, 2009), at *7.

146. *Id.* at *11.

147. *Id.* at *1.

148. *Id.* at *2.

149. *Id.*

150. See 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.”).

151. See 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”).

152. *Scottsdale Insurance Co. v. Hazleton*, 2009 WL 1507161 at *3.

fees, costs, or expenses in the event the insured (Hazleton) incurred a judgment against it for declaratory or injunctive relief.¹⁵³

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 adverse judgment was incurred for declaratory or injunctive relief.¹⁵⁴ Furthermore, the Middle District of Pennsylvania also ruled against Hazleton on the 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.¹⁵⁵ The Third Circuit affirmed both holdings.¹⁵⁶

The exclusion of insurance coverage has not only occurred with Hazleton, but Fremont as well. Fremont's insurer, 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.¹⁵⁷ 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 cities and municipalities' insurance policies,¹⁵⁸ 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*

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. 1070.¹⁵⁹ 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,¹⁶⁰ three major provisions were struck down as unconstitutional: (1) a provision which made the failure of an individual to comply with federal alien registration requirements a state criminal misdemeanor; (2) 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) a provision which makes it a criminal

153. *Id.* at *8.

154. *Id.* at *9.

155. *Id.* at *13.

156. *Scottsdale Insurance Co. v. Hazleton*, 400 F. App'x 626 at 629.

157. Chris Zavadil, *City's Provider May Not Cover Ordinance Suits*, FREMONT TRIBUNE (Jun. 10, 2010), http://fremonttribune.com/news/local/article_a4bc0c7a-74a4-11df-bc9b-001cc4c03286.html.

158. Joyce F. Frank & Lauren F. Goldberg, *Insurance Coverage for Municipalities*, MLI MA-CLE 19-1 (2012).

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

160. *Id.*

misdeemeanor for an undocumented immigrant to seek or engage in work within Arizona.¹⁶¹

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).¹⁶² 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.”¹⁶³

The state of Arizona’s argument that the registration requirements provide a state complement to the federal system of alien registration¹⁶⁴ 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.”¹⁶⁵ The efforts of Fremont, Hazleton, and Farmers Branch in regulating immigration through housing ordinances run 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. 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

161. *Id.*

162. *Id.* at 2503.

163. *Id.* at 2502.

164. *Id.* at 2503.

165. *Arizona v. United States*, 132 S. Ct. 2492, 2052 (2012).

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problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.¹⁶⁶

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 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 Americans. And finally, solutions can be sought nationally that reflect the state motto of Nebraska, which can shine across the entire landscape of the United States: "Equality before law."¹⁶⁷

166. *Id.* at 2510.

167. James E. Potter, 'Equality Before the Law': Thoughts on the Origin of Nebraska's State Motto, 91 NEBRASKA HISTORY 116 (2010).

