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LOCAL GOVERNMENT REGULATION OF IMMIGRATION

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Few issues in the United States are as contentious as illegal immigration. With immigration reform stalled in Congress, many state and local governments have attempted to fill the void, with results that are or may be either legally questionable or plainly unconstitutional. While immigration attorneys can assist individuals in understanding the "nuts and bolts" of immigration law, this paper will focus on the questions that city councils may ask their city attorneys about immigration law and the ability (or perhaps inability) of a city to address immigration issues.

1. Should a City Regulate the Employment or Housing of Unauthorized Workers?
2. Does Federal Law Preempt any Local Attempt at such Regulation?
3. Is It Worth the Fight?
4. Has any City Been Successful to Date?

Although various cities around the nation have enacted fairly comprehensive regulatory schemes to address illegal immigration, the experiences of Hazleton, Pennsylvania, and Farmers Branch, Texas, should make most cities shy away from doing so. The litigation involving both cities is described below and to date, neither city has been successful in its efforts to address illegal immigration issues.

But first, let's review a little history about the origins of state and local policies on immigration. Efforts to regulate immigration and its effects at the state and local level in the United States date back to at least the 19th century and in fact predate federal laws controlling immigrant admission to the United States. Laws passed by the State of New York in 1824 and 1847 gave the Mayor of New York City the power to register immigrants and collect bonds and taxes against their use of public support. Although they were not used to restrict the numbers of immigrants entering the city, these laws provoked some of the first Supreme Court cases outlining federal supremacy on immigration issues.[1]

The national rise of the "Know Nothing" Party and violent conflicts between primarily Irish Catholic immigrants and Protestant natives made immigration an important issue in many cities in the 1850s. The Know Nothings had limited successes in municipal politics, such as the election in Chicago of Mayor Levi Boone. Mayor Boone, who took office vowing to exclude immigrants from city employment, used liquor-licensing laws to combat immigrant-run taverns, which had provided a base for immigrants to organize politically. Immigration continued to be a minor issue at the local level into the 20th century. During World War I, a number of localities responded to anti-German sentiment by declaring English to be their official language. Later, as debates about immigration flared in the mid-1980s, a limited number of counties and municipalities followed many states and the U.S. Congress in debating making English their government's official or exclusive language. Only a handful reportedly passed such measures.[2]

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[1] Migration Policy Institute. *Hazleton and Beyond: Why Communities Try to Restrict Immigration* at 2-3 (2010).

[2] *Id*. at 3.

In 1986, Congress enacted "a comprehensive scheme prohibiting the employment of illegal aliens in the United States."[3] Since that time, in apparent frustration over the enforcement (or lack thereof) of immigration laws by the federal government, municipalities across the United States have enacted ordinances that penalize employers of unauthorized workers as well as property owners who lease property to undocumented immigrants. These municipal ordinances have led to a conflict between federal authority, which traditionally regulates immigration, and local authority, which traditionally regulates employment and housing.[4] In the spring of 2006 in San Bernardino, California, immigration "restrictionists" attempted a ballot initiative that would have fined landlords who rented housing to unauthorized immigrants. The initiative also would have made English the only language used in city business and would have regulated the hiring of day laborers. Although the San Bernardino ballot initiative failed to gain enough signatures to be placed on the ballot,[5] Hazleton, Pennsylvania stepped to the head of the line in attempting to restrict illegal immigration. For the most part, reviewing courts have struck down these local regulations as impermissible forays into an area of the law reserved to the federal government, and although advocates for municipal ordinances held hope that the United States Supreme Court's recent decisions about Arizona's illegal immigration statutes[6] would offer support, as discussed below, that in fact has not been the case.

Hazleton, Pennsylvania. In the forefront of local regulation of illegal immigration is the City of Hazleton, Pennsylvania. Its 2006 ordinances, denoted as the Illegal Immigration Relief Act ("IIRA"), penalized (1) employers who employed unauthorized workers, and (2) landlords who leased property to undocumented noncitizens. In brief, its ordinances provided that upon receipt of a written and signed complaint, a city agency would request identity information from an employer (and suspend the license of any business that did not comply within 3 business days) and would thereafter submit the documentation to the federal government to verify the worker's immigration status. A "safe harbor" provision provided immunity for businesses that verified a

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[3] *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002).

[4] *See* http://legalworkshop.org/2010/01/27/preemption-of-local-regulations-beyond-lozano-v-city-of-hazleton-reconciling-local-enforcement-with-federal-immigration-policy.

[5] *Hazleton and Beyond*, *supra*, note 1, at 3.

[6] *See Arizona v. United States*, 567 U.S. ___, 132 S.Ct. 2492 (2012) (striking three provisions of an Arizona law, holding that the state: (i) cannot make it a misdemeanor for immigrants to not carry registration documents; (ii) cannot criminalize the act of an illegal immigrant seeking employment; and (iii) cannot authorize state officers to arrest someone on the belief that the person has committed an offense that makes him deportable; however, upholding the "show me your papers" provision of the statute); *Chamber of Commerce of the United States v. Whiting*, 563 U.S. ___, 131 S.Ct. 1960 (2011) (discussed herein).

worker's immigration status using what is now known as E-Verify. Hazleton's ordinance regarding a landlord suspected of leasing property to an undocumented immigrant was similar to the employer sanctions procedures: any person could file a written complaint, a city agency would verify the tenant's immigration status with the federal government, and the landlord would have 5 days to evict a tenant after notification of a violation. If the landlord did not comply, the landlord faced a license suspension during which he or she could not collect rent from any tenants.

While sparing the reader a detailed discussion of federal preemption, it is clear that Congress may expressly forbid states from regulating a specified area of law. Through federal immigration legislation, Congress has used its power to expressly preempt states and local governments from imposing criminal and civil penalties on employers of unauthorized workers. Congress also may impliedly preempt states and local governments from legislating in a particular area. The federal government's intention to occupy an entire field of law can preempt any local legislation in that field, and a conflict between local and federal law and policy will also preempt local legislation.[7] In brief, there is express preemption, field preemption and conflict preemption, all of which were addressed by the federal district and appellate courts in response to Hazleton's ordinances.

Express Preemption. When a litigant challenges a local law as preempted by federal law, a court should consider whether Congress has enacted a specific preemption provision and determine whether the local law falls within the area proscribed by that provision.[8] On this ground, a federal district court in the Middle District of Pennsylvania struck down the Hazleton ordinance barring the employment of unauthorized workers as unconstitutional, holding that Congress expressly preempted the Hazleton ordinance by its enactment of 8 U.S.C. § 1324a(h)(2).[9] The City of Hazleton had argued that it complied with applicable federal requirements by sanctioning employers with a license suspension rather than a criminal or civil penalty; however, the federal district court rejected that argument because "[i]t would not make sense for Congress in limiting the state's authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty."[10] The federal

[7] *Id*. at 2.

[8] *Lozano v. City of Hazleton*, 496 F.Supp.2d 477 (M.D. Pa. 2007). *See also Lozano v. City of Hazleton*, 620 F.3d 170, 203 (3d Cir. 2010) ("Express pre-emption occurs when Congress expressly declares a law's pre-emptive effect. . . . In such cases, 'our task is to identify the domain expressly pre-empted.'").

[9] 8 U.S.C. § 1324(h)(2) provides that "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."

[10] *Lozano*, 496 F.Supp.2d at 519.

district court relied on that section's specific legislative history to establish the scope of the savings clause in § 1324a(h)(2), concluding that the savings clause permits states and municipalities to suspend business licenses only for violations of the federal Immigration Relief and Control Act ("IRCA"), not local regulations.

Field Preemption. A court also may strike down a local law if the subject matter inherently leaves no room for local regulation. "Implied field pre-emption occurs when state or local governments attempt regulation in a field which Congress has implied an intent to exclusively occupy."[11] Using this field-preemption theory, the *Lozano* federal district court held that the Hazleton IIRA was invalid. Two factors controlled this outcome: (1) a strong federal interest in the field of immigration, and (2) the pervasiveness of federal regulations in the field of immigration.

Conflict Preemption. "Implied conflict pre-emption occurs where it is 'impossible . . . to comply with both state and federal law. . . . Impossibility conflict pre-emption exists only it is truly impossible to comply with both federal and state law."[12] The *Lozano* federal district court also held that the Hazleton IIRA was invalid under a conflict preemption theory. The court noted that although IRCA and the Hazleton IIRA have a similar purpose—penalizing employers of unauthorized workers—they use different means to achieve that purpose. While federal law requires employers to review a worker's documents and use an I-9 Employment Eligibility Verification Form to establish worker eligibility, the Hazleton IIRA also required the employer to present the worker's documents to the local Code Enforcement Office, which determined the status of the worker by contacting the federal government. The Hazleton IIRA also conflicted with IRCA by failing to contain an exception for casual domestic workers and independent contractors. Moreover, the Hazleton IIRA mandated use of the Basic Pilot Program [now E-Verify], while federal law makes use of the program optional. Finally, the timeframe for employers to respond to alleged violations also varied under the Hazleton IIRA and IRCA. The federal district court further found a conflict in how the United States and Hazleton balanced the interests of preventing illegal employment and protecting the rights of businesses and workers—the Hazleton IIRA placed greater burdens on employers, in the interest of preventing illegal employment, than does IRCA.[13]

The Third Circuit affirmed the district court in part and vacated in part; however, the portion of the district court opinion that was vacated related solely to a somewhat technical standing issue. The court noted that the Hazleton ordinances "are pre-empted by federal immigration law and unconstitutional under the Supremacy Clause."[14] With

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[11] *Lozano*, 620 F.3d at 204.

[12] *Id*.

[13] *Lozano*, 496 F.Supp.2d at 525-29.

[14] *Lozano*, 620 F.3d at 196.

regard to the invalidation of the Hazleton ordinance's employment provisions, the Third Circuit wrote that "it is undisputable that Congress went to considerable lengths in enacting IRCA to achieve a careful balance among its competing policy objectives of effectively deterring employment of unauthorized aliens, minimizing the resulting burden on employers, and protecting authorized aliens and citizens perceived as 'foreign' from discrimination. The IIRAO substantially undermines this careful balance."[15] The court was concerned that if the employment provisions of the Hazleton ordinance were upheld, the result could be chaotic:

> Under the IIRAO, a business in Hazleton must worry about two separate systems of complaints, investigations, prosecutions, and adjudications. Furthermore, Hazleton's ordinance is not the only consideration here, given the emerging landscape of local and state regulation in the area. . . . If Hazleton's ordinance is permissible, then each and every state and locality would be free to implement similar schemes for investigating, prosecuting, and adjudicating whether an employer has employed unauthorized aliens. As noted above, many states and localities have already tried. A patchwork of state and local systems each independently monitoring, investigating, and ultimately deciding—all concurrently with the federal government—whether employers have hired unauthorized aliens could not possibly be in greater conflict with Congress's intent for its carefully crafted prosecution and adjudication system to minimize the burden imposed on employers.[16]

Similarly, the Third Circuit held that Hazleton's ordinances penalizing landowners for leasing property to undocumented immigrants conflicted with federal law and were void. While addressing how Hazleton's illegal immigrant employment provisions were of a fundamentally different nature than Hazleton's housing provisions, nonetheless preemption applied:

> Although we realize that a state certainly can, and presumably should, regulate rental accommodations to ensure the health and safety of its residents, and that such regulation may permissibly affect the rights of persons in the country unlawfully, . . . we cannot bury our heads in the sand ostrich-like ignoring the reality of what these ordinances accomplish. Through its housing provisions, Hazleton attempts to regulate residence based solely on immigration status. Deciding which aliens may live in the United States has always been the prerogative of the federal government. Hazleton purposefully chose to enter this area of "significant federal presence."[17]

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[15] *Id*. at 210-11.

[16] *Id*. at 213.

[17] *Id*. at 220.

Thus, the housing provisions of Hazleton's ordinances were field preempted and precluded state and federal efforts, "whether harmonious or conflicting, to regulate residence in this country based on immigration status."[18]

Not surprisingly, Hazleton sought United States Supreme Court review. On June 11, 2011, the Court vacated the judgment of the Third Circuit and remanded the case for further consideration in light of *Chamber of Commerce of the United States v. Whiting*,[19] issued by the Supreme Court on May 26, 2011. In that case, the Supreme Court held that the provisions of Arizona law allowing suspension and revocation of business licenses fell within the savings clause of IRCA, was not impliedly preempted for conflicting with federal law and the requirement that every employer verify the employment eligibility of hired employees through a specific Internet-based system (E-Verify) did not conflict with federal law.

On remand, the Third Circuit again addressed "whether federal law pre-empts the employment and/or housing provisions of the Hazleton ordinances."[20] Not surprisingly, the Third Circuit held that the employment provisions of the Hazleton city ordinance were preempted under the doctrine of conflict preemption; the housing provisions were preempted under the doctrines of conflict and field preemption; and the ordinance's rental registration scheme was preempted under the doctrine of field preemption.

Farmers Branch, Texas. Farmers Branch is a Dallas suburb, located immediately north of Dallas. Its "active citizens," seeking "to regulate non-citizens who reside in the United States contrary to law," and "[r]esponding to an aroused popular consciousness" and frustrated "at the perceived lack of federal enforcement of immigration law, Farmers Branch sought to 'prevent' such persons from renting housing in the city."[21] In January 2008, the Farmers Branch City Council adopted Ordinance 2952, and the litigation began shortly thereafter. A summary of Ordinance 2952 is provided in the Fifth Circuit's opinion:

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[18] *Id*.

[19] 563 U.S. ___, 131 S.Ct. 1960 (2011).

[20] 724 F.3d 297, 302 (3d Cir. 2013). Hazleton's petition for writ of certiorari was denied by the United States Supreme Court on March 3, 2014. *See* 134 S.Ct. 1491 (2014).

[21] *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 523, 526 (5th Cir. 2013). The Farmers Branch ordinance, unlike Hazleton's ordinance, did not address any employment issues related to unauthorized workers. Farmers Branch's petition for writ of certiorari was denied by the United States Supreme Court on March 3, 2014. *See* 134 S.Ct. 1491 (2014).

> Ordinance 2952 sets forth licensing provisions and criminal sanctions. The Ordinance requires individuals to obtain a license before occupying a rented apartment or "single-family residence." For persons not declaring themselves citizens or nationals of the United States, Farmers Branch's building inspector must verify "with the federal government whether the occupant is an alien lawfully present in the United States." Upon such inquiry, if the federal government twice "reports" that the occupant is "not lawfully present in the United States," then the building inspector must revoke the occupant's license after notifying both the occupant and the landlord. The Ordinance provides that "[a]ny landlord or occupant who has received a deficiency notice or a revocation notice may seek judicial review of the notice by filing suit against the building inspector in a court of competent jurisdiction in Dallas County, Texas."
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> The Ordinance's criminal provisions prohibit persons from occupying a rented apartment or single-family residence without first obtaining a valid license, and making a false statement of fact on a license application. Landlords, in turn, are prohibited from renting an apartment or single-family residence without obtaining licenses from the occupants; failing to maintain copies of licenses from all known occupants; failing to include a lease provision stating that occupancy by a person without a valid license constitutes default; and allowing an occupant to inhabit an apartment without a valid license. If a landlord commits the criminal offense of knowingly permitting an occupant to remain in an apartment or single-family residence without a valid license, then the building inspector shall suspend the landlord's rental license until the landlord submits a sworn affidavit stating that the occupancy has ended. A landlord may appeal the suspension of a rental license to the city council. The Ordinance also criminalizes creating, possessing, selling or distributing a counterfeit license.
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> These seven offenses are Class C criminal misdemeanors punishable by a fine of $500 upon conviction, with a separate offense deemed committed each day that a violation occurs or continues. In Texas, local police may make arrests for Class C misdemeanors.[22]

Two groups of plaintiffs sued Farmers Branch and the federal district court found the ordinance to be preempted under the Supremacy Clause,[23] both as an improper

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[22] *Id*., 726 F.3d at 526-27 (citations omitted).

[23] The Supremacy Clause provides that federal law "shall be the Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

regulation of immigration because it "applies federal immigration classifications for purposes not authorized or contemplated by federal law," and also as an obstacle to the "comprehensive federal" scheme for "removing aliens or adjudicating their status for that purpose" which the district court described as "structured, in part, to allow federal discretion and to permit in appropriate circumstances a legal adjustment in an alien's status."[24] After a panel of the Fifth Circuit affirmed the district court judgment,[25] the United States Supreme Court issued its *Arizona v. United States*[26] opinion; thereafter, the Fifth Circuit reheard the case *en banc*.

Not unexpectedly, the Fifth Circuit decision is not strikingly different from that of the Third Circuit in *Lozano* and its discussion of the issue of conflict preemption. The court concluded that enforcement of the Farmers Branch ordinance conflicts with federal law, despite the city's contention that the ordinance established "concurrent enforcement" of federal immigration law because, the court concluded, "[t]he fact of a common end hardly neutralizes conflicting means." By setting forth criminal offenses that "discourage illegal immigration or otherwise reinforce federal immigration law," and by providing for state judicial review of a non-citizen's lawful or unlawful presence, the ordinance was subject to the doctrine of conflict preemption.[27] The court determined that, applying *Arizona v. United States*, Farmers Branch's establishment of new criminal offenses based on the housing of non-citizens "disrupt[s] the federal [immigration] framework, both by interfering with federal anti-harboring law and by allowing state officers to "hold [ ] aliens in custody for possible unlawful presence without federal direction and supervision."[28] It is the prerogative of the federal government, not state or local governments and state courts, to classify non-citizens and therefore, the ordinance's state judicial review process, "determined by federal law," leaves the determination of immigrant status in the hands of state courts. Since that power to classify non-citizens is reserved exclusively to the federal government, the judicial review section of the Farmers Branch ordinance was preempted by federal law.[29]

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[24] *Villas at Parkside Partners v. City of Farmers Branch*, 701 F.Supp.2d 835, 860-61 (N.D. Tex. 2010).

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

[26] *Supra*, note 6.

[27] *Villas at Parkside Partners*, 726 F.3d at 528-29, citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 372, 379 (2000).

[28] *Id*., 726 F.3d at 529, quoting *Arizona v. United States*, 132 S.Ct. at 2509.

[29] *Id*., 726 F.3d at 536-37. Since the Fifth Circuit determined conflict preemption applied, "we need not reach the question of field preemption." *Id*. at 537 n.17.

The bottom line is this—both Hazleton and Farmers Branch have fought the battle over regulation of housing and/or employment of unauthorized workers, and lost every step of the way. Although the amount of legal fees incurred by Farmers Branch has not been finally resolved, it is anticipated that total legal fees may exceed $8 million (subject to additional fees incurred by plaintiffs' counsel). Quite frankly, it would be foolish for a city council to attempt to fight these battles again—I would anticipate that federal preemption wins every time.[30]

5. What is a Section 287(g) Program?
6. Should a City Implement a Section 287(g) Program?
7. What Other Options Are There for Law Enforcement?

Section 287(g)[31] of the Immigration and Nationality Act of 1996 permits the federal government to delegate immigration enforcement powers to state and local officers. Section 287(g) authorizes the Secretary of Homeland Security to enter into written agreements with state and local officials whereby the latter "perform the function of an immigration officer in relation to the investigation, apprehension or detention of aliens in the United States," all at the expense of the state or local government.[32] This generally includes screening people for immigration status after an arrest; issuing ICE (Immigration and Customs Enforcement) detainers, which permit state and local governments to hold potentially removable immigrants for up to 48 hours before transferring them into ICE custody; and issuing ICE charging documents to initiate the formal removal (deportation) process.[33] As of early 2011, approximately 72 law enforcement agencies in the United States (mostly in the Southeast) had entered into

[30] Interestingly, in *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), the Eighth Circuit held that the Nebraska city's rental provisions were not preempted by federal law. The Fremont ordinance provides that it is unlawful for any person or business entity to rent to, or permit occupancy by, an illegal alien. Prospective renters must obtain an occupancy license from the city and pay a $5 fee. Information about citizenship must be disclosed and if an alien, immigration status. The city must immediately issue a license upon application, but the city thereafter verifies immigration status. A lengthy process ensues in the event the renter is unlawfully present in the United States, and judicial review may be sought. *Id*. at 938. This case is pending before the United States Supreme Court.

[31] 8 U.S.C. § 1357(g).

[32] 8 U.S.C. § 1357(g)(1) (The statute originally authorized the Attorney General to enter into such agreements, but immigration enforcement now resides with Homeland Security).

[33] Migration Policy Institute. *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* at 5 (2011).

memoranda of agreement with ICE about 287(g) programs,[34] which agreements generally provide for a 3-year term and delineate responsibilities for areas of enforcement between the federal government on the one hand and the state or local governmental entity on the other. Local jurisdictions would enter into one of two types of agreements with ICE: task force agreements, which focused on street-level enforcement during policing operations, and jail agreements, in which officials screen for immigration status and issue detainers when booking arrestees into jail on criminal (non-immigration) charges.

In 2009, the Government Accountability Office (GAO) released a report evaluating then-existing 287(g) programs, concluding that the program lacked certain controls, such as documented program objectives, an articulation of how local officials were to use their authority, clear and consistent mechanisms of supervision, and protocols identifying the types of data local officials must collect and report to ICE. In GAO's estimation, the absence of such controls made it difficult for ICE to determine whether the 287(g) program advanced the agency's enforcement objectives or served the program's intended purpose.[35] In July 2009, Homeland Security Secretary Janet Napolitano announced that ICE would sign 11 new agreements, but the memorandum of agreement would be significantly modified to provide closer federal oversight and focus the program on the detention and removal of "dangerous" criminals. As a result, participating jurisdictions entered into negotiations with ICE and were required to sign the new agreements. The 2009 template required that the 287(g) program target resources toward removing offenders and that policing operations and individual arrests in the field be preapproved by ICE supervisors.[36]

In late 2012, the Obama Administration announced that it would start phasing out 287(g) programs and instead would rely on the Secure Communities program.[37] Secure Communities was "a more efficient use of resources focusing on priority cases"[38] and ICE claimed the phase-out of 287(g) programs was a cost-savings measure. According to ICE,

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[34] *Id*. at 1. ICE on its website provides a Memorandum of Agreement template. *See* http://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf.

[35] *Id*. at 11, citing U.S. Government Accountability Office, *Immigration Enforcement: Better Controls Needed Over Program Authorizing State and Local Enforcement of Federal Immigration Laws* (Washington, D.C. 2009) at 4-5.

[36] *Id*. at 11-12.

[37] At present, according to its website, ICE has memoranda of agreement with only 37 law enforcement agencies in 18 states.

[38] *Washington Post*, October 9, 2013, "Immigration Enforcement Program 287(g) Gets Scaled Back."

> Secure Communities is a simple and common sense way to carry out ICE's priorities. It uses an already-existing federal information-sharing partnership between ICE and the Federal Bureau of Investigation (FBI) that helps to identify criminal aliens without imposing new or additional requirements on state and local law enforcement. For decades, local jurisdictions have shared the fingerprints of individuals who are arrested or booked into custody with the FBI to see if they have a criminal record. Under Secure Communities, the FBI automatically sends the fingerprints to DHS to check against its immigration databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable due to a criminal conviction, ICE takes enforcement action—prioritizing the removal of individuals who present the most significant threats to public safety as determined by the severity of their crime, their criminal history, and other factors—as well as those who have repeatedly violated immigration laws.
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> **Secure Communities imposes no new or additional requirements on state and local law enforcement. The federal government, not the state or local law enforcement agency, determines what immigration enforcement action, if any, is appropriate.**
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> Only federal DHS officers make immigration enforcement decisions, and they do so only after an individual is arrested for a criminal violation of local, state, or federal law, separate and apart from any violations of immigration law.[39]

The bottom line is this: Section 287(g) programs are going (or have gone) by the wayside in favor of the Secure Communities program. Efforts by state and local officials to undertake immigration enforcement activities pursuant to Section 287(g) will not be successful and concerns by state and local officials should be addressed by ICE working in conjunction with state and local law enforcement agencies.

8. What Is the Status of the Secure Communities Program Today?
9. What Are Immigration Detainers?
10. How Are Local Governments Responding to the Immigration Detainers?

The Secure Communities Program has come under increased attack. In April 2014 the mayor of Philadelphia, Michael Nutter, announced that Philadelphia officials would no longer acquiesce to the federal government's request that it hold certain undocumented immigrants for extra time solely for deportation purposes.[40] Other state

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[39] *See* http://www.ice.gov/secure_communities/. (Emphasis in original).

[40] *See* http://www.huffingtonpost.com/2014/04/24/secure-communitites.

and local governments around the nation similarly have announced that they will stop honoring requests from ICE to hold individuals except under certain circumstances, and they specifically have noted that they would not honor immigration detainers.[41]

A federal immigration detainer, or Form I-247, is a notice that the U.S. Department of Homeland Security, through its sub-agency U.S. Immigration & Customs Enforcement (ICE), issues to federal, state and local law enforcement agencies (LEAs) to inform them that ICE wants to take custody of a person who is currently being held by the law enforcement agency. For example, a person who has been charged with a local crime and is being held in a local jail may be subject to such a detainer, which means that the person typically will not be released by the jail upon posting bail, but will be held until ICE agents appear to take custody. As ICE states on its website:

> An immigration detainer serves three key functions: 1) to notify an LEA that ICE intends to assume custody of an alien in the LEA's custody once the alien is no longer subject to the LEA's detention; 2) to request information from an LEA about an alien's impending release so ICE may assume custody before the alien is released from the LEA's custody; and 3) to request that the LEA maintain custody of an alien who would otherwise be released for a period not to exceed 48 hours (excluding Saturdays, Sundays, and holidays) to provide ICE time to assume custody.

As one study of the use of immigration detainers in King County, Washington, found:

> On average, people subject to ICE detainers stay in jail 29.2 days longer than others. The results of a statistical regression analysis indicate that ICE detainer requests increase people's jail stay by 161% after case characteristics are taken into account. For example, a person who would otherwise be expected to stay in jail for 30 days would, as a result of an ICE detainer request, stay in jail for a total of 78.3 days instead. . . .
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> The county and municipalities within it are responsible for the fiscal costs associated with the extended jail stays that result from ICE detainers. We estimate that the extra jail days associated with ICE detainers cost nearly $3 million per year in jail costs alone. The results also suggest that not

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[41] *Id*. According to the *Huffington Post* article referenced in note 40, *supra*, Illinois, New York, Massachusetts and Washington, D.C., among other state and local governments, have opted out of participation in the Secure Communities Program and ICE detainers.

honoring detainer requests would save King County and local municipalities approximately $1.8 million each year in jail costs.[42]

A recent case, *Miranda-Olivares v. Clackamas County, Oregon*,[43] underscores the concerns of state and local governments with the Secure Communities Program. The facts in *Miranda-Olivares* were undisputed. On March 14, 2012, Maria Miranda-Olivares was arrested for violating a domestic violence restraining order and booked into the county jail. Miranda-Olivares did not challenge the lawfulness of that arrest. The County did not know her immigration status at the time of her arrest or at any time during her incarceration, and evidence showed that the County generally did not know a person's immigration status during incarceration. The County, however, had a policy of notifying ICE when a foreign-born person was brought to the county jail on a warrant or probable cause charge. The County did not request that ICE issue an immigration detainer against any person.

Early the next morning on March 15, 2012, the county jail received an immigration detainer (Form I–247) issued by ICE for Miranda-Olivares. The top of that ICE detainer contained the following caption: "MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS." After naming and describing Miranda-Olivares, it stated that the Department of Homeland Security "has taken the following action related to" her with an "X" marked in the first of four boxes indicating that DHS had "initiated an investigation to determine whether [Miranda-Olivares] is subject to removal from the United States." It stated no basis for the investigation and was not accompanied by an arrest warrant or any other charging document.

When the county jail received an ICE detainer, it held the person subject to the detainer for up to 48 hours, not including Saturdays, Sundays, and holidays, beyond the time when the person would otherwise be released, even if the person posted bail. The county jail's practice was the same whether or not the ICE detainer was accompanied by an arrest warrant, statement of probable cause, or removal or deportation order. Although Miranda-Olivares became aware of the ICE detainer the day it was issued, she was not provided a copy of it while she was incarcerated. That same day, Miranda-Olivares was arraigned and charged with two counts of contempt of court and the judge set bail at $5,000.00. In order to post bail, Miranda-Olivares was required to pay $500.00; however, the county jail generally held an individual who was subject to an

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[42] Katherine Beckett, Ph.D., & Heather Evans, M.A., Ph.D. Candidate, "Immigration Detainer Requests in King County, Washington: Costs and Consequences," Mar. 26, 2013, available at http://faculty.washington.edu/kbeckett/wordpress/wp-content/uploads/2013/03/Immigration-Detainer-Requests-in-King-County-Washington_Final-Report.pdf. The author wishes to thank Margaret D. Stock of Anchorage, Alaska for the foregoing information about immigration detainers, contained in her May 19, 2014, paper and presentation to the International Municipal Lawyers Association Mid-Year Seminar in Anchorage.

[43] 2014 WL 1414305 (D. Ore. April 11, 2014).

ICE detainer in custody, even if the underlying state criminal charges were resolved or bail was posted. Between March 16 and March 30, 2012, the county jail told Miranda-Olivares's sister, Laura Miranda, approximately four or five times that even if bail were posted, Miranda-Olivares would not be released due to the ICE detainer. On March 16, 2012, Laura Miranda informed Miranda-Olivares by telephone that she would not be released if she posted bail because of the ICE detainer. On or about March 28, 2012, a sheriff's deputy told Miranda-Olivares directly that she would not be released if she posted bail because of the county jail policy relating to ICE detainers. Miranda-Olivares' family was willing and able to pay the $500.00 bail, but did not do so because of the statements by county jail officials. Miranda-Olivares remained in custody at the county jail on the state charges until March 29, 2012, when she pled guilty to one of the charges and was sentenced to 48 hours in jail with credit for time served and probation. Consequently, at about 1:30 p.m. on March 29, 2012, Miranda-Olivares would have been released from the Jail but for the ICE detainer. Instead, the County held Miranda-Olivares in custody for another 19 hours until about 8:30 am on March 30, 2012, when she was released from the Jail to the custody of DHS agents.[44]

In its opinion, the federal district court dismissed the notion that the County was mandated by federal law to detain Miranda-Olivares. "No federal court 'has ever described ICE detainers as anything but requests.'"[45] As a result, the County was at liberty to refuse an ICE request to detain Miranda-Olivares. With regard to her contention that the County violated her Fourth Amendment rights by (i) refusing to release her during the two weeks when she could have posted bail, and (ii) continuing to incarcerate her for 19 hours after her release from the state charges, the court determined that "[t]he seizures that allegedly violated her Fourth Amendment rights were not a continuation of her initial arrest, but new seizures independent of the initial finding of probable cause for violating state law. By continuation of her detention based on the ICE detainer embarked Miranda-Olivares on a subsequent and new 'prolonged warrantless, post-arrest, pre-arraignment custody.'"[46]

> Thus, the Fourth Amendment applies to [the] County's detention of Miranda-Olivares after she was entitled to pre-trial release on bail and again after she was entitled to release after resolution of her state charges. In order for the County to hold a person beyond the period necessary to execute an order of legal authority to continue detention, it must meet the clearly defined reasonable seizure standards of the Fourth Amendment. The Fourth Amendment requires that seizures be objectively reasonable in light of the facts and circumstances. Prolonged detention after a seizure, such as full custodial confinement without a warrant, must

[44] *Id*. at *1-*3.

[45] *Id*. at *7, quoting *Galarza v. Szalczyk*, 2012 WL 1080020 at *5 (E.D. Pa. 2012).

[46] *Id*. at *9, quoting *Pierce v. Multnomah County*, 76 F.3d 1032, 1042-43 (9th Cir. 1996).

be based on probable cause. Absent probable cause, that detention was unlawful.

> Miranda-Olivares was not charged with a federal crime and was not subject to a warrant for arrest or order of removal or deportation by ICE. The County admits that Miranda-Olivares was held past the time she could have posted bail and after her state charges were resolved based exclusively on the ICE detainer. But the ICE detainer alone did not demonstrate probable cause to hold Miranda-Olivares. It stated only that an investigation "has been initiated" to determine whether she was subject to removal from the United States. The ICE detainer's stated purpose of requesting the Jail to hold Miranda-Olivares custody was "to provide adequate time for [ICE] to assume custody" of her. Therefore, it was not reasonable for the Jail to believe it had probable cause to detain Miranda-Olivares based on the box checked on the ICE detainer.[47]

As a consequence of the federal district court's ruling in *Miranda-Olivares*, any local government that detains an arrestee for ICE must fully comply with the mandatory 48-hour time frame referenced in applicable federal regulations.[48] Since arrestees with ICE detainers generally stay in local jails much longer than other arrestees, the potential for constitutional challenges is great, and it reasonably can be anticipated that more state and local governments will opt out of utilizing ICE detainers.[49]

11. Can a City Require U.S. Citizenship as a Job Requirement?
12. What Can a City do about Undocumented Workers?
13. How Can a City Avoid Employment Discrimination Concerns?

The anti-discrimination provisions of the Immigration and Nationality Act (INA), as amended, prohibits four types of unlawful conduct: (1) citizenship or immigration status discrimination; (2) national origin discrimination; (3) unfair documentary practices during Form I-9 process (document abuse); and (4) retaliation. The Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, Department of Justice (OSC), enforces the anti-discrimination provision of the INA while the Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964 and other federal laws that prohibit employment discrimination based on race, color, national origin, religion, sex, age, disability and genetic information. OSC has exclusive jurisdiction over citizenship or immigration status discrimination claims against all employers 4 or more employees. Similarly, OSC has exclusive jurisdiction over all

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[47] *Id*. at *11.

[48] *See* 8 C.F.R. § 287.7 (provides that a law enforcement agency shall maintain custody of an alien once a detainer has been issued by DHS).

[49] At present, the City of Los Angeles, Riverside County, California, and Orange County, California, have stopped honoring ICE detainers as a result of the *Miranda-Olivares* decision. A similar request is under consideration by New York City.

document abuse claims against employers with 4 or more employees OSC and EEOC share jurisdiction over national origin discrimination charges. Generally, the EEOC has jurisdiction over larger employers with 15 or more employees, whereas OSC has jurisdiction over smaller employers with more than 3 and less than 15 employees. OSC's jurisdiction over national origin discrimination claims is limited to intentional acts of discrimination with respect to hiring, firing, and recruitment or referral for a fee. Title VII covers both intentional and unintentional acts of discrimination in the workplace, including discrimination in hiring, firing, recruitment, promotion, assignment, compensation, and other terms and conditions of employment.[50]

Document Abuse. Discriminatory documentary practices related to verifying the employment authorization and identity of employees during the Form I-9 process is called document abuse. Document abuse occurs when employers treat individuals differently on the basis of national origin or citizenship status in the Form I-9 process. Document abuse can be broadly categorized into four types of conduct: (1) improperly requesting that employees produce more documents than are required by Form I-9 to establish the employee's identity and the employer does not require other employees to present: (2) improperly requesting that employees present a particular document, such as a "green card," to establish identity and/or employment authorization; (3) improperly rejecting documents that reasonably appear to be genuine and to relate to the employee presenting them; and (4) improperly treating groups of applicants differently when completing Form I-9, such as requiring certain groups of employees who look or sound "foreign" to present particular documents the employer does not require other employees to present. These practices may constitute unlawful document abuse and of course should be avoided when verifying employment authorization. All employment-authorized individuals are protected against this type of discrimination.[51]

Citizenship Status Discrimination. Citizenship or immigration status discrimination occurs when an employer treats employees differently based on their real or perceived citizenship or immigration status with respect to hiring, firing, recruitment, or referral for a fee. U.S. citizens, recent permanent residents, temporary residents under the IRCA legalization program, asylees, and refugees are protected. The INA's provision against citizenship or immigration status discrimination covers employers with four or more employees.[52]

National Origin Discrimination. National origin discrimination under the INA occurs when an employer treats employees differently based on their national origin with respect to hiring, firing, recruitment, or referral for a fee. An employee's national origin relates to the employee's place of birth, country of origin, ethnicity, ancestry,

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[50] U.S. Citizenship and Immigration Services, *Handbook for Employers* at 31.

[51] *Id*.

[52] *Id*. at 31-32.

native language, accent, or the perception that he or she looks or sounds "foreign." All U.S. citizens and employment-authorized individuals are protected from national origin discrimination. The INA's provision against national origin discrimination generally covers employers with more than 3 and less than 15 employees. The EEOC has jurisdiction over national origin claims involving employers with 15 or more employees.[53]

Retaliation. Retaliation occurs when an employer or other covered entity intimidates, threatens, coerces, or otherwise retaliates against an individual because the individual has filed an immigration-related employment discrimination charge or complaint; has testified or participated in any immigration-related employment discrimination investigation, proceeding, or hearing; or otherwise asserts his or her rights under the INA's anti-discrimination provision.[54]

In practice, a city should treat employees equally when recruiting and hiring, and when verifying employment authorization and identity during the Form I-9 process. Any employer, including a city, should not: (1) set different employment eligibility verification standards or require that different documents be presented by employees because of their national origin and citizenship status; (2) request to see employment eligibility verification documents before hire and completion of Form I-9 because someone looks or sounds "foreign," or because someone states that he or she is not a U.S. citizen; (3) refuse to accept a document, or refuse to hire an individual, because a document has a future expiration date; (4) request that, during re-verification, an employee present a new unexpired Employment Authorization Document (Form I-766) if he or she presented one during initial verification: and (5) limit jobs to U.S. citizens unless U.S. citizenship is required for the specific position by law, regulation, executive order, or federal, state or local government contract. On an individual basis, an employer may legally prefer a U.S. citizen or noncitizen national over an equally qualified alien to fill a specific position, but the employer may not adopt a blanket policy of always preferring citizens over noncitizens.[55] Be aware, however, that the U.S. Department of Labor and the federal courts require that employers who hire undocumented workers must otherwise comply with federal labor laws, including the payment of overtime, regardless of their immigration status.[56]

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[53] *Id*. at 32.

[54] *Id*.

[55] *Id*.

[56] *See Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988); *Lucas v. Jerusalem Café*, 721 F.3d 927 (8th Cir. 2013), *cert. denied* on March 10, 2014; *Chellen v. John Pickle Co.,* 446 F.Supp.2d 1247, 1279–81, 1286 (N.D. Okla. 2006); *Zavala v. Wal–Mart Stores, Inc.,* 393 F.Supp.2d 295, 321–25 (D.N.J. 2005); *Galaviz–Zamora v. Brady Farms, Inc.,* 230 F.R.D. 499, 501–03 (W.D. Mich. 2005); *Flores v. Amigon,* 233 F.Supp.2d 462, 463–64 (E.D.N.Y. 2002); *Singh v. Jutla & C.D. & R's Oil, Inc.,* 214

Conclusion

As the foregoing unequivocally reflects, cities should be extremely wary of addressing immigration issues through ordinances and licensing schemes. Although the ultimate outcome of the Fremont, Nebraska litigation is unknown at present, it seems highly likely that most doubts about municipal regulation of illegal immigration will be decided in favor of the federal government, thereby preempting local efforts to address this contentious issue. Additionally, as a result of the *Miranda-Olivares* decision, state and local governments should be wary of ICE detainers unless they can assure that arrestees will be processed quickly and within the federally-mandated 48-hour time frame.

F.Supp.2d 1056, 1060–62 (N.D. Cal. 2002); *Liu v. Donna Karan Int'l, Inc.,* 207 F.Supp.2d 191, 192 (S.D.N.Y. 2002).

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In 1981, Terry began his legal career in the Dallas City Attorney's Office and he currently is one of the founding partners of Brown & Hofmeister, L.L.P. Since 1981, Terry has represented numerous growing communities in North Texas. He routinely represents and advises local governments on a variety of issues, including employment, land use, civil rights, police, election, natural gas drilling and other regulatory matters.

Terry received his Bachelor of Arts degree at the University of Illinois at Urbana-Champaign in 1976, his law degree in 1979 from the University of Houston College of Law and a Master of Public Affairs in 1981 at the Lyndon Baines Johnson School of Public Affairs at The University of Texas at Austin. Terry has authored and presented over 200 papers to various groups, including the American Bar Association, the Texas City Attorneys Association, the Texas Municipal League, the American Planning Association, the North Central Texas Council of Governments, CLE International, the National Business Institute, Yale center for Environmental Law & Policy, Land Use Law Center at Pace Law School and The University of Texas at Austin Continuing Legal Education Program. He has had four law review articles published in *The Review of Litigation*, *Southern Illinois University Law Journal*, *Baylor Law Review* and *The Vermont Journal of Environmental Law*. Terry also recently had published an article on urban sprawl in Texas in the June 2008 edition of the *Zoning and Planning Law Report*. He was the 2004-05 Chair of the State and Local Government Law Section of the American Bar Association and Immediate Past Section Chair of the State and Local Government Relations Section of the Federal Bar Association. He also serves on the Board of Trustees and is the Vice Chair of the Executive Committee of Dallas Academy, an exceptional school for children with learning differences, located in the White Rock Lake area of East Dallas. In May 2014, Terry was appointed an adjunct member of the City of Dallas Civil Service Commission.

In his free time, while accepting the fact that knee replacement surgery is inevitable, Terry enjoys long distance running, having competed in 45 half-marathons as well as many 20Ks, 25Ks and 30Ks. He completed his 34th marathon in Austin in February 2014. He has competed in the Chicago, New York, San Diego, White Rock/Dallas, Cowtown, Illinois, Marine Corps, Canadian International (Toronto), St. Louis, Austin and Berlin Marathons, all of which he ran very slowly!