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Immigration—Preemption

City Housing Ordinance Adopted to Address Influx of Latino Immigrants Isn't Preempted

Municipal housing restrictions that were adopted to address the growing Latino population in Fremont, Neb., withstand a federal preemption challenge, U.S. Court of Appeals for the Eighth Circuit ruled June 28 (*Keller v. Fremont, Neb.*, 8th Cir., No. 12-1702, 6/28/13).

The restrictions are not preempted by federal law, Judge James B. Loken explained for the court.

Larry J. Joseph, Washington, D.C., who filed an amicus brief on behalf of the Eagle Forum Education and Legal Defense Fund supporting the city, told BNA July 3 that the Fremont ordinance can now be used by other localities in their fight to make the federal government fulfill its constitutional obligation to execute current federal immigration law.

Attorneys who represented the plaintiffs were not available for comment.

Fremont has a population of about 26,000 people. In 2000, 1,085 of them were Latino. By 2010, the Latino population tripled to 3,149.

In 2010, Fremont voters adopted Ordinance No. 5165. Among other things, the law makes it unlawful to rent property to an ''illegal alien,'' which is defined as ''an alien who is not lawfully present'' in the United States under federal law. The penalty for violating the law is $100 per day.

Under the ordinance, prospective renters must obtain an occupancy license from the city to rent property. To obtain a license, the applicant must pay $5, and declare his citizenship or immigration status. A provisional license will be issued at that time. Local police will, however, verify the declaration with the federal government. Anyone determined to be ''unlawfully present'' in the country has 60 days to establish lawful presence. If the renter's immigration status is still challenged, his license will be revoked, and his landlord will be notified. Anybody who receives a deficiency notice may seek judicial review.

Landlords and tenants argued that Ordinance No. 5165 is preempted by the INA and violates the Fair Housing Act. The district court ruled that to the extent the ordinance provides penalties for ''harboring'' illegal aliens, it ''conflicts with the INA'' and is preempted. It also said that the provisions violate the FHA because they have an unlawful disparate impact on Latinos.

No Preemption Here. In *Arizona v. United States*, 2012 BL 157302, 80 U.S.L.W. 4539 (U.S. 2012), the U.S. Supreme Court said that a state law that imposed criminal sanctions for an alien's willful violation of federal registration laws, that imposed criminal penalties on unauthorized aliens who sought work in the state, and that required police to arrest a person without a warrant if the officer believed the person was ''removable'' from the United States, are preempted. But it also held that a provision of the law that required police to determine the immigration status of any person they stop was not preempted. The Supreme Court said that the first provision intruded on the exclusive federal field of alien registration; the second interfered with the congressional decision not to impose criminal penalties on aliens who seek unauthorized employment; and the third interfered with the federal discretion in alien removal. As for the fourth provision, the court said that it was ''inappropriate to assume'' that it would be construed in a way that conflicts with federal law.

The plaintiffs here argued that Fremont's ordinance is preempted under the same preemption doctrines.

The court explained that the exclusive federal power to remove aliens is not in play here because Fremont's rental provisions do not determine who should or should not be admitted into the United States. It added that the occupancy licensing scheme is not field-preempted, because it does not create an ''alien registration regime.'' The ordinance does not apply to all aliens, only renters, it said. It also does not impair federal anti-harboring laws because it does not try to enforce those laws, it said. Instead, ''it prohibits 'harboring' conduct that is inconsistent with the City's local public interests, being careful not to prohibit conduct 'expressly permitted by federal law.' ''

Crux of Issue. Getting to what it called the ''crux of the preemption issue,'' the court said that the rental provisions do not interfere with the federal government's discretion to decide which aliens are in the country illegally and should be removed. The rental provisions do not remove anyone from the United States or even the city, it said. It said, ''federal immigration officials retain complete discretion to decide whether and when to pursue removal proceedings.'' Not only does the ordinance not require local officials

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to decide whether an alien is removable, it expressly requires them ''to defer to the federal government's determination,'' it said.

Arguing as amicus curiae, the United States claimed that the Fremont ordinance undermines the orderly operation of federal removal proceedings. But the court said that argument is based on the false premise that the ordinance creates a competing regime to determine the removability of aliens.

The plaintiffs' facial challenge to the ordinance also must fail because it requires speculation of how it may be construed and implemented, the court said.

FHA Claims. The district court also concluded that the rental provisions violate the FHA because they have an unlawful disparate impact on Latinos. The appeals court said, however, that while Latinos are a protected class, the plaintiffs failed ''to identify a specific disparate impact.'' They made no attempt to identify the relevant population to be compared, it said. Moreover, it said that a ''local ordinance that restricts or disadvantages aliens not lawfully present in the country has no . . . historic ties to the purposes of the FHA.''

Judge Steven M. Colloton joined the opinion.

Dissenting Judge Myron H. Bright argued that with its purpose to remove ''illegal aliens'' and undocumented persons from Fremont, the ordinance ''seeks to usurp power reserved to the federal government by identifying undocumented persons and forcing them out of the city, and perhaps the country.'' He added, ''The federal government has the exclusive authority to determine which immigrants may reside in this country and which immigrants will be removed.'' The sections of the ordinance at issue ''are conflict preempted because they stand as an obstacle to a federal objective,'' he said.

Inconsistency Settled. Joseph explained that the importance of the decision lies in its ''resolution of two competing strands of recent Supreme Court authority on conflict preemption.''

In *Chamber of Commerce v. Whiting*, 2011 BL 138662, 79 U.S.L.W. 4350 (U.S. 2011), the Supreme Court upheld an Arizona law that allows the state to revoke the business licenses of employers that knowingly hire illegal immigrants and requires employers to use the federally run E-Verify immigration status system. Joseph said, however, that ''*Witing* was dismissive of conflict preemption for E-Verify because Congress said nothing about states' mandating it, even though Congress expressly had not made E-Verify optional for federal law.'' By contrast, he added that ''*Arizona* held that employee-based sanctions (on which federal law is silent) conflict with the congressional decision to regulate employer-based sanctions.''

According to Joseph, *Fremont* resolves the ''inconsistency'' between the two cases ''by narrowing *Arizona* to its holdings on specific areas: alien registration for field preemption, removal decisions and employee-based sanctions for conflict preemption.'' He added, ''As long as state and local laws steer clear of these areas, *Fremont* appropriately holds that Congress would not have intended to preempt pre-existing state and local authority by mere implication.''

No Speculation. As for facial challenges, Joseph noted that they ''are the most difficult type of case to bring because the plaintiff must establish that the law is valid in all circumstances, not in speculative or hypothetical scenarios or as applied to specific people.'' Further, he said that ''Article III's case or controversy requirement generally requires a plaintiff to raise its case, not the case of some third party with different facts.''

According to Joseph, the Eighth Circuit distinguished between facial and as-applied challenges in this case to rebut the speculative arguments made by the federal government and the plaintiffs. He explained that they argued that the city's asking the federal government ''about a renter's immigration status—as federal law specifically allows state and local government to do—might conflict with federal immigration decisions if the alien has applied for lawful status.'' But the argument has two problems, he said. ''First, it is not clear that the plaintiffs include someone in this hypothetical situation. Second, and more importantly, it is a hypothetical situation that is inappropriate in a facial challenge, even if it could form the basis of an as-applied challenge.''

Joseph said that ''facial challenges were difficult before *Fremont*, and they remain difficult, especially where the plaintiff depends on hypothetical future situations as a substitute for concrete, present injury. Certainly, for immigration, *Fremont* sets the precedent that courts must disregard plaintiffs' speculation about hypothetical injury.''

The Fremont ordinance can be used as a model for other jurisdictions seeking to adopt similar laws, Joseph said. He cautioned, however, that ''localities will need to tailor their laws to their particular state, as well as their own powers under their state constitutions.'' He added that they should also check the law of the federal circuit in which they are located. ''If neither state law nor circuit-specific federal law poses an obstacle, the ordinance is a good outline for state and local government,'' he said.

Alonzo Rivas, Mexican American Legal Defense and Educational Fund, Chicago, argued for the plaintiffs. Mark B. Stern, Department of Justice, Washington, D.C., argued for the United States as amicus curiae. Jennifer C. Newell, American Civil Liberties Union, San Francisco, argued for ACLU Nebraska Foundation and other amici. Kris W. Kobach, Kobach Law LLC, Kansas City, Kan., argued for the city.

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Full text at http://www.bloomberglaw.com/public/document/Fred_Keller_Jr_et_al_v_City_of_Fremont_et_al_Docket_No_120170 2_8t.

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