UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

MARIO MARTINEZ, JR., PAOLA MERCADO, JANE DOE, MARIA ROE, STEVEN DAHL, AND ACLU NEBRASKA FOUNDATION, Plaintiffs, v. CITY OF FREMONT; DEAN F. SKOKAN, JR., IN HIS OFFICIAL CAPACITY AS FREMONT CITY ATTORNEY; AND TIMOTHY MULLEN, IN HIS OFFICIAL CAPACITY AS FREMONT CHIEF OF POLICE, Defendants.	)	Civ. Action No. _____ **COMPLAINT**

INTRODUCTION

1. This lawsuit challenges the City of Fremont, Nebraska's illegal attempt to enact its own comprehensive immigration law to regulate the housing and employment of immigrants within its borders.

2. On June 21, 2010, Fremont voters passed a City Initiative Petition enacting an "ordinance relating to immigration."[1] The "Immigration Ordinance" seeks to prevent immigrants the City deems "illegal aliens" from residing in rental housing within Fremont's borders. The Immigration Ordinance also mandates that any entities doing business within the

[1] *See* Results of Election on Immigration Ordinance, *available at* http://www.fremontne.gov/index.aspx?NID=449 (last visited July 2, 2010).

City participate in a voluntary, experimental federal program known as "E-Verify," which enables the electronic verification of an employee's federal permission to work in the U.S.

3. As the City itself has previously acknowledged in separate state court litigation, the Immigration Ordinance violates the Supremacy Clause of the U.S. Constitution because it is preempted by federal immigration law, as well as by the federal government's exclusive authority to regulate immigration.[2] Indeed, courts in several other federal jurisdictions have enjoined similar laws relating to housing or employment of immigrants as unconstitutional,[3] and the federal government has recently taken the position before the U.S. Supreme Court that a state or local government cannot lawfully mandate participation in E-Verify.[4]

4. The Immigration Ordinance is unlawful for several other reasons as well, including that it violates Equal Protection and the federal Fair Housing Act, is unconstitutionally vague in violation of due process, and exceeds Fremont's municipal authority under Nebraska law.

5. This lawsuit seeks to prevent the many harms that will befall citizens and noncitizens alike if the Immigration Ordinance is allowed to go into effect – including discrimination and profiling against those who are deemed to look or sound foreign.

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[2] *City of Fremont, Nebraska v. Wanda Kotas et al.*, 279 Neb. 720, 722 (Neb. 2010) (recounting the City's assertion that the Ordinance "violated the Supremacy Clause of the U.S. Constitution and was preempted by federal law"); *id.* [at 723] ("Fremont points out that courts have uniformly determined that harboring and housing provisions such as those contained in the Measure are preempted by federal law and therefore are unconstitutional").

[3] *See Villas at Parkside Partners v. City of Farmers Branch*, --- F. Supp. 2d ----, 2010 WL 1141398, at *16 (N.D. Tex. Mar. 24, 2010); *Chamber of Commerce v. Henry*, No. CIV-08-108-C, 2008 WL 2329164 (W.D. Okla. June 4, 2008), *aff'ed in part by* 594 F.3d 742 (10th Cir. 2010); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007); *Garrett v. City of Escondido*, 465 F.Supp. 2d 1043 (S.D. Cal. 2006).

[4] Brief for the United States as Amicus Curiae at 9 ("States and localities may not impose such requirements"), *Chamber of Commerce v. Candelaria* (No. 09-115), 2010 WL 2190418; *see also id.* at 16-19.

Unfortunately, immigrant residents of Fremont have already reported threats and harassment as a result of the anti-immigrant hostility surrounding the Ordinance.

6. This litigation also seeks to prevent the conflicting patchwork of regulation that would result if cities across the country were allowed to take immigration policy into their own hands as Fremont has attempted to do.

PARTIES

Plaintiffs

7. Plaintiff Mario Martinez, Jr., a Fremont resident and tenant, has lived in Fremont for 13 years. He is a native-born U.S. citizen who identifies himself as Latino. Plaintiff Martinez rents his house in Fremont on a monthly basis and resides there with his wife, daughter, and pet dog. His family and job are in Fremont.

8. Plaintiffs Paola Mercado, a Fremont resident and tenant, has lived in Fremont for about 14 years. Plaintiff Mercado is a native-born citizen of the U.S. She rents a house in Fremont on a monthly basis and resides there with her husband and their children.

9. Plaintiff Jane Doe,[5] a Fremont resident and tenant, is a U.S. citizen who identifies herself as Latina. Plaintiff Doe lives in a rental apartment in Fremont along with her fiancé and minor child. Her fiancé does not currently have any immigration papers. Plaintiff Doe does not believe that her fiancé has any government-issued identification number that would establish his lawful presence in the U.S. as required by the Ordinance. Plaintiff Doe and her fiancé are expecting a baby. After their wedding, Plaintiff Doe and her fiance hope to file an application to adjust her fiance's status to a lawful immigration status. Plaintiff Doe has a lease that will expire early next year.

[5] Jane Doe is a pseudonym. Plaintiff Doe is filing a motion to for leave to proceed pseudonymously.

10. Plaintiff Maria Roe,[6] a Fremont resident and tenant, is a U.S. citizen. Plaintiff Roe was born in Fremont and has lived in Fremont for much of her life. Plaintiff Roe has been married for three and a half years and together with her husband raises her child. Plaintiff Roe's husband does not currently have any immigration papers. Plaintiff Roe does not believe her husband has any government-issued identification number that would establish his lawful presence in the U.S. as required by the Ordinance. She believes her husband may be eligible to adjust to a lawful immigration status and plans to file an application to do so in the near future. Ever since the passage of the ordinance, however, Plaintiff Roe's child has been crying out of fear that the child's father will be taken away. Plaintiff Roe and her family rent an apartment in Fremont on a monthly basis. Plaintiff Roe also has other family who reside in Fremont.

11. Because they believe the Immigration Ordinance is unlawful, Tenant Plaintiffs Martinez, Mercado, Doe, and Roe do not think they should have to comply with it. However, Tenant Plaintiffs are afraid that if they do not do what is required, then they could be criminally prosecuted, fined, and evicted for violating the Ordinance.

12. Tenant Plaintiffs Martinez, Mercado, Doe, and Roe all have friends or relatives who stay at their rental homes from time to time when they visit Fremont. Because of the ordinance, however, Tenant Plaintiffs fear that they are at risk of eviction, prosecution, and sanction if they have guests stay at their homes overnight or for any extended period without an occupancy license. They do not know how to figure out whether someone is staying long enough to require an occupancy license. Indeed, Plaintiff Martinez has a relative who is already afraid to visit him because of developments related to the Ordinance.

[6] Maria Roe is a pseudonym. Plaintiff Roe is filing a motion for leave to proceed pseudonymously.

13. Tenant Plaintiffs Martinez, Mercado, Doe, and Roe do not believe that citizenship or immigration status is relevant to whether someone is good tenant or whether friends and relatives should be permitted to stay over as houseguests.

14. Tenant Plaintiffs Martinez, Mercado, and Roe fear that they will be forced to secure occupancy licenses on a monthly basis, thus requiring that they expend significant amounts of time and money to continue living in Fremont.

15. Because they are month to month tenants, Tenant Plaintiffs Martinez, Mercado, and Roe are particularly vulnerable to eviction for failure to comply with the Ordinance. They fear that if they are evicted, they would not be able to find other suitable rental property in Fremont where they could reside with their families.

16. Plaintiff Roe is particularly vulnerable to eviction. Plaintiff Roe fears that as a result of the Ordinance, the City could force their landlord to evict them because of her husband's immigration status. She fears that as a result of the Ordinance, they would be unable to move to another apartment in Fremont where they could live together as a family. She does not believe any landlord would be willing to rent to them without proof of lawful immigration status, because any landlord who does so would risk the eventual revocation of her husband's occupancy license and having to undergo the burdens and expense of an eviction proceeding. She is also concerned that her family will not be able to afford the expense of moving.

17. Plaintiff Doe likewise fears that because of her fiance's immigration status, her family will be unable to remain together in their current apartment and will be unable to find another apartment in Fremont where they could live together. They do not believe any landlord would be willing to rent to them without proof of lawful immigration status, because any

landlord who does so would risk the eventual revocation of her fiance's occupancy license and having to undergo the burdens and expense of an eviction proceeding.

18. Plaintiff Steven Dahl, a Fremont resident and landlord, owns several rental properties in Fremont comprising about 61 rental units. He ordinarily has about 130 to 140 tenants, including children. His vacancy rate is usually about 5%; he currently has one vacant unit and will have two additional vacant units at the end of this month.

19. Plaintiff Dahl does not ask his tenants about their immigration status, and feels that as a non-lawyer this would be difficult to determine in any case. He thinks immigration status has no bearing on whether a tenant will be good or not.

20. Plaintiff Dahl does not feel that he should have to comply with the Ordinance. Plaintiff Dahl is afraid that he may be subject to prosecution and fines if one of his tenants does not have a proper license.

21. Plaintiff Dahl is concerned that if the Ordinance goes into effect it will negatively impact his business in several respects. He is concerned that rental prices will decline as renters move outside the city limits or to other towns in response to the Ordinance. He expects to have to lower rents to attract new tenants because of the Ordinance, and is concerned that his property values will decline. Indeed, one of Plaintiff Dahl's tenants has already indicated that she may move out as a result of the Ordinance.

22. Plaintiff Dahl is also concerned about the costs of administering the ordinance. In particular, he fears having to undergo the disruption, expense, and difficulty of an eviction proceeding for any tenants whose occupancy licenses are revoked. He fears that tenants who are the subject of such eviction proceedings may cause damage to his property.

23. Plaintiff Dahl is concerned that it will be difficult and burdensome for him to ensure compliance with the Ordinance. For instance, if a roommate moved out and another moved in then he would have to ensure that the new roommate had a license. He is also concerned that he will not be able to monitor how long guests are visiting or whether they qualify as "temporary guests."

24. The ACLU Nebraska Foundation is an employer and business entity with an office in Lincoln, Nebraska. It is a Nebraska non-profit corporation that provides assistance to the public on civil liberties matters. ACLU Nebraska's mission is to protect the civil liberties of all Nebraskans, guaranteeing protection of their US Constitutional rights and their rights under the Nebraska State Constitution.

25. ACLU Nebraska employs three full time employees and one part-time employee. ACLU Nebraska has also sometimes hired law clerks as employees. ACLU Nebraska currently has a vacancy for an administrative assistant and is advertising that available position for prospective applicants.

26. ACLU Nebraska employees have performed work in Fremont and will do so in the future. ACLU Nebraska employees have, for example, testified at a Fremont City Council hearing and assisted a Fremont resident who was improperly denied a driver's license. An ACLU Nebraska employee has also accepted an invitation to travel to Fremont to conduct a know-your-rights training. The ACLU Nebraska has also performed work in Fremont in connection with the Immigration Ordinance.

27. ACLU Nebraska complies with federal law to verify the eligibility of its employees to work in the United States using the traditional "I-9" paper form, but ACLU Nebraska does not currently use the voluntary E-Verify program. If the Fremont Immigration

Ordinance takes effect, ACLU Nebraska will be forced to use the voluntary E-Verify system to verify employment eligibility because we have employees who will perform work in Fremont in the future. ACLU Nebraska fears that if it does not use E-Verify, ACLU Nebraska may be sued by the Fremont City Attorney and have to expend resources defending against such litigation.

28. ACLU Nebraska is concerned that using E-Verify would impose added costs and obligations on ACLU Nebraska, including registering for the program, becoming familiarized with a sixty-page E-Verify User Manual, training its employees in the proper use of E-Verify, entering into and complying with the Memorandum of Understanding ("MOU") with the federal government, and using E-Verify for each new hire. Moreover, ACLU Nebraska will have to assist any employees who are authorized to work but who are not confirmed and have to resolve problems. These obligations will be particularly burdensome because ACLU Nebraska has limited staff resources. If the Fremont Immigration Ordinance does not take effect, ACLU Nebraska will not use E-Verify and will not incur the attendant costs and obligations.

29. ACLU Nebraska believes that complying with the Fremont Immigration Ordinance will also harm ACLU Nebraska by requiring it to divert resources from its programs for implementation, training and proper use of E-Verify as a means of verifying employment eligibility of its employees.

Defendants

30. Defendant City of Fremont is located in the state of Nebraska. During all relevant time periods, the City and its agents acted under color of law.

31. Defendant Dean F. Skokan is sued in his capacity as the City Attorney of Fremont. As City Attorney, Defendant Skokan is responsible for enforcing portions of the Immigration Ordinance.

32. Defendant Timothy Mullen is sued in his capacity as the Chief of Police of Fremont. As Chief of Police and head of the Fremont Police Department, Defendant Mullen is responsible for enforcing and implementing portions of the Immigration Ordinance.

JURISDICTION AND VENUE

33. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 over Plaintiffs' claims under the Constitution of the United States and 42 U.S.C. § 1983. This Court has jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367. This Court has jurisdiction over Plaintiffs' requests for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

34. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because all of the events giving rise to the claims made in this complaint have occurred or will occur in this district, and because Defendant City of Fremont is located in this district and Defendants Skokan and Mullen perform their official duties in this district.

GENERAL BACKGROUND

The City of Fremont

35. Fremont is a city of about 25,000 residents which "historically has been 98 percent white."[7] In 1990, for example, census data indicates that there were only about 165 individuals of Hispanic descent and 272 foreign-born persons residing in Fremont.

36. Since 1990, however, the Hispanic population of Fremont has grown by about eight times,[8] from less than 1% of the population to nearly 8% of the population.[9] Today, there are about 2,000 Fremont residents of Hispanic descent.[10]

[7] Leslie Reed, "City Torn By Immigration Proposal," Omaha World-Herald, June 10, 2010, *available at* http://www.omaha.com/article/20100610/NEWS01/706109891/0 (last visited July 5, 2010).

37. In the same time period, Fremont's foreign-born population has grown by about four times, from 1.1% of the population to about 4.3% of the population, with about 1,100 foreign-born residents today, mostly from Latin America and Asia.[11]

Events Leading Up to Passage of the Immigration Ordinance

38. In 2008, then-City Council Member Bob Warner introduced the Immigration Ordinance, which was eventually considered and rejected by the City Council in June 2008.

39. According to news reports, Warner "said he introduced the ordinance in 2008 because of citizen complaints about unpaid hospital bills at the Fremont hospital and about growing numbers of Spanish-speaking students enrolled in Fremont schools."[12] Warner was apparently "suspicious of the number of adults in Fremont who seem to have no knowledge of English."[13]

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[8] Leslie Reed, "City Torn By Immigration Proposal," Omaha World-Herald, June 10, 2010, *available at* http://www.omaha.com/article/20100610/NEWS01/706109891/0 (last visited July 5, 2010).

[9] *Compare* U.S. Census for 1990 (enumerating Hispanic population as 165 individuals, or .6% of the total population of Fremont), *with* American Community Survey 2006-2008 (estimating Hispanic population at 1,995, or 7.8% of the total population of Fremont).

[10] *See* American Community Survey 2006-2008 (estimating Fremont's Hispanic population to be 1,995 persons); *see also* Leslie Reed, "City Torn By Immigration Proposal," Omaha World-Herald, June 10, 2010, *available at* http://www.omaha.com/article/20100610/NEWS01/706109891/0 (last visited July 5, 2010).

[11] *Compare* U.S. Census for 1990 (enumerating 272 foreign-born persons, or 1.1% of the total population of Fremont) *with* American Community Survey 2006-2008 (estimating a foreign-born population of 1,117, or about 4.3% of the total population of Fremont); *see also* Leslie Reed, "City Torn By Immigration Proposal," Omaha World-Herald, June 10, 2010, *available at* http://www.omaha.com/article/20100610/NEWS01/706109891/0 (last visited July 5, 2010).

[12] Leslie Reed, "City Torn By Immigration Proposal," Omaha World-Herald, June 10, 2010, *available at* http://www.omaha.com/article/20100610/NEWS01/706109891/0 (last visited July 5, 2010).

[13] *Id.*

40. After the City Council voted 4 to 4 on the proposed Ordinance, the Fremont mayor broke the tie by voting against it. Proponents of the Ordinance then collected signatures to have the Immigration Ordinance voted on as a City Initiative Petition.

41. The petitioners named on the City Initiative Petition indicated that in their view, the Immigration Ordinance is necessary in part because of the federal government's failure to control the immigration problem. Jerry Hart, a proponent of the Immigration Ordinance and leader of the petition drive, "said that the federal government isn't controlling immigration, so Fremont and other communities need local ordinances to protect jobs for legal residents and curb spending on education and medical care for illegal immigrants."[14] John Wiegert, another named petitioner, stated to a reporter that "[i]f the federal government is not going to watch out for us, then we need to watch out for ourselves."[15]

42. Proponents of the Immigration Ordinance have also expressed concerns regarding demographic changes in Fremont. Hart reportedly "said he joined the petition drive because Fremont residents were growing more concerned about the changes they were seeing in Fremont." Among Hart's concerns were the increasing numbers of Spanish-speaking residents in Fremont: According to news reports, "[h]e said when he worked out at the YMCA, he heard people griping about visitors struggling with the weight machines who didn't speak English. At the Fremont Wal-mart, he heard other customers speaking in Spanish."[16]

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[14] Timberly Ross, "Neb. City wary of lawsuit over immigration measure," Associated Press, May 16, 2010.

[15] John Ferak and Cindy Gonzalez, "Expense prompted Fremont's mayor's 'no' vote," Omaha World Herald, July 31, 2008.

[16] Leslie Reed, "City Torn By Immigration Proposal," Omaha World-Herald, June 10, 2010, *available at* http://www.omaha.com/article/20100610/NEWS01/706109891/0 (last visited July 5, 2010). Other Fremont residents have openly admitted to stereotyping and racial profiling of Hispanic individuals. *See* "Preliminary Results Show Neb. City Supporting Illegal

43. The Immigration Ordinance has created a climate of hostility against immigrants in Fremont, and Plaintiffs and others in Fremont have suffered incidents of harassment since the introduction of the Ordinance. For example, in one recent incident, Plaintiff Doe asked a Fremont store employee if her minor child could use the bathroom, only to be told that there were "no restrooms for Mexicans." In another incident, Plaintiff Martinez's wife was told to "Go back to Mexico" because of her accent. When Plaintiff Roe sought to express her views on the Immigration Ordinance to a public official, the public official openly laughed at a racist joke told by another constituent in Plaintiff Roe's presence. Plaintiff Martinez has also seen people around Fremont wearing t-shirts that read "Proud to Be an American: If You're Not, Go Home." The ACLU of Nebraska has also been the recipient of numerous vitriolic calls and messages as a result of the organization's public opposition to the Ordinance.[17]

44. Apparently concerned that the Immigration Ordinance was unlawful, the City initiated a pre-election challenge in state court. The City asserted that the Immigration Ordinance was unconstitutional because it violated the Supremacy Clause and was preempted by federal immigration law. The City also claimed that the Immigration Ordinance violated the requirement that initiative petitions concern a single subject.

Immigration Restrictions, Associated Press, June 21, 2010, *available at* http://www.newser.com/article/d9gg0vgg0/preliminary-results-show-neb-city-supporting-illegal-immigration-restrictions.html ("Sandra Leffler, 69, who owns a downtown antique store with her husband, Marv, said she knows not all Hispanics are illegal immigrants, but that it's hard not to think that way. She said she scrutinizes her Hispanic customers. 'I have to admit, when I see them come into the store ... I can't help wondering if I'm profiling someone who's completely honest,' she said.").

[17] *See also, e.g.*, Monica Davey, "City in Nebraska Torn as Immigration Vote Nears," New York Times, June 17, 2010 (describing Latino business owner who was screamed at to "[g]o back to Mexico!' and received an anonymous letter accusing him of harboring illegal immigrants).

45. The Nebraska Supreme Court held that the measure had "one general subject--the regulation of illegal aliens."[18] The Court also affirmed the lower court's ruling that the City's substantive constitutional challenge could not be adjudicated pre-election.

46. On June 21, 2010, Fremont voters passed the Immigration Ordinance as a City Initiative Petition, with a margin of 57 percent to 43 percent.

47. The Ordinance adds a new § 6-428 to the Fremont Municipal Code Ordinance No. 3139, entitled "Harboring or Hiring of Illegal Aliens, Prohibited."

The Immigration Ordinance's Regulation of Immigrant Housing

48. The Immigration Ordinance generally makes it unlawful for any person or business entity that owns a dwelling unit in the City to "harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law." Ord. Sec. 1, 2.A. The Ordinance further provides that "to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall be deemed to constitute harboring." Ord. Sec. 1, 2.A.1.

49. The prohibition on harboring is generally enforced through an enforcement scheme based on occupancy licenses. Ord. Sec. 1, 2.A.4.

50. The Ordinance requires that, prior to occupying a leased or rented dwelling unit, each occupant older than 18 years of age must obtain an occupancy license. Ord. Sec. 1, 3.A.

51. An occupant is defined as any person older than 18 years of age, other than a temporary guest, who resides in a dwelling unit. Ord. Sec. 1, 1.E. A dwelling unit is generally

[18] *City of Fremont v. Kotas*, 279 Neb. 720, 728-29 (Neb. 2010).

defined as "a single residential unit with living facilities for one or more persons … that is let or rented for valuable consideration." Ord. Sec. 1, 1.C.

52. Each occupancy license is valid only for a specific occupant and a specific dwelling unit; a separate occupancy license is required for any relocation to a different dwelling unit. Ord. Sec. 1, 3.D.

53. The owner or manager of any dwelling unit must notify each prospective occupant of the occupancy license requirement, and "shall not permit occupancy of a dwelling unit unless the occupant first obtains an occupancy license." Ord. Sec. 1, 3.C.

54. To obtain the required occupancy license, each occupant must complete and submit an application for an occupancy license to the Fremont Police Department, pay a $5 fee to the City, and obtain an occupancy license. Ord. Sec. 1, 3.B.

55. Each occupant is required to complete the following information as part of the application for an occupancy license: occupant's full legal name, occupant's mailing address, dwelling unit address, name and business address of the dwelling unit owner or manager, the date the lease commences, occupant's date of birth, occupant's "country or citizenship," and the full legal name and date of birth of each minor dependent of the occupant. Ord. Sec. 1, 3.E.

56. If the applicant is a U.S. citizen or national, he or she is required to sign and submit a declaration to that effect. The form shall provide notice of the criminal penalties pursuant to 18 U.S.C. § 1015(e). Ord. Sec. 1, 3.E(9)(a).

57. If the applicant is *not* a U.S. citizen or national, he or she is required to provide "an identification number assigned by the federal government that the occupant believes establishes his lawful presence in the United States," or, if he or she does not know of any such number, he or she must so declare. Ord. Sec. 1, 3.E(9)(b). The Ordinance provides that

examples of such a number could "include, but are not limited to: resident alien card number, visa number, 'A' number, 1-94 [sic] registration number, employment authorization number, or any other number on a document issued by the U.S. Government." Ord. Sec. 1, 3.E(9)(b).

58. The Ordinance provides that the City shall issue an occupancy license to every applicant who submits a completed application and pays the application fee. Ord. Sec. 1, 3.F.

59. After issuing an occupancy license, the Fremont Police Department (hereinafter "P.D.") shall "request the federal government to ascertain whether the occupant is an alien lawfully present in the United States" based on the information provided in the occupancy license application and any other information requested by the federal government. Ord. Sec. 1, 4.A (citing 8 U.S.C. § 1373(c)).

60. The Ordinance provides that if the federal government reports that the occupant is "not lawfully present in the United States," then the P.D. shall send a deficiency notice to the occupant. The deficiency notice shall state that on or before the 60th day following the date of the notice, the occupant may attempt to correct the federal government's records or provide additional information establishing that the occupant is "lawfully present" in the U.S. The P.D. shall submit any such additional information provided by the occupant to the federal government. Ord. Sec. 1, 4.B.

61. The Ordinance further provides that, after the 61st day after the issuance of a deficiency notice, the P.D. shall again make an inquiry to the federal government regarding the immigration status of the occupant. If the federal government reports that the occupant "is an alien who is not lawfully present in the United States," then the P.D. shall send a revocation notice to both the lessor and the occupant. The revocation notice revokes the occupant's occupancy license effective 45 days after the date of the notice. Ord. Sec. 1, 4.D.

62. Any lessor who leases or rents a dwelling unit without obtaining and retaining a copy of the occupancy license of every known occupant is in violation of the Ordinance. Ord. Sec 1, 3.H. In addition, a lessor commits a violation if he or she fails to include in the terms of the lease a provision stating that occupancy of the premises by persons over the age of 18 who do not hold a valid occupancy license constitutes a default of the lease. Ord. Sec. 1, 3.I. Further, a landlord or landlord's agent who has authority to initiate eviction proceedings violates the Ordinance if he or she knowingly permits an occupant to occupy a dwelling unit without a valid occupancy license. Ord. Sec. 1, 3.J.

63. "Any person" who violates Section 3 of the Ordinance (requiring occupancy licenses) shall be subject to a $100 for *each* violation, upon conviction in the Dodge County Court. Ord. Sec. 1, 3.K. Either leasing or renting a dwelling unit without obtaining and retaining a copy of the occupancy license of every known occupant is a "separate violation for each occupant," and "for each day of such occupancy," beginning on the 46th day after the date of any notice from the City that an occupant's occupancy license is being revoked. Ord. Sec. 1, 3.L.

64. The obligations of the Ordinance apply prospectively to "contracts to let, lease, or rent dwelling units that are entered into and tenancies that begin after the date that the Ordinance becomes effective." Ord. Sec. 1, 2.A.4.

65. The Ordinance provides that a landlord or occupant in receipt of a deficiency notice or revocation notice may obtain judicial review in state court of, among other things, the question "whether the occupant is an alien not lawfully present in the United States." Ord. Sec. 1, 4.F.1, 3-4. The Ordinance further provides that the reviewing court must "defer" to "any conclusive ascertainment of immigration status by the federal government," but that the federal

government's "most recent ascertainment" of immigration status creates only a rebuttable presumption. Ord. Sec. 1, 4.F.4-5.

The Immigration Ordinance's Regulation of Immigrant Employment

66. The Immigration Ordinance requires every business entity in the City employing one or more employees and performing work within the City to register in the federal E-Verify Program within 60 days of the Ordinance's effective date, and to use the E-Verify Program to verify the employment authorization of each employee hired thereafter. Ord. Sec. 1, 5.E. The same requirements apply to every business entity with one or more employees that begins performing work within the City subsequent to 60 days following the Ordinance's effective date. Ord. Sec. 1, 5.F.

67. Business entities that apply for a business license, permit, grant, or loan from the City, or are awarded a contract for work to be performed within the City, are required to provide to the City documentation confirming their registration in E-Verify. An authorized representative from each such business entity is also required to execute an affidavit certifying that the business entity does not knowingly employ any person who is an unauthorized alien. These requirements are a condition of any license, permit, grant, or loan from the City, and for any contract awarded by the City. Ord. Sec. 1, 5.C.

68. A business entity is defined as "any person, group of persons, partnership or corporation that engages in any activity, enterprise, profession or occupation for financial gain, benefit, or livelihood . . . whether for profit or not-for-profit. The term business entity shall include but not be limited to contractors, subcontractors, self-employed individuals, partnerships, and corporations. The term business entity shall include both business entities that are required to obtain a license or permit to conduct business in the City of Fremont, and businesses that are

not required to obtain a license or permit to conduct business in the City of Fremont." Ord. Sec. 1, 1.G.

69. A business license "means any license, permit, occupation tax registration, business registration, or registration certification issued to a business entity by the City, including but not limited to all licenses and permits described under the Fremont Municipal Code, Ordinance No. 3139." Ord. Sec. 1, 1.K.

70. An "unauthorized alien" is defined as "an alien who does not have authorization of employment in the United States, as defined by" 8 U.S.C. § 1324a(h)(3). Ord Sec. 1, 1.F.

71. The E-Verify Program is a voluntary and experimental program originally established by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208 (Sept. 30, 1996). E-Verify is set to expire on September 30, 2012. E-Verify permits employers who elect to participate to verify electronically workers' employment eligibility. However, employers generally need not participate in E-Verify should they choose not to do so, and employers may instead verify the employment authorization status of new hires using the federal "I-9" paper form.

72. Employers who use E-Verify must engage in various activities, including learning how to use the program; registering for E-Verify, which includes signing a Memorandum of Understanding ("MOU") with the Department of Homeland Security and the Social Security Administration; and submitting to E-Verify data such as employee name, date of birth, and Social Security Number for all new hires. In addition to initial training, employers must periodically update and re-train personnel using E-Verify each time the system is updated or changed.

73. Pursuant to the MOU, employers have several obligations, including: All employer representatives who use E-Verify must complete a tutorial; the employer must become familiar with and comply with the lengthy E-Verify manual; the employer must agree that in verifying employment eligibility of an employee at the time of hire via the federal Form I-9 process, the employer will only accept documents to establish identity that contain a photograph even though other employers are not so limited under federal law pursuant to 8 C.F.R. § 274a.2(b)(1)(v)(B); and the employer must agree not to use E-Verify as a pre-employment screening procedure or to engage in any unlawful employment practice. The MOU also provides that the federal government may terminate access to E-Verify with 30 days' notice.

74. E-Verify compares employee information submitted by employers via the Internet to information in federal SSA and DHS databases. The system first uses the SSA database to verify an employee's name, date of birth, and social security number. Upon such verification, if the employee claimed U.S. citizenship and such citizenship is confirmed by SSA's database, E-Verify confirms employment eligibility. For non-U.S. citizens, E-Verify uses the DHS database and sometimes DHS personnel to check whether the employee is authorized to work. If the SSA database is unable to verify the employee information or DHS is unable to verify employment authorization, E-Verify issues a tentative non-confirmation. An employee may contest a tentative non-confirmation by contacting the federal government to resolve inaccuracies in the records. If an employee does not contest the tentative non-confirmation within eight federal working days, it becomes final and employers must terminate the employee or notify DHS that the employer is not terminating the employee. As of June 2010, only about 204,000 of the millions of employers nationwide had registered for E-Verify.

75. E-Verify has encountered a number of problems with accuracy, capacity, and fair implementation since its inception. E-Verify relies on databases riddled with errors that put work-authorized individuals at risk of wrongful termination. It is estimated that 17.8 million Social Security Administration records contain errors related to name, date of birth, or citizenship status, with 12.7 million of these discrepancies relating to U.S. citizen records. According to the Social Security Administration's (SSA) Office of the Inspector General, in 2006, over one third of the work authorization information in the Social Security Administration's database for Social Security numbers that were originally assigned for nonwork purposes was no longer accurate. The SSA's Inspector General also found that the SSA database contained enough discrepancies to result in an incorrect finding in four percent of E-Verify submissions.

76. Moreover, error rates for naturalized citizens and non-citizens are much higher. A 2007 study by the private research corporation, Westat, determined that almost ten percent of naturalized U.S. citizens who are eventually found authorized to work initially received a tentative non-confirmation. In general, foreign-born workers are *thirty times* more likely than native-born U.S. citizens to be incorrectly identified as not authorized for employment. Likewise, Westat found that over one in ten work-authorized non-citizens are initially categorized as *not* work-authorized by the program. The records for supposedly non-U.S. citizens showed seven percent were actually U.S. citizens who had not updated their citizenship status.

77. E-Verify also suffers from capacity problems, lacking adequate staff and resources to respond efficiently and effectively to increased requests for verification. According to the Government Accountability Office (GAO), were the number of employers using E-Verify

to increase significantly due to mandatory use of E-Verify, the capacity of the system would be affected based on increased employer queries and the increased costs of hiring and training additional government staff to operate the program, respond to employer queries, and resolve an increasing number of tentative non-confirmations generated by the system. Indeed, U.S. Citizenship and Immigration Services has reported to GAO evaluators that, due to staffing shortages, it has been unable to monitor employers' use of E-Verify.

78. E-Verify is further prone to problems stemming from mistakes and abuse in its implementation by employers. For instance, the SSA's Inspector General found that thirty percent of E-Verify users admitted they had verified the employment authorization of existing employees. Indeed, a recent study of the SSA's own compliance with E-Verify requirements demonstrated that the SSA had incorrectly verified the employment authorization of existing employees, of volunteers, and of job candidates prior to their date of hire. Moreover, Westat's 2007 report found that, when an employee was in the process of contesting a tentative non-confirmation, 22 percent of employers restricted work assignments, 16 percent delayed job training, and two percent reduced pay.

79. A business entity with a license, permit, contract, loan, or grant issued by the City who violates this section (by failing to register in E-Verify or failing to verify employment authorization of new hires through E-Verify) can be tried by the City Attorney at a public hearing before the City Council. Ord. Sec. 1, 5.H. If found in violation, the City Council may revoke the license, cancel the contract, recall the grant or accelerate the loan and institute an action to collect any sums due. Ord. Sec. 1, 5.H.

80. The City Attorney may also bring a civil action against any business entity suspected of violating the Ordinance by failing to register in the E-Verify Program or failing to

verify the employment authorization of new hires. Ord. Sec. 1, 5.H. The City Attorney may seek injunctive relief compelling compliance by the business entity. Ord. Sec. 1, 5.H.

81. Any business entity subject to enforcement under the employment provisions of the Ordinance may seek judicial review of any enforcement action. Any business entity subject to these provisions may also seek judicial review. Ord. Sec. 1, 5.H.

Effective Date and Harm

82. The City has stated its intent to begin enforcement of the Ordinance on July 29, 2010.[19]

83. The adverse effects of the Immigration Ordinance will include, at minimum: (a) subjecting landlords and tenants to criminal prosecution and substantial penalties of up to $100 per tenant per day, unless they comply with the unconstitutional Ordinance, with its associated burdens and costs; (b) subjecting the Tenant Plaintiffs to the risk of losing their homes or separation of their families, restriction on their ability to freely relocate within Fremont, restriction on their ability to have friends and family members stay in their homes for extended visits, and, for the [Doe] Plaintiffs, potential disruption of their daughter's education (c) subjecting landlords to increased vacancy rates and related economic loss; and (d) imposing costs and obligations on employers not required by federal law and the risk of being sued in court by the City Attorney.

84. To the extent that only the housing portion, or the employment portion, of the Ordinance is found invalid, the entire Ordinance must be stricken because its operative parts are not severable pursuant to state law.

[19] "City of Fremont Planning for Implementation," July 13, 2010, *available at* http://fremontne.gov/CivicAlerts.aspx?AID=75 (last visited July 19, 2010). Official website of the City of Fremont, Nebraska, stating the City's plans to begin enforcement of the Ordinance on July 29, 2010.

FIRST CLAIM FOR RELIEF
VIOLATION OF THE SUPREMACY CLAUSE

85. Plaintiffs re-allege and incorporate all of the allegations contained in the previous paragraphs of this complaint as though fully set forth herein.

86. The Supremacy Clause, Article VI, Section 2, of the United States Constitution mandates that federal law preempts any state regulation of any area over which Congress has expressly or impliedly exercised exclusive authority or which is constitutionally reserved to the federal government.

87. The power to regulate immigration is an exclusively federal power that is inherent in the nation's sovereignty and derives from the Constitution's grant to the federal government of the power to "establish a uniform Rule of Naturalization," U.S. Const. art. I, §8, cl. 4., and to "regulate Commerce with foreign Nations," *id.*, cl. 3.

88. Pursuant to its exclusive power over matters of immigration, the federal government has established a comprehensive system of laws, regulations, procedures, and administrative agencies that determine, subject to judicial review, whether and under what conditions a person may enter and live in the United States, including the Immigration and Nationality Act ("INA"), 8 U.S.C. §1101, *et seq.* Under that system, whether an individual noncitizen will be removed from the U.S. or instead will be permitted to reside in the U.S. is determined by a federal immigration judge after hearings and subject to judicial review. The federal system also includes a criminal prohibition on the harboring of aliens that defines harboring in certain limited ways. *See* 8 U.S.C. § 1324(a)(1)(A).

89. Pursuant to its exclusive authority over immigration, the federal government has also established a comprehensive scheme, beginning in 1986, regulating the employment of noncitizens. Congress has prohibited employers from knowingly hiring unauthorized aliens and

established a detailed employment verification process with sanctions for employing unauthorized aliens. Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§1324a-1324b. As part of that comprehensive scheme, Congress has established a voluntary, experimental program known as E-Verify. Congress intended that employers would have a choice as to whether to enroll in and use E-Verify, or whether instead to use the Form I-9 process for verifying employment authorization of new hires.

90. Under the Supremacy Clause, the federal government has the authority to enforce immigration statutes and regulations, confer benefits, make discretionary determinations, undertake adjudication, and otherwise administer the federal immigration laws.

91. The Immigration Ordinance violates the Supremacy Clause, Article VI Clause 2 of the U.S. Constitution, because it attempts to regulate matters that are exclusively reserved to the federal government, because it operates in a field over which Congress has exercised exclusive authority, and because it conflicts and interferes with federal laws and regulations.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE EQUAL PROTECTION CLAUSE
OF THE FOURTEENTH AMENDMENT

92. Plaintiffs re-allege and incorporate all of the allegations contained in the previous paragraphs of this complaint as though fully set forth herein.

93. The Immigration Ordinance violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it was enacted and approved with the purpose and intent to discriminate against Latinos and other minorities on the basis of race and/or national origin.

THIRD CLAIM FOR RELIEF
VIOLATION OF THE DUE PROCESS CLAUSE
OF THE FOURTEENTH AMENDMENT

94. Plaintiffs re-allege and incorporate all of the allegations contained in the previous paragraphs of this complaint as though fully set forth herein.

95. The Ordinance is void for vagueness and deprives Plaintiffs of liberty and property interests without due process of law.

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE FEDERAL FAIR HOUSING ACT

96. Plaintiffs re-allege and incorporate all of the allegations contained in the previous paragraphs of this complaint as though fully set forth herein.

97. The Immigration Ordinance violates the Fair Housing Act, 42 U.S.C. § 3604 *et seq*., because it discriminates on the basis of race and/or national origin.

FIFTH CLAIM FOR RELIEF
VIOLATION OF MUNICIPAL POWERS UNDER NEBRASKA LAW

98. Plaintiffs re-allege and incorporate all of the allegations contained in the previous paragraphs of this complaint as though fully set forth herein.

99. Fremont is not a home rule city, and therefore its powers are limited to those powers it has by grant under the state's statutes.

100. Fremont has, by attempting to regulate immigration, exceeded its municipal powers by, inter alia, attempting to regulate a subject that was not and could not have been within the scope of the powers delegated to it by the State of Nebraska, and which is not within its police powers.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

A. A temporary restraining order, preliminary injunction, and permanent injunction prohibiting Defendant and its officials, employees, and agents from implementing or enforcing the Immigration Ordinance;

B. A declaration pursuant to 28 U.S.C. §§ 2201 and 2202 that the Immigration Ordinance is unlawful and invalid;

C. An order awarding Plaintiffs reasonable attorneys' fees and expenses pursuant to 42 U.S.C. § 1988 and any other applicable law;

D. Such other and further relief as the Court deems equitable, just, and proper.

Dated: July 21, 2010

MARIO MARTINEZ, JR., PAOLA MERCADO, JANE DOE, MARIA ROE, STEVEN DAHL, and ACLU NEBRASKA FOUNDATION, Plaintiffs

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