

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3
4 ROY AND MARY GARRETT; ESCONDIDO)
5 HUMAN RIGHTS COMMITTEE; JANE DOE)
6 1; JANE DOE 2,)
7 PLAINTIFFS,)
8 VS.)
9 CITY OF ESCONDIDO,)
10 DEFENDANT.)
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COPY
CASE NO. 06CV2434-JAH
SAN DIEGO, CALIFORNIA
THURSDAY
NOVEMBER 16, 2006
3:18 P.M.

REPORTER'S TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE JOHN A. HOUSTON
UNITED STATES DISTRICT JUDGE

COURT REPORTER: CAMERON P. KIRCHER
CSR, RPR, CRR, RMR
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COMPUTER-AIDED TRANSCRIPTION

1 APPEARANCES:

2 FOR THE PLAINTIFFS:

3 ROSNER, LAW & MANSFIELD
4 ATTORNEYS AT LAW
5 BY: ALAN M. MANSFIELD, ESQ.
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8 SAN DIEGO, CALIFORNIA 92131

COOLEY, GODWARD, KRONISH
ATTORNEYS AT LAW
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SAN DIEGO, CALIFORNIA 92121

9 FOR THE DEFENDANT:

10 LATHAM & WATKINS
11 ATTORNEYS AT LAW
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13 600 WEST BROADWAY
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15 SAN DIEGO, CALIFORNIA 92101

ENDEMAN, LINCOLN, TUREK & HEATER
ATTORNEYS AT LAW
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SAN DIEGO, CALIFORNIA 92101

COMPUTER-AIDED TRANSCRIPTION

1 SAN DIEGO, CALIFORNIA; THURSDAY, NOVEMBER 16, 2006; 3:18 P.M.

2 THE COURT: MR. MCDOWELL, WILL YOU CALL THE CASE.

3 THE CLERK: ALL RIGHT. THIS IS NO. 10 ON CALENDAR.
4 IT'S 06CV2434, GARRETT AND OTHERS VERSUS THE CITY OF
5 ESCONDIDO FOR A MOTION.

6 THE COURT: MAY I HAVE THE APPEARANCES OF THE
7 REPRESENTATIVE COUNSEL.

8 MR. MANSFIELD: GOOD AFTERNOON, YOUR HONOR. ALAN
9 MANSFIELD FROM THE LAW FIRM ROSNER, LAW & MANSFIELD, COUNSEL
10 FOR PLAINTIFF.

11 MR. TENCER: GOOD AFTERNOON, YOUR HONOR. PHIL
12 TENCER, COOLEY GODWARD, ON BEHALF OF PLAINTIFFS.

13 THE COURT: THANK YOU.

14 MR. GARRETT: GOOD AFTERNOON, YOUR HONOR. CHRIS
15 GARRETT, LATHAM & WATKINS, ON BEHALF OF DEFENDANT, CITY OF
16 ESCONDIDO.

17 THE COURT: GOOD AFTERNOON, SIR.

18 MR. LINCOLN: GOOD AFTERNOON, YOUR HONOR. DON
19 LINCOLN, ENDEMAN, LINCOLN, TUREK & HEATER, ON BEHALF OF THE
20 CITY OF ESCONDIDO.

21 THE COURT: GOOD AFTERNOON, MR. LINCOLN.

22 WE'RE HERE TODAY ON PLAINTIFFS' MOTION FOR A
23 TEMPORARY RETRAINING ORDER ONLY. THE PURPOSE OF THIS HEARING
24 IS ONLY TO DETERMINE WHETHER THE EFFECTIVE DATE OF THE
25 ORDINANCE SHALL BE STAYED UNTIL SUCH TIME THAT THE MERITS OF

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1 THIS MATTER ARE FULLY BRIEFED AND CONSIDERED BY THE COURT.

2 IN OTHER WORDS, IT IS THE PURPOSE OF THIS HEARING TO
3 DETERMINE WHETHER THE COURT SHOULD PRESERVE THE STATUS QUO
4 BEFORE THE PRELIMINARY INJUNCTION HEARING MAY BE HELD, SO AS
5 TO PREVENT IRREPARABLE LOSS OF RIGHT PRIOR TO JUDGMENT. SO
6 THE DECISION RESULTING FROM TODAY'S HEARING IS NOT THE FINAL
7 OR SUBSTANTIVE DECISION ON THE MERITS OF THIS CASE.

8 WITH RESPECT TO PROCEDURES HERE, I SEE HERE THAT
9 COUNSEL HAVE BEEN IDENTIFIED TO BE THE LEAD COUNSEL TO
10 PRESENT HERE TODAY. I APPRECIATE YOUR WORKING THAT THROUGH
11 AMONGST YOURSELVES.

12 THERE WAS AN AMICUS FILED. IS THERE A
13 REPRESENTATIVE FOR THE AMICUS BRIEF HERE?

14 MR. MANSFIELD: THE REPRESENTATIVE FOR THE AMICUS
15 WILL NOT BE ATTENDING TODAY. THEY JUST MERELY SUBMITTED
16 THEIR BRIEF.

17 THE COURT: VERY WELL. THANK YOU.

18 WITH THAT, THE COURT WILL PROVIDE EACH SIDE
19 APPROXIMATELY 20 TO 25 MINUTES FOR ARGUMENTS. AND,
20 THEREAFTER, THE COURT WILL DIRECT YOUR ATTENTION AS THE COURT
21 DEEMS APPROPRIATE, SO THAT WE CAN HAVE A FULL DISCUSSION OF
22 THIS MATTER.

23 BEFORE WE BEGIN, HOWEVER, THE COURT TAKES JUDICIAL
24 NOTICE OF THE FEDERAL REGISTER NO. 109, PAGES 58301 THROUGH
25 58303, BROUGHT TO THE ATTENTION OF THE COURT BY THE

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1 PLAINTIFFS IN THE CASE.

2 MR. MANSFIELD.

3 MR. MANSFIELD: THANK YOU, YOUR HONOR. MR. TENCER
4 WILL BE STARTING THE ARGUMENT, AND THEN I WILL BE FINISHING
5 IT.

6 THE COURT: THANK YOU.

7 MR. TENCER.

8 MR. TENCER: THANK YOU, YOUR HONOR.

9 GOOD AFTERNOON, YOUR HONOR. IF IT PLEASE THE COURT,
10 IN OUR SHORT TIME THIS AFTERNOON, CO-COUNSEL AND I WILL
11 ADDRESS THE FOUR ISSUES GERMANE TO TODAY'S T.R.O.

12 FIRST, I WILL EXPLAIN WHY THE INTERPRETIVE
13 MEMORANDUM PREPARED BY THE ESCONDIDO CITY MANAGER HAS NO
14 FORCE AND EFFECT. AND, SECOND, I WILL ADDRESS THE PROCEDURE
15 THROUGH PROCESS VIOLATIONS THAT STILL EXIST, EVEN IF THIS
16 COURT WERE TO CONSIDER THAT INTERPRETIVE MEMORANDUM. MY
17 CO-COUNSEL WILL ADDRESS FEDERAL/STATE PREEMPTION ISSUES, AS
18 WELL AS THE ISSUE OF ONGOING IRREPARABLE HARM.

19 ORDINANCE 2006-38R, WHICH WILL GO INTO EFFECT
20 TOMORROW, IS ENTITLED, ESTABLISHING PENALTIES FOR THE
21 HARBORING OF ILLEGAL ALIENS.

22 BY WAY OF THIS ORDINANCE, THE CITY OF ESCONDIDO IS
23 ATTEMPTING TO SOLVE THE SIGNIFICANT IMMIGRATION PROBLEMS
24 FACING SOUTHERN CALIFORNIA, AND THE NATION AS A WHOLE, BY
25 LAYING THE RESPONSIBILITY FOR THESE PROBLEMS AT THE FEET OF

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1 ESCONDIDO'S LANDLORDS.

2 THE COURT: EXCUSE ME. IF ANYONE ELSE HAS A CELL
3 PHONE, PLEASE TURN IT OFF. THANK YOU.

4 I'M SORRY. MR. TENCER, YOU MAY CONTINUE.

5 MR. TENCER: QUITE ALL RIGHT.

6 THEY ARE LAYING THIS PROBLEM AT THE FEET OF
7 ESCONDIDO'S LANDLORDS, THREATENING THEM WITH FINES AND JAIL
8 TIME. AT THE SAME TIME, AMERICAN CHILDREN LIVING IN
9 ESCONDIDO IN RENTAL PROPERTIES FACE A REAL POSSIBILITY OF
10 BEING EVICTED FROM THEIR HOMES AND SCHOOL.

11 THE COURT: HOW IS THAT THE CASE, IF THE COURT
12 DETERMINES THAT THE MEMORANDUM IS VALID AND THE MEMORANDUM IS
13 APPLIED PROSPECTIVELY?

14 MR. TENCER: WELL, YOUR HONOR, TO BE APPLIED
15 PROSPECTIVELY DOESN'T MEAN THAT IT WOULD APPLY ONLY TO FUTURE
16 CONTRACTS, LEASING CONTRACTS. TO BE APPLIED PROSPECTIVELY
17 MEANS IT WOULD BE APPLIED STARTING SATURDAY, OR THEREAFTER.

18 IN ORDER TO INTERPRET IT, AS THE CITY MANAGER HAS
19 DONE, YOU'D HAVE TO BASICALLY REWRITE THE ORDINANCE, AND
20 THAT'S SOMETHING THAT A FEDERAL COURT CANNOT DO, REWRITE A
21 STATE OR CITY ORDINANCE. THAT'S LEFT TO THE PREROGATIVE OF
22 THE CITY OR THE STATE.

23 AND SO IN ORDER TO PREVENT THESE THREATS, YOUR
24 HONOR, WHAT THE PLAINTIFFS HAVE DONE IS THEY FILED A LAWSUIT.
25 AND PRIOR TO THAT LAWSUIT, THEY WROTE A LETTER TO THE CITY,

COMPUTER-AIDED TRANSCRIPTION

1 AND THEY EXPLAINED TO THE CITY THAT THIS ORDINANCE HAS
2 SEVERAL CONSTITUTIONAL PROBLEMS WITH IT. THEY INVITED THE
3 CITY TO WITHDRAW IT OR TO REWRITE IT TO CORRECT THE PROBLEMS.
4 THE CITY REFUSED TO DO SO. THE PLAINTIFFS FILED A LAWSUIT.
5 THEREAFTER, PLAINTIFFS FILED A T.R.O.

6 AND AT THE END OF THOSE THREE ACTIVITIES, THE
7 PLAINTIFFS, AFTER INFORMING THE CITY OF ALL THE
8 CONSTITUTIONAL PROBLEMS WITH THIS ORDINANCE, THE CITY, WHAT
9 DOES IT DO? IT CHANGES THE PLAYING FIELD IN ITS OPPOSITION.

10 IT SAYS THAT IT PROVIDES AN INTERPRETIVE MEMORANDUM
11 THAT, AT THE LAST MINUTE, IS A MOVING TARGET AND SAYS, WAIT A
12 MINUTE. THIS ORDINANCE DOESN'T MEAN WHAT IT SAYS, IT MEANS
13 SOMETHING VERY DIFFERENT.

14 THE ONLY FAIR READING OF THE MEMORANDUM IS THAT THE
15 CITY CONCEDES THAT THE ORDINANCE ON ITS FACE IS
16 UNCONSTITUTIONAL. THROUGH ITS CITY MANAGER, ESCONDIDO
17 SUBMITS TO THE COURT A POST-LITIGATION INTERPRETIVE
18 MEMORANDUM THAT REWRITES SIGNIFICANT PORTIONS OF THE CITY
19 ORDINANCE, THAT AVOID SOME, BUT NOT ALL, OF THE
20 CONSTITUTIONAL PROBLEMS FACING THAT ORDINANCE.

21 UNDER BOTH STATE AND FEDERAL LAW, YOUR HONOR, THE
22 MEMORANDUM HAS NO FORCE AND EFFECT AND SHOULD NOT BE RELIED
23 UPON BY THIS COURT FOR THREE KEYS REASONS.

24 ONE, IT'S THIS COURT'S PREROGATIVE TO INTERPRET THE
25 ORDINANCE AND NOT THE CITY MANAGER'S. TWO, THE CITY MANAGER

COMPUTER-AIDED TRANSCRIPTION

1 DOESN'T HAVE THE AUTHORITY TO INTERPRET IT AND CERTAINLY
2 DOESN'T HAVE THE AUTHORITY TO REWRITE THE ORDINANCE. AND,
3 THIRD, FEDERAL COURTS DO NOT HAVE THE AUTHORITY TO REWRITE
4 NARROW OR CORRECT PROBLEMS WITH CITY ORDINANCES.

5 YOUR HONOR, IN ORDER TO CONSTRUE THIS LIKE A STATUTE
6 IN ITS INTERPRETATION IS A QUESTION OF LAW. AS THE SUPREME
7 COURT WROTE IN BURDEN VS. SNOWDEN, 2 CAL. 4TH, 556, COURTS
8 MUST FIRST LOOK TO, QUOTE, THE LANGUAGE OF THE STATUTE,
9 GIVING EFFECT ITS PLAIN MEANING. AND WHERE THE WORDS ARE
10 CLEAR, THE COURT MAY NOT ADD OR ALTER THEM TO ACCOMPLISH A
11 PURPOSE THAT DOES NOT APPEAR ON THE FACE OF THE STATUTE OR
12 FROM ITS LEGISLATIVE HISTORY.

13 IN ITS OPPOSITION, YOUR HONOR, THE CITY OF ESCONDIDO
14 FAILS TO PROVIDE ANY LEGISLATIVE HISTORY THAT WOULD INTERPRET
15 THE ORDINANCE. INSTEAD, ALL THAT WE HAVE IS THE CITY
16 MANAGER'S INTERPRETIVE MEMORANDUM.

17 AND WHILE IT IS TRUE THAT COURTS MAY LOOK TO BINDING
18 JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS IN CONSIDERING AN
19 ORDINANCE, THERE IS NO EVIDENCE THAT THIS INTERPRETIVE
20 MEMORANDUM HAS ANY BINDING EFFECT ON THE CITY.

21 THE CITY OFFERS NO EVIDENCE ESTABLISHING THAT IT IS
22 BINDING, OTHER THAN THE SELF-SERVING DECLARATION OF CLAY
23 PHILLIPS, THE CITY MANAGER, WHO CLAIMS THAT HE ALONE IS THE
24 FINAL AUTHORITY ON THE CITY STAFF'S INTERPRETATION OF ANY
25 ORDINANCE.

COMPUTER-AIDED TRANSCRIPTION

1 THE COURT: WHAT IF THE -- THE DEFENDANTS ARGUE THAT
2 IT'S THE PRACTICE IN THE CITY FOR THE CITY MANAGER TO WRITE
3 SUCH MEMOS TO INTERPRET THE ORDINANCE.

4 ISN'T THERE A NINTH CIRCUIT CASE TO INDICATE THAT IF
5 IT'S WITHIN THE STANDARD PRACTICE OF THE LOCALITY THAT THAT
6 MIGHT SUFFICE?

7 MR. TENCER: WELL, THE CITY OF ESCONDIDO IS A
8 GENERAL CITY. AND IT IS -- IT HAS RULES AND IT IS GOVERNED
9 BY THE CALIFORNIA GOVERNMENT CODE. FOR EMPLOYEES OF THE
10 CITY, THE POWERS THAT THEY HAVE HAVE TO BE SPECIFICALLY
11 DELINEATED IN THEIR CODE.

12 AND I WOULD POINT THE COURT'S ATTENTION TO A
13 COMPARISON BETWEEN THE CITY OF ESCONDIDO'S ORDINANCES AND
14 CODE TO THAT OF THE CITY OF VISTA. IN THE CITY OF VISTA, IT
15 HAS A --

16 ONE MOMENT, YOUR HONOR. I HAVE IT IN MY NOTES HERE.

17 THE COURT: YOU MAY TAKE A MOMENT.

18 MR. TENCER: THANK YOU.

19 VISTA'S MUNICIPAL CODE, IN SECTION 2.20040-A, GIVES
20 ITS CITY MANAGER, QUOTE, POWER TO PRESCRIBE RULES AND
21 REGULATIONS, AS HE SHALL DEEM NECESSARY AND EXPEDIENT FOR THE
22 CONDUCT OF ADMINISTRATIVE AGENCIES, SUBJECT TO HIS AUTHORITY.

23 IN THAT SITUATION, THE CITY MANAGER HAS ACTUALLY
24 BEEN DELEGATED THE POWER TO PROMULGATE RULES AND INTERPRET
25 RULES, SPECIFICALLY BY THE CITY.

COMPUTER-AIDED TRANSCRIPTION

1 IN THE CASE OF ESCONDIDO, THE CITY MANAGER HAS NO
2 SUCH POWER, BECAUSE THAT POWER HAS NOT BEEN DELEGATED TO THE
3 CITY MANAGER AND, THEREFORE, HIS INTERPRETATION HAS NO
4 BINDING FORCE AND EFFECT, REGARDLESS OF WHAT THE PRACTICE MAY
5 VERY WELL BE.

6 THE POWER TO DELINEATE IT TO A CITY MANAGER HAS TO
7 BE SPECIFICALLY LAID OUT BY THE CALIFORNIA GOVERNMENT
8 REGULATIONS THROUGH THE CODES OF THE CITY. AND THAT IS NOT
9 THE CASE HERE.

10 SO WE HAVE A SITUATION WHERE WE HAVE A CITY EMPLOYEE
11 WHO HAS INTERPRETED THIS ORDINANCE WITHOUT ANY AUTHORITY TO
12 BIND THE CITY.

13 THERE ARE TWO CALIFORNIA SUPREME COURT CASES, YOUR
14 HONOR, I THINK THAT ARE DIRECTLY ON POINT TO THE SITUATION WE
15 HAVE HERE. I'D LIKE TO DIRECT YOUR ATTENTION, YOUR HONOR, TO
16 CARMONA VS. DIVISION OF INDUSTRIAL SAFETY. IT'S 118 CAL
17 REPORTER, 473.

18 THE COURT: WHAT IS THAT AGAIN?

19 MR. TENCER: IT'S CARMONA VS. DIVISION OF INDUSTRIAL
20 SAFETY. THE CITE IS 118 CAL REPORTER, 473. IT WAS WRITTEN
21 IN 1975.

22 IN CARMONA, YOUR HONOR, THE DIVISION OF INDUSTRIAL
23 SAFETY ATTEMPTED TO SUPPORT A NARROW INTERPRETATION OF A
24 REGULATION WITH A DECLARATION BY ONE OF ITS EMPLOYEES WHO WAS
25 INVOLVED IN DRAFTING THE INITIAL REGULATION.

COMPUTER-AIDED TRANSCRIPTION

1 THE COURT REFUSED TO GIVE ANY WEIGHT TO THE
2 DECLARATION, HOLDING THAT, FIRST, THE STATEMENTS BY LAW
3 MAKERS ARE NOT RELIABLE EXPRESSIONS OF THE INTENT OF THE
4 ENTIRE LEGISLATIVE BODY.

5 AND, SECOND, MOST IMPORTANTLY, YOUR HONOR, THAT THE
6 DECLARATION AT ISSUE WAS PREPARED BY AN EMPLOYEE OF ONE OF
7 THE PARTIES TO THE LITIGATION, SUBSEQUENT TO THE FILING OF
8 JUDICIAL PROCEEDINGS.

9 THE CALIFORNIA SUPREME COURT THUS DETERMINED, AND I
10 QUOTE, THE SELF-INTEREST INHERENT IN SUCH A PROCESS REMOVES
11 THE DECLARATION -- REMOVES FROM THE DECLARATION THE
12 APPEARANCE OF IMPARTIALITY NECESSARY TO JUSTIFY ANY RELIANCE
13 BY THE COURT.

14 A SIMILAR RESULT WAS REACHED, YOUR HONOR, IN
15 JONES VS. TRACY SCHOOL DISTRICT, WHICH CAN BE FOUND AT 27
16 CAL. 3RD, 99. AND IF THE COURT LIKES, I HAVE COPIES FOR YOUR
17 HONOR OF BOTH OF THESE DECISIONS.

18 IN JONES, YOUR HONOR, AGAIN, THE CALIFORNIA SUPREME
19 COURT REFUSED TO DEFER TO ADMINISTRATIVE INTERPRETATION BY
20 THE DEPARTMENT OF INDUSTRIAL RELATIONS. LIKE THE PRESENT
21 SITUATION, THE INTERPRETATION AT ISSUE IN JONES OCCURRED IN
22 AN INTERNAL MEMORANDUM, RATHER THAN IN AN ADMINISTRATIVE
23 REGULATION THAT MIGHT BE SUBJECT TO NOTICE AND HEARINGS AND
24 PROPER ADMINISTRATIVE PROCEDURE.

25 THE COURT NOTED IN THAT CASE THAT THE MEMORANDUM WAS

COMPUTER-AIDED TRANSCRIPTION

1 WRITTEN AND CIRCULATED AFTER THE DEPARTMENT HAD BECOME A
2 PARTY IN THE CASE. IN ESSENCE, THE COURT REFUSED TO DEFER TO
3 THE INTERPRETATION BECAUSE ITS AUTHORITATIVE FORCE WAS
4 SUBSTANTIALLY DILUTED.

5 WE HAVE EXACTLY THE SAME CASE HERE, YOUR HONOR,
6 WHERE -- AFTER SENDING THE CITY A LETTER OUTLINING THE
7 SIGNIFICANT CONSTITUTIONAL PROBLEMS WITH THE ORDINANCE, AFTER
8 FILING A COMPLAINT LAYING THOSE CONSTITUTIONAL PROBLEMS OUT,
9 AFTER FILING T.R.O. PAPERS WITH THIS COURT IDENTIFYING
10 SEVERAL OF THE CONSTITUTIONAL PROBLEMS, SEVERAL DAYS AFTER
11 THAT, WE GET AN INTERPRETIVE MEMO, WHICH ON ITS FACE CALLS
12 INTO QUESTION, BECAUSE IT HAS ONE DATE ON THE FIRST PAGE AND
13 A DIFFERENT DATE ON THE SECOND AND THIRD PAGE.

14 AND THAT IS WAIVED BEFORE THIS COURT, SAYING, WAIT A
15 MINUTE, THE ORDINANCE DOESN'T SAY WHAT IT ACTUALLY SAYS. IT
16 SAYS SOMETHING QUITE DIFFERENT. AND NOT ONLY ARE WE GOING TO
17 INTERPRET IT IN A MORE NARROW FASHION, BUT WE'RE GOING TO ADD
18 TERMS TO THE ORDINANCE. AND THAT IS SOMETHING THAT THE CITY
19 MANAGER CANNOT DO, YOUR HONOR, IS CHANGE THE ORDINANCE.
20 UNDER THE CALIFORNIA GOVERNMENT CODE, THE ONLY ONES THAT CAN
21 MODIFY AN ORDINANCE OR PASS AN ORDINANCE IS A VOTE OF THE
22 CITY COUNCIL BY MAJORITY VOTE.

23 SO GIVEN THAT THE CITY MANAGER DOESN'T HAVE THE
24 AUTHORITY TO REWRITE THE ORDINANCE, OR DOESN'T HAVE THE
25 AUTHORITY TO INTERPRET THE ORDINANCE, THE QUESTION THEN

COMPUTER-AIDED TRANSCRIPTION

1 BECOMES, CAN THIS COURT SIMPLY MODIFY OR NARROW THE ORDINANCE
2 IN ORDER TO PASS CONSTITUTIONAL MUSTER?

3 WELL, THERE IS FEDERAL AND STATE LAW THAT ARE
4 DIRECTLY ON POINT TO THAT QUESTION, YOUR HONOR. AS THE
5 CALIFORNIA SUPREME COURT HELD IN MANUFACTURERS LIFE INSURANCE
6 COMPANY VS. SUPERIOR COURT, WHICH CAN BE FOUND AT 10 CAL.4TH,
7 257, THE COURT WROTE, NEITHER THE CITY MANAGER, NOR THE COURT
8 MAY, QUOTE, INSERT WHAT HAS BEEN OMITTED, OR, QUOTE, OMIT
9 WHAT HAS BEEN INSERTED, END OF QUOTE. AND THIS RULING IS
10 CONSISTENT WITH FEDERAL LAW.

11 AS THE U.S. SUPREME COURT WROTE IN GRAYNEED VS.
12 CITY OF ROCKFORD, 408 U.S. 104, IT, QUOTE, IS NOT WITHIN OUR
13 POWER TO CONSTRUCT ANY NARROW STATE LAWS.

14 IN BOOS VS. BARRY, 485 U.S. 312, THE SUPREME COURT
15 AGAIN HELD THAT FEDERAL COURTS ARE WITHOUT POWER TO ADOPT A
16 NARROWLY CONSTRUCTION OF A STATE STATUTE, UNLESS THIS
17 INSTRUCTION IS REASONABLY AND READILY APPARENT FROM THE FACE
18 OF THE STATUTE.

19 AND IN VIRGINIA VS. BOOKSELLERS ASSOCIATION, 484
20 U.S. 383, THE U.S. SUPREME COURT HELD THAT FEDERAL COURTS,
21 QUOTE, WILL NOT REWRITE A STATE LAW TO CONFORM IT TO
22 CONSTITUTIONAL REQUIREMENTS, END OF QUOTE.

23 HERE WE HAVE, AGAIN, AN ORDINANCE THAT WAS PASSED.
24 IT'S BEEN CHALLENGED ON ITS FACE. AND I BELIEVE THAT THE
25 INTERPRETIVE MEMO DEMONSTRATES THAT IT IS UNCONSTITUTIONAL ON

COMPUTER-AIDED TRANSCRIPTION

1 ITS FACE, AS THE CITY MANAGER TRIED TO REWRITE AND CHANGE IT
2 BY ADDING SAFE HARBOR PROVISIONS, BY ADDING A TOLLING
3 PROVISION, BY SAYING THAT, WHEN WE SAID IT IS ONLY TO APPLY
4 IN THE FUTURE, WE DON'T MEAN CONDUCT IN THE FUTURE; WE MEAN
5 LEASES IN THE FUTURE.

6 MY UNDERSTANDING FROM CO-COUNSEL, FROM READING
7 TODAY'S NEWSPAPERS, THAT THE CITY COUNCIL MEMBERS WERE, AT
8 LEAST ONE OF THEM, WERE SURPRISED THAT IT DOESN'T APPLY TO
9 CURRENT LEASES GOING FORWARD.

10 THE COURT: THAT'S NOT IN EVIDENCE HERE, SIR.

11 MR. TENCER: THE OTHER ISSUE I'D LIKE TO ADDRESS
12 VERY BRIEFLY, YOUR HONOR, IS THE FACT THAT, EVEN IF THE
13 INTERPRETIVE MEMORANDUM APPLIES, THAT THE ORDINANCE STILL
14 VIOLATES PROCEDURAL DUE PROCESS IN AT LEAST FOUR WAYS.

15 FIRST, BECAUSE THE INTERPRETIVE MEMORANDUM REQUIRES
16 LANDLORDS TO COMMENCE AN UNLAWFUL DETAINER ACTION WITHIN TEN
17 DAYS, IT VIOLATES PROCEDURAL DUE PROCESS. AND A CASE
18 DIRECTLY ON POINT, YOUR HONOR, IS A CASE WE CITED, WHICH IS
19 COOK VS. CITY OF BUENA PARK, WHICH CAN BE FOUND AT 126
20 CAL.4TH, 1. IT'S CITED 2005.

21 AND IN COOK, THE CALIFORNIA COURT OF APPEALS WAS
22 FACED WITH AN ORDINANCE OBLIGATING LANDLORDS TO UNDERTAKE
23 EVICTION PROCEEDINGS AGAINST ALL OCCUPANTS OF A RENTAL UNIT
24 WHEN THE CHIEF OF POLICE SUSPECTED THAT A TENANT WAS ENGAGED
25 OR PERMITTED ILLEGAL DRUG ACTIVITY OR GANG-RELATED ACTIVITY

COMPUTER-AIDED TRANSCRIPTION

1 OR DRUG-RELATED NUISANCES NEAR OR IN THE RENTAL PROPERTY.

2 THE COURT HELD THAT THE ORDINANCE VIOLATED THE
3 LANDLORD'S PROCEDURAL DUE PROCESS RIGHTS, BECAUSE IT CREATED
4 AN UNREASONABLY HIGH RISK OF ERRONEOUS DEPRIVATION OF A
5 LANDLORD'S PROPERTY INTEREST. THE COURT SAID THAT THE TEN
6 DAYS IN ORDER TO PERMIT -- TO COMMENCE AN UNLAWFUL DETAINER
7 ACTION WAS, QUOTE, IT SUFFICES TO SAY THAT TEN DAYS IS FAR
8 TOO SHORT.

9 COOK ALSO INSTRUCTS US THAT THE ORDINANCE IN
10 QUESTION HERE VIOLATES DUE PROCESS BECAUSE LANDLORDS ARE
11 REQUIRED TO PREVAIL IN AN UNLAWFUL DETAINER ACTION.

12 ACCORDING TO PAGE 3 OF THE INTERPRETIVE MEMORANDUM,
13 LANDLORDS CANNOT COLLECT RENTS FROM A TENANT WHERE THEY WERE
14 UNSUCCESSFUL IN EVICTING THE TENANT AFTER AN UNLAWFUL
15 DETAINER PROCEEDING.

16 AS THE UNITED STATES SUPREME COURT HELD IN
17 JAMES DANIEL GOODWILL PROPERTY, DEPRIVATION OF RENT THAT IS
18 DUE IS A SIGNIFICANT PROPERTY INTEREST REQUIRING PROCEDURAL
19 DUE PROCESS.

20 THIRD, BECAUSE THE LANDLORD VIOLATES THE
21 ORDINANCE --

22 THE COURT: EXCUSE ME. JAMES DANIEL GOOD ALSO
23 PROVIDED THAT A POST-DEPRIVATION HEARING WAS CONSTITUTIONAL,
24 DIDN'T IT?

25 MR. TENCER: WELL, ONLY IN EXTREME CIRCUMSTANCES,

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1 YOUR HONOR. ONLY WHERE THERE IS A SIGNIFICANT RISK OF
2 IMMINENT DANGER OR IMMINENT HARM TO THE PUBLIC.

3 AGAIN, YOU HAVE A POST-DEPRIVATION. THAT'S A VERY
4 NARROW EXCEPTION, WHICH ISN'T HERE. THE ORDINANCE DOESN'T
5 SAY THAT THERE IS ANY FINDING OF IMMINENT RISK TO THE
6 CITIZENS OF ESCONDIDO'S HEALTH AND SAFETY. THERE IS NO OTHER
7 RISKS THAT'S BEEN IDENTIFIED BY THE CITY OF ESCONDIDO, AND
8 CERTAINLY NOT STATED IN THE ORDINANCE.

9 THIRD, BECAUSE THE LANDLORD VIOLATES THE ORDINANCE
10 IF HE OR SHE FAILS TO PROVIDE THE CITY IDENTIFYING
11 INFORMATION WITHIN FIVE DAYS, THAT ALSO VIOLATES PROCEDURAL
12 DUE PROCESS. THERE IS NO SAFE HARBOR THERE, IF, IN FACT, THE
13 TENANT IS ON VACATION, UNAVAILABLE DURING THAT FIVE-DAY
14 PERIOD, OR EVEN REFUSES TO SPEAK TO THE LANDLORD. AS SUCH,
15 WE SUBMIT THAT IT VIOLATES DUE PROCESS.

16 AND FINALLY, YOUR HONOR, BECAUSE TENANTS WHO HAVE
17 BEEN LABELED BY THE CITY OF ESCONDIDO AS ILLEGAL ALIENS HAVE
18 NO OPPORTUNITY TO CHALLENGE THAT LABEL, IT VIOLATES THEIR DUE
19 PROCESS RIGHTS.

20 IN MATHEWS V. ELDRIDGE, THE SUPREME COURT MADE CLEAR
21 THAT IT HAS HELD THAT SOME FORM OF HEARING IS REQUIRED BEFORE
22 AN INDIVIDUAL IS FINALLY DEPRIVED OF A PROPERTY INTEREST.

23 AND IN PLYER V. DOE, THE SUPREME COURT WROTE, AND I
24 QUOTE, ALIENS, EVEN ALIENS WHOSE PRESENCE IN THIS COUNTRY IS
25 UNLAWFUL, HAVE LONG BEEN RECOGNIZED AS PERSONS GUARANTEED DUE

COMPUTER-AIDED TRANSCRIPTION

PROCESS OF LAW PROTECTED BY THE FOURTEENTH AMENDMENT.

THE CITY, IN ITS OPPOSITION BRIEF, AGAIN CITES HODEL VS. VIRGINIA SURFACE MINING AND RECLAMATION, AND CLAIMS THAT A POST -- LIKE YOU SAY, YOUR HONOR, A POST-HEARING IS SUFFICIENT FOR DUE PROCESS; A POST-DEPRIVATION HEARING.

THAT CASE ACTUALLY EXPLAINS THAT THE -- THAT IT IS A LIMITED EXCEPTION WHERE POST-DEPRIVATION HEARING IS APPROPRIATE. AND IN THAT, THE COURT FOUND ONLY WHERE THERE IS AN IMMINENT DANGER TO THE HEALTH OR SAFETY OF THE PUBLIC, OR AN IMMINENT ENVIRONMENTAL HARM TO LAND, AIR OR WATER RESOURCES, WOULD A POST-SUSPENSION APPEAL BE APPROPRIATE, AND NOT IN ANY OTHER SITUATION.

MAY IT PLEASE THE COURT, MY CO-COUNSEL WILL ADDRESS THE OTHER ISSUES.

THE COURT: A QUESTION BEFORE YOU SIT DOWN.

MR. TENCER: YES, YOUR HONOR.

THE COURT: IN STATE LAND OR TENANT LAW, WOULD THE STATUS OF BEING AN UNDOCUMENTED ALIEN BE REASON TO TERMINATE, BE CAUSE TO TERMINATE A LEASE?

MR. TENCER: I'M UNAWARE OF ANY STATE LAW THAT WOULD ALLOW A LANDLORD TO TERMINATE A LEASE SIMPLY BASED UPON SOMEONE BEING AN ILLEGAL ALIEN.

THE COURT: OKAY. ALL RIGHT. THANK YOU. AND COUNSEL -- AND --

MR. TENCER: AND THE CITY CERTAINLY HASN'T

COMPUTER-AIDED TRANSCRIPTION

IDENTIFIED ANY.

THE COURT: COUNSEL, IF YOU NEED A FEW MORE MINUTES LATER, I'LL DEFER TO YOU IN A FEW MOMENTS.

THE COURT APPRECIATES THAT THE PLAINTIFFS DID NOT HAVE AN OPPORTUNITY TO RESPOND, BY WAY OF A REPLY, TO THE ARGUMENT IN THE OPPOSITION REFERRING TO THE MEMORANDUM.

MR. TENCER: THANK YOU VERY MUCH, YOUR HONOR.

THE COURT: MR. MANSFIELD.

MR. MANSFIELD: THANK YOU, YOUR HONOR.

MY ROLE IN THIS PARTICULAR PART OF THE ARGUMENT IS TO SAY THAT WHATEVER CREDENCE WE GIVE TO THE INTERPRETATION MEMORANDUM IS REALLY ULTIMATELY IRRELEVANT, BECAUSE IF WE GET TO THE DOCTRINE OF THE SUPREMACY CLAUSE, AND THAT OF FEDERAL AND STATE PREEMPTION, IT DOESN'T MATTER WHETHER THE ORDINANCE APPLIES PROSPECTIVELY OR NOT, IT DOESN'T MATTER WHETHER THE CITY MANAGER HAS THE AUTHORITY TO REWRITE A STATUTE, IT DOESN'T REALLY MATTER WHETHER OR NOT IT APPLIES TO CONTRACTS NOW OR CONTRACTS IN THE FUTURE.

BECAUSE UNDER THE DOCTRINE OF THE SUPREMACY CLAUSE, AND THE THREE TESTS DISCUSSED IN THE DECANAS DECISION, WHICH BOTH SIDES EXTENSIVELY BRIEFED, THIS STATUTE IS PREEMPTED. IT'S PREEMPTED IN THREE WAYS. THE FIRST WAY IS THE SIMPLEST WAY, WHICH IS THAT THE STATUTE IS INTENDED TO REGULATE IMMIGRATION.

IT'S IN THE RECORD, UNREBUTTED, IN THE DECLARATION

COMPUTER-AIDED TRANSCRIPTION

OF MS. CALDERON, WHERE THE CITY COUNCIL, IN THE CONTEXT OF DISCUSSING THE STATUTE, ADOPTING THE STATUTE, SPECIFICALLY SAID, OUR INTENT IS TO STEM THE FLOW OF ILLEGAL IMMIGRATION INTO THE CITY OF ESCONDIDO.

THE COURT: THERE IS SUCH DISCUSSION IN THE PUBLIC RECORDS DURING CITY COUNCIL MEETINGS?

MR. MANSFIELD: YES, IT IS. THAT DISCUSSION WAS -- IT'S IN MS. CALDERON'S DECLARATION.

THE VIDEOTAPED FEEDS OF THOSE -- AND THEY CAN BE SUBMITTED TO THE COURT, OR VIEWED BY THE COURT. THE VIDEOTAPED SUBMISSION OF THOSE PROCEEDINGS ARE ONLINE AND AVAILABLE THROUGH THE ESCONDIDO WEBSITE. WE WENT THROUGH THOSE PROCEEDINGS AND WE HEARD TESTIMONY, AND HER DECLARATION SPECIFICALLY NOTES WHERE EXACTLY IN THOSE PROCEEDINGS IT OCCURRED.

UNFORTUNATELY, ONE OF THE PROBLEMS WITH TEMPORARY RESTRAINING ORDERS IS WE WOULD LIKE TO HAVE A FULL TRANSCRIPT OF THOSE PROCEEDINGS. WE'RE IN THE PROCESS OF PREPARING IT. WE DON'T HAVE IT.

BUT SHE CITES EXACTLY WHERE IT OCCURS, WHERE IT'S AVAILABLE, AND HOW IT'S ACCESSIBLE. BUT THOSE POINTS WERE SPECIFICALLY NOTED DURING THE COURSE OF THAT -- OF THOSE DISCUSSIONS.

SECONDLY -- AND THAT'S SIGNIFICANT, BECAUSE IF WE LOOK AT THE CASES, SPECIFICALLY, THE CASE OF GRAHAM VS.

COMPUTER-AIDED TRANSCRIPTION

RICHARDSON AND TRUAX V. RAICH, IN BOTH OF THOSE CASES, THE COURT SAID, WHERE THE ASSERTION IS THE RIGHT TO DENY ENTRANCE AND ABODE, IT'S UNCONSTITUTIONAL FOR AN ORDINARY CASE, AS ONE CANNOT LIVE WHERE ONE CANNOT WORK.

I WOULD SUBMIT THE SAME RULE APPLIES. ONE CANNOT WORK WHERE ONE CANNOT LIVE.

THE COURT: BUT THE CITY SAYS THERE ARE HEALTH AND SAFETY REASONS FOR ENACTING THIS ORDINANCE, BLIGHT IN A PARTICULAR AREA OF TOWN AND SUCH.

WHAT'S YOUR THOUGHTS -- WHAT'S YOUR TAKE ON THAT?

MR. MANSFIELD: THE ONLY EVIDENCE THAT'S IN THE RECORD ON THAT POINT IS A CITE TO A STUDY BY THE CITY OF THE MISSION PARK AREA OF THE CITY OF ESCONDIDO.

IF WE LOOK SPECIFICALLY AT THAT STUDY, THAT STUDY ACTUALLY SAYS NOTHING ABOUT THE ISSUE OF ILLEGAL IMMIGRATION. IT WAS ATTACHED TO THE CALDERON DECLARATION, EXHIBIT 4. AND SPECIFICALLY, AT PAGE -- APOLOGIZE, YOUR HONOR.

AT PAGE 17 OF THAT STUDY, SPECIFICALLY IT SAYS, AS DISCUSSED IN THE CITY'S CONSOLIDATED PLAN --

THE COURT: SAVE THAT, COUNSEL. I PERUSED THAT ENTIRE DOCUMENT.

WHICH EXHIBIT WAS IT?

MR. MANSFIELD: I'M SHOCKED YOU DON'T HAVE IT ALL MEMORIZED, BECAUSE I CERTAINLY DO.

EXHIBIT 4, THAT IS THE MISSION PARK COMMUNITY

COMPUTER-AIDED TRANSCRIPTION

1 SURVEY, ESCONDIDO, CALIFORNIA. PAGE 17, HALFWAY DOWN.

2 THE COURT: I HAVE IT.

3 MR. MANSFIELD: THANK YOU, YOUR HONOR.

4 THE SECTION THAT WAS CITED BY THE CITY IN ITS
5 CONTEXT THAT THERE WAS CONCERN ABOUT URBAN BLIGHT AND
6 OVERCROWDING WAS REFERRING TO THE MISSION PARK STUDY. AND IN
7 MR. EPPS' MEMORANDUM TO THE CITY COUNCIL TO JUSTIFY ITS
8 POSITION, THE ONLY THING THAT WAS CITED IN THE RECORD WAS
9 THAT DOCUMENT.

10 IF WE LOOK AT THAT PAGE OF THAT DOCUMENT, IT
11 SPECIFICALLY SAYS, AS DISCUSSED IN THE CITY'S CONSOLIDATED
12 PLAN, OVERCROWDING IS CAUSED BY A COMBINATION, COMBINED
13 EFFECT OF LOW EARNINGS AND HIGH HOUSING COSTS, AND IS DEFINED
14 BY THE CENSUS OF HOUSEHOLDS WITH MORE THAN 1.01 PERSONS PER
15 ROOM.

16 THE COURT: WITH 70-PLUS PERCENT OF THE INCOME GOING
17 TO RENTS.

18 MR. MANSFIELD: YES.

19 THE COURT: YES, I RECALL.

20 MR. MANSFIELD: YES. THAT SECTION.

21 BO IT'S TALKING ABOUT WHAT THE CITY OF ESCONDIDO --
22 WHAT THE STUDY FOUND, MENTIONED BY THE CITY OF ESCONDIDO, IN
23 CONNECTION WITH THE CAL STATE UNIVERSITY OF SAN MARCOS, WAS
24 THE CAUSE OF OVERCROWDING WERE NOT ILLEGAL IMMIGRANTS.
25 NOTHING TO DO WITH ILLEGAL IMMIGRATION.

COMPUTER-AIDED TRANSCRIPTION

1 THE ONLY THING THEY NOTED WAS ON THE NEXT PAGE,
2 WHICH ON PAGE 18 OF THE STUDY SAID, OVERCROWDING CAN
3 CONTRIBUTE TO A GENERAL DETERIORATION OF STRUCTURES, EXCESS
4 TRASH. BUT, AGAIN, REMEMBER WHAT THE CAUSES OF THAT
5 OVERCROWDING WAS. AND THEN IT SAYS, RENTERS WHO ARE NEW
6 IMMIGRANTS, AND EXCEEDING UNIT OCCUPANCY ARE LESS LIKELY TO
7 COMPLAIN. NEW IMMIGRANTS. DOESN'T SAY ILLEGAL IMMIGRANTS.
8 DOESN'T SAY ILLEGAL ALIENS. IT JUST SAYS NEW IMMIGRANTS.

9 THAT IS THE SOLE REFERENCE IN THE RECORD TO THE FACT
10 THAT THERE WAS A CONCERN OF URBAN BLIGHT, OVERCROWDING OR
11 ANYTHING OF THAT NATURE. THERE IS ABSOLUTELY NO EVIDENCE IN
12 THIS RECORD AS PRESENTED BY THE CITY COUNCIL -- I'M SORRY --
13 PRESENTED BY THE CITY ATTORNEY THAT THE QUESTION -- THAT THE
14 ISSUE THAT WAS ATTEMPTING TO BE ADDRESSED WAS ONE
15 ATTRIBUTABLE TO ILLEGAL ALIENS. THE ONLY THING THEY CITED
16 WAS A STUDY THAT SAID THAT THE OVERCROWDING WAS CAUSED BY
17 HIGH HOUSING COSTS, COMBINED WITH LOW INCOMES.

18 AND IN LIGHT OF THAT, WE GO BACK TO THE BASIC
19 PREMISE, WHICH WAS DISCUSSED IN RICHARDSON AND TRUAX, WHERE A
20 GOVERNMENT ENTITY, A LOCAL GOVERNMENT ENTITY ATTEMPTS TO
21 REGULATE IMMIGRATION, ATTEMPTS TO STEM THE FLOW OF ILLEGAL
22 IMMIGRATION INTO AN AREA, SPECIFICALLY DENYING ENTRANCE AND
23 ABODE -- AND THE COURT SPECIFICALLY USED THE WORD ABODE,
24 HOUSING. THAT IF ONE DOES THAT, ONE IS INTERFERING, IS
25 ATTEMPTING, TRYING TO REGULATE THE ISSUE OF IMMIGRATION AND

COMPUTER-AIDED TRANSCRIPTION

1 IT'S UNCONSTITUTIONAL.

2 THE SECOND TEST, WHICH IS DISCUSSED IN DECANAS, IS
3 WHERE THE ORDINANCE, ON ITS FACE, ATTEMPTS TO REGULATE IN A
4 FIELD THAT'S EXTENSIVELY OCCUPIED BY THE FEDERAL GOVERNMENT:
5 FIELD OF PREEMPTION.

6 AGAIN, IF WE GO BACK TO THE POINT THAT MR. TENCER
7 MADE, WHAT'S THE TITLE OF THE STATUTE? ESTABLISHING
8 PENALTIES FOR HARBORING OF ILLEGAL ALIENS IN THE CITY OF
9 ESCONDIDO.

10 THERE IS A STATUTE, FEDERAL STATUTE, 8 U.S.C.
11 1384 -- 1324, PROHIBITING THE HARBORING OF ILLEGAL ALIENS.

12 THE COURT: THE COURT'S FAMILIAR WITH IT. WE DEAL
13 WITH IT QUITE OFTEN.

14 MR. MANSFIELD: AS I WAS GOING TO SAY, I DON'T NEED
15 TO TELL THIS COURT. THIS COURT PROBABLY HAS A LONG CAREER,
16 MORE THAN IT REALLY CARES TO THINKS ABOUT, THAT HAS DEALT
17 WITH 8 U.S.C. 1324.

18 THE FEDERAL GOVERNMENT HAS A VERY COMPREHENSIVE
19 REGULATORY SCHEME HOW IT DETERMINES WHAT HARBORING IS, WHAT
20 THE PENALTIES ARE FOR HARBORING, HOW IT PROVES HARBORING,
21 WHOSE BURDEN IT IS TO ESTABLISH HARBORING, AND WHAT EVIDENCE
22 IS NEEDED TO ESTABLISH HARBORING.

23 THE U.S. SUPREME COURT IN THE HINES VS. DAVIDOWITZ
24 CASE, SPECIFICALLY SAID, THE REGULATION OF ALIENS IS SO
25 INTIMATELY INTERTWINED -- I'M SORRY -- THAT WHERE A STATE

COMPUTER-AIDED TRANSCRIPTION

1 GOVERNMENT ACTS, AND THE STATE ALSO ACTS ON THE SAME SUBJECT,
2 THE ACT OF CONGRESS IS SUPREME AND THE LAW OF THE STATE MUST
3 YIELD TO IT. THAT'S WHAT WE HAVE HERE.

4 THE COURT: I HEAR YOU. BUT WHAT'S YOUR TAKE ON, I
5 THINK IT'S DECANAS VS. BICA.

6 MR. MANSFIELD: YES.

7 THE COURT: WHAT'S YOUR TAKE ON THAT?

8 HOW DO YOU RECONCILE DECANAS WITH THE CASE YOU'VE
9 JUST CITED?

10 MR. MANSFIELD: SURE. DECANAS -- THEY ARE ACTUALLY
11 PERFECTLY HARMONIOUS, AND THANK YOU FOR RAISING THAT.

12 IN DECANAS, WHAT HAPPENED WAS, IS THE COURT SAID, WE
13 DON'T HAVE TO DEAL WITH THIS -- IT IS OKAY FOR THE STATE OF
14 CALIFORNIA TO ISSUE A REGULATION ABOUT EMPLOYMENT, BECAUSE,
15 FIRST OF ALL, WITH REGARD TO -- IT NOTED, WITH REGARD TO
16 HARBORING, EMPLOYMENT IS SPECIFICALLY EXEMPTED FROM IT.

17 AND, MORE IMPORTANTLY, THE FEDERAL GOVERNMENT HAS
18 ISSUED NO REGULATIONS PROHIBITING THE EMPLOYMENT OF ILLEGAL
19 ALIENS.

20 THE COURT: YOU MEAN OF A FEDERAL STATUTE MAKING IT
21 CRIMINAL TO HIRE ILLEGAL ALIENS -- I MEAN, TO EMPLOY ILLEGAL
22 ALIENS?

23 MR. MANSFIELD: CORRECT. WHICH WAS ADOPTED AFTER
24 DECANAS.

25 THE COURT: ALL RIGHT.

COMPUTER-AIDED TRANSCRIPTION

MR. MANSFIELD: IT WAS CONSIDERED -- IN FACT, IF THE COURT LOOKS AT DECANAS, WHAT HAPPENED WAS THE COURT RECOGNIZED THE FACT THAT THERE WAS LEGISLATION PENDING THAT WOULD DEAL WITH THIS ISSUE, DEAL WITH THE ISSUE OF EMPLOYING ILLEGAL ALIENS. AND THEN SAID, HOWEVER, IN THAT PARTICULAR STATUTE, IT SPECIFICALLY RECOGNIZED THAT THERE WILL BE COMPLIMENTARY STATE REGULATIONS. AND IT SAYS, BECAUSE THE FEDERAL GOVERNMENT HAS SPECIFICALLY SAID THERE CAN BE COMPLIMENTARY STATE REGULATIONS, THAT EVIDENCE IS A CONGRESSIONAL INTENT TO -- FOR THERE TO BE COMPLIMENTARY REGULATIONS.

THE COURT ALSO SPECIFICALLY NOTED IN DECANAS, THAT AT THAT POINT, THERE WAS NO SPECIFIC FEDERAL LAW THAT PROHIBITED THE EMPLOYMENT OF ILLEGAL ALIENS. AND, IN FACT, THAT THERE WAS THE EXCEPTION THAT WAS NOTED IN THE HARBORING STATUTE.

WE ARE NOW IN A DIFFERENT REGIME THAN WE WERE IN THE DECANAS ERA. SO WE ACTUALLY -- IT ACTUALLY IS MORE LIKE THE SITUATION THAT OCCURRED IN THE LULAC CASES WHICH WE CITED IN OUR BRIEF, WHERE THERE IS A COMPREHENSIVE FEDERAL SCHEME, IN TERMS OF PROVIDING BENEFITS TO CERTAIN PERSONS, AND THE PROCESS FOR CHECKING THAT, AND FOR REPORTING PERSONS AND INTERFACING WITH THE FEDERAL GOVERNMENT IN THAT REGARD.

AND JUDGE PFAELZER ENGAGED IN A COMPREHENSIVE ANALYSIS, AS THE COURT KNOWS, PIECE BY PIECE THROUGH THE

COMPUTER-AIDED TRANSCRIPTION

STATUTE AND SAID, EVEN WHERE YOU HAVE A PARALLEL ENFORCEMENT SCHEME, BECAUSE OF THE FACT THAT YOU HAVE COMPREHENSIVE FEDERAL REGULATIONS, ON THIS PARTICULAR SUBJECT --

THE COURT: TELL ME, WHAT'S YOUR VIEW ON WHETHER OR NOT THE COMPREHENSIVE SCHEME NEEDS TO TRICKLE DOWN TO LOCAL COMMUNITIES, TO BE IMPACTFUL IN LOCAL COMMUNITIES?

MR. MANSFIELD: IN TERMS --

THE COURT: LARGE AND SMALL TOWNS.

MR. MANSFIELD: IN TERMS OF WHETHER THE FEDERAL -- WHETHER OR NOT THE -- THE EFFECT THAT IT HAS ON LOCAL COMMUNITIES?

THE COURT: YES.

MR. MANSFIELD: WELL, I THINK THAT THE ISSUE THERE IS THAT IT CAN -- THAT IS UP FOR THE FEDERAL GOVERNMENT, OR THE FEDERAL PROSECUTOR TO DECIDE, WHETHER IT NEEDS TO LOOK AT A PARTICULAR -- IT NEEDS TO ADDRESS OR LOOK AT A PARTICULAR AREA.

I THINK THAT WAS SORT OF ONE OF THE ISSUES THAT AROSE IN HAZLETON, IN THE LOZANO DECISION. WHERE THE COURT, LOOKING AT THE STATUTORY SCHEME, ALTHOUGH IT DIDN'T ADDRESS IT IN DETAIL, SAID IT RAISED A SERIOUS CONSTITUTIONAL QUESTION WHETHER A LOCAL GOVERNMENT COULD GO INTO AN AREA THAT HAS BEEN SPECIFICALLY REGULATED BY THE FEDERAL GOVERNMENT. SO CERTAINLY IT IS -- I'M TRYING TO RESPOND DIRECTLY TO YOUR QUESTION.

COMPUTER-AIDED TRANSCRIPTION

I THINK THAT IT IS WITHIN THE FEDERAL GOVERNMENT'S PREROGATIVE TO SAY, WE'RE GOING TO ATTEMPT TO ADDRESS THE ISSUE OF HARBORING IN A PARTICULAR LOCALE, BUT THAT IS WITHIN THE FEDERAL REGULATORY SCHEME.

CONGRESS GAVE NO INDICATION -- UNLIKE OTHER FEDERAL STATUTES, WHERE IT DID, IT GAVE NO INDICATION IN CONNECTION WITH THIS FEDERAL SCHEME THAT LOCAL CITIES, EVEN STATES COULD ADOPT A REGULATION EVEN PARALLEL TO THE REGULATORY SCHEME THAT WAS ADOPTED BY THE FEDERAL GOVERNMENT.

AND I THINK THAT'S WHAT MAKES IT DIFFERENT THAN DECANAS, AND EVEN MAKES IT DIFFERENT THAN OTHER STATUTES, WHERE THERE IS A SPECIFIC RECOGNITION THAT IN SOME CIRCUMSTANCES STATE AND FEDERAL GOVERNMENTS MAY INTERACT AND COOPERATE.

THE COURT: DO YOU KNOW WHETHER OR NOT IN LEGISLATIVE HISTORY, OR OTHERWISE, IN THE ENACTMENT OF 1324, THAT THERE WAS ANY MENTION WITH RESPECT TO PERMITTING STATES TO HAVE PARALLEL RULES?

MR. MANSFIELD: TO MY KNOWLEDGE, AT LEAST FROM MY -- 1324 HAS BEEN AMENDED SUBSTANTIALLY -- HAS BEEN AMENDED SEVERAL TIMES OVER THE YEARS. I DON'T BELIEVE THAT THERE IS ANYTHING, ONE WAY OR THE OTHER, THAT ADDRESSES THAT ISSUE; SO I THINK WE'RE SORT OF LOOKING AT THE FACE OF THE STATUTE.

BUT I WOULD NOTE THIS ISN'T A STATUTE THAT HAS A SAVINGS CLAUSE. THIS ISN'T A STATUTE THAT HAS A STATE -- WE

COMPUTER-AIDED TRANSCRIPTION

LOOK FOR STATES TO ADOPT COMPLEMENTARY REGULATIONS. AND WE ARE TALKING ABOUT THE IMMIGRATION AND NATIONALITY ACT, AN ACT THAT IS PRESUMPTIVELY CONSIDERED ONE THAT IS CREATING A FIELD OF -- A FIELD GOVERNED BY THE SUPREMACY CLAUSE, SPECIFICALLY BECAUSE IT'S REGULATED IN THE CONSTITUTION.

SO THE FACT THAT THERE MAY NOT BE SPECIFIC LEGISLATIVE HISTORY THAT I CAN CITE TO YOU THAT WOULD SAY, WE DON'T WANT ANYBODY DEALING WITH THIS, WE DON'T WANT ANYBODY LOOKING AT THIS. WHAT WE DO KNOW IS WE HAVE A VERY EXTENSIVE HISTORY OF THE STATUTE THAT HAS NEVER BEEN INTERPRETED THAT WAY AND A VERY EXTENSIVE HISTORY OF THE STATUTE THAT HAS EXCLUSIVELY BEEN GIVEN THE AUTHORITY IN THE FEDERAL GOVERNMENT.

THE COURT: THANK YOU. YOU MAY CONTINUE.

MR. MANSFIELD: THE FINAL POINT IN TERMS OF THE CONSTITUTIONALITY QUESTION OF THE SUPREMACY CLAUSE, IS WHETHER OR NOT THE ORDINANCE CONFLICTS WITH FEDERAL LAW. AND I APPRECIATE THE COURT STARTING OFF THE HEARING BY NOTING THAT IT WAS TAKING JUDICIAL NOTICE OF THE FEDERAL REGISTER CITE.

I WOULD SPECIFICALLY NOTE, IT'S IMPORTANT BECAUSE OF SOMETHING THAT WAS SAID IN THE OPPOSITION. IN THE OPPOSITION, THE DEFENDANT SAID, WELL, YOU DON'T REALLY HAVE TO WORRY, YOUR HONOR, ABOUT THE FACT THAT WE MAY BE REGULATING IN THIS PARTICULAR AREA, BECAUSE WE ARE JUST GOING

COMPUTER-AIDED TRANSCRIPTION

1 TO REFER TO GOVERNMENT DATABASES; AND SPECIFICALLY THE SAVE
2 DATABASE. AND THE GOVERNMENT IS GOING TO LOOK AT THAT SAVE
3 DATABASE, WE'LL GET INFORMATION BACK FROM THAT, AND THAT'S
4 HOW WE'RE GOING TO MAKE OUR DETERMINATION; SO THERE DOESN'T
5 HAVE TO BE WORRY ABOUT THERE BEING AN INCONSISTENCY.

6 INTERESTINGLY, WHEN THE SAVE DATABASE WAS ADOPTED IN
7 CONNECTION WITH THE FEDERAL -- OTHER FEDERAL LEGISLATION, THE
8 QUESTION CAME UP OF, WHAT DOES IT MEAN TO KNOW THAT SOMEONE
9 IS AN ILLEGAL ALIEN? HOW DOES THAT -- HOW IS THAT KNOWLEDGE
10 CREATED? IS A MERE RESPONSE BACK FROM SAVE, THAT CAN'T
11 IDENTIFY THAT PARTICULAR PERSON, IS THAT ENOUGH? AND THE
12 FEDERAL GOVERNMENT SPECIFICALLY NOTED THAT THE ANSWER WAS NO.

13 THE FEDERAL -- IN THE FEDERAL REGISTER CITE THAT THE
14 COURT RECOGNIZED, IT SPECIFICALLY SAID THAT A SYSTEMATIC
15 ALIEN VERIFICATION FOR ENTITLEMENTS RESPONSE SHOWING NO
16 SERVICE RECORD ON AN INDIVIDUAL, OR AN IMMIGRATION STATUS
17 MAKING THE INDIVIDUAL INELIGIBLE FOR A BENEFIT, IS NOT A
18 FINDING OF FACT OR CONCLUSION OF LAW THAT THE PERSON IS NOT
19 LAWFULLY PRESENT.

20 IT GOES ON TO SAY, THE TERMINATION OF STATUS FOR
21 PURPOSE OF THE IMMIGRATION AND NATURALIZATION ACT ARE THE
22 RESPONSIBILITY OF THE DEPARTMENT OF JUSTICE; NOT ANY OTHER
23 AGENCY.

24 THE POINT BEING, THE WAY THAT -- IF WE LOOK AT THE
25 INTERPRETIVE MEMO, THE INTERPRETIVE MEMO SAYS, WHAT WE'RE

COMPUTER-AIDED TRANSCRIPTION

1 GOING TO DO IS WE'RE GOING TO ASK LANDLORDS TO PROVIDE US
2 THIS DATA, OR ANY PERSON FRANKLY; NOT EVEN LANDLORDS. WE'RE
3 GOING TO ASK PERSONS TO PROVIDE COMPLAINTS. WE'RE GOING TO
4 ASK LANDLORDS FOR DATA, WHICH MAY BE PROTECTED FROM
5 DISCLOSURE. AND WE'RE GOING TO PROVIDE THAT DATA TO THE SAVE
6 DATABASE, AND WE'RE GOING TO GET RESPONSES BACK. AND FROM
7 THAT, WE'RE GOING TO MAKE SOME SORT OF DETERMINATION AS TO
8 WHETHER THE PERSON IS AN ILLEGAL ALIEN.

9 THE FEDERAL GOVERNMENT SPECIFICALLY SAID, YOU CAN'T
10 MAKE THAT DETERMINATION BASED ON THAT. YOU HAVE TO HAVE THAT
11 DETERMINATION MADE BY THE COURTS, OR IN AN ADMINISTRATIVE
12 PROCEEDING, OR AN I.N.S. PROCEEDING, WHICH THIS COURT IS
13 FAMILIAR WITH. THAT'S HOW THAT DETERMINATION IS MADE. IT IS
14 NOT MADE BY ACCESSING THE SAVE DATABASE. THAT'S WHERE YOU
15 RUN INTO DIRECT CONFLICT.

16 IF YOU LOOK AT THE THREE DIFFERENT PREEMPTION
17 DOCTRINES, IT REALLY ESTABLISHES THAT WE DO NOT HAVE TO
18 REALLY -- THAT THE INTERPRETIVE MEMO IS IMPORTANT, AND IT'S
19 INTERESTING, AND ITS EFFECT CAN BE DEBATED, BUT AT THE END OF
20 THE DAY, WHERE THE GOVERNMENT IS REGULATED, THIS IS SIMPLY
21 NOT AN AREA FOR LOCAL REGULATION.

22 AS AN ALTERNATIVE, WE ALSO NOTED THAT THERE WAS
23 STATE PREEMPTION. WE THINK THE FEDERAL PREEMPTION RESOLVED
24 THE ISSUE, BUT WE THINK STATE PREEMPTION IS ALSO IMPORTANT TO
25 NOTE.

COMPUTER-AIDED TRANSCRIPTION

1 AS WE NOTED, THE CALIFORNIA CONSTITUTION
2 SPECIFICALLY FOUND THAT A MUNICIPALITY CAN ADOPT AN ORDINANCE
3 SO LONG AS IT IS NOT INCONSISTENT WITH THE GENERAL LAWS. AND
4 MR. TENCER HAS ALREADY TALKED ABOUT, AND YOU ALLUDED TO, THE
5 QUESTION OF WHETHER THE STATUTE CONFLICTS WITH
6 LANDLORD/TENANT LAWS, SPECIFIC TIMING SET FORTH IN THAT. AND
7 THERE IS SPECIFIC REQUIREMENTS, AND THE CALIFORNIA COURTS
8 HAVE MADE IT CLEAR, THAT THOSE TIMING REQUIREMENTS ARE SET BY
9 THE STATE AND CANNOT BE ABROGATED BY ANY LOCAL ORDINANCE.

10 AND I DON'T BELIEVE THAT AN INTERPRETATION MEMO THAT
11 SAYS, WELL, WHAT WE REALLY MEAN WITHIN THAT TEN-DAY RULE IS
12 SIMPLY THAT YOU HAVE TO START THE PROCESS, DOESN'T ANSWER THE
13 QUESTION.

14 BECAUSE WHAT IS THAT PROCESS? DOES A LANDLORD HAVE
15 TO TERMINATE TENANCY? DOES A LANDLORD HAVE TO GIVE 30 DAYS'
16 NOTICE OR 60 DAYS' NOTICE, DEPENDING ON THE SITUATION? DOES
17 A LANDLORD HAVE TO SAY, WELL, WHEN THAT LEASE IS OVER IN A
18 YEAR, I'M GOING TO TERMINATE IT?

19 AS WE NOTED, THE CALIFORNIA CONSTITUTION
20 SPECIFICALLY SAID THAT CITIZENS AND NONCITIZENS ALIKE HAVE
21 VERY SPECIFIC PROPERTY INTEREST. AND WE'VE ALSO NOTED THAT
22 THE LEASEHOLD INTEREST AND RENTAL HOLD INTEREST ARE PERSONAL
23 PROPERTY THAT HAVE BEEN PROTECTED UNDER THE CALIFORNIA CIVIL
24 CODE, SECTION 671.

25 THE COURT: TELL ME, COULD THAT EVICTION HEARING

COMPUTER-AIDED TRANSCRIPTION

1 PROCEDURE BE THE DUE-PROCESS HEARING THAT THE TENANT AND THE
2 LANDLORD WOULD HAVE A RIGHT TO HAVE?

3 MR. MANSFIELD: WELL, EXCEPT FOR THE FACT OF --
4 LET'S THINK ABOUT HOW THAT WOULD PLAY OUT.

5 THE LANDLORD BEGINS AN UNLAWFUL DETAINER PROCEEDING.
6 THE TENANT OBJECTS TO THAT UNLAWFUL DETAINER PROCEEDING BY
7 SAYING, WELL, THAT'S NOT A GROUND TO EVICT ME, BECAUSE
8 ILLEGAL ALIEN IS NOWHERE LISTED IN CALIFORNIA CIVIL CODE FOR
9 A BASIS FOR AN UNLAWFUL DETAINER PROCEDURE; AND I'M NOT AN
10 ILLEGAL ALIEN.

11 SO NOW YOU HAVE A PROCEEDING PROCEEDING BEFORE A
12 SUPERIOR COURT JUDGE ASKING QUESTIONS, AND A SUPERIOR COURT
13 JUDGE MAKING A DETERMINATION WHETHER SOMEONE IS AN ILLEGAL
14 ALIEN; NOT WITHIN THE PROVINCE OF STATE COURT TO DO. IT'S
15 THE PROVINCE OF THE FEDERAL COURT TO DO.

16 AND EVEN IF THEY MADE THAT DETERMINATION, BY THE
17 TIME THAT DETERMINATION IS MADE, IF THERE HAS BEEN AN
18 AUTOMATIC SUSPENSION OF A LICENSE, YOU BASICALLY HAVEN'T BEEN
19 ABLE TO COLLECT RENT, WE ARGUE ON THE WHOLE DWELLING UNIT,
20 THEY ARGUE JUST ON ONE, BUT YOU HAVEN'T BEEN ABLE TO COLLECT
21 RENT FOR A SIGNIFICANT PERIOD OF TIME.

22 THE TENANT CERTAINLY HAS -- THE ONLY TIME THAT THEY
23 EVER GET TO EVEN PRESENT THAT ISSUE IS IN THE CONTEXT OF AN
24 UNLAWFUL DETAINER PROCEEDING, WHICH THEY ONLY GET TO IF FOR
25 SOME REASON, SOMEBODY COMES IN AND TRIES AN UNLAWFUL DETAINER

COMPUTER-AIDED TRANSCRIPTION

1 PROCEEDING, AS COMPARED TO SIMPLY SAYING, I'M CUTTING OFF THE
2 LEASE; I'M NOT RENTING TO YOU ANYMORE.

3 THE COURT: EXCUSE ME. AN UNLAWFUL DETAINER ACTION,
4 SHARE WITH ME, WOULD THE LANDLORD HAVE THE OPTION TO
5 NEGOTIATE AND PERMIT THE TENANT TO STAY BEFORE THE ACTION WAS
6 COMPLETED?

7 MR. MANSFIELD: THAT IS CORRECT. ONE OF THE
8 OPTIONS --

9 THE COURT: IS THAT PROVISION, IS THAT REMEDY, OR
10 RESULT OF AN UNLAWFUL DETAINER ACTION, CONTAINED IN THE
11 ORDINANCE, OR IS IT RESTRICTED BY THE ORDINANCE, IN YOUR
12 VIEW?

13 MR. MANSFIELD: WE WOULD ARGUE THAT IT'S RESTRICTED
14 BY THE ORDINANCE. BECAUSE, AGAIN, REMEMBER WHAT THE
15 ORDINANCE SAYS. WITHIN TEN DAYS, ONE MUST, QUOTE, CORRECT
16 THE VIOLATION.

17 WELL, IF THE VIOLATION OF LAW IS SUFFERING
18 OCCUPANCY, PERMITTING OCCUPANCY, RENTING OR LEASING, THEN THE
19 ONLY WAY TO CORRECT THAT VIOLATION IS TO STOP DOING IT. SO
20 IF YOU HAD AN UNLAWFUL DETAINER PROCEEDING AND THE PARTIES
21 ULTIMATELY AGREED TO SOME SORT OF RESOLUTION OF THAT ISSUE,
22 YOU'RE STILL PERMITTING THAT PROCESS TO GO FORWARD.

23 SO THAT DOES NOT -- IN OUR MIND, IT DOESN'T CURE THE
24 VIOLATION. AND, THEREFORE, ARGUABLY THE LANDLORD WOULD BE
25 PUT IN THIS IMPOSSIBLE POSITION OF BEING TOLD THAT THEY ARE

COMPUTER-AIDED TRANSCRIPTION

1 VIOLATING THIS ORDINANCE, WHILE AT THE SAME TIME BEING
2 REQUIRED TO GO THROUGH THIS -- GO THROUGH THE UNLAWFUL
3 DETAINER PROCEEDING PROCESS.

4 THE COURT: THANK YOU.

5 MR. MANSFIELD: SO WE THINK THAT WHEN YOU LOOK AT --
6 THAT'S YET A SEPARATE, INDEPENDENT BASIS UPON WHICH TO FIND
7 THAT THE STATUTE IS UNCONSTITUTIONAL.

8 FINALLY, THERE IS THIS LAST QUESTION,
9 UNDERSTANDABLY, IMPORTANT ONE, WHICH IS THAT OF IRREPARABLE
10 HARM.

11 THE CITY'S POSITION IT'S TAKEN IS THAT, WELL, THERE
12 IS REALLY NO IRREPARABLE HARM ANYMORE, BECAUSE WE'RE ONLY
13 APPLYING THIS PROSPECTIVELY. AND; AGAIN, WE RESPECTFULLY
14 SUBMIT THAT IT IS WHAT THE ORDINANCE SAYS, AND WE HAVE TO
15 TAKE IT ON ITS FACE. BUT WHAT THE CASE LAW HAS CONSISTENTLY
16 SAID IS THAT THE THREAT OF A CONSTITUTIONAL VIOLATION ALONE
17 IS SUFFICIENT TO CREATE IRREPARABLE HARM. YOU HAVE THAT
18 THREAT ONGOING.

19 WE'VE NOTED IN OUR DECLARATIONS, UNREBUTTED, OF BOTH
20 JANE DOE'S 1 AND 2 SAYING THAT THEY ARE VERY CONCERNED ABOUT
21 THE FACT THAT THEY MAY BE EVICTED, EVEN IF YOU TRIED TO
22 EXPLAIN TO THEM THAT THEY MIGHT NOT BE.

23 WE HAVE MR. GARRETT, WHO IN HIS OWN DECLARATION HAS
24 TALKED ABOUT HIS TENANTS TELLING HIM THAT THEY MIGHT LEAVE.
25 HIS TENANTS INDICATING THAT THEY ARE CONCERNED ABOUT WHETHER

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1 OR NOT THEY ARE SUBJECT TO THIS ORDINANCE. AND HIM BEING PUT
2 IN THIS ROCK AND A HARD PLACE, WHICH WILL CONTINUE, BECAUSE
3 HE WILL CONTINUE TO HAVE PROPERTY AND CONTINUE TO HAVE
4 PROPERTY THAT WOULD BE VACANT, NO MATTER HOW YOU INTERPRET
5 THE STATUTE.

6 YOU HAVE THE REPORTS -- THAT, AGAIN, UNREBUTTED IN
7 THE RECORD -- OF LANDLORDS THREATENING TENANTS WITH RENT
8 INCREASES, LANDLORDS THREATENING TO REPORT THEM, QUESTIONS OF
9 BLACKMAIL, THESE ISSUES ARE ALL SIGNIFICANT AND ALL
10 IRREPARABLE. AND, UNFORTUNATELY, THE MORE THAT THIS
11 ORDINANCE IS OUT THERE AND UNCERTAIN THAT IT MIGHT BE
12 INTERPRETED ONE WAY OR MIGHT BE INTERPRETED ANOTHER WAY,
13 THOSE THREATS OF CONSTITUTIONAL INFRINGEMENT REMAIN.

14 AND SO, IRRESPECTIVE OF THE QUESTION, WHETHER THE
15 INTERPRETATION MEMO MAKES THIS STATUTE APPLY PROSPECTIVELY OR
16 NOT, THE CONSTITUTIONAL INFRINGEMENTS STILL REMAIN, AND
17 BECAUSE THE CONSTITUTIONAL INFRINGEMENTS STILL REMAIN, THE
18 IRREPARABLE HARM STILL REMAINS.

19 AND, THUS, WE THINK THAT IRRESPECTIVE OF HOW YOU END
20 UP ON THAT, THERE IS STILL IRREPARABLE HARM, AND THAT AS A
21 RESULT OF THAT, WE MUST MAINTAIN THE STATUS QUO. AND AS THE
22 STATUS QUO, WE MAINTAIN THAT THE ORDINANCE NOT GO INTO
23 EFFECT.

24 UNLESS YOU HAVE ANY OTHER QUESTIONS, THAT'S IT.

25 THE COURT: THANK YOU, COUNSEL.

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1 MR. MANSFIELD: THANK YOU, YOUR HONOR.

2 THE COURT: MR. GARRETT.

3 MR. GARRETT: GOOD AFTERNOON, YOUR HONOR.

4 WITH THE COURT'S PERMISSION, MR. LINCOLN AND I WILL
5 DIVIDE UP OUR TIME AS FOLLOWS: I'M GOING TO ADDRESS THE
6 QUESTION OF IRREPARABLE INJURY, AND MR. LINCOLN IS GOING TO
7 ADDRESS THE QUESTION OF PROBABILITY OF SUCCESS ON THE MERITS,
8 INCLUDING THE LEGALITY AND QUESTIONS OF THE STATUS OF THE
9 CITY MANAGER'S MEMORANDUM.

10 AND SO I'M GOING TO FOCUS ON THE ALLEGATIONS OF
11 IRREPARABLE HARM FOR THIS T.R.O.

12 THE COURT: THANK YOU.

13 YOU MAY PROCEED.

14 MR. GARRETT: I FIND IT QUITE REMARKABLE -- I
15 ACTUALLY TIMED HOW MUCH TIME WAS SPENT BY THE PLAINTIFFS IN
16 THIS PRESENTATION, AND BY MY COUNT, IT WAS LESS THAN TWO
17 MINUTES, WAS SPENT ON THE QUESTION OF IRREPARABLE INJURY AND
18 POTENTIAL HARM TO THEIR CLIENTS. AND, FRANKLY, WE FEEL -- MY
19 CLIENTS FEEL VERY STRONGLY THAT THAT IS THE MOST IMPORTANT
20 ISSUE IN FRONT OF THE COURT TODAY.

21 AND I'M VERY SURPRISED. I'M USED TO, IN TEMPORARY
22 RESTRAINING ORDER HEARINGS, THAT BEING THE PRIMARY CONCERN OF
23 THE PLAINTIFFS, THE HARM TO THEIR ACTUAL CLIENTS, THINGS THAT
24 MIGHT HAPPEN TO THEM.

25 AND I RECALL THE -- YOUR HONOR'S, THE DISCUSSION OF

COMPUTER-AIDED TRANSCRIPTION

1 WHAT WAS AT STAKE HERE TODAY. YOU ARE NOT HERE TO RENDER A
2 DECISION ON THE ULTIMATE LEGALITY OF WHAT'S OCCURRED, AS MUCH
3 AS THE PROBABILITY OF SUCCESS ON THE MERITS IS IMPORTANT.
4 BUT THE REAL ISSUE OUGHT TO BE WHETHER OR NOT WE HAVE PEOPLE
5 WHO ARE FACING REAL LIFE DANGER OR INJURY, IRREPARABLE INJURY
6 THAT THEY WOULD BE FACING.

7 AND WE'RE VERY CONCERNED ABOUT THAT. AND I THINK
8 DESPITE THE EFFORTS TO ATTRIBUTE MOTIVES AND NEGATIVE THINGS
9 TO MY CLIENTS -- MY CLIENT, I WOULD LIKE TO SPEAK ON BEHALF
10 OF THE CITY ATTORNEY, THE CITY MANAGER, WHO IS THE CHIEF
11 EXECUTIVE OFFICER OF THE CITY, AND THE CITY COUNCIL AS A
12 COLLECTIVE BODY, AND WE ARE ALL VERY CONCERNED BY THE
13 POSSIBILITY THAT THERE COULD BE IRREPARABLE INJURY.

14 AND WE'RE ALSO VERY CONCERNED BY THE CONFUSION THAT
15 MAY HAVE BEEN RAISED ABOUT THIS ORDINANCE, AND FEEL IT'S VERY
16 IMPORTANT TO REDUCE THAT CONFUSION, RATHER THAN CREATE MORE
17 CONFUSION UNDER THE GUISE OF CREATING MORE FEAR AND CONCERN.

18 AND, AGAIN, WHAT I THOUGHT WAS REMARKABLE FROM
19 MR. MANSFIELD WAS, WHEN HE DID SPEAK ABOUT IRREPARABLE
20 INJURY, THAT THE MAJORITY OF HIS STATEMENTS REALLY DEALT WITH
21 THE CONCERNS AND FEARS OF THE TENANTS AND THE LANDLORDS.
22 AND, INSTEAD, I THINK WE SHOULD ALL BE IN THIS COURTROOM
23 TRYING TO REDUCE THOSE CONCERNS AND FEARS, AND THAT'S
24 UPPERMOST IN MY CLIENT'S MIND.

25 MY CLIENT IS NOT A PRIVATE BUSINESSPERSON. IT IS A

COMPUTER-AIDED TRANSCRIPTION

1 CITY AGENCY. MY CLIENTS DEAL EVERY DAY WITH CONCERNS OF ALL
2 THE RESIDENTS OF THE CITY. AND I THINK THE COURT SHOULD
3 AGAIN CONSIDER VERY CAREFULLY WHAT -- WHETHER THERE ARE
4 CONCERNS HERE, AND WHAT THEY ARE TRYING TO DO TO REDUCE WHAT
5 REALLY IS THE ENTIRE BASIS FOR THIS T.R.O. HEARING, IS THERE
6 AN IRREPARABLE INJURY TO THE FIVE NAMED PLAINTIFFS THAT ARE
7 IN THIS CASE.

8 NOW, WHEN I LOOK AT THE T.R.O. PAPERS THAT WERE
9 FILED, TWO VERY ISSUES -- TWO THINGS REALLY JUMP OUT AT ME
10 FROM THE PAPERS AND CAUSE ME A GREAT DEAL OF CONCERN. AND,
11 FRANKLY, IF THEY WERE TRUE, I WOULD THINK THAT THE COURT
12 WOULD WANT TO ENTER A TEMPORARY RETRAINING ORDER RIGHT AWAY
13 TO DEAL WITH THE ISSUE.

14 AND I SPEAK OF JANE DOE 1 AND JANE DOE 2. WE HAVE A
15 LIMITED FACTUAL DISCUSSION ABOUT WHAT THEIR SITUATIONS ARE,
16 BUT AT LEAST IN PARTS OF THE DECLARATION, THEY SPEAK TO A
17 CONCERN THAT THEY WOULD BE EVICTED FROM LONG-TERM TENANCIES.

18 I THINK JANE DOE 1 SPEAKS PERHAPS OF BEING IN THE
19 SAME APARTMENT BUILDING FOR NINE YEARS. THEY BOTH HAVE MINOR
20 CHILDREN. AND IF THE IMPACT OF THIS ORDINANCE IS THAT THEY
21 ARE GOING TO BE EVICTED AND THROWN OUT ON THE STREET BEFORE
22 THIS COURT CAN RENDER A DECISION ON THE MERITS, I THINK
23 THAT'S A GREAT DEAL OF CONCERN.

24 AND I'D LIKE TO GO THROUGH THE ORDINANCE AND EXPLAIN
25 HOW WE DON'T FEEL THAT THAT IS AN INJURY THAT WILL HAPPEN

COMPUTER-AIDED TRANSCRIPTION

1 TODAY. NOW, THERE ARE OTHER CLAIMS OF IRREPARABLE INJURY, AS
2 I SEE IT, BUSINESS AND ECONOMIC CONCERNS OF ROY AND MARY
3 GARRETT, AND WHAT APPEARS TO ME TO BE MOSTLY AN ECONOMIC
4 CONCERN, OR AN ALLOCATION OF RESOURCES CONCERN OF THE
5 COMMITTEE, WHICH IS THE FIFTH PLAINTIFF. I'LL GET TO THOSE
6 IN A MOMENT.

7 AGAIN, I'D LIKE TO REALLY FOCUS ON WHAT I THINK THE
8 TWO ISSUES, THE REAL HUMAN IMPACT THAT THIS COURT SHOULD BE
9 CONCERNED ABOUT. THAT'S THE IMPACTS ON JANE DOE 1 AND
10 JANE DOE 2.

11 AND IF THE COURT WILL PERMIT ME, I'D FIRST LIKE TO
12 SPEAK WITHOUT BENEFIT OF RELIANCE ON THE INTERPRETATION
13 MEMORANDUM THAT THE CHIEF EXECUTIVE OFFICER OF THE CITY, THE
14 CITY MANAGER, HAS ENTERED INTO. I'M GOING TO LEAVE IT TO
15 MR. LINCOLN THE TASK FOR EXPLAINING THAT.

16 THE COURT: ALL RIGHT.

17 MR. GARRETT: FOR THIS -- AT THIS POINT, I WANT TO
18 WORK JUST EXCLUSIVELY FROM THE TEXT OF THE ORDINANCE.

19 AND I BELIEVE THERE ARE THREE CRUCIAL POINTS WHERE
20 THE PLAINTIFFS HAVE JUST SIMPLY INCORRECTLY STATED THE
21 CONTENTS OF THE ORDINANCE, OR ADDED ADDITIONAL PROVISIONS IN
22 THE ORDINANCE WHICH DON'T EXIST. AND BY DOING SO, THEY HAVE
23 HAD TO DO THAT, I THINK, IN FACT, IN ORDER TO RAISE THE
24 CLAIMS THAT THERE COULD BE IMMEDIATE EVICTIONS, OR THAT THIS
25 ORDINANCE AUTHORIZES EVICTIONS; OR THAT IN SOME WAY THERE IS

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1 A MISUNDERSTANDING ABOUT HOW THE LEGAL STATUS OF THE TENANTS
2 WILL BE DETERMINED.

3 FIRST OF ALL, THE ORDINANCE DOES NOT CONTAIN A
4 RETROACTIVITY CLAUSE. IT DOES NOT CONTAIN EXPRESS LANGUAGE
5 WHICH STATES THAT IT APPLIES TO TENANCIES WHICH WERE CREATED
6 BEFORE THE EFFECTIVE DATE OF THE ORDINANCE. AND THE
7 OPERATIVE LANGUAGE OF WHAT IS PROHIBITED BY THE ORDINANCE IS
8 LETTING, LEASING OR RENTING A DWELLING UNIT. IT DOES NOT
9 SAY, AND WE INTEND TO APPLY TO RENTALS WHICH OCCURRED -- THE
10 ACT OF RENTING, WHICH OCCURRED BEFORE THE DATE OF THE
11 ORDINANCE.

12 NOW, WITHOUT GETTING INTO ANY INTERPRETATION MEMO,
13 THE PLAIN LANGUAGE OF THIS ORDINANCE DOES NOT SAY, AND WE
14 INTEND TO APPLY TO TENANCIES WHICH WERE CREATED BEFORE THE
15 DATE OF THE ORDINANCE, TO RENTAL DECISIONS WHICH WERE MADE
16 BEFORE THE DATE OF THE ORDINANCE. SO I BELIEVE THAT THE
17 COURT CAN EASILY SEE THAT IT'S -- FROM THIS LANGUAGE HERE,
18 THAT NO TENANT IN AN EXISTING TENANCY, HAS ANY FEAR OF THAT
19 TENANCY BEING TERMINATED BY THE EFFECTIVENESS OF THIS
20 ORDINANCE.

21 IN A SECOND AREA -- AND THIS IS SUBSECTION (D) OF
22 SECTION 16(E) (2) -- FOR ENFORCEMENT, I ACTUALLY WROTE DOWN
23 WORD FOR WORD WHAT MR. TENCER SAID THIS SECTION MEANT. THAT
24 IT, QUOTE, REQUIRES A LANDLORD TO COMMENCE UNLAWFUL DETAINER
25 ACTIONS WITHIN TEN DAYS.

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YOUR HONOR, THAT'S NOT WHAT THIS SECTION SAYS. IT SAYS THAT IF -- IF AFTER TEN DAYS, FOLLOWING RECEIPT OF A WRITTEN NOTICE FROM THE CITY, THAT A VIOLATION HAS OCCURRED, AND THAT THE IMMIGRATION STATUS OF ANY ILLEGAL ALIEN HAS BEEN VERIFIED, PURSUANT TO UNITED STATES CODE, TITLE 8, SECTION 1373, THE OWNER OF THE DWELLING UNIT FAILS TO CORRECT A VIOLATION OF THE SECTION, THE CITY SHALL DENY OR SUSPEND THE BUSINESS LICENSE OF THE DWELLING UNIT, AS PROVIDED IN SECTION 16235.

THE COURT: THAT'S WHERE YOU LOSE ME, COUNSEL. WHERE IS THE VIOLATION?

MR. GARRETT: I'M SORRY?

THE COURT: WHERE IS THE VIOLATION? SOMEWHERE IN THERE, A VIOLATION HAS BEEN DETERMINED BEFORE THAT LETTER GOES TO THE LANDLORD.

MR. GARRETT: RIGHT.

THE COURT: HOW IS THAT VIOLATION DETERMINED?

MR. GARRETT: WELL, TO BACK UP FROM MY POINT AND TO ANSWER YOUR QUESTION, THERE IS A COMPLAINT OF SOME SORT WHICH IS SUBMITTED TO THE CITY.

THE COURT: IS THAT COMPLAINT PROVIDED TO THE LANDLORD?

MR. GARRETT: WELL, THE LANDLORD -- THE CITY, AFTER RECEIVING A COMPLAINT, THE NEXT STEP UNDER THE ORDINANCE IS FOR THE CITY TO CONTACT THE LANDLORD.

COMPUTER-AIDED TRANSCRIPTION

THE COURT: DOES THE CITY GIVE NOTICE, A COPY OF THE COMPLAINT TO THE LANDLORD, AS ANY OTHER -- WHEN ANY OTHER TYPE OF VIOLATION IS CITED, THAT THE ACCUSED PERSON RECEIVES NOTICE OF THE VIOLATION AND HAS AN OPPORTUNITY TO CONFRONT, AT SOME MEANINGFUL TIME, THE ACCUSER? OR IS THIS --

MR. GARRETT: THERE IS SEVERAL QUESTIONS --

THE COURT: YEAH, THAT'S SEVERAL QUESTIONS.

MR. GARRETT: RIGHT.

THE COURT: PLAINTIFF RAISES IN ITS DECLARATION CIRCUMSTANCES WHERE SOMEONE MAY THREATEN AN OCCUPANT OF A HOME TO TURN THEM IN, BECAUSE THEY FAILED TO PAY A BILL, OR TO TAKE SOME OTHER ACTION.

MR. GARRETT: RIGHT.

THE COURT: THE ORDINANCE STATES THAT A COMPLAINT IS FILED WITH THE CITY. IT DOESN'T SAY IT'S VERIFIED UNDER OATH, UNDER PENALTY OF PERJURY.

THEN THERE IS A NOTION THERE THAT UPON INVESTIGATION AND FINDING REASONABLE CAUSE. THE QUESTION IS WHO INVESTIGATES? DOES THE CITY OFFICIAL GO OUT AND CHECK THE VERACITY OF THE COMPLAINT WITH THE FILER, OR IS THE COMPLAINT FILED, AND THEN THE CITY RUNS OFF WITH IT BY SENDING A NOTE TO THE LANDLORD?

MR. GARRETT: I THINK THE ORDINANCE IS VERY CLEAR THAT THE BUSINESS LICENSE DIVISION OF THE CITY IS INSTRUCTED TO OBTAIN IDENTITY DATA FROM THE LANDLORD.

COMPUTER-AIDED TRANSCRIPTION

THE COURT: BASED UPON A COMPLAINT THAT'S NOT VERIFIED?

MR. GARRETT: THE ORDINANCE DOES NOT REQUIRE THE COMPLAINT BE VERIFIED IN THE TRADITIONAL SENSE OF SUBMITTED UNDER PENALTY OF PERJURY.

THE COURT: AND THE ORDINANCE DOES NOT REQUIRE THE CITY TO INVESTIGATE TO DETERMINE WHETHER OR NOT THERE IS REASONABLE GROUNDS TO BELIEVE THAT THE COMPLAINANT HAS MADE -- YOU KNOW, THAT THE INFORMATION CONTAINED IN THE COMPLAINT SHOULD BE RELIED UPON.

MR. GARRETT: WELL, YOUR HONOR, THE ORDINANCE IS VERY CLEAR THAT THE CITY IS INSTRUCTED TO LOOK AT THE COMPLAINT TO MAKE SURE THAT IT IS NOT BASED SOLELY OR PRIMARILY ON THE BASIS OF NATIONAL ORIGIN, ETHNICITY OR RACE.

THE COURT: HOW DOES IT DO THAT?

I MEAN, IT SEEMS LIKE THAT'S WHERE THE CITY MANAGER SHOULD HAVE COME IN WITH SOME REGULATIONS, IF THE MANAGER HAS THAT AUTHORITY. AND WE NEED TO GET TO THAT POINT. AND I GUESS WE'LL GET TO THAT POINT IN A MOMENT.

BUT IF IT CAN'T BE BASED ON RACE, NATIONAL ORIGIN, ALIENAGE, WHAT IS IT BASED ON? I MEAN, WHAT COULD IT BE BASED ON?

MR. GARRETT: SOMEONE COULD SAY, I'M HERE ILLEGALLY.

COMPUTER-AIDED TRANSCRIPTION

THE COURT: AN ADMISSION?

MR. GARRETT: YES.

THE COURT: WHAT COULD IT BE BASED ON, OTHER THAN AN ADMISSION; IF YOU DON'T GET TO ALIENAGE, OR COLOR, NATIONALITY?

MR. GARRETT: STATEMENTS BY THIRD PARTIES, THAT THEY BELIEVE THE PERSON IS NOT -- 'DOESN'T' HAVE LAWFUL IMMIGRATION STATUS.

THE COURT: WHAT ABOUT THE SWEDISH PERSON WHO IS A HOUSEKEEPER IN ANOTHER PART OF TOWN WHO'S OVERSTAYED THE VISA? HOW WOULD THE CITY KNOW ABOUT THAT; SOMEONE FILES A SIMILAR COMPLAINT?

MR. GARRETT: THAT'S RIGHT, YOUR HONOR.

AND THERE IS A LOT OF LATITUDE FOR COMPLAINTS. THE CHECK IN THE PROCESS IS WRITTEN INTO THE ORDINANCE, WHICH IS THE CITY CANNOT DO ANYTHING OTHER THAN OBTAIN VERIFICATION FROM THE FEDERAL GOVERNMENT THAT THE PERSON IS AN ALIEN WHO IS NOT LAWFULLY PRESENT IN THE UNITED STATES.

SO THERE IS EXCLUSIVE RELIANCE UPON THE FEDERAL SYSTEM FOR THAT STATEMENT THAT THE CITY, BY THE WORDS OF THE ORDINANCE, ALL DISCRETION ABOUT WHETHER OR NOT, WHAT THE IMMIGRATION STATUS IS OF THE INDIVIDUAL IN QUESTION --

THE COURT: HOW DO YOU --

MR. GARRETT: -- IS TAKEN AWAY FROM THE CITY.

THE COURT: HOW DO YOU RECONCILE THE ORDINANCE, OR

COMPUTER-AIDED TRANSCRIPTION

1 THE MEMORANDUM, WITH THE FEDERAL REGISTER I'VE TAKEN JUDICIAL
2 NOTICE OF?

3 MR. GARRETT: WELL, YOUR HONOR, I'LL LET MR. LINCOLN
4 ADDRESS IT IN DETAIL. BUT WHAT I WILL SAY IS, MY READING OF
5 THE FEDERAL REGISTER, IT SAYS, IN CERTAIN CASES, THE OUTPUT
6 FROM THE FEDERAL SYSTEM IS, WE DON'T KNOW, RATHER THAN
7 THIS -- THERE IS A FINAL ORDER OF DEPORTATION IN THE SYSTEM
8 FOR THIS NAMED INDIVIDUAL.

9 SO THERE ARE SITUATIONS WHERE THE RESPONSE BACK FROM
10 THE FEDERAL GOVERNMENT IS SOMETHING OTHER THAN, WE ARE
11 CONFIRMING THAT THIS PERSON IS AN ALIEN, WHO IS NOT LAWFULLY
12 PRESENT IN THE UNITED STATES.

13 THE COURT: ALL RIGHT. THANK YOU.

14 YOU MAY PROCEED.

15 MR. GARRETT: AND THE CITY MANAGER'S MEMORANDUM ADDS
16 A GLOSS TO THIS, WHICH IS, IN THE RESPONSE I THINK THE WORD
17 "CONCLUSIVELY" IS USED TO PROVIDE THAT THE PERSON IS AN ALIEN
18 WHO IS NOT LAWFULLY PRESENT IN THE UNITED STATES.

19 MY POINT, YOUR HONOR, ON THE IRREPARABLE INJURY, IS
20 THAT ONE HAS TO READ IN THINGS TO THE ORDINANCE, EXPRESS --
21 ADD THINGS TO REACH THE RESULTS WHICH THE PLAINTIFFS CLAIM.

22 AND AS I WAS DISCUSSING THE TEN-DAY PROVISION, IT
23 DOESN'T SAY, THE LANDLORD IS COMMANDED TO EVICT SOMEONE.
24 NOW, CERTAINLY IN A SITUATION, SOMEONE COULD ENTER INTO A
25 TENANCY IN A MONTH THAT VIOLATES THE ORDINANCE, WITH AN

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1 ILLEGAL ALIEN, KNOWINGLY.

2 AND THEN THE CITY WOULD KNOW ABOUT IT UNDER THE
3 ORDINANCE, IT WOULD BE A PROSPECTIVE APPLICATION. THE CITY
4 WOULD SAY, THIS IS A VIOLATION. AND THE LANDLORD SAYS,
5 YOU'VE GOT ME. YOU KNOW, I AGREE. I'VE RENTED TO AN ILLEGAL
6 ALIEN. THEN THE TEN-DAY PROVISION KICKS IN. THERE MAY BE
7 SITUATIONS WHERE THE LANDLORD CAN DO NOTHING.

8 AS THE JANE DOE DECLARATION STATES -- I BELIEVE IT'S
9 JANE DOE 1 SAYS EXPRESSLY THAT HER RENTAL AGREEMENT DOES NOT
10 HAVE ANY PROVISION FOR CANCELLATION OF THE TENANCY BASED ON
11 HER IMMIGRATION STATUS.

12 THERE IS NOTHING IN THIS ORDINANCE WHICH TRIES TO
13 REACH OUT AND CHANGE STATE LAW. IT DOESN'T SAY THAT THE
14 LANDLORD HAS TO COMMENCE EVICTION PROCEEDINGS. IF A LANDLORD
15 ENTERS INTO A TENANCY THAT VIOLATES THE ORDINANCE, AND FOR
16 WHATEVER REASON DOES NOT HAVE THE ABILITY TO CORRECT THE
17 VIOLATION, THE REMEDY THAT'S GIVEN IN THE ORDINANCE IS NOT
18 THE POLICE BE AUTHORIZED TO GO IN AND DRAG THE PERSON OUT,
19 BUT SIMPLY THAT FOR THAT UNIT, THE LANDLORD CAN NO LONGER
20 COLLECT RENT.

21 NOW, FOR MULTIPLE VIOLATIONS, THE LANDLORD MAY FACE
22 FURTHER CONSEQUENCES, BUT NONE OF -- TO READ INTO THIS AND
23 ATTEMPT TO PREEMPT STATE LANDLORD/TENANT LAW, OR TO FORCE
24 EVICTIONS, ESPECIALLY IMMEDIATE EVICTIONS, IS JUST A GROSS
25 OVERREADING OF THE ORDINANCE.

COMPUTER-AIDED TRANSCRIPTION

1 AND COMING BACK TO THE TWO HARMS THAT WE'RE MOST
2 CONCERNED ABOUT HERE, ARE PEOPLE GOING TO BE EVICTED. THERE
3 IS NOTHING IN THE TEXT OF THE ORDINANCE, NOT EVEN GOING TO
4 THE CITY MANAGER'S INTERPRETIVE MEMORANDUM, WHICH WOULD
5 PROVIDE FOR THAT CONSEQUENCE.

6 AND, AGAIN, IN THE CASE OF THE JANE DOES, FOR TWO
7 SEPARATE REASONS, FIRST OF ALL, THERE IS NOTHING IN THE
8 ORDINANCE WHICH MAKES IT APPLY TO THE TENANCIES WHICH ARE
9 CREATED BEFORE THE DATE OF THE ORDINANCE. AND TO READ IN A
10 RETROACTIVITY CLAUSE IS TORTURING THE LANGUAGE.

11 SECONDLY, THERE IS NOTHING IN THE ORDINANCE THAT
12 COMPELS A LANDLORD OR AUTHORIZES A LANDLORD TO COMMENCE
13 EVICTION PROCEEDINGS WHERE THE LANDLORD DOESN'T HAVE ANY
14 BASIS FOR EVICTING THE TENANT. AND WE HAVE ONE OF THE JANE
15 DOES WHO SAYS EXPRESSLY, IN MY RENTAL AGREEMENT, THERE IS NO
16 PROVISION FOR THAT. AND IN THAT CASE, IF THIS ORDINANCE
17 SOMEHOW APPLIED TO THAT TENANCY, UNDER THE PLAIN READING OF
18 THE ORDINANCE, THE LANDLORD IS NOT GIVEN ANY POWER TO TRY TO
19 TERMINATE THE ORDINANCE.

20 I THINK TO SET UP A STRAW MAN AND A STRAW-MAN
21 ALLEGATION OF HARM HERE, WE'VE HAD THIS WHOLE ELABORATE SUPER
22 STRUCTURE ERECTED THAT SOMEHOW THE CITY IS TRYING TO INSERT
23 ITSELF IN LANDLORD/TENANT LAW, AND THAT IT MIGHT IMMEDIATELY
24 EVICT PEOPLE. AND NO WONDER PEOPLE ARE CONCERNED AND
25 FEARFUL. AND, HOPEFULLY, THE CITY CAN MAKE SURE THAT NO ONE

COMPUTER-AIDED TRANSCRIPTION

1 BELIEVES THAT THAT'S THE CASE UNDER THE OPERATION OF THE
2 ORDINANCE.

3 THE COURT: AND IT WAS, IN YOUR MIND, THE CITY'S
4 PREROGATIVE TO CHOOSE THE BUSINESS AND LICENSE DIVISION AS A
5 WAY TO ENFORCE THE ORDINANCE, AS OPPOSED TO SOME OTHER
6 SERVICE ENTITY OF THE CITY?

7 MR. GARRETT: YES. YES, IT WAS THE CITY'S
8 PREROGATIVE. AND I BELIEVE THE WISDOM OF THAT IS THIS IS AN
9 ORDINANCE WHICH REGULATES THE BUSINESS OF BEING A LANDLORD IN
10 THE CITY OF ESCONDIDO.

11 THE CHOICE OF THE BUSINESS LICENSE DIVISION
12 INDICATES THAT THIS IS NOT INTENDED TO BE AN ORDINANCE
13 REGULATING LANDLORD TENANCY LAW, THAT IT'S AN ORDINANCE
14 TRYING TO REGULATE EMPLOYMENT, OR TRYING TO REGULATE ANYTHING
15 OTHER THAN THE CONDUCT OF LANDLORDS AND THEIR CREATION OF NEW
16 TENANCIES FOR PEOPLE WHO DON'T HAVE LAWFUL IMMIGRATION
17 STATUS.

18 THE COURT: WHY IS IT TITLED THE WAY IT IS? WHY IS
19 THE ORDINANCE TITLED THE WAY IT IS, IF IT'S A BUSINESS -- IF
20 IT'S A BUSINESS APPROACH TO REGULATING TENANCIES IN THE CITY?

21 MR. GARRETT: WELL, HARBORING, THE TRADITIONAL
22 MEANING OF HARBORING, IS GIVING SOMEONE A DWELLING, A PLACE
23 OF RESIDENCE; AND THAT'S WHY THE WORD "HARBORING" IS USED.

24 IN ADDITION, THE FEDERAL GOVERNMENT HAS USED THAT
25 TERM. AND I BELIEVE THE STATE -- AGAIN, WE DON'T WANT TO

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MOVE, GIVEN THE NEED TO NOT IN ANY WAY VARY FROM THE TERMS OF THE WAY THE FEDERAL GOVERNMENT HAS PROCEEDED. I THINK USING THE SAME FEDERAL GOVERNMENT'S TERMS IS THE APPROPRIATE WAY TO PROCEED.

NOW, WHAT DOES HARBORING MEAN? AND IT'S PRECISELY DEFINED IN THIS ORDINANCE HERE. AND UNLIKE THE FEDERAL GOVERNMENT, THE CITY CLEARLY CAN'T PREEMPT FEDERAL LAW, AND IT CLEARLY CAN'T REWRITE STATE LAW. SO THE CITY IS LIMITED TO DEFINING WHAT IT'S TRYING TO REGULATE WITH THE LANDLORDS IN A WAY WHICH DOESN'T INTERFERE WITH EITHER STATE LAW OR FEDERAL LAW.

THE COURT: REFRESH ME. ARE YOU GOING TO DEAL WITH THE ORDINANCE WITH RESPECT TO THE PURPOSE BEHIND IT, OR WILL YOUR PARTNER DO THAT?

MR. GARRETT: I'M GOING TO LET MR. LINCOLN ADDRESS THAT.

THE COURT: ALL RIGHT.

MR. GARRETT: I WILL JUST WRAP UP ON THE HARM.

THE COURT: ALL RIGHT.

MR. GARRETT: AGAIN, THE MOST COMPELLING ISSUE OF HARM, WHICH I THINK IS THE MOST IMMEDIATE ISSUE HERE, AND THE ONE THING WE SHOULD BE CONCERNED ABOUT, IS WHETHER OR NOT PEOPLE WILL BE EVICTED AS A RESULT OF THE ORDINANCE.

AND I BELIEVE, WITHOUT EVEN RECOURSE TO THE INTERPRETATION MEMORANDUM, THE PLAIN MEANING OF THE ORDINANCE

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DOESN'T PROVIDE FOR THAT. IN ADDITION, THE COURT SHOULD INTERPRET THE ORDINANCE IN A WAY WHICH DOESN'T LEAD IT INTO CONFLICT WITH STATE OR FEDERAL LAW.

AND THEN, FINALLY, FOR THE VERY REASON THE PLAINTIFFS HAVE STATED, I THINK IT'S IMPORTANT FOR EVERYONE, TO TRY TO REDUCE THE FEAR AND UNCERTAINTY, AND RATHER THAN ARGUE ABOUT HOW THINGS MIGHT CHANGE, ACCEPT THE FACT THAT THE ORDINANCE SAYS WHAT IT SAYS, AND THE CITY MANAGER, THE CHIEF EXECUTIVE OFFICER OF THE CITY, HAS MADE A DECISION.

MOVING TO THE OTHER INJURIES. I BELIEVE MR. GARRETT'S CONCERNS, ONE OF HIS CONCERNS IS THAT HE WOULD BE REQUIRED TO IMMEDIATELY EVICT TENANTS. I THINK I'VE ALREADY EXPLAINED WHY I DON'T SEE THAT ANYWHERE IN THE ORDINANCE, IN THE MEANING OF THE ORDINANCE.

HE'S ALSO INDICATED A CONCERN THAT HE HAS QUESTIONS FROM LANDLORDS AND FROM -- OR FROM TENANTS, AND THEY'RE FEARFUL. AND, AGAIN, WE UNDERSTAND THE FEAR AND, HOPEFULLY, WE CAN ALL REDUCE THAT FEAR BY BEING VERY CLEAR ABOUT WHAT THE ORDINANCE MEANS AND DOESN'T MEAN.

THERE WAS ALSO A DISCUSSION AT THE VERY END OF MR. MANSFIELD'S STATEMENTS ABOUT LANDLORDS THREATENING TENANTS, AND THE VERY SEVERE PROBLEM OF SOMEONE WITH AN ILLEGAL ALIEN STATUS, WHO IS NOT LAWFULLY IN THE UNITED STATES, BEING FEARFUL THAT THERE WOULD BE RETALIATION AS A RESULT OF THAT.

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AND I NOTED -- VERY CLEARLY, IN FACT -- THAT IN THE DECLARATIONS OF CONSUELO MARTINEZ AND ESTELA DE LOS RIOS, THAT WERE FILED BY THE PLAINTIFFS, THERE IS A GREAT DEAL OF EXPLANATION TO THE PHENOMENON OF EXPLOITATION OF ILLEGAL ALIEN TENANTS BY LANDLORDS. AND THAT VARIOUS PEOPLE SAID, WELL, I'M GOING TO RAISE YOUR RENT, OR I'LL REPORT YOU UNDER THIS ORDINANCE, OR OTHERWISE.

THAT IS A VERY BIG PROBLEM. AND, IN FACT, THAT IS A PROBLEM WHICH LED -- ONE OF THE REASONS WHICH LED THE CITY, AND EXPRESSLY STATED IN THE FINDINGS WITHIN THE ORDINANCE, AS TO THE INTENT OF THE ORDINANCE, THIS CONCERN THAT TENANTS WILL BE FEARFUL TO REPORT VIOLATIONS OF LANDLORD/TENANT LAW. AND THAT, THEREFORE, TENANTS WITHOUT LEGAL IMMIGRATION STATUS ARE NOT GOING TO REPORT VIOLATIONS, WILL SUFFER VIOLATIONS, WON'T HAVE ESTABLISHED LEASES AND PROBLEMS LIKE THAT.

NOW, THERE CERTAINLY IS A PUBLIC POLICY --

THE COURT: EXCUSE ME. THAT'S A GOOD POINT YOU RAISE.

YOU MENTION THAT PERSONS WHO ARE UNDOCUMENTED MAY NOT HAVE LEASE AGREEMENTS, TENANCIES. WHAT'S THE PURPOSE OF THE ORDINANCE, IF THAT'S YOUR FOCUS?

MR. GARRETT: WELL --

THE COURT: BECAUSE YOU'RE NOT -- YOUR NET IS NOT GOING TO REACH EVERYONE APPARENTLY THAT THE CITY INTENDS TO REACH, IF YOU HAVE FOUND THAT UNDOCUMENTED ALIENS MAY NOT

COMPUTER-AIDED TRANSCRIPTION

HAVE TENANCIES AGREEMENTS.

MR. GARRETT: WELL, IF THERE IS NO WRITTEN AGREEMENT, THE LAW PRESUMES THAT IT'S A MONTH-TO-MONTH TENANCY, RENEWABLE WITHOUT FURTHER ACTION. AND IN THE INTERPRETIVE MEMORANDUM, THE MANAGER GOES INTO THAT.

THE COURT: SO THAT'S A MONTH-TO-MONTH, THAT'S RENEWABLE EACH MONTH?

MR. GARRETT: RIGHT.

THE COURT: WOULDN'T THOSE PERSONS WHO ARE CURRENTLY SITUATED HAVE THAT ISSUE IF THIS ORDINANCE WENT INTO EFFECT, BECAUSE EACH MONTH THEY START A NEW TENANCY, AND IT'S SUBJECT TO THE ORDINANCE?

MR. GARRETT: WELL, THE INTERPRETATION MEMORANDUM SAYS THAT IT REQUIRES -- WHERE THE TENANCY AUTOMATICALLY RENEWS. AND THERE ARE RENTAL AGREEMENTS ATTACHED TO MR. GARRETT'S DECLARATION, FOR EXAMPLE, THAT ALL PROVIDE FOR AUTOMATIC RENEWALS OF TENANCY IF NO ONE GIVES NOTICE.

THE CITY'S INTERPRETATION OF THE ORDINANCE IS, UNLESS THE LANDLORD DOES SOMETHING AFFIRMATIVELY TO CREATE A NEW TENANCY, MERELY ALLOWING THEM TO RENEW BY OPERATION OF LAW IS NOT THE CREATION OF A NEW TENANCY, DOES NOT SUBJECT THE LANDLORD TO THE ORDINANCE.

SO I BELIEVE ONE OF THE JANE DOES TALKS ABOUT HAVING A RENTAL AGREEMENT, THE OTHER ONE TALKS ABOUT RENEWALS BY MONTH TO MONTH; BUT THEY ARE ESTABLISHED TENANCIES. NEITHER

COMPUTER-AIDED TRANSCRIPTION

1 OF THE DECLARATIONS INDICATE THAT THERE IS A TENANCY THAT
2 WILL COME TO AN END AND THAT REQUIRES AFFIRMATIVE ACTION BY
3 THE LANDLORD TO RENEW.

4 BACK TO THE QUESTION OF THE TENANTS BEING CONCERNED
5 AND THE LEVERAGE THAT WOULD BE UPSET. NOW, CLEARLY THERE IS
6 A PUBLIC POLICY ISSUE HERE. AND ONE OF OUR PURPOSES TODAY IS
7 NOT TO DEBATE THE PUBLIC POLICY. BUT I WOULD SIMPLY NOTE
8 THAT THE EVIL, THE PROBLEM, THE HARM, THE IRREPARABLE INJURY
9 THAT THE PLAINTIFFS TALK ABOUT, WHICH IS PEOPLE WHO ARE HERE
10 IN AN UNDOCUMENTED STATUS.

11 AND I REMEMBER A STATEMENT A NUMBER OF YEARS AGO BY
12 A POLICE OFFICER IN SAN DIEGO ABOUT THE PROBLEM, IF YOU
13 HAVE -- IF SOMEONE'S IN THE UNITED STATES, BUT OUTSIDE THE
14 LAW, AND DOESN'T FEEL COMFORTABLE HAVING RECOURSE WITH THE
15 LAW, OR BEING RETALIATED AGAINST.

16 THERE ARE CERTAINLY TWO DIFFERENT, VERY COMPETING
17 PUBLIC POLICY ISSUES ABOUT HOW TO DEAL WITH THAT PROBLEM.
18 ONE PUBLIC POLICY IS, WELL, WHEN THEY ARE HERE, PLEASE REMOVE
19 ANY POSSIBILITY THAT THEY WOULD BE AFFECTED BY THE NATURE OF
20 THEIR IMMIGRATION STATUS.

21 MY CLIENT, THE CITY, CHOSE TO ACT UPON IT, A
22 DIFFERENT VIEW, WHICH IS THAT THE WAY TO DEAL WITH THE
23 PROBLEM LONG-TERM IS TO PREVENT THE CREATION OF NEW TENANCIES
24 WHO PUT PEOPLE IN THE POSITION WHERE THEY CAN BE EXPLOITED.

25 THE COURT: WAS THAT DISCUSSED AT THE CITY COUNCIL

COMPUTER-AIDED TRANSCRIPTION

1 MEETING?

2 MR. GARRETT: YOUR HONOR, IT'S STATED IN THE
3 FINDINGS IN THE ORDINANCE. AND AS MR. LINCOLN WILL STATE,
4 WHAT IS APPROPRIATE DETERMINATION FOR LEGISLATIVE INTENT.

5 IT'S ENOUGH FOR ME TO SAY THAT THERE WERE FIVE VERY
6 DIFFERENT MEMBERS OF THE CITY COUNCIL, JUST LIKE THERE ARE
7 435 VERY DIFFERENT MEMBERS OF THE HOUSE OF REPRESENTATIVES.
8 AND IN NEITHER CASE, YOU CAN TAKE THE INDIVIDUAL VIEWS OF ONE
9 PERSON WHO SPEAKS AT THE MEETING AS REFLECTIVE OF THE
10 ORDINANCE WHICH WAS ADOPTED BY THE COLLECTIVE.

11 IN CLOSING ON THE HARM ISSUE, YOUR HONOR, I THINK
12 THAT'S THE ISSUE IN FRONT OF THE COURT TODAY. I'M SURPRISED
13 AND HAPPY THAT THE COURT IS SO WILLING TO DELVE INTO THE
14 MERITS OF THE CASE, AND PERHAPS YOU'LL DECIDE THE MERITS OF
15 THE CASE TODAY.

16 BUT WHAT I'M USED TO IN A TRADITION T.R.O. HEARING
17 IS FOCUSING ON INJURY AND HARM TO REAL PEOPLE, AND I BELIEVE
18 THAT THE WAY THAT THE PLAINTIFFS HAVE PRESENTED THEIR CASE
19 INDICATES THAT THIS IS MORE ABOUT AN IDEOLOGICAL STATEMENT
20 AND MORE ABOUT CREATING CONFUSION THAN ACTUALLY PROTECTING
21 REAL PEOPLE WHO HAVE REAL CONCERNS.

22 THE COURT: BEFORE YOU SIT DOWN, COUNSEL, WITH
23 RESPECT TO BALANCING THE HARDSHIP. WHAT IS THE HARDSHIP OF
24 THE CITY WAITING THREE TO FOUR MONTHS TO TAKE THIS ACTION?

25 MR. GARRETT: WELL, THERE IS ONE HARDSHIP, YOUR

COMPUTER-AIDED TRANSCRIPTION

1 HONOR, AND THAT IS, THE EVIL THAT THE LEGISLATION IS DESIGNED
2 TO ADDRESS, AND THAT THE DE LOS RIOS AND CONSUELO MARTINEZ
3 DECLARATIONS OF THE PLAINTIFFS TALK ABOUT, WHICH IS THAT YOU
4 HAVE PEOPLE WHO ARE IN A POSITION IN THE CITY TO BE EXPLOITED
5 BECAUSE OF THEIR UNDOCUMENTED STATUS.

6 AND, ADMITTEDLY, THE CITY, THIS ORDINANCE IS NOT
7 GOING TO -- IT'S GOING TO WORK OVER TIME. IT'S GOING TO
8 REDUCE THE NUMBER OF THOSE TENANCIES. THERE IS NOT GOING TO
9 BE AN IMMEDIATE CHANGE. BUT THE CITY WOULD LIKE TO GET
10 STARTED ON THAT PROCESS.

11 AND SO BY DELAYING THE IMPLEMENTATION OF THE
12 ORDINANCE, WE DELAY THE EFFECT OF THAT LEGISLATIVE PROCESS.

13 THE COURT: WHAT'S THE PREJUDICE? IN THAT THIS IS
14 2006, I WOULD ASSUME THIS ISSUE HAS BEEN PERCEIVED BY THE
15 CITY OF ESCONDIDO FOR A NUMBER OF YEARS MAYBE. I HAVEN'T
16 READ THE ENTIRE FILE. I DON'T HAVE A TRANSCRIPT.

17 BUT WHAT'S THE PREJUDICE IN STAYING THE EFFECTIVE
18 DATE OF THE ORDINANCE FOR 90, 120 DAYS OR SO?

19 MR. GARRETT: WELL, YOUR HONOR, THE SHORT ANSWER TO
20 YOUR QUESTION IS, THERE IS NO ACTUAL PREJUDICE OTHER THAN
21 WHAT I'VE JUST DESCRIBED, WHICH IS THE FRUSTRATION OF THE
22 LEGISLATIVE PURPOSE. AND I WANT TO BE VERY CLEAR ABOUT THAT.
23 IT'S A SHORT -- IT'S A LEGISLATIVE PROCESS THAT WORKS OVER
24 TIME.

25 THE ONLY OTHER THING I WOULD MENTION IS THAT THERE

COMPUTER-AIDED TRANSCRIPTION

1 IS A STIGMA ATTACHED TO A T.R.O. BEING GRANTED. IN FACT, I
2 THINK PART OF THE REASON FOR THE T.R.O. BEING SOUGHT IS NOT
3 SO MUCH TO PROTECT INDIVIDUALS, BUT TO SORT OF -- TO CREATE
4 THE HIGHLY-PUBLICIZED VICTORY THAT A T.R.O. IS GRANTED.

5 AND SO ANY TIME THAT A PRIVATE INDIVIDUAL HAS A
6 T.R.O. GRANTED AGAINST THEM, OR A CITY OR AN AGENCY, THERE IS
7 A STIGMA ATTACHED TO THAT, THAT SOMEHOW THEY DID SOMETHING
8 WRONG.

9 THE COURT: THANK YOU, COUNSEL.

10 MR. LINCOLN.

11 MR. LINCOLN: MAY IT PLEASE THE COURT, DON LINCOLN
12 FOR THE CITY OF ESCONDIDO.

13 ONE OF THE ISSUES THAT I'D LIKE TO ADDRESS IS THE
14 POWER OF THE CITY MANAGER UNDER THE ESCONDIDO FORM OF
15 GOVERNMENT. I HAVE SOME PROVISIONS HERE FROM THE ESCONDIDO
16 MUNICIPAL CODE. UNFORTUNATELY, I DON'T HAVE COPIES. I CAN
17 READ THEM INTO THE RECORD.

18 SECTION 2-50: THE CITY MANAGER SHALL BE THE
19 ADMINISTRATIVE HEAD OF THE GOVERNMENT OF THE CITY UNDER THE
20 DIRECTION AND CONTROL OF THE COUNCIL, EXCEPT AS OTHERWISE
21 PROVIDED.

22 SECTION 2.52: THE CITY MANAGER SHALL SEE THAT ALL
23 LAWS AND ORDINANCES OF THE CITY ARE DULY ENFORCED AND THAT
24 ALL FRANCHISES, PERMITS AND PRIVILEGES GRANTED BY THE CITY
25 ARE FAITHFULLY PERFORMED AND OBSERVED.

COMPUTER-AIDED TRANSCRIPTION

1 UNDER THE CITY OF ESCONDIDO FORM OF GOVERNMENT, IT
2 IS THE CITY MANAGER, NOT THE MAYOR, NOT THE CITY COUNCIL, BUT
3 THE CITY MANAGER WHO SEES THAT THE LAWS AND ORDINANCES ARE
4 ENFORCED.

5 THIS IS THE TYPE OF MEMORANDUM, THIS IS THE TYPE OF
6 ADVICE THAT, WHENEVER A LAW IS PASSED, THAT THE CITY MANAGER
7 TAKES CARE OF AND ISSUES.

8 IT'S INTERESTING THAT THE VERY ITEM THAT THE COURT
9 TOOK JUDICIAL NOTICE OF, JUST AT THE COMMENCEMENT OF THIS
10 HEARING, WAS THIS REFERENCE TO THE FEDERAL REGISTER. AND I
11 THINK, IN SOME RESPECTS, REVIEW OF THAT KIND OF HELPS
12 UNDERSTAND WHAT HAPPENS HERE, TOO.

13 IF -- IN THAT PARTICULAR REFERENCE, THERE WAS A
14 QUESTION OF HOW TO INTERPRET ONE OF THE ACTS, THE WORDS, HOW
15 DOES AN ENTITY KNOW THAT AN ALIEN IS NOT LAWFULLY PRESENT?
16 THE WORD "KNOW" OR "KNOWS" WAS NOT DEFINED IN THE
17 LEGISLATION.

18 THE NOTICE WAS HOW THEY -- THE REGULATION GAVE
19 MEANING TO THAT WORD. AND THEN THEY DESCRIBE THAT IN THE
20 CONTEXT OF THAT PARTICULAR LEGISLATION, "KNOWING" MEANS --
21 AND THEN THEY GO ON, ONLY WHEN AN UNLAWFUL PRESENCE IS A
22 FINDING OF FACT OR CONCLUSION OF LAW THAT IS MADE BY AN
23 ENTITY AS PART OF A FORMAL DETERMINATION, ET CETERA.

24 THAT WASN'T WHAT THE LEGISLATION SAID. THAT'S WHAT
25 THIS REGULATION SAID. AGAIN, THE PEOPLE WHO ISSUED THIS

COMPUTER-AIDED TRANSCRIPTION

1 REGULATION WERE DOING THE SAME SORT OF ACTION WITH THE
2 FEDERAL LAW AS THE CITY MANAGER WAS DOING WITH THE CITY
3 ORDINANCE.

4 THE COURT: IS THE AUTHORITY THE SAME IN EACH
5 INSTANCE?

6 MR. LINCOLN: YES. THE CITY -- WELL, ACTUALLY, THE
7 CITY MANAGER, ALTHOUGH HE DOES -- IT'S TRUE, HE DOES NOT HAVE
8 THE SPECIFIC AUTHORITY, AS MENTIONED IN THE VISTA ORDINANCE,
9 HE HAS THE OSTENSIBLE AUTHORITY AND, IN FACT, HAS BEEN DOING
10 THAT AS PART OF HIS -- AS PART OF THE PROCESS.

11 THAT IS WHAT THE CITY MANAGER OF THE CITY OF
12 ESCONDIDO DOES, IS ISSUE THIS TYPE OF REGULATION.

13 THE COURT: COUNSEL -- EXCUSE ME FOR CUTTING YOU
14 OFF.

15 COUNSEL, ONE OF MY CONCERNS IS THE NATURE AND SCOPE
16 OF THE MEMORANDUM.

17 MR. LINCOLN: YES.

18 THE COURT: WHETHER OR NOT THE MEMORANDUM SIMPLY
19 IMPLEMENTS THE CITY'S LEGISLATION, THE ORDINANCE --

20 MR. LINCOLN: YES.

21 THE COURT: -- OR WHETHER OR NOT IT AMENDS IT.
22 BECAUSE IT IMPACTS SUBSTANTIVE ASPECTS OF THE ORDINANCE.

23 MR. LINCOLN: WELL, YOUR HONOR, AGAIN, TAKING THE
24 FIRST -- AND I'M TURNING TO EXHIBIT B, TO CITY MANAGER
25 PHILLIPS' DECLARATION. HE STARTS OFF BY, ONE OF THE KEY

COMPUTER-AIDED TRANSCRIPTION

1 INTERPRETATIONS, PROSPECTIVE ONLY. AND HE LOOKS AT, AND HE,
2 IN FACT, POINTS TO THE LANGUAGE OF THE ORDINANCE AS THE BASIS
3 FOR HIS INTERPRETATION.

4 AS WAS POINTED OUT BY COUNSEL, THERE IS NOTHING IN
5 THE ORDINANCE THAT SAYS IT'S RETROACTIVE. AND, IN FACT,
6 NORMALLY ORDINANCES OR LAWS ONLY HAVE PROSPECTIVE EFFECT.
7 THIS IS CLEARLY -- IT DOESN'T SAY IN THE ORDINANCE, WHETHER
8 IT'S PROSPECTIVE, BUT IT CERTAINLY DOESN'T SAY IT'S
9 RETROSPECTIVE. AND THIS WAS A LOGICAL INTERPRETATION BASED
10 ON THE PARTICULAR LANGUAGE.

11 NOW, THE CITY MANAGER -- AND, AGAIN, THERE ISN'T A
12 DECLARATION FROM HIM, BUT I'M SURE THAT AT SOME POINT, IF
13 THIS CASE CONTINUES, THERE WILL BE A LOOK AT THE RECORD OF
14 WHAT WENT ON IN FRONT OF THE CITY COUNCIL AND SOME OF THE
15 STATEMENTS. THERE ARE CLEAR STATEMENTS BY SOME OF THE CITY
16 COUNCIL MEMBERS DURING THE COURSE OF THIS THAT THEY DID NOT
17 INTEND TO THROW ANYBODY OUT.

18 THE COURT: WAS THAT THE MINORITY VIEW OR THE
19 MAJORITY VIEW?

20 MR. LINCOLN: YOUR HONOR, IT IS MY UNDERSTANDING
21 THAT THAT -- THAT ONE OF THE INDIVIDUALS WHO WAS IN THE
22 THREE-PERSON MAJORITY SAID THOSE WORDS. HE CERTAINLY DIDN'T
23 INTEND TO GET -- YOU KNOW, THROW ANYBODY OUT.

24 NOW, AGAIN --

25 THE COURT: I DON'T KNOW THAT THAT MATTERS. I'M

COMPUTER-AIDED TRANSCRIPTION

1 JUST ASKING, ALL RIGHT.

2 MR. LINCOLN: A LOGICAL CONCLUSION, AGAIN, THE CITY
3 MANAGER USED THAT ALSO IN COMING UP WITH HIS INTERPRETATION.
4 HE WAS THERE. HE WAS PRESENT. I WASN'T, BUT HE WAS.

5 THE SECOND ITEM, THE SAFE HARBOR. I THINK THAT WAS
6 ALSO MENTIONED. THAT'S CLEARLY IN THE ORDINANCE. THERE IS A
7 SAFE HARBOR THAT SAYS -- THE ORDINANCE DOES TALK ABOUT, AND
8 THAT IS SECTION 16(E) (2) (I).

9 UPON THE REQUEST OF A DWELLING OWNER, SUBJECT TO
10 THIS SECTION, THE CITY SHALL -- AND, AGAIN, IT REFERS TO THE
11 SPECIFIC VERIFICATION LANGUAGE FROM THE U.S. CODE, UNDER
12 SECTION 1373C -- VERIFY WITH THE FEDERAL GOVERNMENT THE
13 LAWFUL IMMIGRATION STATUS.

14 THE NEXT SENTENCE, THE PENALTIES IN THIS SECTION
15 SHALL NOT APPLY IN THE CASE OF OCCUPANTS WHOSE STATUS AS AN
16 ALIEN HAS BEEN VERIFIED. THIS IS A SAFE HARBOR. IF THE
17 LANDLORD GOES AND VERIFIES WITH THE CITY, USING THE SYSTEM OF
18 FEDERAL VERIFICATION, HE KNOWS. HE KNOWS THAT THIS PERSON IS
19 A LAWFUL -- HAS LAWFUL IMMIGRATION STATUS.

20 THE COURT: WHERE IS THE HEARING, COUNSEL? WHERE IS
21 THE HEARING FOR THE TENANT?

22 MR. LINCOLN: THE HEARING FOR THE TENANT?

23 THE COURT: THERE ARE DECISIONS BEING MADE HERE.
24 THERE IS A COMPLAINT THAT COMES IN THAT'S NOT VERIFIED. THE
25 CITY NOTIFIES THE LANDLORD TO OBTAIN DATA. THE INFORMATION

COMPUTER-AIDED TRANSCRIPTION

1 IS SENT OFF TO SOMEONE IN WASHINGTON D.C. AND THEN ALL OF A
2 SUDDEN, THE PERSON IS LABELED AN ILLEGAL ALIEN, AND THE
3 LANDLORD NEEDS TO DO SOMETHING ABOUT THAT. WHERE IS THE
4 HEARING?

5 NOW, WHEN I LOOK TO THE FEDERAL REGISTER THAT I HAVE
6 TAKEN JUDICIAL NOTICE OF, THE REGISTER INDICATES THAT, FIRST,
7 YOU APPLY -- THAT THE STATE OR LOCAL AGENCY CAN APPROACH THE
8 SAVE PROGRAM, AS YOU IDENTIFY IT, AND YOU LAY OUT THE MANUAL
9 IN YOUR EXHIBIT B1. THE LOCAL AGENCY CAN APPROACH THE SAVE
10 PROGRAM FOR DETERMINATION AS TO THE STATUS OF AN ALIEN,
11 WHETHER IT'S UNDOCUMENTED OR DOCUMENTED, I GUESS.

12 MR. LINCOLN: YES.

13 THE COURT: ALL RIGHT. FOR THE BENEFIT -- WHEN AN
14 ALIEN IS APPLYING FOR OR IS A RECIPIENT OF FEDERAL BENEFITS.
15 THAT'S WHAT THE C.F.R. SAYS.

16 MR. LINCOLN: THAT'S CORRECT.

17 THE COURT: OKAY. FIRST QUESTION IS, WHERE IS THE
18 FEDERAL BENEFIT THAT THE CITY IS ATTEMPTING TO ENSURE IT'S
19 GIVING TO THE RIGHT PERSON, WHEN WE'RE DEALING WITH A PRIVATE
20 LANDOWNER WHO'S RENTING TO AN INDIVIDUAL? WHERE IS THE
21 FEDERAL BENEFIT IN THAT, TO APPLY TO SAVE FOR VERIFICATION?

22 MR. LINCOLN: FIRST OF ALL, THE SAVE IS NOT LIMITED
23 JUST TO THAT. ALTHOUGH IT IS TRUE THAT'S HOW IT COMMENCED.
24 AND IT WAS ORIGINALLY FOR FEDERAL PUBLIC BENEFITS. LATER
25 EXPANDED TO INCLUDE STATE AND LOCAL PUBLIC BENEFITS.

COMPUTER-AIDED TRANSCRIPTION

1 THE COURT: YES.

2 MR. LINCOLN: BUT THERE IS A PROVISION THAT ALLOWS
3 IT TO BE USED FOR OTHER PURPOSES.

4 THE COURT: OTHER LEGITIMATE, LAWFUL PURPOSES OF THE
5 CITY?

6 MR. LINCOLN: FOR EXAMPLE -- AND, AGAIN, THIS IS THE
7 SAVE VERIFICATION ENTITLEMENT THAT WAS ATTACHED TO THE CITY'S
8 DECLARATION WAS A 2000, WAS DATED 2000. THAT WAS BEFORE
9 9/11.

10 SINCE 9/11, THAT WHOLE SYSTEM HAS NOW COME UNDER THE
11 DEPARTMENT OF HOMELAND SECURITY. THEY HAVE ISSUED NEW
12 REGULATIONS. I DON'T HAVE A COMPLETE SET OF THE REGULATIONS.
13 THEY ARE AVAILABLE ONLINE, AND I CAN GIVE THAT CITE:
14 WWW.USCIS. THAT'S THE NEW --

15 THE COURT: WHY WEREN'T THEY INCLUDED IN YOUR
16 PLEADINGS?

17 MR. GARRETT: NO, THEY WERE NOT, YOUR HONOR.

18 THE COURT: WHY WEREN'T THEY INCLUDED IN YOUR
19 PLEADINGS? I MEAN, I'VE DIGESTED ALL THIS INFORMATION BASED
20 UPON THE PLEADINGS.

21 MR. LINCOLN: I APOLOGIZE, YOUR HONOR. THIS
22 ACTUALLY CAME IN RESPONSE TO THE JUDICIAL NOTICE ISSUE, WHICH
23 I BELIEVE CAME AFTER OUR PLEADINGS WERE FILED. I WAS LOOKING
24 UP TO DETERMINE.

25 ANYWAY, IN THIS -- IN THIS PARTICULAR DOCUMENT, IT

COMPUTER-AIDED TRANSCRIPTION

1 DOES POINT OUT THAT IT GOES BEYOND THESE OTHER ITEMS. FOR
2 EXAMPLE, IT WILL BE USED IN THE -- ONE PROVISION IS THE
3 ROUTINE VERIFICATION OF LAWFUL STATUS THROUGH THE SAVE
4 PROGRAM OF ALL NONCITIZEN APPLICANTS FOR A DRIVER'S LICENSE.
5 THERE IS GOING TO BE -- UNDER THE REAL I.D. ACT OF 2005.

6 IT'S ALSO USED UNDER OTHER -- THERE IS A LIST OF
7 OTHER AGENCIES THAT USE IT.

8 THE COURT: DOES IT HAVE A DESIGNATION FOR
9 LANDLORD/TENANT, OR TENANCIES?

10 MR. LINCOLN: THE CLOSEST I CAN FIND IS IT'S USED BY
11 THE PALM BEACH COUNTY PROPERTY APPRAISER. I'M NOT EXACTLY
12 SURE WHAT THAT'S FOR. THERE IS A LIST OF VARIOUS SOURCES
13 THAT ALREADY USE IT.

14 IT'S ALREADY BEING USED FOR DRIVER'S LICENSE
15 AGENCIES, SOCIAL SECURITY ADMINISTRATION. IT'S BEING USED BY
16 CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION. HAZ-MAT
17 PROGRAMS. IT HAS A MUCH WIDER USAGE THAN IT ORIGINALLY HAD.

18 IN ADDITION -- AND, AGAIN, WE WEREN'T ABLE TO FULLY
19 RESEARCH WHETHER OR NOT THIS 2000 FEDERAL REGISTER IS STILL
20 IN EFFECT. THE REASON I SAY THAT IS THE FEDERAL REGISTER
21 REFERRED TO THE USE FOR ONLY A SPECIFIC NUMBER OF AGENCIES
22 THAT ARE REQUIRED TO MAKE THIS NOTIFICATION TO, AT THAT TIME,
23 I.N.S. FOUR TIMES A YEAR.

24 AND IT SAYS IN THE NOTICE THAT VARIOUS AGENCIES
25 SHOULD SPECIFICALLY NOTE, NO OTHER ENTITY IS REQUIRED TO

COMPUTER-AIDED TRANSCRIPTION

1 REPORT THAT PARTICULAR THING, ABOUT KNOWING.

2 THE COURT: YES.

3 MR. LINCOLN: SO THAT WAS FOR A PARTICULAR PURPOSE,
4 FOR A PARTICULAR REPORT, FROM PARTICULAR AGENCIES. WE ARE
5 NOT -- IT DOES NOT APPEAR TO BE APPLICABLE TO ALL THE OTHER
6 USES OF THIS SAVE PROGRAM.

7 AND THE SAVE PROGRAM, AGAIN, IT'S A LITTLE HARD TO
8 DESCRIBE. AND WE AREN'T QUITE SURE OURSELVES HOW IT'S GOING
9 TO WORK, BUT IT IS WEB BASED. IT DOES HAVE -- ONE OF THE
10 QUESTIONS IS THE RESPONSE TIME. THE RESPONSE TIME FOR
11 INITIAL VERIFICATION IS THREE TO FIVE SECONDS. FOR
12 ADDITIONAL VERIFICATION, WHERE THEY GO THROUGH AND DO MORE,
13 IT'S THREE TO FIVE WORKDAYS. AND THEN THERE IS EVEN A
14 FURTHER STEP THAT THEY UP TO 20 WORKING DAYS.

15 IT IS A PROCESS THAT IS USED BY NOW MANY, MANY, MANY
16 AGENCIES TO DETERMINE, FOR THE PURPOSES OF THOSE AGENCIES,
17 WHETHER OR NOT A PERSON IS A LEGAL RESIDENT OF THE UNITED
18 STATES.

19 THE COURT: NOW, THOSE PURPOSES -- I DON'T KNOW IF
20 YOU'VE HAD MUCH TIME TO PERUSE THIS, BUT THOSE PURPOSES, ARE
21 THEY FOR PUBLIC BENEFITS, OR FOR ANY OTHER PURPOSES THE CITY
22 DETERMINES APPROPRIATE?

23 MR. LINCOLN: THEY CLEARLY STARTED OUT TO BE JUST
24 STATE AND LOCAL BENEFIT AND FEDERAL PUBLIC BENEFIT. BUT IT'S
25 MY UNDERSTANDING THAT THEY HAVE GONE BEYOND THAT, AND, AGAIN,

COMPUTER-AIDED TRANSCRIPTION

1 ARE BEING USED, AS I MENTIONED, WILL BE USED FOR DRIVER'S
2 LICENSE OR STATE ISSUE --

3 THE COURT: THAT'S A PUBLIC BENEFIT. A DRIVER'S
4 LICENSE IS A PUBLIC BENEFIT TO PROTECT THE PUBLIC ON THE
5 HIGHWAY.

6 BUT WITH RESPECT TO -- I SEE LANDLORD/TENANT IN
7 NONPUBLIC HOUSING TO BE NOT A PUBLIC BENEFIT. CORRECT ME IF
8 I'M WRONG WITH THAT.

9 MR. LINCOLN: YOUR HONOR, THAT'S CORRECT. IT IS A
10 NONPUBLIC BENEFIT. I DO NOT KNOW. I DO NOT KNOW THE ANSWER
11 TO YOUR QUESTION.

12 THE COURT: THANK YOU.

13 MR. LINCOLN: JUST BRIEFLY RESPONDING TO SOME OF THE
14 CASES THAT THEY CITED. THEY CITED THE CARMONA CASE, WHICH
15 IS -- AS THEY DESCRIBED IT, HAD TO DO WITH WHETHER A
16 LEGISLATOR OR SOMEONE WHO DRAFTED LEGISLATION COULD GIVE AN
17 OPINION. AGAIN, THERE IS A LOT OF LEGISLATIVE -- A LOT OF
18 HISTORY AS TO WHEN YOU CAN AND CANNOT USE THE STATEMENTS OF A
19 LEGISLATOR.

20 BUT THIS IS NOT THE STATEMENTS OF A LEGISLATOR.
21 THIS IS NOT THE STATEMENT OF A SINGLE CITY COUNCILMAN OR
22 MEMBER WHO ENACTED THIS ORDINANCE. THIS IS THE STATEMENT,
23 THE OPINION, THE INTERPRETATION MEMORANDUM OF THE CITY
24 MANAGER, WHO WAS CHARGED UNDER THE CITY OF ESCONDIDO
25 ORDINANCES WITH ENFORCING THAT LAW.

COMPUTER-AIDED TRANSCRIPTION

1 THE COURT: WHAT'S YOUR TAKE ON PLAINTIFFS' POSITION
2 THAT, YOU KNOW, THE MEMORANDUM SHOULD BE GIVEN LITTLE WEIGHT,
3 IF ANY, BECAUSE IT WAS, I TAKE IT FROM THE PLAINTIFFS,
4 CREATED IN LIGHT OF THIS LITIGATION?

5 MR. LINCOLN: WELL, CLEARLY IT WAS CREATED TO ANSWER
6 SOME QUESTIONS. AND THE QUESTIONS WERE RAISED IN THIS
7 LITIGATION.

8 ONE OF THE PROBLEMS THAT THEY HAVE RAISED IS THE
9 CONFUSION OVER THIS ORDINANCE. AND LOOKING AT THE ORDINANCE,
10 IN CONNECTION WITH THE ORDINANCE BEING ATTACKED IN THIS CASE,
11 AND IN CONNECTION WITH THE ORDINANCE GOING INTO EFFECT, THERE
12 HAD TO BE SOME DECISIONS MADE.

13 THERE IS NO QUESTION THAT THE TIMING OF THIS
14 DECISION WAS THAT IT WAS MADE LAST WEEK, WHICH IS A WEEK
15 BEFORE THE ORDINANCE WAS GOING TO GO INTO EFFECT. AND WAS
16 DELIVERED FROM THE CITY MANAGER TO THE BUSINESS LICENSE
17 DIVISION, WHICH IS EXACTLY THE NORMAL WAY IN WHICH THIS TYPE
18 OF INTERPRETATION WOULD COME OUT.

19 THIS PROBABLY WILL NOT BE THE LAST INTERPRETATION.
20 THERE WILL BE OTHER ISSUES THAT ARISE. THERE WILL BE
21 QUESTIONS THAT ARE NOT DIRECTLY SET FORTH IN THE ORDINANCE,
22 AND THERE WILL BE QUESTIONS OF HOW THE ORDINANCE IS TO BE
23 INTERPRETED. WE ANTICIPATE THAT THERE WOULD BE ADDITIONAL
24 MEMORANDUM ISSUED BY THE CITY MANAGER.

25 ALL I CAN SAY IS THAT WE BELIEVE THAT THIS

COMPUTER-AIDED TRANSCRIPTION

1 MEMORANDUM WILL BE ENFORCED. THAT THIS IS THE WAY WE, THE
2 CITY, INTENDS TO INTERPRET IT, ASSUMING IT GOES INTO FORCE
3 TOMORROW.

4 THE COURT: WHAT IS YOUR TAKE ON THE RIGHTS, IF ANY,
5 OF THE TENANT HAVING A SAY WITH RESPECT TO BEING IDENTIFIED
6 AS UNDOCUMENTED PRIOR TO AN EVICTION HEARING?

7 MR. LINCOLN: IT'S INTERESTING THAT, IDENTIFIED AS
8 BEING UNDOCUMENTED. I THINK WE QUOTED, OR AT LEAST MADE
9 REFERENCE IN OUR MEMORANDUM TO AN OPINION FROM THE DEPARTMENT
10 OF HOUSING, I BELIEVE IT WAS; YES.

11 THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
12 HAS STATED, ACTUALLY IN RESPONSE TO SOME QUESTIONS THAT AROSE
13 AFTER 9/11, AS TO -- THEY WERE ASKED WHETHER OR NOT YOU CAN
14 ASK HOUSING APPLICANTS, AND THEY WEREN'T JUST TALKING ABOUT
15 FEDERAL HOUSING, ASKING HOUSING APPLICANTS TO PROVIDE
16 DOCUMENTATION OF THEIR CITIZENSHIP DURING THE SCREENING
17 PROCESS.

18 AND THEY SAID, YOU KNOW, AT LEAST THAT'S NOT GOING
19 TO VIOLATE THE FAIR HOUSING ACT. THAT'S ALL THAT THEY OPINED
20 ON. BUT THEY WERE ASKED, WOULD IT VIOLATE THE FAIR HOUSING
21 ACT, AND THEY SAID, NO.

22 THEY INDICATED THAT THIS IS THE TYPE OF THING THAT A
23 LANDLORD, DWELLING UNIT OWNER CAN ASK. JUST AS HE NOW ASKS
24 PEOPLE, WHEN THEY ENTER IN, FOR CREDIT AND OTHER THINGS. HE
25 CAN ASK THIS QUESTION. AT LEAST THAT WAS THE OPINION OF THE

COMPUTER-AIDED TRANSCRIPTION

1 HOUSING AND URBAN DEVELOPMENT.

2 I THINK THAT THAT IS THE TYPE OF QUESTION THAT THE
3 CITY AUTHORIZES TO BE -- AND AGREES WOULD BE THE SAFE HARBOR.
4 IF A DWELLING UNIT OWNER, IN A PRE-SCREENING, SOMEONE WANTS
5 TO RENT, AND THEY SAY, OKAY, WE NEED YOUR CREDIT RECORDS, WE
6 NEED YOUR REFERENCES, AND, OH, BY THE WAY, UNDER THE CITY'S
7 ORDINANCE, WE DON'T WANT TO BE ACCUSED OF HARBORING, JUST
8 SHOW US YOU'RE A CITIZEN, SHOW THAT YOU'RE A LEGAL IMMIGRANT.

9 THE COURT: HOW WOULD THAT PLAY OUT IF THERE WAS A
10 LAWSUIT AND THAT TENANT, THAT PROSPECTIVE TENANT SUED
11 UNDER STATE -- WELL, UNDER CALIFORNIA CONSTITUTION OR THE
12 U.S. CONSTITUTION FOR REFUSING HOUSING? HOW WOULD THAT PLAY
13 OUT?

14 WOULD THERE BE AN EXCUSE, THAT IT'S A CITY
15 ORDINANCE? WOULD THE LANDLORD BE EXEMPT FROM LIABILITY, OR
16 WOULD THE LANDLORD GET TO BRING THE CITY IN BECAUSE IT'S
17 FOLLOWING THE CITY'S DICTATES?

18 MR. LINCOLN: FIRST OF ALL, I THINK THAT, TO THE
19 EXTENT THAT THE CALIFORNIA CONSTITUTION WAS QUOTED AS GIVING
20 RIGHTS TO ALIENS, I THINK THAT TO THE EXTENT THAT THAT'S
21 TRUE, I THINK IT DOES GIVE RIGHTS TO ALIENS. BUT IT DOES NOT
22 GIVE THE RIGHT TO HARBOR ILLEGAL ALIENS. THAT IS A FEDERAL
23 LAW. AND TO THE EXTENT THAT THE CALIFORNIA CONSTITUTION
24 WOULD BE INTERPRETED OF DOING THAT, IT WOULD BE PREEMPTED.

25 THE FEDERAL LAW IS YOU CANNOT GIVE -- YOU CANNOT

COMPUTER-AIDED TRANSCRIPTION

HARBOR ILLEGAL ALIENS.

THE COURT: SO YOU'RE SAYING THAT IF A PROSPECTIVE TENANT WAS DENIED A RENTAL UNIT BECAUSE OF HIS UNLAWFUL STATUS, AND HE SUED -- HE SUED THE LANDLORD, THE LANDLORD WOULD HAVE TO DEFEND BY SAYING THAT HE HAD A RIGHT NOT TO LEASE IN ORDER TO AVOID SUFFRAGE UNDER THE LOCAL ORDINANCE?

MR. LINCOLN: YES.

THE COURT: ALL RIGHT. WHO PAYS FOR THAT LAWSUIT WHEN HE'S FOLLOWING CITY LAW?

MR. LINCOLN: WELL, I THINK --

THE COURT: WOULDN'T THAT BE AN INJURY THAT HE CAN CONTEMPLATE, PROSPECTIVELY?

MR. LINCOLN: IF THERE WAS A SUIT BY THE PROSPECTIVE TENANT AGAINST THE -- YOU'RE SAYING THAT THERE IS A SUIT BY THE PROSPECTIVE TENANT AGAINST THE LANDLORD?

THE COURT: AGAINST THE LANDLORD WHO IS ATTEMPTING TO ABIDE BY THE ORDINANCE. THE LANDLORD IS SUED.

MR. LINCOLN: YES.

THE COURT: AND THE LANDLORD IS OUT OF MONEY TO DEFEND THE LAWSUIT, BECAUSE OF THE CITY ORDINANCE. WHAT PROVISIONS -- I MEAN, ISN'T THAT A LOSS OF PROPERTY OR DEPRIVATION WITHOUT A HEARING?

ISN'T THAT A LOSS, ISN'T THAT A DEPRIVATION, EVEN THOUGH THE CITY ISN'T INVOLVED, BECAUSE THEY ARE FOLLOWING THE CITY'S DICTATES?

COMPUTER-AIDED TRANSCRIPTION

MR. LINCOLN: I'M TRYING TO FIT IT INTO THE --

THE COURT: THIS GOES MORE TO HARM, IRREPARABLE HARM.

MR. LINCOLN: YEAH.

THE COURT: EXCUSE ME. THE MATTER JUST CAME UP IN MY MIND.

MR. LINCOLN: YEAH. I'M TRYING TO FIT IT INTO THE CIVIL RIGHTS ANALYSIS.

I MEAN, THERE IS, AS PLYLER ITSELF SAID, WHERE TEXAS WAS GOING TO DENY RIGHTS TO UNDOCUMENTED SCHOOLCHILDREN --

THE COURT: YES.

MR. LINCOLN: -- THEY HELD THEY COULDN'T DENY THEM, BUT THEY DID IT, NOT BECAUSE OF PREEMPTION, BUT RATHER A DENIAL OF EQUAL PROTECTION. AND THE EQUAL PROTECTION, THEY REALLY LIMITED TO THE FACT THAT THEY WERE KIDS. I MEAN, THE LANGUAGE IN THERE IS PRETTY CLEAR.

UNDOCUMENTED STATUS IS NOT IRRELEVANT TO ANY PROPER LEGISLATIVE GOAL. HERE, THE DIFFERENCE IS, IT WAS DIRECTED AGAINST CHILDREN.

THE COURT: I UNDERSTAND THAT. I UNDERSTAND THAT, COUNSEL. MAYBE WE CAN GET BACK TO THAT CASE IN A MOMENT.

BUT WITH RESPECT TO THE ONE AT ISSUE, IF A LANDLORD IS SUED BECAUSE THE LANDLORD IS FOLLOWING PROSPECTIVELY THE CITY ORDINANCE, THEY HAVE GOT TO HIRE A LAWYER, THEY HAVE GOT TO FILE MOTIONS TO DISMISS, BASED UPON THE CITY ORDINANCES,

COMPUTER-AIDED TRANSCRIPTION

AS AN EXCUSE FOR THE DISCRIMINATION, THE ALLEGED DISCRIMINATION. THEY ARE OUT OF POCKET. THEY CAN BE OUT OF POCKET EVERY OTHER DAY.

AND WHAT DOES THE CITY DO ABOUT THAT? WHY ISN'T THAT A DEPRIVATION OF PROPERTY TO A LANDLORD BORNE PROSPECTIVELY, EVEN IF THIS ORDINANCE IS VIEWED PROSPECTIVELY?

MR. LINCOLN: WELL, FIRST OF ALL, IF -- AT THE POINT AT WHICH HE WOULD BE SUED BECAUSE HE DENIED THE -- IF HE WAS USING THE SAFE HARBOR, IF HE WAS USING THE SAFE HARBOR, HE WOULD HAVE GOTTEN FROM THE FEDERAL GOVERNMENT A STATEMENT THAT THIS WAS, IN FACT, AN ILLEGAL IMMIGRANT.

THE COURT: SO -- BUT HE'S STILL SUED. HE'S STILL SUED BY THE PERSON WHO IS DENIED THE HOUSING. AND HE'S BEING SUED BECAUSE OF THE CITY ORDINANCE.

MR. LINCOLN: BUT --

THE COURT: THE LANDLORD IS BEING SUED BECAUSE HE OR SHE FOLLOWED THE CITY ORDINANCE.

MR. LINCOLN: WELL --

THE COURT: EVEN IF IT'S DISMISSED -- MAYBE IT WILL BE. I'M NOT JUDGING THAT -- BUT THERE IS OUT-OF-POCKET COSTS. AND IT COULD HAPPEN EVERY DAY.

IF THE LANDLORDS IN THE CITY OF ESCONDIDO HAD THE CHILLING EFFECT OF SUFFERING LOSS OF RENTS AND SUCH, ON ONE HAND, AND SUITS ON THE OTHER, IF THEY DENIED OCCUPANCY, THEY

COMPUTER-AIDED TRANSCRIPTION

ARE OUT-OF-POCKET EITHER WAY AS A RESULT OF THE ORDINANCE, EVEN GOING FORWARD, WOULDN'T YOU SAY?

MR. LINCOLN: TO SOME EXTENT, IT'S THE SAME QUESTION AS IN THE FIELD OF EMPLOYMENT.

THE COURT: EXCUSE ME. EXCUSE ME. MR. GARRETT, IF YOU'D LIKE TO RESPOND TO THAT.

MR. GARRETT: I HAVE A SHORT ANSWER. HOPEFULLY IT WILL BE THE SAME AS MR. LINCOLN.

THE COURT: I'LL LEAVE IT UP TO YOU. THIS IS THE AREA THAT YOU ADDRESSED, AND WITH RESPECT, YOU MAY ADDRESS THIS QUESTION IF YOU'D LIKE.

MR. GARRETT: THE ANSWER TO YOUR QUESTION, YOUR HONOR, IS, YES, THE LANDLORD COULD SUFFER COST FROM IT, AND THAT WOULD BE A CONSEQUENCE OF THE ORDINANCE. BUT IT'S NO DIFFERENT THAN ANY OTHER MUNICIPAL REGULATION OF THE BUSINESS OF BEING A LANDLORD.

FOR EXAMPLE, IF THE CITY INSPECTORS SAY THAT THE UNIT THAT YOU'VE RENTED TO THIS PERSON IS SUBSTANDARD, DOESN'T HAVE THE PROPER VENTILATION OR THE PLUMBING THAT WE REQUIRE, YOU CAN'T RENT THIS UNIT. THE LANDLORD THEN EVICTS THE TENANT, OR SAYS, I CAN'T RENT THE UNIT TO YOU, THE TENANT, BECAUSE IT'S SUBSTANDARD. THE TENANT SUES AND SAYS, YOU DISCRIMINATED AGAINST ME. IT WAS IMPROPER.

ANYBODY CAN BE SUED. THEY MAY SUFFER CONSEQUENCES OF THAT, FROM BEING A LANDLORD. BUT THE FACT IS, THE CITY

COMPUTER-AIDED TRANSCRIPTION

1 STILL HAS TO HAVE THE POWER TO REGULATE THE LANDLORDS'
2 BUSINESS, HAS THE ABILITY TO DO THAT.

3 THE COURT: AND THE CITY IS IMMUNE FROM SUIT, I
4 WOULD ASSUME, IF IT'S ENFORCING THE REGULATIONS IN THAT
5 REGARD?

6 MR. GARRETT: WELL, ANYONE CAN FILE A LAWSUIT AT ANY
7 TIME. AS MR. LINCOLN CAN TELL YOU, HE'S DEFENDED MANY
8 LAWSUITS THAT HAVE BEEN FILED AGAINST THE CITY OF ESCONDIDO
9 ON A NUMBER OF THINGS.

10 BUT I THINK OUR POSITION WOULD BE THAT IT WOULD NOT
11 BE A RECOVERABLE COST. AND THE CITY FEELS, AS A POLICY
12 MATTER, IT'S APPROPRIATE TO PUT LANDLORDS IN THAT POSITION,
13 BECAUSE THEY ARE RELYING EXCLUSIVELY ON THE DOCUMENTATION
14 THAT COMES FROM THE FEDERAL GOVERNMENT BY FEDERAL STATUTE,
15 MR. LINCOLN WILL TELL YOU --

16 THE COURT: 1373.

17 MR. GARRETT: -- THEY HAVE TO RESPOND TO ALL
18 INQUIRIES FROM LOCAL AGENCIES. AND THAT'S THE SAME STATUTE
19 THAT WILL ALLOW PEOPLE TO BE DENIED DRIVER'S LICENSES, TO
20 ALLOW -- DENY A NUMBER OF OTHER PRIVILEGES, AND THAT'S WHAT
21 THE CITY IS UTILIZING.

22 SO, YES, THE LANDLORD, IN THE BUSINESS OF BEING A
23 LANDLORD, SUFFERS THE POSSIBILITY THAT HE COULD BE SUED BY
24 TENANTS AS A RESULT OF DECISIONS HE HAS TO MAKE, TO IMPLEMENT
25 THE CITY'S REGULATION OF HIS BUSINESS.

COMPUTER-AIDED TRANSCRIPTION

1 THE COURT: AND I ASSUME, THEN, SIR, THE LANDLORD
2 WOULD NOT BE AN AGENT OF THE CITY TO BE IMMUNE AS A CITY
3 OFFICIAL MIGHT BE FOR UNDERTAKING THE SAME CONDUCT?

4 MR. GARRETT: I CAN SAY THAT MOST DEFINITELY.
5 PEOPLE IN A REGULATED COMMUNITY DO NOT BECOME THE AGENTS OF
6 THE CITY BY VIRTUE OF THAT REGULATION.

7 THE COURT: THANK YOU, SIR.

8 MR. LINCOLN: JUST VERY BRIEFLY.

9 IN RESPONSE TO THE POINT ABOUT WHETHER OR NOT THIS
10 ORDINANCE MEETS THE DECANAS TEST, THE CITY, OF COURSE,
11 DISAGREES. WE BELIEVE THAT THE FIRST PRONG IS, IS IT AN
12 INVALID REGULATION OF IMMIGRATION ONLY APPLIES IF WE'RE THE
13 ONES DETERMINING, IF THE CITY IS THE ONE THAT'S DETERMINING.
14 HERE, UNDER THE ORDINANCE, IT'S CLEAR IT'S NOT THE CITY
15 DETERMINING, BUT IT'S A FEDERAL DETERMINATION.

16 THE REFERENCE HE MADE TO THE HINES CASE, THAT WAS A
17 CASE WHERE THERE WAS A PARTICULAR -- THERE WAS A COMPLETE
18 PARALLEL SYSTEM SET UP BY THE STATE OF PENNSYLVANIA. HERE,
19 WE'RE USING THE FEDERAL SYSTEM. AND IT'S ONLY UPON
20 VERIFICATION BY THE FEDERAL GOVERNMENT THAT ACTION WILL BE
21 TAKEN.

22 UNDER THE SECOND PRONG, THE QUESTION IS WHETHER
23 CONGRESS CLEARLY INTENDED TO OCCUPY THIS FIELD. AGAIN, TO
24 SOME EXTENT, IT DEPENDS ON WHAT FIELD YOU SAY IT IS, YOU
25 DEFINE. IF THE FIELD IS LANDLORD/TENANT RELATIONSHIPS,

COMPUTER-AIDED TRANSCRIPTION

1 CERTAINLY THAT'S AN AREA THAT HAS HISTORICALLY BEEN LEFT TO
2 STATE AND LOCAL CONTROL. CLEARLY MANY, MANY QUESTIONS --
3 MANY CASES ON THAT. IF IT'S A BLIGHT, AGAIN, IT'S BEEN LEFT
4 TO THE LOCAL CONTROLLER.

5 HERE, THERE ARE VERY FEW FEDERAL CLAUSES THAT AFFECT
6 THE RELATIONSHIP BETWEEN --

7 THE COURT: EXCUSE ME. IN THAT REGARD, I HAVE TO
8 ASK THIS QUESTION AGAIN. MAYBE YOU'VE ADDRESSED IT.

9 CAN THE LOCAL GOVERNMENT IMPOSE A LANDLORD/TENANT
10 CAUSE OF ACTION, OR ADD A CAUSE FOR EVICTION, THAT'S NOT
11 CONTAINED IN STATE LAW?

12 MR. LINCOLN: I DON'T BELIEVE SO.

13 THE COURT: SO IS BEING AN ILLEGAL ALIEN A CAUSE FOR
14 A CONVICTION IN STATE LAW -- CAUSE FOR EVICTION? EXCUSE ME.

15 MR. LINCOLN: THAT IS A QUESTION WHICH, YOUR HONOR,
16 WILL BE, I THINK, EXTENSIVELY BRIEFED IN THE FUTURE. THE
17 ARGUMENT WOULD BE THAT THERE IS -- IT'S AN ILLEGAL CONTRACT.

18 IF HARBORING -- AND YOU CAN HARBOR WITHOUT INTENT.
19 IF HARBORING IS ILLEGAL, THEN MOST LEASES SAY YOU CAN'T
20 ENGAGE IN ILLEGAL CONDUCT. AND IF THAT'S ILLEGAL CONDUCT,
21 THE ANSWER IS IT MAY BE. WE DON'T KNOW. WE AREN'T TRYING TO
22 CHANGE AND DECIDE LANDLORD/TENANT LAW ON THIS.

23 ALL WE'RE SAYING IS THAT IF YOU DO THAT, YOU HAVE TO
24 DO SOMETHING. YOU HAVE TO AT LEAST TRY. AND THAT'S WHAT
25 THE -- UNDER THE INTERPRETATION MEMO, REMEMBER, ONE OF THE

COMPUTER-AIDED TRANSCRIPTION

1 RESPONSES WITHIN THAT TEN-DAY PERIOD IS THAT THEY ARE
2 COMMENCING PROCEEDINGS. REMEMBER, THERE HAS ALREADY BEEN A
3 DETERMINATION BY THE FEDERAL GOVERNMENT OF ILLEGAL STATUS;
4 AND NOW, WITH THE ILLEGAL STATUS, THEY ARE COMMENCING THIS
5 PROCEDURE.

6 WHETHER THE STATE COURTS WILL UPHOLD IT OR NOT,
7 THAT'S -- THAT HAS NOT BEEN DECIDED, I DON'T THINK. WE THINK
8 IT'S SOMETHING CERTAINLY ARGUABLY THAT THEY SHOULD.

9 FINALLY, THE QUESTION UNDER DECANAS IS, IS THE
10 ORDINANCE AN OBSTACLE TO THE ENFORCEMENT OF FEDERAL
11 IMMIGRATION LAW? THE ORDINANCE COULDN'T SAY IT ANY CLEARER.

12 IT SAYS, IN THE CONSTRUCTION PROVISION, THAT THE
13 REQUIREMENTS OF THIS SECTION SHALL BE IMPLEMENTED IN A MANNER
14 FULLY CONSISTENT WITH FEDERAL LAW, RELATING TO IMMIGRATION.
15 IT CLEARLY IS NOT INCONSISTENT AND IS HARMONIOUS WITH THE
16 FEDERAL LAW.

17 YOUR HONOR, WE BELIEVE THAT THEY ARE LOOKING AT THE
18 PROBABILITY OF SUCCESS ON THE MERITS. THAT THE LAW DOES MEET
19 THE REQUIREMENTS. THAT IT IS NOT PREEMPTED. IT IS NOT
20 CONTRARY TO DUE PROCESS OR EQUAL PROTECTION. AND THAT THIS,
21 THEREFORE, WHEN PEEKING AT THE MERITS, WHICH IS WHAT WE
22 UNDERSTAND THE COURT DOES ON A T.R.O., YOU SHOULD FIND THAT
23 THIS ORDINANCE MEETS THOSE TESTS.

24 THE COURT: THANK YOU, COUNSEL.

25 IS THERE A REPLY?

COMPUTER-AIDED TRANSCRIPTION

1 MR. TENCER: THANK YOU, YOUR HONOR.

2 THE COURT: MR. TENCER.

3 MR. TENCER: IT'S INTERESTING, YOUR HONOR, THAT
4 MR. LINCOLN IN HIS ARGUMENT STATED THAT THE PRACTICE OF THE
5 CITY AND THE CITY MANAGER IS TO ISSUE THESE INTERPRETIVE
6 MEMORANDUMS. THAT EVIDENCE IS NOT BEFORE THIS COURT.

7 DURING THE ARGUMENT, I WENT AND TOOK THE TIME TO
8 READ THE DECLARATION OF MR. PHILLIPS. AND NOWHERE IN THAT
9 DECLARATION DOES HE STATE THAT IT'S HIS PRACTICE TO ISSUE
10 THESE INTERPRETIVE MEMORANDUMS. WHILE THAT FACT WHILE IN
11 ARGUMENT IS NOT A FACT THAT'S BEFORE THIS COURT.

12 AND I CAN REPRESENT TO THIS COURT THAT I PERSONALLY,
13 MY CO-COUNSEL SPENT A LOT OF TIME ON THE ESCONDIDO CITY
14 WEBSITE. WE'VE SPENT A LOT OF TIME LOOKING AT THEIR CODES.
15 AND IF IT WOULD PLEASE THE COURT, I'VE GOT A COPY OF THE
16 ARTICLE OF THE CITY MANAGER OF ESCONDIDO THAT HAS ALL OF THE
17 ORDINANCES THAT PERTAIN TO HIS RESPONSIBILITIES AND RULES.
18 AND I CAN HAND IT UP TO THE COURT --

19 THE COURT: NO. JUST SHARE WITH ME WHAT YOU THINK
20 IS PERTINENT.

21 MR. TENCER: THANK YOU, YOUR HONOR.

22 LOOKING AT THE CITY WEBSITE, THERE IS NOT A SINGLE
23 PLACE THAT YOU WILL FIND AN INTERPRETIVE MEMO. THERE IS NOT
24 THIS INTERPRETIVE MEMO. THERE IS NOT AN INTERPRETIVE MEMO
25 WITH RESPECT TO ANY OTHER ORDINANCE PASSED BY THE CITY OF

COMPUTER-AIDED TRANSCRIPTION

1 ESCONDIDO.

2 SO TO THE EXTENT THAT IT'S MEANT TO CLARIFY SOME
3 CONFUSION OUT THERE, I WOULD SUBMIT THAT THE CITY IS NOT
4 DOING A VERY GOOD JOB OF DISSEMINATING ITS CLARIFICATION MEMO
5 TO THE FAIR CITIZENS OF THE CITY OF ESCONDIDO.

6 THE ORDINANCE SECTIONS OF -- WITH RESPECT TO THE
7 CITY MANAGER, ONLY TO THE EXTENT THAT YOU INTERPRET IT TO
8 ALLOW FOR THIS INTERPRETATION MEMO TO BE GIVEN THE POWER.
9 IT'S CERTAINLY NOT EXPLICIT. THEY WANT -- DEFENSE ARGUES
10 THAT IT IS EXPLICIT IN PROVISIONS OF THIS ORDINANCE.

11 BUT EVEN IF THE POWER TO INTERPRET IS IMPLICIT, YOU
12 ALSO HAVE TO GET TO THE POINT THAT IT'S IMPLICIT THAT THAT
13 INTERPRETATION HAS BINDING EFFECT ON THE CITY AND ON ITS
14 PEOPLE IN ORDER TO BE ABLE TO AFFORD ANY WEIGHT OR EFFECT TO
15 THAT INTERPRETATION, ASSUMING THAT YOU COULD OVERCOME THE
16 PROBLEM THAT WE'VE ALREADY MENTIONED, AND THAT IS, THAT IT
17 WAS DONE AFTER THE LITIGATION. AND AS DEFENSE COUNSEL
18 RECOGNIZED, IT WAS DONE IN RESPONSE TO THE SERIOUS ISSUES
19 THAT WERE RAISED BY THIS LAWSUIT.

20 SECOND, YOUR HONOR, MR. GARRETT OFFERS THAT THIS
21 ORDINANCE IS A LANDLORD ORDINANCE. WELL, THAT'S NOT WHAT THE
22 ORDINANCE SAYS. IN FACT, IN PARAGRAPH 4 OF THE ORDINANCE, IT
23 SAYS THAT THE STATE AND FEDERAL GOVERNMENT LACKS THE
24 RESOURCES TO PROPERLY PROTECT THE CITIZENS OF ESCONDIDO FROM
25 THE ADVERSE EFFECTS OF THE HARBORING OF ILLEGAL ALIENS AND

COMPUTER-AIDED TRANSCRIPTION

1 THE CRIMINAL ACTIVITIES OF SOME ILLEGAL ALIENS.

2 THAT'S NOT DEALING WITH LANDLORDS, YOUR HONOR.
3 THAT'S DEALING WITH ILLEGAL ALIENS AND THE ADVERSE EFFECTS
4 THEREOF.

5 MR. GARRETT ALSO WENT ON TO ARGUE THAT THE ORDINANCE
6 AS WRITTEN, WITH RESPECT TO THE INTERNAL MEMORANDUM, IS IN
7 SECTION A. IT ONLY APPLIES TO LETS, LEASE OR RENT OF A
8 DWELLING UNIT, AND, THEREFORE, IT ONLY APPLIES IN THE FUTURE,
9 TO FUTURE LEASES, LETS OR RENTS. BUT THE ORDINANCE DOESN'T
10 STOP THERE.

11 IT ALSO SAYS, TO SUFFER OR PERMIT THE OCCUPANCY.
12 AND THAT WOULD OCCUR AS OF TOMORROW, IF THE ORDINANCE GOES
13 INTO EFFECT. IF THERE IS AN ILLEGAL ALIEN LIVING IN A HOUSE,
14 WHETHER HE IS THE TENANT ON THE LEASE, WHETHER HE IS A GUEST
15 OR SHE IS A GUEST, OR WHETHER THEY ARE A RELATIVE STAYING IN
16 THIS PROPERTY, THAT WOULD BE TO SUFFER OR TO PERMIT.

17 NOW, THE CITY REPRESENTS THAT THEY ARE NOT GOING TO
18 ENFORCE THIS ORDINANCE, ACCORDING TO THE INTERNAL MEMORANDUM,
19 TO CURRENT TENANCIES. BUT NOWHERE DO THEY EXPLAIN THAT THAT
20 WOULD -- HOW THE CITY WOULD FIGURE THAT OUT.

21 SO IF YOU THINK OF A SCENARIO, YOU GET A COMPLAINT
22 ON A SATURDAY, AND THE COMPLAINT IS A SIGNED COMPLAINT, AS
23 REQUIRED, AND WHATEVER THE INFORMATION IS THAT IS SUFFICIENT,
24 WE DON'T REALLY KNOW. WE KNOW WHAT IT'S SUPPOSED TO NOT DO,
25 WHICH IS IT'S NOT SUPPOSED TO BE BASED SOLELY OR PRIMARILY ON

COMPUTER-AIDED TRANSCRIPTION

1 NATIONAL ORIGIN, ETHNICITY OR RACE, BUT IT DOESN'T SAY THAT
2 IT CAN'T BE A MAJOR FACTOR. CERTAINLY IT DOESN'T SAY THAT.

3 AND SO THEY GET THIS COMPLAINT, AND THEY NOW REQUIRE
4 OF THE LANDLORD TO RESPOND WITHIN FIVE DAYS WITH IDENTIFYING
5 INFORMATION. THEY DON'T GIVE THE COMPLAINT TO THE LANDLORD,
6 BECAUSE IT'S NOT REQUIRED. BUT THEY SAY, MR. LANDLORD, YOU
7 NEED TO TURN OVER THIS INFORMATION. AND THE LANDLORD SAYS, I
8 DON'T. IT'S A CURRENT TENANCY. I DON'T NEED TO RESPOND TO
9 YOU.

10 IT DOESN'T SAY THAT. WHAT IT SAYS IS IF YOU DON'T
11 RESPOND IN FIVE DAYS, YOU'RE IN VIOLATION OF THIS ORDINANCE.
12 AND NOT ONLY THAT, IF YOU DON'T -- ON THE SIXTH DAY, IF YOU
13 DON'T RESPOND, YOU'RE NOW IN VIOLATION -- IT'S YOUR SECOND
14 VIOLATION, AND, THEREFORE, YOU'RE SUBJECT TO FINES OF UP TO
15 \$1,000 AND SIX MONTHS IN JAIL. AND YOU'RE SUBJECT TO THOSE
16 FINES EVERY SINGLE DAY THEREAFTER THAT YOU DO NOT RESPOND TO
17 OUR REQUEST OF THIS SIGNIFICANT INFORMATION ABOUT THIS
18 PERSON.

19 AND THE INFORMATION THAT THEY ASK FOR IS INFORMATION
20 IN THE SAVE DATABASE. WHICH THEY HAVEN'T PUBLISHED WHAT THE
21 SAVE DATABASE REQUIRES. IT'S -- BUT I CAN REPRESENT TO THE
22 COURT THAT ONE OF THE THINGS IT DOES REQUIRE IS NATIONAL
23 ORIGIN. WHAT COUNTRY ARE YOU FROM. AND UNDER THE FAIR
24 HOUSING LAWS, YOUR HONOR, THAT'S AN ILLEGAL QUESTION TO ASK.
25 THEY CANNOT ASK THAT QUESTION.

COMPUTER-AIDED TRANSCRIPTION

WE DIDN'T GET INTO THOSE ISSUES FOR PURPOSES OF THE T.R.O., BECAUSE IT WASN'T GERMANE. BUT NOW THAT THEY SAY THEY ARE GOING TO RELY UPON IT, I CAN REPRESENT THAT THAT IS AN ILLEGAL QUESTION. AGAIN, PUTTING THE LANDLORD, ON SATURDAY, IN A DIFFICULT PLACE. EITHER VIOLATING THE FAIR HOUSING LAWS OR NOT FULLY RESPONDING AS REQUIRED UNDER THE INTERPRETIVE MEMO, OR ANY OTHER DEFINITION AS THIS ORDINANCE IS WRITTEN, TO THE INFORMATION THAT THE CITY OF ESCONDIDO SAYS IT'S GOING TO REQUIRE OF THE LANDLORDS.

THAT, I WOULD SAY TO YOU, IS AN IRREPARABLE HARM, THAT PUTS A LANDLORD BETWEEN A ROCK AND A HARD PLACE. HE'S EITHER COMPLYING WITH THE FAIR HOUSING LAWS OR COMPLYING WITH THIS ORDINANCE.

I BELIEVE MY CO-COUNSEL HAS A FEW POINTS AS WELL, YOUR HONOR.

THE COURT: THANK YOU, COUNSEL.

MR. MANSFIELD: YOUR HONOR, JUST TWO QUICK POINTS.

IN RESPONSE TO COLLOQUY THAT YOU ENGAGED IN BOTH WITH MR. LINCOLN AND MR. GARRETT, THE QUESTION WAS RAISED ABOUT WHAT IMPACT THIS HAD -- WHAT IMPACT THIS WOULD HAVE ON A LANDLORD, IF THE LANDLORD'S DEFENSE WAS, WELL, I HAD THIS ORDINANCE.

AND I ULTIMATELY BELIEVE THAT THE CITY RECOGNIZED, OR ACCEPTED THE PROPOSITION THAT THE LANDLORD WOULD BE EXPOSED TO A LITIGATION RISK AND POTENTIAL LOSS AS A RESULT

COMPUTER-AIDED TRANSCRIPTION

OF THAT.

I ONLY RAISE THIS BECAUSE THE COLUMBIA BASIN APARTMENT ASSOCIATION DECISION FROM THE NINTH CIRCUIT, CITED IN OUR BRIEF, SPECIFICALLY ADDRESSES THAT ISSUE. WHERE THERE WAS A LANDLORD WHO WAS REQUIRED, UNDER A LOCAL ORDINANCE, TO TAKE CERTAIN ACTIONS THAT POTENTIALLY COULD VIOLATE THE RIGHTS OF THE TENANTS.

AND IN THAT DECISION, THE COURT SPECIFICALLY SAID, IMPERMISSIBLY THREATENING LANDLORDS WITH THE DEPRIVATION OF PROPERTY AND CIVIL PENALTIES IF THEY ARE UNWILLING TO VIOLATE THE FOURTH AMENDMENT RIGHTS OF THEIR TENANTS, GIVES RISE TO STANDING TO SEEK INJUNCTIVE RELIEF.

THIS CASE WENT ON TO SAY THAT ENFORCEMENT OF THE ORDINANCE EXPOSES THE LANDLORDS TO THE RISK OF LITIGATION, AND SPECIFICALLY NOTED THAT THE EXPOSURE OF A LANDLORD TO THE RISK OF LITIGATION, PUTTING THEM IN THAT ROCK AND A HARD PLACE, WHERE THEY EITHER HAVE TO VIOLATE THE ORDINANCE OR VIOLATE THE CONSTITUTIONAL RIGHTS OF ANOTHER, WAS FOUND TO BE SUFFICIENT TO CREATE STANDING.

AND SPECIFICALLY SAID THAT WHERE IT'S LIKELY THESE INJURIES WILL BE REGRESSED BY A DECLARATION OF THE ORDINANCE AS UNCONSTITUTIONAL, THAT CREATES STANDING SUFFICIENT TO CHALLENGE THE STATUTE ISSUES.

SO I THINK THAT, BASED ON THAT COLLOQUY, THE COLUMBIA BASIN APARTMENT ASSOCIATION CASE IS ON POINT, AND

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SPECIFICALLY RECOGNIZES THEIR STANDING AND THEIR ABILITY TO CHALLENGE THIS ORDINANCE.

MY FINAL POINT IS IF WE -- WE'VE HAD A LOT OF TALK ABOUT THE SAVE DATABASE AND WHAT IT REQUIRES AND WHAT IT DOESN'T. I'D ONLY ASK THE COURT TO LOOK AT PAGE 3-5 OF THE EXHIBIT B ATTACHED TO MR. PHILLIPS' DECLARATION, WHICH PROVIDES A LIST OF THE TYPE OF INFORMATION THAT WOULD BE REQUIRED FROM A TENANT. THEIR ALIEN NUMBER, THEIR DATE OF BIRTH, THEIR COUNTRY OF BIRTH, THEIR SOCIAL SECURITY NUMBER, THEIR DATE OF ENTRY, THEIR I.N.S. STATUS.

IT'S THE TYPE OF INFORMATION THAT, IF YOU RECALL FROM THE AMICUS BRIEF, THE ONLY REASON LANDLORDS GET THIS INFORMATION IS BECAUSE IT'S PROTECTED UNDER THE FAIR CREDIT REPORTING ACT; SO THEY ARE FACED WITH VIOLATING THE FAIR CREDIT REPORTING ACT.

THE AMICUS NOTED THAT WE ONLY GET THIS DATA PURSUANT TO THE FAIR CREDIT REPORTING ACT, AND SO, THEREFORE, WE EITHER HAVE TO VIOLATE THE FAIR CREDIT REPORTING ACT, BY PROVIDING THIS VERY DATA, OR VIOLATE THE ORDINANCE, BECAUSE THAT'S WHAT THEY CLAIM THEY NEED IN ORDER TO RESPOND TO THE ORDINANCE.

AND THEN I'D FINALLY NOTE ONE POINT. AT THE VERY END OF THAT EXHIBIT, THERE IS A QUESTION AND ANSWER. IT'S ON PAGES H1 AND H2.

IN H1, THE QUESTION IS RAISED, IS THE APPLICANT AN

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ILLEGAL NONCITIZEN WHEN SECONDARY VERIFICATION IS REQUESTED?

ANSWER: NO. A REQUEST FOR SECONDARY VERIFICATION MERELY MEANS THE PRESENT CLASSIFICATION IN THE COMMUTER DATABASE INDICATES SOMETHING OTHER THAN THEY ARE A LEGAL PERMANENT RESIDENT.

THE OTHER QUESTION WAS, WHAT SAFEGUARDS EXIST TO PREVENT BENEFITS BEING ISSUED BY ISSUING AGENCY? AND THE ANSWER SAYS, IN MOST CASES, A BENEFIT IS NOT DENIED, DELAYED, REDUCED OR TERMINATED BASED SOLELY ON THE RESPONSE FROM PRIMARY. THAT'S WHAT THE SECONDARY VERIFICATION RESPONSE IS FOR.

THE POINT ALL OF THAT BEING, JUST BECAUSE YOU GET A RESPONSE FROM THE SAVE DATABASE DOES NOT SAY THIS PERSON IS AN ILLEGAL ALIEN. IT SPECIFICALLY MERELY SAYS THE DOCUMENTATION WE HAVE DOESN'T INDICATE THAT. THAT'S THE IMPORTANCE OF THE FEDERAL REGISTER, WHERE IT SAYS THAT'S NOT THE PURPOSE. YET, THAT'S THE PURPOSE THEY WANT TO USE IT FOR, AND THAT'S WHY THERE IS A PROBLEM.

AND THAT'S WHY, IRRESPECTIVE OF THE INTERPRETATION MEMO, THE STATUTE IS PREEMPTED UNDER FEDERAL LAW. AND NO MATTER HOW YOU INTERPRET IT, AT LEAST AT THIS POINT IN THE CASE, THERE IS SUBSTANTIAL, SERIOUS QUESTIONS ABOUT THE CONSTITUTIONALITY OF THE STATUTE. AND BECAUSE IT'S GOING TO GO INTO EFFECT IN ABOUT SEVEN HOURS, WE RESPECTFULLY REQUEST THE COURT ISSUE A TEMPORARY RETRAINING ORDER.

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THANK YOU. UNLESS THE COURT HAS ANY QUESTIONS.

THE COURT: NO QUESTIONS.

IS THERE A QUICK RESPONSE?

MR. GARRETT: YES, YOUR HONOR.

THE COURT: SURE. YOU MAY.

MR. GARRETT: VERY QUICKLY, YOUR HONOR. I HAVE FOUR POINTS.

THE POINT WAS MADE THAT THE INTERPRETATION MEMO FROM THE MANAGER HAS BEEN HIDDEN SOMEPLACE. IT IS ON THE WEBSITE. I JUST CHECKED ON MY BLACKBERRY, AND I WAS ABLE TO PULL IT UP ON THE INTERNET BROWSER THAT'S THERE; SO IT'S THERE. AND THE CITY IS NOT AFRAID OF IT. AND IF YOU GO TO THE CITY'S MAIN PAGE, IT'S LISTED RIGHT THERE.

THE COURT: IS IT A PRACTICE TO WRITE MEMORANDUMS, OR IS THIS THE ONLY ONE?

MR. GARRETT: IT IS A PRACTICE TO WRITE MEMORANDUMS. IT IS VERY FREQUENTLY, THE CITY MANAGER INSTRUCTS HIS DEPARTMENT HOW TO PERFORM VARIOUS FUNCTIONS. JUST AS THE PRESIDENT SENDS MEMORANDUMS TO VARIOUS MEMBERS OF THE EXECUTIVE BRANCH. SPECIFICALLY, TO DO INTERPRETIVE MEMORANDUM. THERE ARE MANY OTHERS.

AND I WOULD -- I HAVE TO CONCEDE TO THE PLAINTIFFS, HOWEVER, THAT'S NOT IN OUR PAPERS. BECAUSE IT WAS NOT A POINT THAT WAS MADE IN THEIR PAPERS, BECAUSE WE BROUGHT UP THE INTERPRETATION MEMORANDUM IN OURS.

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THE COURT: AND I DID NOT GIVE THEM AN OPPORTUNITY TO REPLY.

MR. GARRETT: THAT'S CORRECT.

YOUR HONOR, ON THE HEARINGS QUESTION, YOU ASKED A QUESTION I THINK OF ME, AND I THINK WE GAVE YOU A VERY POOR ANSWER.

YOU ASKED, WHERE ARE THE HEARINGS IN THIS, AND ISN'T THERE A PROBLEM OR A HARM THAT COULD HAPPEN BECAUSE PEOPLE ARE NOT BEING GIVEN HEARINGS OVER THESE VARIOUS ISSUES, THINGS ARE BEING TAKEN AWAY FROM THEM, CONSEQUENCES ARE HAPPENING; WHY AREN'T THERE HEARINGS INVOLVED?

I THINK WE HAVE A BETTER ANSWER TO YOUR QUESTION ON PAGE 17 OF OUR PAPERS. THERE ARE REALLY TWO SETS OF HEARINGS THAT ARE GOING ON.

FIRST OF ALL, REMEMBER THIS IS AN ORDINANCE THAT REGULATES LANDLORDS. THERE IS NOT A SINGLE CLAUSE, PHRASE OR SECTION WHICH PURPORTS TO INFLICT A PENALTY ON A TENANT OR DO ANYTHING THAT DIRECTS A TENANT TO DO ANYTHING OR NOT. THE ONLY PENALTY AND THE ONLY REGULATION IS OF THE LANDLORD.

SO THE LANDLORD -- THE CONSEQUENCES THE LANDLORD SUFFERS IS EITHER -- THERE ARE REALLY TWO CONSEQUENCES. ONE THAT IS A PRE-HEARING DEPRIVATION. AND THAT IS THE PROVISION OF THE ORDINANCE WHICH SAYS THE LANDLORD CAN'T COLLECT RENT IF HE'S IN VIOLATION OF THE ORDINANCE IN THAT PARTICULAR DWELLING UNIT.

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BUT HE'S GIVEN -- FOR THAT PARTICULAR ITEM THAT IS DEPRIVED -- AND THE ORDINANCE PROVIDES THAT GOES INTO EFFECT RIGHT AWAY. THERE IS NO DELAYED EFFECTIVENESS ON THAT. THE LANDLORD HAS THE ABILITY, AS WE CITE IN OUR PAPERS, TO FIRST OF ALL APPEAL THE DETERMINATION THAT HE'S IN VIOLATION OF THE ORDINANCE TO THE CHIEF OF THE PLANNING AND BUILDING, I BELIEVE THE ORDINANCE PROVIDES FOR. AND IT'S CITED IN OUR PAPERS.

IF THAT'S NOT SUFFICIENT, HE HAS THE RIGHT TO APPEAL THE DETERMINATION THAT HE'S IN VIOLATION OF THE ORDINANCE AND SUSPENSION OF THE BUSINESS LICENSE TO THE FULL CITY COUNCIL. THAT'S THE NORMAL PROCEDURE THAT'S ALWAYS BEEN IN EFFECT FOR SUSPENSION OF BUSINESS LICENSES.

SO IN THAT SITUATION, IF THE LANDLORD FEELS THAT THE CITY HAS MADE A MISTAKE, HAS DONE SOMETHING WRONG, HE DOESN'T HAVE TO EVICT TENANTS, HE DOESN'T HAVE TO DO ANYTHING ELSE. HE DOES FACE THE JEOPARDY OF PERHAPS HAVING TO LET THE PERSON LIVE THERE RENT FREE DURING THE PENDENCY OF THE PROCEEDINGS, BUT HE DOES HAVE SUCCESSIVE APPEAL.

AS OUR PAPERS POINT OUT FROM THE CITY COUNCIL, OF COURSE, WE CITE NUMEROUS CASES. THE LANDLORD ALSO HAS THE RIGHT TO THEN APPEAL VIA MANDAMUS TO SUPERIOR COURT, ARGUING THAT THE CITY COUNCIL HAD MADE AN INCORRECT DECISION.

AND BEFORE I GET TO THE SECOND SET OF HEARINGS, LET ME MENTION ONE THING. THERE WAS A HARM THAT WAS MENTIONED BY

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MR. GARRETT, THAT HE BELIEVES THAT SOMEHOW HE MIGHT BE FOUND IN VIOLATION, AND THERE WOULD BE A PROBLEM, AND HOW CAN HE TRUST THIS INTERPRETATION MEMO, BECAUSE IT'S GOING TO BE YANKED OUT RIGHT IN FRONT OF HIM, AND THEN HE'LL SUFFER ALL THESE CONSEQUENCES.

I WOULD SUBMIT THAT IF SOMEONE AT THE CITY DID ANYTHING WHICH IS IN VIOLATION OF THE INTERPRETATION MEMORANDUM, AND THEN ATTEMPTED TO ENFORCE AGAINST MR. GARRETT, AT SOME POINT, MR. GARRETT IS GOING TO HAVE AN IRONCLAD DEFENSE THAT HE ACTED IN ACCORDANCE WITH THE INTERPRETATION OF THE CHIEF EXECUTIVE OFFICER OF THE CITY.

SO THE HARM THAT WAS DESCRIBED, THAT MR. GARRETT MIGHT FACE A PROBLEM BASED ON THE FACT OF THIS INTERPRETATION, CAN'T BELIEVE THIS INTERPRETATION OR NOT, WITHIN THAT APPEAL STRUCTURE, THE CITY IS REALLY STUCK WITH THEIR OWN INTERPRETATION.

THERE IS A SECOND SET OF HEARINGS THAT WE DESCRIBED THAT ARE AVAILABLE, AND THESE ARE TO THE TENANTS. AND, OBVIOUSLY, IF THE TENANT BELIEVES THAT THE LANDLORD DOESN'T HAVE CAUSE TO EVICT HIM, AS WE'VE SAID ALL ALONG -- AND I BELIEVE PLAINTIFFS AGREE NOW. THERE IS NOTHING IN THE ORDINANCE WHICH INTENDS TO PREEMPT STATE LAW.

AS MR. LINCOLN CLEARLY SAID IN RESPONSE TO YOUR HONOR'S QUESTION, THE ORDINANCE DOESN'T ADD AN ADDITIONAL CAUSE OF ACTION. WITHIN THE STATE COURT PROCEDURE, THERE

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1 WILL BE A HEARING IN FRONT OF A STATE COURT JUDGE AS TO
2 WHETHER OR NOT THE LANDLORD HAS GROUNDS TO EVICT THE TENANT.

3 THE COURT: THAT WOULD INCLUDE A DETERMINATION OF
4 WHETHER OR NOT THE PERSON IS ACTUALLY AN ILLEGAL ALIEN,
5 RIGHT, BECAUSE THAT'S THE BASIS OF THE EVICTION?

6 MR. GARRETT: WELL, LET ME SAY FIRST, YOUR HONOR, IT
7 WOULD INCLUDE THE DETERMINATION OF WHETHER OR NOT THE
8 LANDLORD HAS A BASIS FOR EVICTING THE TENANT.

9 THE COURT: YEAH. BUT A TENANT -- IF YOU'RE SAYING
10 THAT THE EVICTION PROCEEDING IS THE TENANT'S HEARING, QUOTE,
11 UNQUOTE, AND THE TENANT HAS A RIGHT TO CONFRONT THE EVIDENCE,
12 AS TO THE CAUSE OF THE EVICTION, THE TENANT COULD SAY, NUMBER
13 ONE, IT'S NOT A VIOLATION OF STATE LAW; AND THE STATE JUDGE
14 WOULD HAVE TO DEAL WITH THAT.

15 SECONDLY, IF HE SAYS, PROVE I'M AN ILLEGAL ALIEN.
16 WHOSE BURDEN IS IT? A PIECE OF PAPER FROM SAVE IS PROOF TO
17 SATISFY A COURT THAT THE PERSON IS ILLEGAL. HOW DOES THAT
18 TENANT DEAL WITH THAT ON A CONFRONTATION BASIS?

19 MR. GARRETT: WELL, I THINK IN THE SAME WAY -- FOR
20 EXAMPLE, MR. LINCOLN USED THE EXAMPLE THAT IF A LEASE HAS A
21 PROVISION THAT SAYS, NO FELON MAY LIVE IN THE SITE. YOU
22 CAN'T BE CONVICTED OF A FELONY, OR YOU CAN'T BE COMMITTING A
23 CRIME WITHIN THE DWELLING UNIT. YOU CAN'T BE SELLING DRUGS.

24 THAT IS -- FOR EXAMPLE, THERE IS A CLAUSE IN
25 MR. GARRETT'S LEASE AGREEMENT, ATTACHED TO HIS DECLARATION IN

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1 THIS CASE, WHICH THAT'S -- HE HAS THAT PROVISION, THAT YOU
2 CAN'T SELL DRUGS.

3 THE COURT: YES. BUT STATE COURT JUDGES DEAL WITH
4 THOSE THINGS ALL THE TIME. BUT NOW WE'RE GETTING TO THE
5 REALM WHERE A STATE JUDGE IS DECIDING FEDERAL IMMIGRATION
6 LAWS, AS TO WHO IS ILLEGAL AND WHO IS NOT. A PERSON CAN BE
7 UNDOCUMENTED AND HAVE A RIGHT TO BE HERE.

8 A STATE COURT JUDGE IS NOW IN A POSTURE OF
9 DETERMINING WHETHER OR NOT THE TENANT IS ACTUALLY AN ILLEGAL
10 ALIEN UNDER FEDERAL LAW BEFORE HE CAN PROCEED WITH THE
11 EVICTION; RIGHT?

12 MR. GARRETT: YES, YOUR HONOR. BUT I GUESS I DON'T
13 SEE THE QUANDARY, BECAUSE CONGRESS HAS SPOKEN VERY
14 DEFINITELY AND HAS SAID, IN SECTION 1373, THE IMMIGRATION
15 AND NATURALIZATION SERVICE HAS AN OBLIGATION TO RESPOND TO
16 INQUIRIES AND PROVIDE REQUESTED VERIFICATION OR STATUS
17 INFORMATION. AND THEY HAVE TO RESPOND TO ANY INQUIRY BY A
18 FEDERAL, STATE OR LOCAL GOVERNMENT AGENCY SEEKING TO VERIFY
19 OR ASCERTAIN THE CITIZENSHIP OR IMMIGRATION STATUS OF ANY
20 INDIVIDUAL WITHIN THE JURISDICTION OF THE AGENCY FOR ANY
21 PURPOSE AUTHORIZED BY LAW.

22 NOW --

23 THE COURT: THAT'S TRUE. BUT THE QUESTION IS, BUT
24 THE HEARING IS FOR THE TENANT AT THIS POINT; NOT THE
25 LANDLORD. THE HEARING IS FOR THE TENANT. THE UNITED STATES

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1 GOVERNMENT WOULD NOT EXPEL, REMOVE OR DEPORT AN ALIEN WITHOUT
2 HIM OR HER VOLUNTARILY DOING SO, WITHOUT A HEARING WHERE THE
3 GOVERNMENT HAS THE BURDEN OF SHOWING THAT THE PERSON IS
4 ACTUALLY ILLEGAL.

5 WHERE IS THAT PROCESS IN THE LANDLORD/TENANT LAW
6 BEFORE A SUPERIOR COURT JUDGE?

7 MR. GARRETT: WELL, YOUR HONOR, WHAT HAPPENED -- IF
8 IT, IN FACT, BECOMES A FACT QUESTION IN A LITIGATION -- AND
9 THIS CAN HAPPEN IN ANY LITIGATION -- WHAT SOMEONE'S
10 DOCUMENTED STATUS IS, CONGRESS HAS PROVIDED THERE IS ONE
11 MECHANISM FOR DOING THAT. IT DOESN'T HAVE TO BE A
12 LANDLORD/TENANT LAW. THERE CAN BE A CONTRACT BETWEEN TWO
13 PRIVATE PARTIES.

14 AND IN THAT SITUATION, THE COURT IS GOING TO HAVE TO
15 MAKE A DETERMINATION OF WHETHER OR NOT THAT PERSON IS IN THE
16 UNITED STATES UNDER THE DEFINITION -- AND IN OUR CASE, IT'S
17 NOT JUST WHETHER OR NOT THEY ARE AN ILLEGAL ALIEN. IT IS
18 WHETHER OR NOT THEY HAVE AUTHORIZED PRESENCE WITHIN THE
19 UNITED STATES IN OUR ORDINANCE.

20 NOW, IF THE STATE COURT JUDGE IN THAT SITUATION --
21 AND, AGAIN, WE'RE NOT THE STATE COURT JUDGE. WE'RE NOT IN
22 FRONT OF YOU. YOU'RE NOT RESTRAINING US. BUT LET'S SAY THAT
23 THE JUDGE DOES THAT, AND HE DOES THAT IN A WAY WHICH IS
24 INCONSISTENT WITH FEDERAL LAW AND PREEMPTED UNDER DECANAS OR
25 WHATEVER, THERE IS A REMEDY OF APPEAL.

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1 YOU CAN SAY TO THE JUDGE, JUST AS THE DECANAS CASE
2 STARTED IN STATE COURT AS WELL. AND IT WENT UP TO THE U.S.
3 SUPREME COURT, AND THE STATE COURTS IN THAT SITUATION HELD
4 THAT THE ORDINANCE WAS PREEMPTED.

5 THE COURT: SO THOSE CASES WOULD BE REMOVED TO
6 FEDERAL COURT?

7 MR. GARRETT: NOT NECESSARILY REMOVED, YOUR HONOR.
8 BUT IF IT IS A QUESTION -- IT BECOMES A QUESTION OF FEDERAL
9 LAW WHETHER SOMEONE HAS -- WHAT THEIR IMMIGRATION STATUS IS.
10 THE STATE COURT CAN DETERMINE THAT AND HAS TO DO THAT IN
11 ACCORDANCE WITH FEDERAL LAW.

12 JUST AS IF THE QUESTION IS, WAS THE TENANT DEALING
13 DRUGS, WAS THE TENANT CONVICTED OF SELLING DRUGS. THE
14 EVIDENCE OF THE CONVICTION WOULD BE PROVIDED, AND YOU'D HAVE
15 TO GO TO THE FEDERAL GOVERNMENT FOR THAT IF IT WAS A FEDERAL
16 CONVICTION.

17 SO I MEAN, THERE ARE QUESTIONS OF PROOF AND VERACITY
18 OF SOURCES WHENEVER YOU'RE ASKING ABOUT SOMEONE'S GOVERNMENT
19 STATUS OR GOVERNMENT RECORD IN ANOTHER SITUATION. AND,
20 PRESUMABLY, WE DON'T HAVE TO BE THE GUARANTORS OF THE
21 ULTIMATE COMPLETE EFFICACY OF THE PROCESS.

22 THE QUESTION YOU ASKED IS, WAS THERE A HEARING, WILL
23 THERE BE AN OPPORTUNITY FOR DUE PROCESS FOR BOTH SIDES.
24 HOPEFULLY ALL THESE EXCELLENT LAWYERS WILL BE RIGHT THERE FOR
25 EVERY TENANT WHO FACES THIS SITUATION IN LANDLORD/TENANT

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SITUATIONS, TO MAKE SURE THAT THEY ARE NOT UNJUSTLY EVICTED BECAUSE OF THEIR STATUS.

AND, AGAIN, I WOULD REMIND THE COURT THAT THE PLAINTIFFS HAVE SAID IN THEIR DECLARATIONS THAT THESE LEASES OF THE TWO PEOPLE THAT ARE IN FRONT OF YOU, OR AT LEAST ONE OF THEM, THAT THE LEASE DOESN'T ALLOW FOR THE EVICTION UNDER LANDLORD/TENANT LAW.

AND I HOPE WE WERE CLEAR. THE ORDINANCE DOESN'T ADD TO THAT. AND WE'RE NOT -- IF THAT'S THE POSITION, THEN THE JEOPARDY SITUATION THAT YOU'VE TALKED ABOUT SIMPLY DOESN'T EXIST, BECAUSE IT'S ONLY WHERE A TENANT ENTERS INTO A LEASE WHICH EXPRESSLY GIVES THE LANDLORD THE ABILITY TO EVICT THAT TENANT AS A RESULT OF THEIR IMMIGRATION STATUS, DOES THE ISSUE ARISE IN THE FIRST INSTANCE UNDER THE PLAINTIFFS' VIEW OF THE LAW.

THE COURT: THANK YOU, MR. GARRETT.

COUNSEL, I APPRECIATE YOUR INPUT. I'M GOING TO TAKE A RECESS TO REVIEW THE BIDDING. I'LL TAKE A RECESS FOR AT LEAST 20 MINUTES.

ALL RIGHT. WE'RE IN RECESS.

(RECESS, 5:20 P.M. TO 5:58 P.M.)

THE COURT: FIRST I'D LIKE TO THANK COUNSEL FOR YOUR INPUT IN THIS MATTER. THE PLEADINGS WERE INFORMATIVE, AS WELL AS THE ORAL ARGUMENT. I MUST SAY THAT, YOU KNOW, THE COURT HAS SPENT CONSIDERABLE TIME ON THE PLEADINGS, AND

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YOU'VE AMPLIFIED YOUR POSITIONS HERE ON ORAL ARGUMENT.

HERE IS THE COURT'S TAKE ON THIS MATTER. WE ALL KNOW THAT THE CITY COUNCIL IS GOVERNED -- IS CHARGED WITH THE GOVERNANCE OF THE CITY AND IS TO ACT IN A MANNER TO REFLECT THE WILL OF THE PEOPLE, AND THUS TO PROVIDE A SAFE AND HEALTHY ENVIRONMENT, AMONG OTHER THINGS, FOR THE PEOPLE OF THE CITY OF ESCONDIDO.

FOR THESE REASONS AND OTHERS, LEGISLATIVE MEASURES, SUCH AS ORDINANCES BY A CITY COUNCIL, SHOULD BE PRESUMED VALID. HOWEVER, THE EXERCISE OF THIS POLICE POWER MUST FALL WITHIN STATUTORY CONSTITUTIONAL CONSTRAINTS. AND THE COURT MUST TRY, ACCORDING TO THE CASE LAWS, TO CONSTRUER AN ORDINANCE TO AVOID CONSTITUTIONAL PROBLEMS.

WE'RE HERE TODAY BECAUSE THE PLAINTIFFS HAVE FILED A MOTION FOR A TEMPORARY RESTRAINING ORDER. UNDER THE TRADITIONAL TEST, A PARTY, THE PLAINTIFF, MUST SHOW A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS, THE POSSIBILITY OF IRREPARABLE INJURY TO PLAINTIFF IF THE PRELIMINARY RELIEF IS NOT GRANTED, IF THE TEMPORARY RELIEF IS NOT GRANTED, AND A BALANCE OF HARDSHIPS FAVORING THE PLAINTIFF, AND IN CERTAIN CASES, THE ADVANCEMENT OF THE PUBLIC INTEREST.

WHERE THE PARTY DEMONSTRATES THAT A PUBLIC INTEREST IS INVOLVED, THE DISTRICT COURT MUST ALSO EXAMINE WHETHER THE PUBLIC INTEREST FAVORS THE PLAINTIFF.

THERE IS AN ALTERNATIVE TEST UNDER RULE 65 FOR

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INJUNCTIVE RELIEF. AND UNDER THE ALTERNATIVE TEST, THE PLAINTIFF MUST SHOW EITHER A COMBINATION OF LIKELIHOOD OF SUCCESS ON THE MERITS OR THE POSSIBILITY OF IRREPARABLE HARM, OR THAT SERIOUS QUESTIONS GO TO THE MERITS AND THE BALANCE OF HARDSHIPS TIPS SHARPLY IN THE MOVING PARTY'S FAVOR.

WITH THAT, I MOVE TO THE ORDINANCE. HERE IN THE FIRST INSTANCE, IT APPEARS TO THE COURT THAT THE PLAINTIFFS CHALLENGE THE VALIDITY OF THE ORDINANCE AS WELL AS THE MEMORANDUM. THE MEMORANDUM WAS -- HAD NOT BEEN FILED AT THE TIME PLAINTIFFS FILED ITS MOTION. I'VE ACCEPTED PLAINTIFFS' RESPONSE OR REPLY TO THE OPPOSITION CONTAINING EVIDENCE OF THE MEMORANDUM HERE IN OPEN COURT.

IN THE PLEADINGS -- WE HAVE NOT DISCUSSED THE ISSUE AT LENGTH HERE, BUT IN THE PLEADINGS, THE PLAINTIFFS CHALLENGE THE CITY'S ORDINANCE BASED UPON A LACK OF RATIONALIZATION BEHIND THE EXERCISE OF THE POLICE POWER THAT IS THE SUBJECT MATTER HERE.

THE PLAINTIFFS ALLEGE THAT THIS IS NOT A LANDLORD/TENANT ORDINANCE. THIS IS AN ORDINANCE AKIN TO ONE OF STEPPING INTO THE SHOES OF THE STATE AND FEDERAL GOVERNMENT TO DEAL WITH THE PROBLEM OF THE HARBORING OF UNDOCUMENTED ALIENS.

THAT ISSUE ASIDE, THE SECOND ARGUMENT HERE THAT PLAINTIFFS HAVE RAISED HERE IN OPEN COURT IN REPLY TO THE MEMORANDUM, IS THAT THE MEMORANDUM -- THAT THE CITY MANAGER

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HAD NO AUTHORITY TO ISSUE THIS MEMORANDUM; THAT THE MEMORANDUM WAS ISSUED AFTER THE LAWSUIT WAS FILED AND FOR PURPOSES TO CHALLENGE THE CONTENTIONS MADE BY PLAINTIFFS IN THIS LAWSUIT. AND IN THAT REGARD, THE COURT SHOULD GIVE IT LESS CREDENCE, IN THAT IT WAS PREPARED FOR PURPOSES OF LITIGATION.

IN THE COURT'S MIND, THERE IS A SERIOUS QUESTION REGARDING THE VALIDITY OF THE MEMORANDUM. IN RICHARDSON, IN THE RICHARDSON CASE BY THE NINTH CIRCUIT, THE RICHARDSON COURT FOUND THAT WHILE THE CITY CANNOT DELEGATE ANY PART OF ITS GOVERNMENT POWER, IT MAY DELEGATE ADMINISTERIAL OR ADMINISTRATIVE FUNCTIONS TO ITS OFFICIALS.

IN THE NINTH CIRCUIT CASE OF SANTA MONICA FOODS, THE NINTH CIRCUIT HELD THAT A LIMITING INSTRUCTION OR MEMORANDUM THROUGH AN ADMINISTRATIVE INSTRUCTION OR MEMO MAY AFFECT CONSTITUTIONAL ANALYSIS, IF THE CONSTRUCTION IS MADE EXPLICIT BY THE TEXTURAL INCORPORATION, SUCH THAT IT BINDS JUDICIAL AND ADMINISTRATIVE CONSTRUCTION OR WELL-ESTABLISHED PRACTICE.

IN THAT REGARD, HERE THE COURT FINDS THAT THERE IS NO EVIDENCE, VIA DECLARATIONS OR OTHERWISE, THAT THE CITY MANAGER OR THE CITY OF ESCONDIDO HAD A WELL-ESTABLISHED PRACTICE OF PREPARING MEMOS TO INTERPRET ITS ORDINANCES.

SECONDLY, THERE IS NO TEXTURAL INCORPORATION, BINDING JUDICIAL OR ADMINISTRATIVE CONSTRUCTION CONTAINED IN THE ORDINANCE. THE CITY HAS PRESENTED TO THE COURT TWO

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PROVISIONS FROM STATE GOVERNMENT REFLECTING THAT THE CITY MANAGER IS THE ADMINISTRATIVE HEAD OF THE CITY AND MUST DULY ENFORCE ORDINANCES.

THE ENFORCEMENT OF AN ORDINANCE AS AN EXECUTIVE SORT OF FUNCTION, OR TO ADMINISTER AS THE HEAD OF A CITY, AS AN EXECUTIVE SORT OF FUNCTION, DOES NOT GIVE THE CITY MANAGER, IN THE COURT'S VIEW, THE AUTHORITY TO LEGISLATE OR TO INTERPRET TO THE POINT OF LEGISLATING A PARTICULAR ORDINANCE.

IN THE COURT'S VIEW, THE INTERPRETIVE MEMORANDUM IN THIS CASE GOES BEYOND THE ADMINISTRATIVE RESPONSIBILITY OF A CITY MANAGER, IN THE ABSENCE OF ANY EVIDENCE OTHERWISE IN THE RECORD, AND IT MOVES TOWARDS DELVING INTO THE AREA OF AMENDING SUBSTANTIVE PROVISIONS IN THE ORDINANCE.

IN THAT REGARD, THE CITY MANAGER HAS STEPPED INTO THE ROLE OF CITY COUNCIL TO DO MORE LEGISLATING THAN INTERPRETING OR IMPLEMENTING A LEGISLATIVE DOCUMENT. THE COURT FINDS THERE IS SERIOUS QUESTIONS WITH RESPECT TO THE VALIDITY OF THE INTERPRETIVE MEMORANDUM.

THE COURT LOOKS TO THE MERITS OF THIS CASE. I'D LIKE TO FOCUS ON TWO AT THIS JUNCTURE: DUE PROCESS AND THE SUPREMACY CLAUSE.

PLAINTIFFS ASSERT THAT THE ORDINANCE FACIALLY DEPRIVES PLAINTIFFS OF DUE PROCESS, IN THAT THE ORDINANCE FAILS TO PROVIDE EITHER LANDLORDS OR TENANTS WITH NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE THE DEPRIVATION OF PROPERTY

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OR LIBERTY. THE DEFENDANT ASSERTS THAT THERE IS A SUBSTANTIAL PROCESS THAT MUST BE COMPLETED PRIOR TO ENFORCEMENT.

IN THE COURT'S VIEW, THE RECORD DOES NOT BEAR THAT OUT. IN THE COURT'S VIEW, THE SUBSTANTIAL PROCESS REFERRED TO BY THE DEFENDANT MAY NOT CONTAIN THE CONSTITUTIONALLY ACCEPTABLE NOTICE AND HEARING COMPONENT. IT MAY NOT PROVIDE FOR NOTICE AND OPPORTUNITY TO BE HEARD AT A MEANINGFUL TIME AND IN A MEANINGFUL MANNER, AS PRESCRIBED -- EVEN IN A POST-DEPRIVATION HEARING, AS PRESCRIBED BY THE U.S. SUPREME COURT IN THE JAMES DANIEL GOOD CASE.

ALSO, THE PROVISIONS RELIED UPON BY THE DEFENDANT REFLECTS THAT THE FORMAL DETERMINATION AS TO A PERSON'S STATUS IN THE UNITED STATES WILL BE MADE BY THE FEDERAL GOVERNMENT. THE EVIDENCE OF RECORD DOES NOT BEAR THAT OUT. THE EVIDENCE OF RECORD REFLECTS, FROM THE FEDERAL REGISTER, THAT THE SAVE PROGRAM SYSTEM -- SEVERAL REASONS.

FIRST, THE SAVE PROGRAM'S SYSTEM IS NOT A FINDING OF FACT OR CONCLUSION OF LAW WITH RESPECT TO THE STATUS OF AN ALIEN IN THE UNITED STATES. THAT'S A FEDERAL REGULATION THAT SAYS THAT.

THAT SAME REGULATION REFLECTS THAT THE SAVE PROGRAM IS FOR THE DETERMINATION OF PUBLIC BENEFITS. THERE COULD BE A PUBLIC BENEFIT IF A TENANT WAS IN A HOUSING FACILITY THAT WAS SUPPORTED OR ASSISTED THROUGH THE SECTION 8 PROGRAM OR

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THE SECTION 10 PROGRAM. THEN IT WOULD BE MORE PUBLIC-ASSISTED HOUSING, BECAUSE THE FEDERAL GOVERNMENT OR THE STATE OR LOCAL GOVERNMENT HAS A PART IN ENSURING A PLACE FOR THAT TENANT TO LIVE.

THERE IS NOTHING IN THE RECORD TO SUGGEST THAT A TENANT BEING HOUSED BY A PRIVATE LANDOWNER IN A LANDLORD/TENANT CAPACITY EQUATES TO A PUBLIC BENEFIT THAT WOULD PERMIT THE CITY TO UTILIZE THE SAVE PROGRAM TO OBTAIN DATA.

AND, ALSO, THE PROGRAM, THE REG REFLECTS THAT IT'S UPON THE CITY TO MAKE A DETERMINATION OF ILLEGAL STATUS OF THE ALIEN AND PRESENT THAT INFORMATION TO THE FEDERAL GOVERNMENT, AS OPPOSED TO THE CITY SENDING INFORMATION TO THE FEDERAL GOVERNMENT FOR DETERMINATION IF A PERSON IS AN UNDOCUMENTED ALIEN.

DEFENSE COUNSEL IS RIGHT, THAT THE REG THAT I'VE TAKEN JUDICIAL NOTICE OF IS THE FEDERAL GOVERNMENT'S INTERPRETATION OF THE STATUTE, SECTION 1373(A) OF TITLE 8. BUT THE REG SAYS WHAT IT SAYS.

AND THE OTHER INFORMATION PRESENTED TO THE COURT, NOT SUBMITTED IN THE PAPERS, WAS THAT THE SAVE PROGRAM SYSTEM HAS BEEN UTILIZED FOR OTHER PUBLIC BENEFITS, DRIVING PRIVILEGES AND SUCH. BUT THOSE ARE PUBLIC BENEFITS. THAT'S A PRIVILEGE, TO DRIVE ON THE PUBLIC HIGHWAYS. THE STATE HAS AN INTEREST IN REGULATING THAT PUBLIC BENEFIT, THAT

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PRIVILEGE.

THE COURT CANNOT SAY -- THERE IS NO EVIDENCE IN THE RECORD TO SUGGEST OTHERWISE -- THAT IT'S A PRIVILEGE TO LIVE IN THE CITY OF ESCONDIDO, AND THAT THE CITY OF ESCONDIDO CAN CONTROL WHO LIVES THERE WITHOUT VIOLATING OTHER CONSTITUTIONAL PRINCIPLES, IN LIGHT OF THE REG -- IN LIGHT OF THE ORDINANCE PRESENTED TO THE COURT.

BEYOND THAT, THE ONLY HEARING REFERRED TO IN THE ORDINANCE IS THE ADMINISTRATIVE HEARING; A PROCESS THAT APPEARS TO OCCUR WITHOUT AN INITIAL DUE-PROCESS HEARING. AGAIN, THE DEFENDANT ASSERTS THAT A POST-DEPRIVATION HEARING IS CONSTITUTIONAL. AND IT MAY BE, UNDER THE RIGHT CIRCUMSTANCES. AND THE DEFENDANT ALSO ASSERTS THAT ALONG WITH THE APPELLATE OPPORTUNITIES PERMITTING THE PROPERTY OWNER TO CONTEST, AS WELL AS THE PROTECTIONS UNDER CALIFORNIA'S EVICTION LAW, THERE WILL BE NO DUE-PROCESS VIOLATION.

FIRST, THERE IS NOTHING IN THE RECORD TO INDICATE -- AND THE RECORD IS UNCLEAR, AS TO WHETHER OR NOT THAT POST-DEPRIVATION HEARING WOULD BE HELD AT A MEANINGFUL TIME AND IN A MEANINGFUL MANNER. AND THE RECORD IS DEVOID OF ANY COMMENT OR SUGGESTION ABOUT THE DUE-PROCESS RIGHTS OF TENANTS IN THAT PROCESS.

AND WITH THE CONSTITUTIONAL TEST BEING THE THREAT AND HARM OF A CONSTITUTIONAL VIOLATION, AS FAR AS IRREPARABLE

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HARM IS CONCERNED, THE HEARING, THE EVICTION PROCEEDING THAT MAY OCCUR TWO TO FOUR WEEKS AFTER THE INITIAL NOTICE THAT THE LANDLORD NEEDS DATA FROM A TENANT, IS NOT THAT THAT HEARING IS AT A MEANINGFUL TIME AND TO BE HELD IN A MEANINGFUL MANNER. AS SUCH, THERE ARE SERIOUS QUESTIONS THAT ARISE WITH RESPECT TO THE DUE-PROCESS COMPONENTS OF THE ORDINANCE.

WITH RESPECT TO THE SUPREMACY CLAUSE, WE KNOW UNDER DECANAS VS. BICA, B-I-C-A, THAT THE SUPREME COURT HAS LAID DOWN THREE TESTS TO DETERMINE WHETHER OR NOT A STATE OR LOCAL LAW IS PREEMPTED BY FEDERAL LAW. I'LL FOCUS ON THE LAST TWO.

THE SECOND TEST IS WHERE THE LOCAL LAW ATTEMPTS TO OPERATE IN AN AREA OCCUPIED BY THE FEDERAL GOVERNMENT. THAT'S PREEMPTION BY OCCUPATION. AND THE THIRD, WHERE THE LOCAL LAW TENDS TO BURDEN OR CONFLICT WITH THE FEDERAL LAW.

THE COURT FINDS THAT THERE IS SERIOUS QUESTIONS TO BE RESOLVED ON THE MERITS WITH RESPECT TO THE SUPREMACY CLAUSE IN THESE TWO AREAS.

I NOTE THAT THE DEFENDANT CITES TO AUTHORITY CONCERNING LOCAL LAWS INVOLVING EMPLOYMENT-RELATED CASES. PLAINTIFF SUGGESTS THAT HARBORING IS DIFFERENT, IN THAT CONGRESS HAS A FEDERAL STATUTE MAKING HARBORING A CRIME.

DECANAS WAS AN EMPLOYMENT CASE. THERE ARE FEDERAL STATUTES THAT AFFECT AND PROHIBIT HARBORING UNDOCUMENTED ALIENS. AS SUCH, THE COURT FINDS THAT THERE IS A SERIOUS QUESTION TO BE ADDRESSED AS TO WHETHER OR NOT THERE IS

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PREEMPTION IN HARBORING CASES BY OCCUPATION OF THE FIELD.

WITH RESPECT TO PREEMPTION BY BURDENING OR CONFLICTING WITH FEDERAL LAW, AGAIN, THE DEFENDANTS POINT TO THE SYSTEMATIC ALIEN VERIFICATION FOR ENTITLEMENTS PROGRAM -- WHICH WE'VE REFERRED TO HERE AS THE SAVE PROGRAM, A COPY OF WHICH IS ATTACHED AS EXHIBIT B1 OF THE DEFENDANT'S PLEADINGS -- AS A MANNER IN WHICH THE GOVERNMENT WILL VERIFY WHETHER OR NOT A PERSON IS UNDOCUMENTED.

ACCORDING TO THE DEFENDANT'S ORDINANCE, THE CITY WILL SEND THE IDENTIFICATION DATA TO THE SAVE PROGRAM AND TRY TO GET SAVE TO VERIFY THE STATUS OF THE ALIENS. AS WE KNOW FROM THE FEDERAL REGISTER, THAT'S NOT HOW THE PROGRAM WORKS, NUMBER ONE.

AND, NUMBER TWO, IT ONLY WORKS FOR PUBLIC AGENCIES WHEN THE PUBLIC AGENCIES ARE INQUIRING WITH RESPECT TO PUBLIC BENEFITS FOR AN INDIVIDUAL, TO DETERMINE WHETHER OR NOT AN INDIVIDUAL IS ELIGIBLE FOR PUBLIC BENEFITS; THAT IS, NOT AN UNDOCUMENTED ALIEN. SO THERE ARE TWO POINTS OF SIGNIFICANCE THAT BEG DISCUSSION HERE.

IN LIGHT OF THE EVIDENCE BEFORE THE COURT, THE SAVE PROGRAM ONLY ASSISTS STATE AND LOCAL GOVERNMENTS WITH THE VERIFICATION OF IMMIGRATION STATUS OF PERSONS WHO APPLY FOR OR ARE RECIPIENTS OF FEDERAL OR OTHER PUBLIC BENEFITS. THE DEFENDANTS HAVE NOT SHOWN THAT THE ORDINANCE APPLIES TO ALLEGED ILLEGAL ALIENS APPLYING FOR FEDERAL OR OTHER PUBLIC

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BENEFITS.

SECONDLY, THE REGULATION REQUIRES THAT APPLICATIONS FOR VERIFICATION OF STATUS OF INDIVIDUALS BE PRESENTED TO THE FEDERAL GOVERNMENT AFTER THERE HAS BEEN A FORMAL DETERMINATION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE AS TO THE UNLAWFUL STATUS OF THAT PERSON.

HERE, THE ORDINANCE STATES THAT THE CITY WILL SUBMIT THE IDENTIFICATION DOCUMENTS TO THE FEDS FOR THE FEDS TO MAKE THAT DETERMINATION OF ILLEGAL STATUS. IT APPEARS THAT THE ORDINANCE MAY IMPERMISSIBLY BURDEN THE I.N.S. BY SUGGESTING TO THE I.N.S. TO MAKE A DETERMINATION, WHEN THE REG IS CLEAR THAT THE LOCAL AGENCY IS TO CONDUCT A FACT-FINDING IN A FORMAL MATTER.

ACCORDING TO THE EVIDENCE BEFORE THE COURT, IT APPEARS THAT THE ORDINANCE CONFLICTS WITH FEDERAL REGS AND THAT THE ORDINANCE, AS WELL AS THE MEMO, REQUIRE I.N.S. TO VERIFY INFORMATION, AS OPPOSED TO IT BEING THE OTHER WAY AROUND. AS SUCH, IT APPEARS THAT THERE ARE SERIOUS QUESTIONS PRESENTED AS TO WHETHER OR NOT THE LOCAL LAW BURDENS OR CONFLICTS WITH FEDERAL LAW IN THIS REGULATED AREA.

HARDSHIP. IN LIGHT OF THE COURT'S CONCERNS REGARDING THE VALIDITY OF THE INTERPRETIVE MEMORANDUM, THE COURT FINDS THE EXISTING LEASES ARE IMPACTED BY THE ORDINANCE, AND THE PLAINTIFFS WILL SUFFER IRREPARABLE HARM.

THE COURT ALSO FINDS THAT EVEN IF THE MEMORANDUM WAS

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VALID, IS EVENTUALLY FOUND TO BE VALID -- I'M NOT FINDING IT INVALID AT THIS POINT. I HAVE SERIOUS CONCERNS ABOUT THE VALIDITY OF THE MEMORANDUM.

IN THE EVENT THE COURT WOULD MAKE A FINDING AT THIS TIME THAT THE MEMORANDUM WAS VALID, THE COURT FINDS THAT THERE IS IRREPARABLE HARM LAID UPON LANDLORDS AND TENANTS, ECONOMIC DAMAGES AND SUCH, THAT WOULD JUSTIFY IRREPARABLE HARM.

BUT THE ALTERNATIVE TEST THAT THE COURT UTILIZES HERE IS THE ONE WHERE THERE EXISTS -- WHETHER OR NOT THERE EXISTS SERIOUS QUESTIONS THAT GO TO THE MERITS OF THIS ACTION, NUMBER ONE. AND, NUMBER TWO, WHETHER OR NOT THE BALANCE OF HARDSHIPS TILT SHARPLY IN THE PLAINTIFFS' FAVOR.

UNDER THIS TEST, THE COURT FINDS THAT THERE ARE SERIOUS QUESTIONS GOING TO THE MERITS OF THIS ACTION, AND THE BALANCE OF HARDSHIPS TIP SHARPLY IN THE PLAINTIFFS' FAVOR. THE DEFENDANTS PRESENTED NO SIGNIFICANT EVIDENCE THAT A DELAY UNTIL THIS FINAL HEARING IS HELD WOULD PREJUDICE THE CITY IN ANY MATERIAL WAY.

IT IS SUFFICIENT FOR THE PLAINTIFF TO ESTABLISH A SIGNIFICANT THREAT OF IRREPARABLE INJURY, IRRESPECTIVE OF THE MAGNITUDE OF THE INJURY, AND NEED NOT SHOW ACTUAL HARM, THAT THE PLAINTIFFS WILL SUFFER ACTUAL HARM. WHILE SPECULATION ISN'T ENOUGH, THERE HAS TO BE A SIGNIFICANT THREAT OF IRREPARABLE INJURY TO THE CONSTITUTIONAL RIGHTS OF THE

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1 PLAINTIFFS. THE COURT FINDS THAT THE PLAINTIFFS HAVE SHOWN
2 THAT HERE.

3 IN SUM, THE PLAINTIFFS HAVE ESTABLISHED THE SERIOUS
4 QUESTIONS THAT SURROUND THE MERITS OF THE CITY'S ACTIONS, AND
5 THAT HARDSHIPS TIP SHARPLY IN PLAINTIFFS' FAVOR. AS SUCH,
6 THE COURT ORDERS THAT THE MOTION FOR TEMPORARY RESTRAINING
7 ORDER IS GRANTED.

8 NOW, THE COURT WILL ISSUE A WRITTEN ORDER WITHIN THE
9 NEXT TWO BUSINESS DAYS THAT WILL INCORPORATE THIS ORAL
10 RULING. AND IN THAT WRITTEN ORDER, THE COURT WILL SET DATES
11 FOR THIS PRELIMINARY HEARING, PRELIMINARY INJUNCTION HEARING.
12 THE COURT ANTICIPATES THAT THAT HEARING WILL OCCUR WITHIN THE
13 NEXT 90 TO 120 DAYS TO ALLEVIATE ANY ALLEGED HARM BY THE CITY
14 IN THIS DELAY.

15 THAT'S THE COURT'S ORDER. WE'RE IN RECESS.

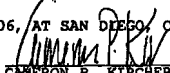
16 (PROCEEDINGS CONCLUDED AT 6:20 P.M.)

17 --000--

18 C E R T I F I C A T I O N

19 I HEREBY CERTIFY THAT I AM A DULY APPOINTED,
20 QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED
21 STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND
22 CORRECT TRANSCRIPT OF THE PROCEEDINGS HAD IN THE
23 AFOREMENTIONED CAUSE; THAT SAID TRANSCRIPT IS A TRUE AND
24 CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES; AND THAT THE
25 FORMAT USED HEREIN COMPLIES WITH THE RULES AND REQUIREMENTS
OF THE UNITED STATES JUDICIAL CONFERENCE.

DATED: DECEMBER 4, 2006, AT SAN DIEGO, CALIFORNIA.


CAMERON P. KIRCHER