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No State Power: Critiquing the Eighth Circuit’s Preemption Analysis in *Keller v. City of Fremont*

Meghan Harrington*

**INTRODUCTION**

In *Keller v. City of Fremont*, the Eighth Circuit overturned the U.S. District Court for the District of Nebraska, finding that federal law did not preempt a municipal housing ordinance that prevents undocumented immigrants from renting property anywhere in the City of Fremont. I contend that the Eighth Circuit erred in its application of preemption doctrine. The Third, Fifth, and Eleventh Circuits have all overturned housing provisions similar to Fremont’s. Although the Supreme Court denied certiorari to review *Keller II* in May 2014, the conflict among the circuits’ preemption analyses remains and must be resolved. The Supreme Court should rectify the preemption analysis in *Keller II* by resolving the circuit split, applying the Third, Fifth, and Eleventh Circuits’ application of preemption doctrine to local laws that restrict the ability of immigrants to reside in certain locations. Such laws are inconsistent with federal immigration policy and invade the exclusive

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1. Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013) [hereinafter Keller II]. While there is a compelling argument to be made that the Fremont Ordinance and others like it are unconstitutional on Fourteenth Amendment Equal Protection grounds, this Note is limited to a critique of the preemption analysis in Keller II.
3. Since its decision in Arizona, the U.S. Supreme Court has denied certiorari in Keller II, Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013) [hereinafter Lozano III], and Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524 (5th Cir. 2013) (en banc) [hereinafter Farmers Branch], despite the circuits’ conflicting interpretations of Arizona as applied to immigration preemption analysis.
jurisdiction of the federal government to regulate immigration.

I.

KELLER v. CITY OF FREMONT

In Keller II, the Eighth Circuit upheld provisions of an ordinance passed in Fremont, Nebraska that (1) impose severe restrictions on the ability of undocumented immigrants to rent housing and (2) prohibit building owners from harboring undocumented immigrants. Fremont voters passed Fremont Ordinance No. 5165 in June 2010 with the explicit purpose of prohibiting any individual or business from renting to or allowing occupancy by any undocumented immigrant. In order to enforce the Ordinance, the city requires renters to obtain an occupancy license, which requires them to pay a small fee and disclose personal information, including citizenship or immigration status. Once the city issues an occupancy license, the applicant is permitted to rent housing while the Fremont Police Department verifies the renter’s immigration status with the federal government. If the renter is ultimately found to be not lawfully present in the United States, the city will begin eviction procedures. A fine is imposed on violators for each day of noncompliance.

The district court held that federal law did not preempt the Ordinance’s occupancy license requirement. But to “the extent that the Ordinance . . . provides penalties for the harboring of persons who have entered or remained in the United States in violation of law and penalties for the lease or rental of dwelling units following the revocation of occupancy licenses,” it is unconstitutional. The penalizing features of the Ordinance conflict with the Immigration and Naturalization Act (INA) and therefore frustrate the “full purposes and objectives of Congress.”

The Eighth Circuit held that the occupancy provisions in the Fremont Ordinance did not impermissibly regulate immigration. While the court acknowledged that regulating immigration was exclusively the federal government’s authority, it held that the occupancy provisions were not

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4. Id.
6. Id. at 937–38. The Ordinance also contains provisions that require employers to verify the legal immigration and employment status of every employee. The employment provisions of the Ordinance were upheld by the district court and were therefore not at issue in the Eighth Circuit’s review of the Ordinance’s legality. Id.
7. Id. at 938.
8. Id.
9. Id.
10. Id.
11. Keller v. City of Fremont, 853 F. Supp. 2d 959, 972–73 (D. Neb. 2012) [hereinafter Keller I]. The district court also held that the preempted provisions violated the Fair Housing Act because they would disparately impact Latino residents in Fremont. Id. at 978–79.
constitutionally preempted because they would not conflict with the federal government’s exclusive authority to determine “who may enter or remain in the country.” It found that the Ordinance, “designed to deter or even prohibit, unlawfully present aliens from residing within a particular locality,” affects immigrants but does not regulate immigration per se. While the ordinance prohibited undocumented immigrants from securing rental housing within the city, affected individuals could move outside of the city or could remain in Fremont if they found alternative accommodations. Therefore, the Ordinance did not infringe federal control of the nation’s borders. Further, the court distinguished the occupancy licensing requirement from other immigrant registration and licensing laws that have been preempted because it did not apply to all undocumented immigrants, only those who rent housing. The Eighth Circuit called on Congress to expressly preempt laws like the Fremont Ordinance if it finds them in conflict with the federal immigration scheme.

Dissenting, Judge Myron H. Bright asserted that the occupancy provisions in the Fremont Ordinance are conflict preempted because barring undocumented immigrants from obtaining rental housing effectively ensures the removal of undocumented immigrants from the city. This interferes with the federal government’s exclusive power to remove individuals.

II. LEGAL HISTORY

“A fundamental principle of the Constitution is that Congress has the power to preempt state law.” This principle is rooted in the Supremacy Clause of the United States Constitution, which holds that the “Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land, . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”

Two types of preemption commonly apply to local and state immigration laws. First, field preemption prohibits state laws when Congress intended that federal law would “occupy the field.” Because states have no historic police power to regulate immigration, the U.S. Supreme Court held in Plyler v. Doe

13. Id. at 940–42.
14. Id. at 941 (emphasis in original).
15. Id.
16. See id.
17. Id. at 942–43.
18. Id. at 942.
19. Id. at 953, 959–60.
22. Crosby, 530 U.S. at 372.
that states may only regulate immigration when furthering a federal policy or if Congress expressly grants states power to regulate matters affecting immigration.\(^23\) Second, conflict preemption occurs where either (1) complying with both state and federal laws is impossible, or (2) a state law prevents Congress’s “full purposes and objectives” from being accomplished.\(^24\) Immigration regulations are thus preempted when a state or local government attempts to determine “who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”\(^25\)

The Supreme Court recently analyzed preemption of state immigration laws in two opinions: *Chamber of Commerce v. Whiting*\(^26\) and *Arizona v. United States*.\(^27\) In *Whiting*, the Court upheld the Legal Arizona Workers Act of 2007, which “allows Arizona courts to suspend or revoke the licenses necessary to do business in the State” if an employer knows it is employing an undocumented immigrant, and requires employers to use an E-Verify system to determine their employees’ immigration status.\(^28\) The Court held that the law was not preempted. Although the federal Immigration Reform and Control Act (IRCA) preempts state laws that impose civil or criminal penalties on employers of undocumented immigrants, the Arizona law survived under the IRCA savings clause, which permits states to implement sanctions through licensing regulations.\(^29\)

Following *Whiting*, the Supreme Court decided *Arizona v. United States*, another opinion that impacted immigration preemption analysis.\(^30\) In *Arizona*, the Court struck down an Arizona law that made the failure to carry an alien registration document a misdemeanor, holding that the federal government occupies the entire field of alien registration, and therefore even state laws that compliment federal regulations are impermissible.\(^31\) The Court distinguished its decision in *Whiting*, which addressed a law that constituted a clear exception to IRCA preemption.\(^32\) The *Arizona* Court held that while states can pass laws when no “comprehensive federal program” regulates a field, states do not have authority to create laws when Congress has created a comprehensive framework to regulate the field.\(^33\) In *Arizona*, the Court found that the registration provision conflicted with demonstrated legislative intent in IRCA not to criminally prosecute undocumented employees.\(^34\) Where a state


\(^{26}\) 131 S. Ct. 1968 (2011).

\(^{27}\) Arizona v. United States, 132 S. Ct. at 2498–2501.


\(^{29}\) *Id.* at 1977.

\(^{30}\) 132 S. Ct. 2492, 2502 (2012).

\(^{31}\) *Id.* at 2502.

\(^{32}\) *Id.* at 2503–2505.

\(^{33}\) *Id.*

\(^{34}\) *Id.* at 2504.
regulation conflicts with Congress’s ability to accomplish and execute its full objectives, it is preempted.  

Other circuit courts have struck down housing ordinances similar to the Fremont Ordinance on preemption grounds. In Lozano III, the U.S. Court of Appeals for the Third Circuit applied the holdings in Whiting and Arizona to a housing ordinance very similar to the Fremont Ordinance. It held that a Hazleton, Pennsylvania housing law with an occupancy license requirement and punitive measures for violating the provision nearly identical to the Fremont Ordinance was preempted in its entirety by federal immigration law. The Lozano III court concluded that because Whiting only dealt with a narrow exception to preemption in the employment context, Whiting did not undermine the court’s determination that the Hazleton housing provisions were preempted. The Lozano III court noted that the housing provisions were “nothing more than a thinly veiled attempt to regulate residency under the guise of a regulation of rental housing.” Because the statute only negatively impacted undocumented immigrants, the housing provisions attempted to “regulate residence based solely on immigration status.”

The Lozano court held that the Ordinance was preempted for three reasons. First, the Ordinance was an impermissible regulation of immigration because the federal government has the exclusive authority to determine which immigrants may reside in the United States. Therefore “[s]tates and localities have no power to regulate residency based on immigration status.” Second, it was field preempted because the INA bars states from regulating residency based on immigration status and gives the federal government control over regulating “alien harboring.” Finally, the law was conflict preempted because it obstructs the federal government from controlling the removal of noncitizens, is “inconsistent with federal anti-harboring law,” and “unilaterally attach[es] additional consequences to a person’s immigration status with no regard for the federal scheme, federal enforcement priorities, or the discretion Congress vested in the Attorney General.”

The U.S. Court of Appeals for the Fifth and Eleventh Circuits have decided cases with similar holdings and analyses. In an en banc decision in Villas at Parkside Partners v. City of Farmers Branch, the Fifth Circuit struck

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35.  Id. at 2505.
37.  See id. at 300–301.
38.  Id. at 314; see also Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1977 (2011); Arizona, 132 S. Ct. at 2503–05.
39.  Lozano III, 724 F.3d at 315.
40.  Id. (quoting their earlier opinion in Lozano v. City of Hazleton, 620 F.3d 170, 220 (3d Cir. 2010) [hereinafter Lozano II]).
41.  Id.
42.  Id.
43.  Id. at 315–16; Lozano II, 620 F.3d at 220.
44.  Lozano III, 724 F.3d at 317–18.
down a law passed in Farmers Branch, Texas that had similar housing rental restrictions for undocumented immigrants and penalties for landlords found in violation.\footnote{Farmers Branch, 726 F.3d 524 (5th Cir. 2013) (en banc).} The Farmers Branch court held that the local law conflicted with federal law because it did not recognize the federal scheme’s “carefully calibrated” distinctions among the many different definitions of “lawful resident” applied to immigrants in different contexts. Instead, the Farmer’s Branch ordinance used a definition of “lawful resident” not found in federal law, impermissibly allowing the local government to decide who is lawfully present for purposes of the ordinance.\footnote{Id. at 533–36.} A concurrence by two judges argued that the law is field preempted because it explicitly attempts to regulate immigration, a field exclusively occupied by the federal government.\footnote{Id. at 539–41.} They conclude that the Farmers Branch ordinance was an unconstitutional interference with federal power because it was an attempt to remove undocumented immigrants from the city.\footnote{Id.}

In two cases since 2012, the Eleventh Circuit has also held that laws prohibiting the harboring of undocumented immigrants or regulating the “entry, movement, and residence” of immigrants are field preempted because they conflict with the scheme created by the INA.\footnote{Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250, 1263–65 (11th Cir. 2012); United States v. Alabama, 691 F.3d 1269, 1285–87 (11th Cir. 2012) (prohibiting undocumented immigrants from enforcing contracts).} Both of these holdings relied on the Supreme Court’s preemption analysis in Arizona and neither interpreted Whiting as creating any obstacles to concluding that the challenged statutes were preempted.\footnote{See Georgia Latino Alliance for Human Rights, 691 F.3d at 1264; Alabama, 691 F.3d at 1280.}

III.

ANALYSIS

The Eighth Circuit took a minority position in Keller II when it applied preemption doctrine to the Fremont Ordinance in a way that conflicted with how the Third, Fifth, and Eleventh Circuits have analyzed substantially similar statutes. Part A will explain how the preemption doctrine is different in the immigration context than it is in other fields and why this difference requires preemption of the Fremont Ordinance. Part B will explain that the weight of authority is against the Eighth Circuit. The Third, Fifth, and Eleventh circuits have all correctly held that although Whiting allows cities and states to pass laws impacting immigrant employment when such laws fit under the narrow exception of the IRCA savings clause,\footnote{Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1977 (2011).} regulating residency, movement, or
transport of immigrants is federally preempted. Part C explains why laws like the Fremont Ordinance are conflict preempted because they conflict with federal immigration policy.

A. The Federal Government’s Exclusive Control Over Immigration Regulation Requires Invalidating the Fremont Ordinance

In most preemption analysis, a court should find that state law is not preempted unless Congress has expressly superseded “the historic police powers of the States.” However, preemption analysis in the field of immigration begins with the opposite presumption. The power to regulate immigration is an extension of federal power over foreign affairs and therefore has been repeatedly recognized as exclusively belonging to the federal government. There is no backdrop of state authority over immigration; therefore, any state regulation of immigration must serve a federal objective to survive preemption. No federal objective to regulate the housing or movement of undocumented immigrants exists, meaning states are not permitted to regulate within that field. Conversely, Congress has explicitly indicated that it does not want states to regulate the residency of immigrants. State regulation of where and through what means undocumented immigrants can obtain housing is unauthorized by Congress and is inconsistent with federal immigration policy.

The Keller II court failed to adequately address the tension between state and federal law in its analysis because it inaccurately denied that Fremont is regulating immigration at all. The court held that because the Fremont Ordinance does not “remove aliens from the country” or “create a parallel local process to determine an alien’s removability” it does not meet the court’s own narrow definition of regulation of immigration. The court went on to analogize the Fremont Ordinance to the state regulation challenged in Whiting that imposed barriers on undocumented immigrants’ ability to work. The Keller II court reasoned that if the statute in Whiting was not an impermissible regulation of immigration, even though it may have had the effect of driving individuals out of the state to seek work, then the Fremont Ordinance is not

53. Cassiday, supra note 21 at 543–44 (citing Hines v. Davidowitz, 312 U.S. 52 (1941) and Torao Takahashi v. Fish & Game Comm’n, 334 U.S. 410 (1948)).
55. See Lozano III, 724 F.3d 297, 318 (3d Cir. 2013); Farmers Branch, 726 F.3d 524, 540 (5th Cir. 2013) (Reavley, J. concurring)
56. See Lozano III, 724 F.3d at 315–16.
57. Keller II, 719 F.3d 931, 942 (8th Cir. 2013).
58. Id.
either.59 The court fails to address the factors that distinguish the law challenged in Whiting from the Fremont Ordinance. A regulation that prevents immigrants from residing in a city looks much more like removing or creating a process to determine removability than a statute regulating the employment of undocumented immigrants.

The Keller II majority superficially analyzes the occupancy provisions’ effects. The preemption analysis rests on a distinction drawn between a hypothetical unconstitutional law that would regulate the physical removal of immigrants from a jurisdiction and the law at issue, which prevents undocumented immigrants from obtaining rental housing in the city.60 The dissent points out that these two examples are effectively the same—the occupancy license requirement will deter any undocumented immigrant from seeking a license because doing so would result in the disclosure of the immigrant’s presence and illegal status to the federal government and would ultimately leave him or her unable to rent housing.61 The Fremont Ordinance should be considered a regulation of immigration because it is tantamount to establishing a policy to remove undocumented immigrants—for whom renting is often the sole means of obtaining housing—from the city. As a locally promulgated immigration regulation, the federal government’s sole authority to regulate the field of immigration constitutionally preempts the Fremont Ordinance.

Furthermore, like the housing provision at issue in Lozano III, the Fremont Ordinance attempts to regulate residency solely based on immigration status.62 Because the federal government has exclusive authority to regulate whether immigrants may reside in the United States, the Fremont Ordinance is an impermissible regulation of immigration and is field preempted by the federal scheme.63

B. Keller II Misapplies Preemption Precedent and Reaches a Result Inconsistent with Other Circuits

Keller II’s erroneous legal reasoning is highlighted by its application of precedent in a way that contradicts decisions by several other circuit courts. The Keller II majority relied on its analysis distinguishing the challenged statute in Arizona from the Fremont Ordinance to overturn the district court’s ruling that the occupancy provisions were conflict preempted.64 For example, the Keller II court described how the Arizona statute explicitly purported to enforce the federal anti-harboring prohibition, whereas the Fremont Ordinance

59.  Id.
60.  Id. at 941–42.
61.  Id. at 958–59.
63.  See id.
64.  Keller II, 719 F.3d at 939.
merely states that it “prohibits harboring” conduct that is inconsistent with the city’s local public interests.\textsuperscript{65} The court further rationalized that while the Arizona statute forced local officials to determine if an undocumented immigrant was removable, the Fremont Ordinance required local officials to defer to a federal determination of immigration status.\textsuperscript{66} These distinctions should not change the preemption analysis.

The post-Arizona Third Circuit in Lozano III carefully analyzed the effects of Arizona and determined that it did not change federal preemption doctrine with regard to regulation of housing available to undocumented immigrants.\textsuperscript{67} Analogizing to the law rejected in Arizona, the Lozano III court held that the statute at issue did not survive preemption analysis because it was promulgated by the city enacting its own immigration policy.\textsuperscript{68} The Lozano III court correctly held that occupancy provisions that deny undocumented immigrants the ability to obtain rental housing within a certain locale are preempted because they conflict with the federal government’s exclusive authority to regulate the residency of immigrants. This Note contends that the circuit split created by Keller II between the Eighth and the Third, Fifth, and Eleventh Circuits regarding immigrant residency and movement regulations should be resolved in favor of the conclusion reached by the majority of circuits that have decided this question. Occupancy provisions that restrict the availability of housing to undocumented immigrants impermissibly regulate immigration and are therefore unconstitutional.

The Keller II dissent, like the Third Circuit, relied on Arizona’s emphasis on the need for uniform national immigration policy to support its contention that the federal government, not states, should control law that significantly impacts immigrant communities.\textsuperscript{69} Because Keller was not heard en banc,\textsuperscript{70} the circuit split created by the Eighth Circuit is founded upon the opinions of only two judges, while the dissent, the district court, and the majority in three other federal appellate court cases concluded that ordinances like the one in Fremont are preempted.\textsuperscript{71} Although the Supreme Court denied certiorari to review Keller II in May 2014,\textsuperscript{72} the conflict among the circuits’ preemption analyses remains and must be resolved. Conflicting interpretations of the federal government’s supremacy in a context like immigration may result in more

\begin{itemize}
\item \textsuperscript{65} Id. at 943.
\item \textsuperscript{66} Id. at 944.
\item \textsuperscript{67} Lozano III, 724 F.3d at 414; Farmers Branch, 726 F.3d 524, 527-29 (5th Cir. 2013).
\item \textsuperscript{68} Id. at 303. The court distinguished the Hazleton statute and the rejected statute in Arizona from the statute that was upheld in Whiting because the statute in Whiting regulated employment of undocumented immigrants through a business licensing law, not through a state or locally enacted immigration law. Id.
\item \textsuperscript{69} Keller II, 719 F.3d at 957–58.
\item \textsuperscript{70} Nos. 12-1702, 12-1705, 12-1708, 2013 U.S. App. LEXIS 21104 (8th Cir. Oct. 17, 2013) (petition to review en banc denied)
\item \textsuperscript{71} Id. at 955.
\item \textsuperscript{72} Keller II, 719 F.3d 931 (8th Cir. 2013), cert. denied, 134 S. Ct. 2140 (2014).
\end{itemize}
states being able to regulate immigration through laws that are deemed unconstitutional in other states. The Supreme Court should rectify the preemption analysis in Keller II by resolving the circuit split in favor of the analysis put forth by Lozano and Farmers Branch: disabling undocumented immigrants from residing in a particular area is an impermissible regulation of immigration.

C. Regulating Residency Conflicts with Federal Immigration Policy

To ensure uniformity of federal policy, occupancy requirements that restrict immigrants’ ability to reside in certain locales should be conflict preempted because it would be impossible to carry out both the federal scheme and local residency restrictions. The Third Circuit recognized that although the occupancy ordinance did not physically remove undocumented immigrants from the city of Hazleton, “[i]t is difficult to conceive of a more effective method of ensuring that persons do not enter or remain in a locality than by precluding their ability to live in it.”73 Ordinances that impose occupancy restrictions solely based on immigration status result in de facto removal of undocumented immigrants, thereby interfering with the federal government’s unitary power to remove or transport undocumented immigrants.74 It is plainly apparent that Fremont and cities with similar ordinances have enacted occupancy restrictions with the underlying purpose of requiring undocumented immigrants to relocate.75

Forcible relocation is contrary to federal policy for a number of reasons. In Plyler v. Doe, the Supreme Court held that undocumented children residing in the United States have an equal right to access public education.76 Keller II frustrates the federal policy objectives of Plyler because the Fremont Ordinance will force families to leave the city of Fremont and leave the public schools that their children are rightfully attending.77 Fremont does not have the right to wall off its public education and other resources from undocumented immigrants by forcing relocation. In additional to placing a heavy burden on undocumented parents who cannot rent homes, the Fremont Ordinance also collaterally impacts their children, who may be U.S. citizens. These children may be made homeless or uprooted from their schools, friends, and neighborhoods.78

73. Lozano II, 620 F.3d 170, 220 (3d Cir. 2013).
74. See id. at 318; Farmers Branch 726 F.3d 524, 540 (5th Cir. 2013) (Reavley, J. concurring).
75. The stated purpose of the Fremont Ordinance was to “prohibit the harboring of illegal aliens.” FREMONT, NEB., ORDINANCE 5165 (2010). The Lozano III court found that “it appears plain that the purpose of these housing provisions is to ensure that aliens lacking legal immigration status reside somewhere other than Hazleton.” Lozano III, 620 F.3d at 224.
77. See id. The Plyler Court found it “difficult to conceive of a rational justification for penalizing these children for their presence in the United States.” Id.
78. See Ashleigh Bausch Varley & Mary C. Snow, Don’t You Dare Live Here: The Constitutionality of the Anti-Immigrant Employment and Housing Ordinances At Issue in Keller v.
Furthermore, the Obama Administration has chosen to “suspend deportations for ‘low priority’ undocumented immigrants,” including young immigrants who are eligible to obtain work permits under the Deferred Action for Childhood Arrivals program.79 These actions, seeking to accommodate undocumented immigrants currently residing in the United States, indicate that the federal government does not want to pursue uniform action against all undocumented immigrants. Cities that prohibit undocumented immigrants from renting housing, thereby forcing them to leave the city, are de facto opting out of participation in this federal scheme that allows young immigrants to work. Furthermore, if the federal government has explicitly issued a policy stating that deportations of undocumented immigrants is a low priority, individual cities and states cannot choose to expel undocumented immigrants from their jurisdiction. Like the preempted ordinance in Farmers Branch, the Fremont Ordinance does not take into account that some undocumented immigrants that are subject to the rental restrictions may be lawfully present in the United States because of federal policy.80 Because national policy does not indicate a desire to regulate residency of undocumented immigrants, the Fremont Ordinance conflicts with federal objectives.

CONCLUSION

For the foregoing doctrinal and policy reasons, the Lozano III court’s interpretation of preemption doctrine as precluding local laws that restrict residency of undocumented immigrants ought to be adopted by every circuit court. Because the Supreme Court denied certiorari in Keller II, it will have to grant certiorari to a similar case to clarify that a regulation prohibiting undocumented immigrants from obtaining housing in a city is an impermissible regulation of immigration and is therefore preempted. Without resolution by the Supreme Court, confusion over residency restrictions on immigrants will remain unless Congress explicitly prohibits restrictions on undocumented immigrants’ ability to rent housing because it interferes with the federal immigration scheme and because of the negative policy implications of these laws.

80. See Farmers Branch, 726 F.3d 524, 533–36 (5th Cir. 2013).