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FRED H. KELLER, JR., ET AL., PLAINTIFFS, V.
CITY OF FREMONT, DEFENDANT.

MARIO MARTINEZ, JR., ET AL., PLAINTIFFS, V.
CITY OF FREMONT ET AL., DEFENDANTS.

790 N.W.2d 711

Filed November 5, 2010. No. S-33-100018.

Certified Question from the U.S. District Court for the District of Nebraska. Certification request denied.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

This matter is before the court on a "Certification Request" filed in this court by the U.S. District Court for the District of Nebraska under Neb. Rev. Stat. § 24-219 et seq. (Reissue 2008). The federal district court's request involves two federal cases consolidated under the lead case docketed in federal district court as case No. 8:10CV270. The court has certified the following question:

> May a Nebraska city of the first class, that is not a "home rule" city under Article XI of the Nebraska Constitution and has not passed a home rule charter, promulgate an ordinance placing conditions on persons' eligibility to occupy dwellings, landlords' ability to rent dwellings, or business owners' authority to hire and employ workers, consistent with Chapters 16, 18, and 19 of the Revised Statutes of Nebraska?

Section 24-221 requires that a certification request set forth (1) the questions of law to be answered and (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

The question certified is a general question. It concerns a city of the first class' authority under various state statutes to enact an ordinance "*placing conditions on*" residential property rentals or business hiring and employment decisions. The question offers no particulars as to the nature or extent of the "conditions" which have been or may be imposed. But the question

asks us to answer the legal question through an exploration of chapters 16, 18, and 19 of the Nebraska Revised Statutes.

Although the certified question does not specify the conditions that the city seeks to impose, the facts and showing submitted under § 24-221(2) consist of the following: (1) a copy of "Fremont Ordinance 5156" out of which "[t]his controversy arose"; (2) a statement that voters adopted the ordinance on June 21, 2010, to become effective on June 29, 2010; and (3) a statement that the Fremont City Council voted on June 27 to stay its enforcement. Thus, the "conditions" to which the certified question refers are those imposed by "Fremont Ordinance 5156." Regarding the controversy, however, the showing filed under § 24-221(2) states only that the controversy centers on the plaintiffs' challenge to "the legality of the Ordinance on grounds of both state and federal law."

Under § 24-219, this court may answer certified questions when (1) a proceeding before the federal certifying court involves a question of state law which may be determinative of the pending cause and (2) the certifying court believes that there is no controlling precedent in the state. However, under § 24-219, this court may "in its absolute discretion, accept or reject such request for certification."

In interpreting the certified request and deciding whether to accept it, we are guided by the following principles. Section 24-219 requires a federal certified question to present a question of state law that is undecided. But the U.S. Supreme Court has held that federal courts are not required to obtain a state court's construction of a state statute or ordinance before deciding a federal constitutional challenge to the law and should not certify such question unless the law is fairly susceptible to a narrowing construction.[1] Also, the Court has held that it is "manifestly inappropriate to certify a question in a case where . . . there is no uncertain question of state law whose resolution might affect the pending federal claim."[2] The same is

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[1] See, *Stenberg v. Carhart*, 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000); *Houston v. Hill*, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987).

[2] *Houston, supra* note 1, 482 U.S. at 471.

true under § 24-219, which requires us to consider whether the certified question may be determinative of the pending federal cause. The "determinative" requirement is also consistent with state courts' holdings declining to answer certified questions asking for advisory opinions.[3]

Here, although § 24-221 requires a statement of facts showing the nature of the controversy, the request does not specify the plaintiffs' challenge to the ordinance on state law grounds. Nor does it identify any state statutes or state constitutional provisions that were allegedly violated in the plaintiffs' complaints. These omissions require us to make assumptions about the plaintiffs' state law challenge and imply that it is a constitutional challenge.

Obviously, even if this court held that the ordinance did not violate a state statute or the state Constitution, that holding would not be determinative of a federal constitutional challenge to the ordinance.[4] And the request does not ask us to consider whether any authorizing statute raised by the complaint is subject to a construction that would limit the statute's or ordinance's reach and thus resolve the pending federal challenge. Nor does it ask us to decide whether the ordinance violated any specific statute. Thus, we assume that the plaintiffs have alleged that the ordinance offends state and federal constitutional protections or conflicts with federal immigration law, rather than violating specific state statutes.

We have stated that "'"[i]n the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to

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[3] See, e.g., *CSX Transp., Inc. v. City of Garden City*, 279 Ga. 655, 619 S.E.2d 597 (2005); *Carle Foundation v. Illinois Dept. Revenue*, 396 Ill. App. 3d 329, 917 N.E.2d 1136, 335 Ill. Dec. 72 (2009); *Darney v. Dragon Products Co., LLC*, 994 A.2d 804 (Me. 2010); *State v. Arends*, 786 N.W.2d 885 (Minn. App. 2010).

[4] See, e.g., *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006), quoting *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

when and how such police power should be exercised." . . .'"[5] But because the request does not identify any state constitutional provision implicated by the controversy that is unique to Nebraska, we assume the plaintiffs' state constitutional challenge coincides with federal constitutional provisions.

The most common constitutional challenges to these types of ordinances have been due process, equal protection, and federal preemption challenges.[6] We have interpreted the Nebraska Constitution's due process and equal protection clauses to afford protections coextensive to those of the federal Constitution.[7] Because we have not afforded greater state constitutional protections, no state constitutional questions are determinative of the pending federal claims. If the plaintiffs have instead claimed that the ordinance is preempted by federal immigration laws, preemption of a state law under the Supremacy Clause presents a federal question.[8]

Even assuming that there could be state law issues in the federal case that we have not considered here, we could not decide those issues without knowing the nature of the challenge. Thus, we decline to accept the federal district court's certified question.

It is therefore ordered that the certification request by the U.S. District Court for the District of Nebraska is denied.

CERTIFICATION REQUEST DENIED.

WRIGHT, J., not participating.

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[5] *Wolf v. City of Omaha*, 177 Neb. 545, 555-56, 129 N.W.2d 501, 508 (1964).

[6] See *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010).

[7] See, e.g., *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007); *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006); *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[8] See, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983); *Lozano, supra* note 6.

MILLER-LERMAN, J., concurring.

I concur with the opinion of this court that the certification request should be declined. I write separately because my

reasoning differs. In particular, to the extent the opinion states otherwise, I do not agree that the lack of specificity in the certified question and showing implies only the presence of a constitutional challenge and I do not agree that because the showing regarding the nature of the controversy is not informative, we must assume that the pending federal consolidated case not only involves constitutional issues but cannot be determined on the basis of state statutory law.

The U.S. District Court for the District of Nebraska, pursuant to Neb. Rev. Stat. § 24-219 et seq. (Reissue 2008), certified this question:

> May a Nebraska city of the first class, that is not a "home rule" city under Article XI of the Nebraska Constitution and has not passed a home rule charter, promulgate an ordinance placing conditions on persons' eligibility to occupy dwellings, landlords' ability to rent dwellings, or business owners' authority to hire and employ workers, consistent with Chapters 16, 18, and 19 of the Revised Statutes of Nebraska?

The request asks this court to determine if a Nebraska city of the first class can promulgate an ordinance, such as Fremont ordinance No. 5156, consistent with chapters 16, 18, and 19 of the Nebraska Revised Statutes. Chapters 16, 18, and 19 contain about 1,200 separately numbered statutes which, in the printed version, run about 500 pages. The certified question filed under § 24-221(1) fails to identify any particular statute. Furthermore, the showing filed under § 24-221(2) does not identify a state statute or focus on a series of state statutes which form the basis of the controversy which would inform the certified question. The question does, however, suggest by its terms that we are being asked a question about state statutory law.

The opinion assumes, based on what is known about other cases challenging these types of ordinances, that the lack of specificity in the question and showing implies that the pending federal consolidated case involves federal constitutional challenges or federal question issues which will wholly determine the outcome of the case, making an opinion by Nebraska's highest state court unnecessary. Under Nebraska's

certification of questions of law statute, § 24-219, the federal certifying court may request an answer to a question of law if "there are involved in any proceeding before [the federal court] questions of law of this state." Contrary to the opinion, I would not rule out the possibility that an issue has been raised in the federal consolidated case which questions the scope of the authority of cities to promulgate certain ordinances under Nebraska statutory law which the Nebraska Supreme Court is best equipped to assess. In my view, there are possible "questions of [statutory] law of this state" in the federal case "which may be determinative of the cause . . . pending in the certifying court." *Id.*

Certification is useful where an interpretation of state statutory law might avoid a need to decide a federal question. See 17A Charles Alan Wright et al., Federal Practice and Procedure § 4248 (3d ed. 2007 & Supp. 2010). The showing at issue suggests as much where it states that if the "Nebraska Supreme Court . . . suggests that the Ordinance is invalid under state law, this [federal] Court will entertain a motion to dismiss the remaining federal questions as moot." Further, the request indicates the presence of a significant state law issue where it states that if this court declines the request, the federal court "will consider whether [*Pullman*-type] abstention is appropriate . . . to enable the parties to pursue available state remedies." See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941).

Consistent with the opinion, it has been observed that "[a] federal court may not impose on a state court the responsibility for determining a federal question." *Imel v. United States*, 523 F.2d 853, 857 (10th Cir. 1975). For several reasons, including the request's reference to "*Pullman*-type" abstention, I agree with the opinion that the request implies the presence of a federal constitutional issue. Contrary to the inference in the opinion, however, there is authority for the proposition that this court may answer a question about the meaning of a state law while not opining on the issue of the law's constitutionality pending in federal court. See *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). See, similarly, *Baird v. Belotti*, 428 F. Supp. 854 (D. Mass. 1977).

Although it would admittedly require us to be careful, I believe, for the "benefits of comity and harmony," see *Cuesnongle v. Ramos*, 835 F.2d 1486, 1494 (1st Cir. 1987), between federal and state courts, we should not foreclose accepting and answering a focused certified question asking us to construe a state statute while explicitly reserving comment on the constitutional implications. See *Orr, supra*. Indeed, we have done so where a certified question required construction of a statute but did not request consideration of the statute's constitutionality. See *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991).

With respect to the scope of our potential inquiry, I note that although the Nebraska version of the certification of questions of law act states that a question can be certified "which may be determinative of the cause" in federal court, see § 24-219, the 1995 replacement to the Uniform Certification of Questions of Law Act (1967) requires only that the question "may be determinative of an issue in pending litigation." See Unif. Certification of Questions of Law (1995) § 3, 12 U.L.A. 53 (2008). In any event, "determinative of the cause" has been read by other state courts, not as meaning that the answer entirely disposes of the federal case, but, rather, that the answer to a pretrial certified question will materially advance the ultimate termination of the federal litigation. E.g., *Schlieter v. Carlos*, 108 N.M. 507, 775 P.2d 709 (1989). The majority of state courts seem to read "determinative of the cause" as determining at least one claim in the federal case. See, *Volvo Cars of North America v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006) (collecting cases discussing "determinative of the cause"); *Western Helicopter Services v. Rogerson Aircraft*, 311 Or. 361, 811 P.2d 627 (1991). To the extent the opinion implies that a certified question will only be accepted if it determines the outcome of the entire federal case, I read that implication as dictum.

Finally, with respect to preemption, the ordinance by its terms is directed at the "harboring of illegal aliens or hiring of unauthorized aliens"; these subjects implicate federal concerns. The opinion mentions preemption and the recently decided case of *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010) (concluding that employment provisions

of similar ordinance were conflict preempted whereas housing provisions were field preempted). I agree with the opinion that an issue of preemption is no doubt present in the federal cases, and poses federal questions, and that the resolution of the preemption issue, in the absence of a state law claim, may well resolve the entire federal controversy. I would not assume the preemption outcome to be the same with respect to the distinct issues regarding housing and employment and would not assume for certification purposes that construction of state law necessarily lacks relevance in equal measure as to housing and employment.

Because the showing in this request lacks specificity regarding the nature of the challenge in the federal consolidated case and the question does not direct us to the specific state law at issue, I agree with the opinion which declines this request.