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July 23, 2012

Marcia M. Waldron
Clerk of the Court
United States Court of Appeals for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Re: *Pedro Lozano, et al. v. City of Hazleton*, 3rd Cir. No. 07-3531, Sup. Ct. No. 10-772—Letter Brief of the Appellant City of Hazleton Regarding the Supreme Court's Decision in *Arizona v. United States*, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012).

Dear Ms. Waldron:

This letter brief responds to your June 26, 2012, letter calling for a new round of briefing in the case of *Pedro Lozano, et al. v. City of Hazleton.* On June 25, 2012, the United States Supreme Court issued its decision in the case of *Arizona v. United States*, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012).

In *Arizona*, the Supreme Court reversed the Ninth Circuit's decision in

Arizona v. United States, 558 F.3d 856, 866 (9th Cir. 2011), which held all of the four challenged provisions of Arizona Senate Bill 1070 ("SB 1070") to be preempted. The Court rejected the implied conflict preemption challenge to the principal section of SB 1070—Section 2(B), which mandates that all state and local police in Arizona verify the immigration status of persons they encounter during law enforcement activities whom they reasonably suspect to be illegal aliens. *Arizona*, 183 L. Ed. 2d at 376-79. For the reasons described below, the analysis of that section is most applicable to the case at bar.

The other three sections of SB 1070 are less relevant to current inquiry. The Court applied conflict preemption principles to two other sections of the law. Section 5(C) was conflict preempted because it contradicted Congress's manifest intention to impose criminal penalties on the employers of unauthorized aliens, but not on the aliens themselves. *Id*. at 371-73. Section 6 was conflict preempted because it gave state officers discretion to make an independent determination of an alien's removability from the United States.[1] Section 3 was impliedly

[1] "Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers. …This state authority could be exercised without any input from the federal government about whether an arrest is warranted in a particular case. …Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer." *Arizona*, 183 L. Ed. 2d at 374. Such independent determinations of removability are expressly prohibited by the

(footnote continued on next page …)

preempted on field preemption grounds distinct from those asserted in the case at bar.[2]

In this letter brief, the City will explain the ways in which the Supreme Court's *Arizona* decision directly affects this Court's reconsideration of the instant case. This letter brief contains the following sections:

As this letter brief explains, *Arizona* significantly weakens Plaintiffs' preemption

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(… footnote continued from previous page)

IIRA Ordinance. §§ 3.D, 7.E. In any event, the IIRA Ordinance does not authorize Hazleton officials to make immigration arrests.

[2] The Court found Section 3 to be field preempted in the specific field of an alien registration system. *Arizona*, 183 L. Ed. 2d at 369-71. The Ordinances cannot plausibly be said to operate in that field. See *infra*, Section V.

claims in the instant case. Consequently, the only holding that is consistent with *Arizona* is one that upholds the Hazleton Ordinances in their entirety.

I. Factual Background.

For the convenience of the Court, the City will briefly restate the facts with respect to how the Ordinances at issue operate. On July 13, 2006, the City of Hazleton enacted Ordinance 2006-10, the "Illegal Immigration Relief Act Ordinance." On September 21, 2006, Hazelton enacted Ordinance 2006-18 to replace Ordinance 2006-10. Ordinance 2006-18 was subsequently amended by Ordinances 2006-40 and 2007-6. They are collectively referred to as the "Illegal Immigration Relief Act" ("IIRA") Ordinance,

On August 15, 2006, the City enacted Ordinance 2006-13, the "Rental Registration Ordinance" ("RRO") to address increasing problems with absentee landlords and overcrowded apartments. It requires any landlord to obtain a permit prior to allowing occupancy of a dwelling unit. It also requires any tenant to provide basic identity and contact information to the City in order to obtain an occupancy permit. The City does not attempt to verify or confirm any information received from tenants under the ordinance. All occupancy permits are issued to all applicants, regardless of the information or documents presented. Trans. vol. 5, p. 119, Appx. A1852. The City merely collects information that may be used later

for code enforcement, security purposes, or for the purpose of investigating an IIRA Ordinance complaint.

The IIRA Ordinance renders it unlawful for any business entity to employ unauthorized aliens, as that term is defined by federal law. § 4. The IIRA Ordinance does not permit any Hazleton official to determine independently whether a person is authorized to work in the United States. § 7.E. Rather, the city relies entirely upon the federal government's verification of any person's employment authorization, through the E-Verify program (formerly the "Basic Pilot Program"). § 4.B(3).

The IIRA Ordinance also renders it unlawful to harbor an illegal alien by knowingly providing rental accommodations to an illegal alien. § 5. The IIRA Ordinance applies federal definitions of unlawful presence in the United States. § 3.D. The IIRA Ordinance does not permit any City official to independently determine whether a person is an alien unlawfully present in the United States. §§ 3.D, 7.E. Rather, the City relies entirely upon the federal government's verification of any alien's legal status, pursuant to 8 U.S.C. § 1373(c). §§ 3.D, 4.B(3), 4.B(7), 5.B(3), 5.B(4), 5.B(8), 5.B(9), 7.D(2), 7.E, 7.G. The City will use the Systematic Alien Verification for Entitlements (SAVE) internet-based system, to obtain such verifications from the federal government, unless the federal government directs the City to utilize another method of verification.

Ordinance 2006-40 clarifies that the IIRA applies only prospectively. § 7.A. It defines what actions constitute a correction of a violation under the IIRA, § 7.C-7.D, and allows an employer or landlord to toll enforcement by seeking reverification of an alien's status from the federal government. § 7.E. It also provides that the Magisterial District Court of Hazleton is an available venue in which an employer, employee, landlord, or tenant may challenge the enforcement of the IIRA, at any point in the enforcement process. § 7.F.

II. *Arizona* Clarified that the *Salerno* Standard for Facial Challenges Applies in Immigration Preemption Cases Like the Case at Bar.

When they initiated this lawsuit, Plaintiffs brought a highly-speculative facial challenge to the validity of the Ordinances before they could be implemented. Consequently, Plaintiffs must establish that the Ordinances would conflict with federal law under *every conceivable set of circumstances:* "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully since the challenger must establish that *no set of circumstances exist under which the Act would be valid*." *United States v. Salerno,* 481 U.S. 739, 745 (1987)(emphasis added).

In 2008, the Supreme Court reaffirmed the *Salerno* standard's high hurdle for facial challenges. *Washington State Grange v. Washington State Republican Party,* 128 S. Ct. 1184, 1190 (2008). The Court also reiterated that to prevail in a

facial challenge, a plaintiff must establish "that the law is unconstitutional in *all* of its applications." *Id*. (emphasis added). This is because "[t]he State has had no opportunity to implement [the law], and its courts have had no occasion to construe the law in the context of actual disputes… or to accord the law a limiting construction to avoid constitutional questions." *Id*. The Supreme Court cautioned: "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id*. (*quoting United States v. Raines*, 362 U.S. 17, 22 (1960)).

In *Arizona*, the Supreme Court reiterated that facial challenges are disfavored, this time in the specific context of a conflict preemption challenge to a state law discouraging illegal immigration. "There is basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume [the law] will be construed in a way that creates a conflict with federal law." *Arizona*, 183 L. Ed. 2d at 378-79.

The *Arizona* holding specifically undermines Plaintiffs' contention that, because they declare that the City lacks authority to act in *every* application of the Ordinance, they need not meet the high standard of the *Salerno* rule. Pl. Resp. Br. 82. In the *Arizona* case, the plaintiff asserted that Section 2(b) of SB 1070 was preempted in *all possible applications* because it imposed a statewide policy

mandating that all law enforcement officers make inquiries to the federal government whenever, during the enforcement of other laws, they have reasonable suspicion indicating that a person is unlawfully present in the United States. *Arizona*, 183 L. Ed. 2d at 377. This, the plaintiff argued, would interfere with federal enforcement priorities, namely by requiring Arizona officers to contact federal officers even when it was unlikely that the person detained would be removed. *Id.* The plaintiff therefore alleged that Section 2(B) was unconstitutional in *all* of its applications. *See id*.

The *Arizona* Court rejected this argument and reiterated that the rule for facial challenges applies—even when a plaintiff raises a preemption challenge claiming that no application of the law would be permissible. A court must not assume that the state or local law will necessarily create a conflict with federal law. "[I]t would be inappropriate to assume [the law] will be construed in a way that creates a conflict with federal law." *Id.* at 378-79. The same is true in the instant case.

As noted in the City's briefs when this case was originally before this Court, there are multiple possible applications of the Ordinances that would certainly not be preempted. For example, suppose a lawful permanent resident alien (or "green card" holder) rents an apartment in Hazleton in compliance with the RRO. A few months later, a neighbor files a complaint based on incorrect information and

alleges that the tenant is an alien unlawfully present in the United States. The City verifies the tenant's immigration status with the federal government, pursuant to 8 U.S.C. § 1373(c), and confirms that the tenant is a lawful permanent resident. *See* IIRA §§ 3.D; 5.B(3). No further action is taken by the City. This hypothetical case could not give rise to any possible preemption concerns in the wake of *Arizona*. No more need be shown for the Ordinances to survive this facial challenge.

Finally, *Arizona* highlights two errors made by this Court in its now-vacated decision. First, *Arizona* removes the doubt expressed by this Court regarding the applicability of the *Salerno* standard: "…Hazleton insists that we must apply the *Salerno* standard to Plaintiffs' claims under the Supremacy Clause. However, since both *Washington State Grange* and *Salerno* involved quite different constitutional challenges than the ones we consider here, it is not at all clear that *Salerno* applies." *Lozano v. Hazleton*, 620 F.3d 170, 203 n.25 (3d Cir. 2010). *Arizona* clarifies that the high standard for facial challenges applies in the specific context of a conflict preemption challenge concerning federal immigration law. *Arizona*, 183 L. Ed. 2d at 378-79.

Second, *Arizona's* reiteration of the *Salerno* standard for facial challenges underscores the problem with this Court's approach to conflict preemption in its now-vacated holding. This Court speculated that the City's implementation of the

IIRA Ordinance might lead to the eviction of an alien who is *reported by the federal government* to be unlawfully present in the United States but is not removed from the United States by Immigration and Customs Enforcement (ICE) even though the federal government knows of the alien's unlawful status. *Lozano*, 620 F.3d at 222. Setting aside the question of what legal impact a decision to forego removal has, if any, it is speculation that such an alien might reside in Hazleton, that such an eviction might occur, and that a subsequent decision to forego removal might be made. "In determining whether a law is facially invalid, [a court] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange*, 128 S. Ct. at 1190 (internal citation omitted). This Court cannot rely on a hypothetical scenario as the basis for its conflict preemption holding in the wake of *Arizona*.

III. *Arizona* Confirmed that a Presumption Against Preemption Applies in All Cases, Including Those Dealing with Immigration.

In discussing the types of preemption and prior to reviewing all "four challenged provisions" of SB 1070, the *Arizona* Court stated that, "In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*, 183 L. Ed. 2d at 369 (*quoting Rice v. Santa Fe Elevantor Corp.*, 331 U.S.

218, 230 (1947); and *citing Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

However, in its now-vacated opinion, this Court applied the presumption against preemption with respect to the employment provisions of the ordinance, 620 F. 3d at 206-07, but declined to apply the presumption against preemption with respect to the housing provisions of the ordinance. This Court dismissed any presumption against preemption in areas "where there has been a history of significant presence":

> Accordingly, in pre-emption inquiries, we assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [*Medtronic, Inc. v. Lohr*, 518 U.S. at 485] (internal quotation marks omitted). When states act beyond the scope of their historic police powers, however, and wander into "*an area where there has been a history of significant federal presence," we do not begin with this assumption of nonpre-emption. United States v. Locke*, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000).

Lozano, 620 F.3d at 203 (emphasis added). This Court then explained that it would not apply any presumption against preemption to the housing provisions of the IIRA: "Through its housing provisions, Hazleton attempts to regulate residence based solely on immigration status. Deciding which aliens may live in the United States has always been the prerogative of the federal government. Hazleton purposefully chose to enter this area of 'significant federal presence.' Accordingly, we will not presume nonpre-emption." *Id*. at 220 (*quoting Locke*, 529 U.S. at 108).

This Court's line of reasoning is not valid after *Arizona*. Importantly, the Supreme Court noted that the assumption of non-preemption applied to *all four* SB 1070 provisions. *Arizona*, 183 L. Ed. 2d at 369. One of those provisions, Section 3, the Supreme Court found to be field preempted because of the 1941 case of *Hines v. Davidowitz*, 312 U.S. 52, in which the Court found field preemption in the area of alien registration. Therefore, according to the *Arizona* Court, there had been a significant federal presence—a presence so vast that it ousted state authority to enact even complementary legislation and "so dominant that the federal system [was] assumed to preclude enforcement of state laws on the same subject"—for over *70 years*. *Arizona*, 183 L. Ed. at 369 (*quoting Rice*, 331 U.S. at 230). But despite its prior holding of field preemption, the Court still began with the presumption against preemption. That is because the presumption applies in "all pre-emption cases." *Wyeth*, 555 U.S. at 565. Therefore, this Court's supposition that a significant federal presence in any part of the field of immigration eliminates the presumption against preemption was incorrect. *See Lozano*, 620 F. 3d at 220.

IV. *Arizona* Supports the IIRA Ordinance Against Plaintiffs' Conflict Preemption Claims.

As noted above, the *Arizona* Court applied conflict preemption principles to three sections of the law, finding Sections 5(C) and 6 to be conflict preempted and finding Section 2(B) not to be conflict preempted. Section 5(C) imposed state

criminal penalties on aliens who engage in unauthorized employment, which conflicted with the objective of a specific federal statute (8 U.S.C. § 1324a) that penalized employers of unauthorized aliens, but not the unauthorized aliens themselves. Congressional intent was unmistakable: "…Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." *Arizona*, 183 L. Ed. 2d at 372. In the instant case, there is no specific statute that Plaintiffs can point to that even *suggests* Congress intended to allow landlords to harbor illegal aliens in rental accommodations. Section 6 was conflict preempted because it attempted to give state officers arrest authority that exceeded the authority of federal ICE officers and permitted them to make independent determinations of aliens' removability. *Id*. at 374-75. The Ordinances in the instant case do neither.

In contrast, the section that the *Arizona* Court did not find to be conflict preempted is one that bears a significant similarity to the IIRA Ordinance. Section 2(B) of the Arizona law requires state officers to verify the immigration statuses of certain aliens with the federal government, just as the Ordinance requires the City to verify the immigration statuses of certain aliens with the federal government. Both laws are based on 8 U.S.C. § 1373(c), which expresses the statutory obligation that Congress imposed upon the executive branch to facilitate such programs. As the *Arizona* Court observed, "Consultation between federal and state

officials is an important feature of the immigration system. Congress has made clear that no formal agreement or special training needs to be in place for state officers to 'communicate with the [Federal Government] regarding the immigration status of any individual….'" *Id.* (*quoting* 8 U.S.C. § 1357(g)(10)(A)).

A. *Arizona* Confirmed Congressional Intent to Facilitate Status Verification Inquiries Like Those of the IIRA Ordinance.

As noted above, the *Arizona* Court sustained the provision of the Arizona law most similar to the Ordinances in the instant case—Section 2(B), the provision mandating communication between local officials and ICE regarding aliens' immigration statuses. *Arizona*, 183 L. Ed. 2d at 376-79. Both the Arizona law and the IIRA expressly rely on 8 U.S.C. § 1373(c), which requires ICE to provide the immigration status of any alien "for any purpose" whenever a local official inquires. *See* Ariz. Rev. Stat. Ann. § 11-1051(B). Indeed, the IIRA refers to 8 U.S.C. § 1373(c) eleven times. IIRA §§ 3.D, 4.B(3), 4.B(7), 5.B(3), 5.B(4), 5.B(8), 5.B(9), 7.D(2), 7.E, 7.G (twice). The text of the federal statute is unambiguous:

> **Obligation to respond to inquiries**
>
> The Immigration and Naturalization Service *shall respond* to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency *for any purpose authorized by law*, by providing the requested verification or status information.

8 U.S.C. § 1373(c)(emphasis added).

The *Arizona* Court spoke at length about the importance of this federal statute. As the Court observed, Congress made ICE compliance with local requests for immigration status verification *mandatory*: "…Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status." *Arizona*, 183 L. Ed. at 376. The Court also noted that Congress created the Law Enforcement Support Center (LESC) to respond to such requests from state and local officials around the clock:

> ICE's Law Enforcement Support Center operates "24 hours a day, seven days a week, 365 days a year" and provides, among other things, "immigration status, identity information and real-time assistance to local, state and federal law enforcement agencies.' LESC responded to more than one million requests for information in 2009 alone."

Arizona, 183 L. Ed. at 377 (internal citations omitted). Through the enactment of 8 U.S.C. § 1373, Congress assured cities and states that if they enacted programs that involved immigration status inquiries, the federal government *must* respond. Where a city or state relies upon the federal government's determination of an alien's immigration status, no preemption exists.

Importantly, in the same section, Congress also recognized the interest of cities in "[s]ending" and "[m]aintaining" such "information regarding the immigration status, lawful or unlawful, of any individual." 8 U.S.C. §§ 1373(b)(1)-(2). The fact that Congress wanted municipalities to be able to *send*

and *maintain* alien status information—not just receive it—is definitive proof that Congress expected state and local governments to implement programs under which they would acquire information about the legal status of aliens, and that they would maintain records related to such inquiries.

The Senate Report accompanying the statute that included 8 U.S.C. § 1373 emphasized Congress's objective of encouraging states to acquire and maintain immigration-related information:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. *The acquisition, maintenance, and exchange of immigration-related information by State and local agencies* is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 104-249, 104th Cong., 2d Sess., at 19-20 (1996) (emphasis supplied). "Congress … has encouraged the sharing of information about possible immigration violations." *Arizona*, 183 L. Ed. 2d at 377. The IIRA Ordinance exemplifies that sharing of information.

In addition to 8 U.S.C. § 1373 (and the similar language found at 8 U.S.C. § 1644), the *Arizona* Court also pointed to 8 U.S.C. § 1357(g)(10). In 1996, Congress expressly put to rest any notion that it did not welcome local efforts to assist with the problem of illegal immigration. In enacting 8 U.S.C. § 1357(g), a provision allowing states enter into agreements to deputize specially-trained state and local officers to exercise the full "function[s] of an immigration officer" of the

United States, Congress affirmed that *no such agreement was necessary for municipalities to act*. Municipalities retained unpreempted authority to otherwise assist in immigration enforcement: "Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision … otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10). The Supreme Court in *Arizona* confirmed that this provision of law "encouraged the sharing of information about possible immigration violations." *Arizona*, 183 L. Ed. 2d at 377.

B. The Limits in the Arizona Statute that Weighed Against Conflict Preemption Are Also Found in the IIRA Ordinance.

The *Arizona* decision mentioned three provisions of Section 2(B) that weigh against a finding of conflict preemption:

> Three limits are built into the state provision. First, a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification. Second, officers "may not consider race, color or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s]." …Third, the provisions must be "implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."

Arizona, 183 L. Ed. 2d at 376 (internal citations omitted).

The second and third limits are also found in the Hazleton Ordinances. The Ordinances do not include the first limit because the Ordinances do not authorize

City officials to detain aliens or otherwise deal with arrest authority. Under the RRO, all tenants are presumed to be either United States citizens or aliens lawfully present in the United States. There is no scrutiny of any documents or information provided to the City. Trans. vol. 5, p. 119, Appx. A1852. When verification of an alien's lawful presence occurs in the enforcement of the housing provisions of the IIRA Ordinance, the City does not attempt to make any independent determination of an alien's immigration status. § 7.E. Instead, the City relies on the federal government's SAVE Program, or any other verification method the federal government directs the City to utilize, for status verification purposes.

The second and third limits described in *Arizona* are evident on the face of the IIRA Ordinance. Section 5.B(2) states: "A complaint which alleges a violation on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced." And the Ordinance contains language regarding the manner in which it is to be construed that is virtually identical to the SB 1070 text approved by the *Arizona* Court: "The requirements and obligations of this section shall be implemented in a manner fully consistent with federal law regulating immigration and protecting the civil rights of all citizens and aliens." § 6.A. As the *Arizona* Court did, this Court should in a facial challenge assume that these limitations will be faithfully applied.

C. Federal Enforcement Priorities Have No Preemptive Effect.

The *Arizona* decision also undermined the argument that enforcement of the Ordinances might somehow conflict with the federal government's enforcement priorities. In their Response Brief, Appellees argued that the IIRA is conflict preempted because the federal government "routinely allows persons who currently lack lawful immigraiton status to live in the United States." Appellees' Resp. Br. 47. This Court adopted the same line of reasoning: "Hazleton would effectively remove from its City an alien college student the federal government has purposefully declined to initiate removal proceedings against." 620 F. 3d. 222.

However, the *Arizona* Court made clear that the unlikelihood of ICE removing a particular alien does not have preemptive effect:

> It is true that §2(B) does not allow state officers to consider federal enforcement priorities in deciding whether to contact ICE about someone they have detained. …In other words, the officers must make an inquiry even in cases where it seems unlikely that the Attorney General would have the alien removed. …Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of information about possible immigration violations. See 8 U.S.C. § 1357(g)(10)(A).

Arizona, 183 L. Ed. 2d at 377. The fact that the federal government has not yet devoted the resources to removing a particular illegal alien from the United States (or may never devote the resources to doing so) did not prohibit the State of Arizona from verifying a lawfully detained alien's immigration status with the federal government. Similarly, it does not prohibit the City from enforcing the

housing provisions of the IIRA Ordinance after the federal government has confirmed that the alien in question is unlawfully present in the United States. At that point in time, absent a claim for relief granted by an immigration court, *the alien has no legal right to reside anywhere in the United States.* The alien therefore has no legal right to reside in the City of Hazleton.

If the illegal alien manages to escape enforcement of federal law for years on end, and eventually receives some sort of amnesty that results in an adjustment of status to lawfully present, that alien would then possess the legal right to be present in the United States. But until then, the alien is unlawfully present in the United States. Plaintiffs are asking this Court to enjoin the City from acting on any illegal alien's *current* immigration status (as confirmed by the federal government) in the hope that someday, somehow, that status might change, and in the meantime that the federal government might focus its enforcement resources elsewhere. As the *Arizona* Court indicated, the federal executive branch's decision not to remove a particular illegal alien (for whatever reason) does not change conflict preemtion analysis.

IV. *Arizona* Undermines the Theory that the Ordinances Constitute a Preempted "Regulation of Immigration."

The *Arizona* Court offered no support whatsoever for the holding in the now-vacated opinion of this Court that the housing provisions of the Hazleton

Ordinances consituted a prohibited "regulation of immigration." On the contrary, the *Arizona* opinion undermines that holding, because Section 2(B) of the Arizona law would be preempted if it were correct.

Arizona's holding that Section 2(B) does not on its face conflict with federal immigration law confirms *a fortiori* that the district court in the instant case correctly ruled in 2007 that the *Hazleton* housing provisions do not constitute a preempted "regulation of immigration." That is because they do not fit the narrow definition of a "regulation of immigration" established by the Supreme Court—they do not determine who may enter the United States or the legal conditions under which a legal entrant may remain in the United States:

> Plaintiffs argue that the instant ordinances are impermissible regulations of immigration. Based upon this definition of "regulation of immigration" [in *De Canas*, 424 U.S. at 355] however, we find that the laws are not unconstitutional on that ground. They do not regulate who can or cannot be admitted to the country or the conditions under which a legal entrant may remain.

Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 524, n.45 (M.D. Pa. 2007).

The IIRA Ordinance plainly does not fall within the narrow definition of a preempted "regulation of immigration" provided by the Supreme Court in *De Canas*, namely a determination of "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas*, 424 U.S. at 355. In its now-vacated opinion, this Court acknowledged—as it

must—that the housing provisions do not constitute "expulsion" of any alien from the United States by the City. *See Lozano*, 620 F.3d, at 220 ("We recognize, of course, that Hazleton's housing provisions neither control actual physical entry into the City, nor physically expel persons from it.").

Nevertheless, this Court in its vacated opinion held that the housing provisions constituted a prohibited regulation of immigration, holding that the enforcement of the housing provisions of the IIRA would make it difficult for illegal aliens to reside in Hazleton and would therefore effectively remove those aliens from the United States. *Id*. "'It 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." *Id*. at 220-221 (*quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989)).

If the overbroad definition of what constitutes a "regulation of immigration" in this Court's now-vacated opinion were correct, then it would have necessarily resulted in the preemption of Section 2(B) of the Arizona law (requiring all state and local police to inquire into immigration status whenever reasonable suspicion exists that the encountered individual is unlawfully present). That section unquestionably makes it exponentially more difficult for an illegal alien to reside in the State of Arizona—since every traffic citation becomes a potential basis for detention and transfer to ICE. But the *Arizona* Court upheld the section. *Arizona*,

183 L. Ed. 2d at 376-79; *see also Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (upholding state law penalizing employers for knowingly employing unauthorized aliens, thus making the aliens' ability to reside in Arizona more difficult).

Finally, it must be remembered that federal law has long encouraged states and localities to make it more difficult for illegal aliens to reside within their jurisdictions. Long before Hazleton ever considered its Ordinances, Congress had already enacted multiple federal laws in the field of housing that require the City to screen occupants of any "public or assisted housing," and to deny occupancy to those found to be unlawfully present. 8 U.S.C. § 1621(c)(1)(B). Moreover, the City must periodically report identifying information on public or assisted housing occupants who are unlawfully present aliens to ICE. *See* 8 USC § 1611(c)(1)(A); 42 U.S.C. § 1436a; 42 U.S.C. § 1437y. Federal law also expressly states that a city may direct its law enforcement officers to arrest "any person" for "attempting to harbor," "conspiring to attempt to harbor", or "aiding or abetting an attempt to harbor" an alien in "reckless disregard of the fact" that the alien "remains in the United States in violation of law… in any building…." 8 U.S.C. §§ 1324(a)(1)(A)(iii), 1324(c). In short, discouraging illegal aliens from residing in the United States is consistent with federal law, and it is certainly not within the narrow definition of a preempted "regulation of immigration" laid out in *De*

Canas.

V. Plaintiffs Cannot Claim that the Ordinances Constitute a Preempted Registration System.

Although Plaintiffs did not make the argument in their initial briefing to this Court, Plaintiffs may now attempt to claim that the Ordinance is a forbidden "alien registration" system, hoping to somehow piggy-back on the *Arizona* Court's rejection of the alien registration scheme adopted by Arizona. *See Arizona*, 183 L. Ed. 2d at 369-71. Such an argument could not stand in the instant case.

It is true that states and cities *are* preempted from implementing alien registration systems. The Supreme Court held in 1941 that the State of Pennsylvania's attempt to register, document, and track all aliens in the State during the Second World War was preempted by Congress's "complete system for alien registration." *Hines v. Davidowitz*, 312 U.S. at 70. The *Arizona* Court reiterated the *Hines* conclusion, holding that the federal alien registration system displaced an alien registration law adopted by Arizona through field preemption. "The framework enacted by Congress leads to the conclusion here, as it did in *Hines*, that the Federal Government has occupied the field of alien registration." *Arizona*, 183 L. Ed. 2d at 370. The Arizona law was field preempted because it created state crimes for failing to register in the federal registration system and failure to carry federal registration documents, thereby "giv[ing] itself independent

authority to prosecute federal registration violations…." *Id.*

The RRO and the IIRA Ordinance are nothing like an alien registration system. The most notable difference is of course that the Ordinances apply equally to citizens and aliens alike; *all* occupants of rental units must pay five dollars and provide the basic information necessary to obtain a license under the RRO. RRO §§ 6-7. Indeed, there will likely be far more citizen tenancies than alien tenancies covered by the RRO. In contrast, the sixty-year-old Alien Registration Act requires all aliens in the United States, fourteen years of age or older, who remain in the United States for thirty days or longer, to register with the federal government and be fingerprinted, carry their alien registration receipt card, and imposes penalties for noncompliance. 8 U.S.C. §§ 1302(a), 1304(e), 1306. *The Ordinances do none of the above.* They do not in any way involve aliens who are merely present in the City and who do not reside in rental housing. The Ordinances do not involve aliens who reside in homes that they own. They do not require any person to carry any identification card. And, as noted above, the Ordinances also apply to U.S. citizens. Thus, the Ordinances cannot be reasonably characterized as an "alien registration" system.

Moreover, the argument is implausible because it would require other state laws, such as laws limiting drivers' licenses to lawfully present aliens, to also be classified as alien registration laws. Indeed, a state driver's license statute is *more*

like an alien registration scheme since it requires license holders to carry licenses with them when they drive; and it is used as a form of identification for air travel, financial transactions, and entry into government buildings. Of course, it would be absurd to claim that driver's license statutes constitute forbidden alien registration systems. It would be equally absurd to claim that the Ordinances are one.

VI. Conclusion

In light of the Supreme Court's opinion in *Arizona* and its opinion in *Whiting*, which prompted the vacatur of this Court's earlier decision, Plaintiffs preemption claims in this facial challenge can no longer stand. Accordingly, the City requests that this Court find the Ordinances to be unpreempted in their entirety. The City also requests that this Court then reach the due process, 42 U.S.C. § 1981, and state law holdings of the district court and reverse them for the reasons stated in the City's original briefing to this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2012, this letter brief of Appellant, the City of Hazleton, Pennsylvania, has been served on Appellees by transmission through the Court's electronic case filing system to the following:

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