

No. _____

**In The
Supreme Court of the United States**

THE CITY OF HAZLETON, PENNSYLVANIA,

Petitioner,

v.

PEDRO LOZANO; HUMBERTO HERNANDEZ;
ROSA LECHUGA; JOHN DOE 1; JOHN DOE 2; JOHN
DOE 3, A MINOR, BY HIS PARENTS; JANE DOE 1;
JANE DOE 2; JANE DOE 3; JOHN DOE 4, A MINOR,
BY HIS PARENTS; BRENDA LEE MIELES; CASA
DOMINICANA OF HAZLETON, INC.; HAZLETON
HISPANIC BUSINESS ASSOCIATION;
PENNSYLVANIA STATEWIDE LATINO COALITION;
JANE DOE 5; JOHN DOE 7; AND JOSE LUIS LECHUGA,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a local ordinance prohibiting the knowing harboring of illegal aliens in rental housing a preempted “regulation of immigration”?
2. Is a local ordinance prohibiting the knowing harboring of illegal aliens in rental housing impliedly field preempted?
3. Is a local ordinance prohibiting the knowing harboring of illegal aliens in rental housing impliedly conflict preempted?
4. Is a local ordinance prohibiting the employment of unauthorized aliens impliedly conflict preempted?

PARTIES TO THE PROCEEDING BELOW

All parties are named in the caption above. Petitioner who was defendant/appellant below is the City of Hazleton, Pennsylvania.

Respondents who were plaintiffs/appellees below are: Pedro Lozano, Humberto Hernandez, Rosa Lechuga, John Doe 1, John Doe 2, John Doe 3, a Minor by His Parents, Brenda Lee Mieles, Casa Dominicana of Hazleton, Inc., Hazleton Hispanic Business Association, Pennsylvania Statewide Latino Coalition, Jane Doe 5, John Doe 7, and Jose Luis Lechuga.

RULE 29.6 STATEMENT

The Petitioner is a Pennsylvania municipality. There are no parent corporations or publicly-held corporations that own stock in the Petitioner.

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OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania is published at 496 F. Supp. 2d 477 (M.D. Pa. 2007) and reproduced below at App. 94. The original opinion of the Third Circuit is published at 620 F.3d 170 (3d Cir. 2010). That opinion was vacated by this Court, 131 S.Ct. 2958 (2011), when this Court remanded the case back to the Third Circuit for reconsideration in light of *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (2011). The subsequent opinion of the Third Circuit, which is the basis for this petition, is published at 724 F.3d 297 (3d Cir. 2013) and reproduced below at App. 1.



JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court for the Middle District of Pennsylvania, was entered on July 26, 2013. This Court possesses jurisdiction under 28 U.S.C. §1254(1).



**CONSTITUTIONAL AND
STATUTORY PROVISIONS AT ISSUE**

Federal Constitutional and Statutory Provisions

United States Constitution, Article VI (Supremacy Clause):

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

8 U.S.C. §1324(a)(1)(A):

(a) Criminal penalties

(1)(A) Any person who –

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves

or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(v)(II) aids or abets the commission of any of the preceding acts,

Shall be punished as provided in subparagraph (B).

8 U.S.C. §1324a(a)(1)-(2)

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity –

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection

(h)(3) of this section) with respect to such employment, or

(B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

8 U.S.C. §1324a(h)(2)

Preemption

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. §1373**(a) In general**

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of Government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
- (2) Maintaining such information.
- (3) Exchanging such information with any other Federal, State, or local government entity.

(c) 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. §1357(g)(10)

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 of a State –

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) 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. §1621(a), in pertinent part

Notwithstanding any other provisions of law ... an alien who is not ... a qualified alien ... is not eligible for any State or local public benefit....

Local Ordinances

Hazleton, Pennsylvania, Illegal Immigration Relief Act Ordinance (IIRAO) (Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-7)

See App. 58-75.

Hazleton, Pennsylvania, Rental Registration Ordinance (RO) (Ordinance 2006-13)

See App. 75-93.

**STATEMENT OF THE CASE**

Hazleton is a Pennsylvania city of the third class that experienced a rapid increase in population during 2001-06, from approximately 23,000 to 30,000-33,000 residents, due in part to a significant influx of illegal aliens. Hazleton derives the majority of its tax revenues from a local income tax. However, the population increase was not accompanied by additional income tax revenues, because many of the new arrivals worked “off the books.” Consequently, the influx of illegal aliens overloaded the City’s budget. In addition to the fiscal costs, illegal aliens committed numerous crimes in Hazleton, including murder. In June 2006, the Mayor and City Council decided to exercise their authority, consistent with federal law, to take limited steps to discourage the employment and harboring of illegal aliens. They enacted two ordinances, described below.

A. The Rental Registration Ordinance

Ordinance 2006-13, the “Rental Registration Ordinance” (“RO”) was enacted primarily to address increasing problems with overcrowded apartments. It requires every landlord to obtain a permit prior to

allowing occupancy of a dwelling unit. RO §6.a; App. 85. It also requires any tenant to provide basic identity and contact information to the City in order to obtain an occupancy permit. *Id.* The City does not confirm any information received from tenants at that time. Occupancy permits are issued to all applicants, regardless of the information or documents presented. RO §6.c; App. 86. The RO merely facilitates the collection of information that may be used later for code enforcement purposes, security purposes, or for the purpose of investigating a complaint under the harboring provisions of the IIRAO.

B. The Illegal Immigration Relief Act Ordinance

Ordinance 2006-18, as later amended by Ordinances 2006-40 and 2007-6, (collectively the “Illegal Immigration Relief Act” or “IIRAO”) is the principal ordinance at issue in this case.¹ The employment provisions of the IIRAO allow the City to revoke the business license of any business entity that knowingly employs unauthorized aliens, after first giving the business entity notice and an opportunity to correct the violation. §4.A-B; App. 62-63. The IIRAO applies federal definitions of immigration status and federal standards of work authorization. §§3.E, 3.G, 4.B(3), 6.A; App. 61-64, 70. The IIRAO relies on the

¹ The text of the amended IIRAO is found at App. 58. The text of the RO is found at App. 75.

federal government's verification of a person's work authorization, pursuant to 8 U.S.C. §1373(c). §4.B(3); App. 63-64. The IIRAO does not permit any Hazleton official to "attempt to make an independent determination of any alien's legal status, without verification from the federal government." §7.E; App. 74. Employers that use the federal government's E-Verify Program to verify the work authorization of their employees are granted safe harbor against the loss of their business licenses. §4.B(5); App. 64.

The IIRAO also renders it unlawful to knowingly provide rental accommodations to an illegal alien. §5.A; App. 67. The IIRAO applies federal definitions of unlawful presence in the United States. §§3.D, 6.A; App. 61, 70. The City relies on the federal government's verification of an alien's immigration status, according to the terms of 8 U.S.C. §1373(c). §§7.E, 7.G; App. 74, 75. 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. App. 218-219, n.58. Additionally, an employer or landlord may toll enforcement of the IIRAO by seeking re-verification of an alien's status from the federal government. §§7.A-E; App. 71-74.

C. Procedural History

On October 30, 2006, Respondents, a group of landlords, tenants, employers, and employees in the

City of Hazleton, brought a facial challenge against the IIRAO and the RO, seeking to enjoin the City from enforcing the ordinances. On October 31, 2006, the United States District Court for the Middle District of Pennsylvania granted Respondents' request for a Temporary Restraining Order. The District Court exercised jurisdiction pursuant to 28 U.S.C. §§1331, 1367 and 2201. The ordinances have never been implemented or enforced.

On January 12, 2007, Respondents filed a Second Amended Complaint seeking a permanent injunction of the IIRAO and the RO. On July 26, 2007, the District Court issued its opinion and on August 7, 2007, the District Court issued a final order granting a permanent injunction.

On August 23, 2007, Petitioner appealed the decision to the United States Court of Appeals for the Third Circuit. On August 24, 2007, Petitioner filed a corrected Notice of Appeal. The Court of Appeals exercised jurisdiction pursuant to 28 U.S.C. §1291. On September 9, 2010, the Third Circuit affirmed the decision of the District Court but differed in its reasoning. 620 F.3d 170 (3d Cir. 2010).

On December 8, 2010, Petitioner filed its first Petition for Certiorari to this Court. On June 6, 2011, this Court granted the Petition, vacated the Third Circuit's decision, and remanded the case in its entirety for reconsideration in light of *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (2011). *City of Hazleton v. Lozano*, 131 S.Ct. 2958 (2011).

On July 26, 2013, the Third Circuit issued its second opinion, once again holding that both the employment provisions and the harboring provisions of the ordinances were preempted. App. 1. Regarding the employment provisions, the court claimed that part of its previous holding was “not disturbed” by *Whiting* and again held the employment provisions to be conflict preempted. App. 17, 25-26. The court generally held that they conflicted with federal law by upsetting an “intricate balance that lead [sic] to the enactment of [the Immigration Reform and Control Act (IRCA)].” App. 18. The court claimed that this “intricate balance” was upset because of minor differences between the IIRAO and IRCA. See App. 17-32.

With respect to the ordinances’ housing provisions, the court below again found them to be impliedly preempted. Essentially, the court restated its earlier reasons for finding preemption in its vacated decision and then added an additional reason. First, the court held that the housing provisions were a constitutionally-preempted “regulation of immigration,” because the IIRAO operates to “regulate residency ... in Hazleton.” App. 38-40 (internal quotations and citations omitted). The Court found regulation-of-immigration preemption while acknowledging that the ordinances “do not control actual physical entry into, or expulsion from, Hazleton, or the United States....” App. 40. Second, the court held that the IIRAO and RO were field preempted. Specifically, the court found that the ordinances impermissibly intruded on the field of harboring and on

the field of alien registration. App. 40-43, 54-57. Third, the court held the ordinances were conflict preempted because they “interfere with the federal government’s discretion in, and control over, the removal process” and because they are “inconsistent with federal anti-harboring law” as defined in the Third Circuit. App. 43-44. The court also found conflict preemption because the ordinances would operate “without regard for the Executive Branch’s enforcement and policy priorities.” App. 47.



REASONS FOR GRANTING THE WRIT

I. Introduction

This case involves a question of great national importance: whether municipalities may use their police powers in a limited manner to assist the federal government in returning the rule of law to immigration. In recent years, numerous municipalities have utilized their police power to regulate rental housing in order to discourage landlords from knowingly harboring illegal aliens.² Such ordinances have faced lawsuits proposing a variety of implied preemption challenges. Three of those cases have reached the

² A 2010 study calculated that 46 municipalities had considered such ordinances, of which 17 had enacted the ordinances by the time the study was published. See Kevin O’Neil, “Hazleton and Beyond: Why Communities Try to Restrict Immigration,” Migration Policy Institute Study (Nov. 2010), at <http://www.migrationinformation.org/Feature/display.cfm?ID=805>.

circuit courts. Over a four-week period in the summer of 2013, the Third, Fifth, and Eighth Circuits produced a deep and irreconcilable circuit split, by issuing a total of ten opinions that reached diametrically opposite conclusions about the validity of virtually-identical ordinance language.³

On June 28, 2013, the Eighth Circuit decided *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), *reh'g en banc denied*, ___ F.3d ___ (Oct. 17, 2013), sustaining the provisions of a local ordinance that prohibited the knowing harboring of illegal aliens in rental accommodations. The majority (Judges Loken and Colloton) held that the Fremont ordinance was not a prohibited “regulation of immigration” and was neither field nor conflict preempted. Judge Colloton concurred specially, taking a different view only as to certain standing issues that did not affect the preemption claims. Judge Bright dissented, believing the ordinance to be conflict preempted.

On July 22, 2013, the Fifth Circuit, sitting *en banc*, decided *Villas at Parkside Partners v. City of Farmers Branch*, 2013 U.S. App. LEXIS 14953, 726 F.3d 524 (5th Cir. 2013). A splintered court issued six

³ Additionally, at least one jurisdiction has suspended a similar ordinance until these legal questions are resolved. *Robert Stewart, Inc. v. Cherokee County*, No. 07-cv-0015 (N.D. Ga. 2007). The parties agreed to suspend the relevant ordinance, and the pending litigation, until all appeals were concluded in this case and in *Gray v. City of Valley Park*, 567 F.3d 976 (8th Cir. 2009).

different opinions. Judge Higginson’s opinion for a five-judge plurality held the criminal provisions of the Farmers Branch ordinance to be conflict preempted and the remainder of the ordinance to be non-severable (notwithstanding the ordinance’s robust severability clause). Judge Reavley (joined by Judge Graves) concurred only in the judgment, regarding the ordinance as a constitutionally-preempted “regulation of immigration,” as tantamount to a conflict-preempted “removal” of aliens, and as trenching on the federal foreign-relations power. Judge Dennis (joined by three judges) specially concurred on conflict-preemption grounds. Judge Higginson filed a special concurrence to his own plurality opinion, commenting that the ordinance is not field preempted but raising dormant-Commerce-Clause concerns. Judge Owen concurred and dissented, believing that only two portions of the judicial review section of the ordinance were preempted and dissenting vigorously as to the remainder of the ordinance. Judges Jones and Elrod (joined by Judges Jolly, Smith, and Clement) vigorously defended the ordinance as a valid exercise of the police power that was not preempted as a “regulation of immigration” or under field- or conflict-preemption principles.

Four days later, the Third Circuit decided the instant case, on remand after this Court had vacated the Third Circuit’s prior decision. The court (speaking through Chief Judge McKee, joined by Judges Nygaard and Vanaskie) held that the rental provisions of the ordinances were a preempted “regulation of immigration”

and were field- and conflict-preempted. The court also held the employment provisions were conflict preempted, in spite of this Court's *Whiting* decision erasing the basis for the Third Circuit's prior holding on the subject.

The widely-differing decisions of these three circuits on important questions of federal law on which this Court has not spoken constitute a compelling reason for the grant of a writ of certiorari.⁴ See Sup. Ct. R. 10(a). The City of Farmers Branch, Texas petitioned this Court for a writ of certiorari on October 21, 2013. This Court may wish to combine the two cases or consider them simultaneously.

The Third Circuit's opinion not only conflicts with the opinion of the Eighth Circuit in *Fremont* and differs from the opinions of the Fifth Circuit in *Farmers Branch*, but it also stands in direct conflict with this Court's opinions in *Whiting* and *Arizona v. United States*, 132 S.Ct. 2492 (2012). This constitutes a second, independent reason to grant the writ. See Sup. Ct. R. 10(c).

⁴ In addition to the three circuits that have ruled on this specific type of ordinance, three other circuits have ruled on similar preemption challenges to state criminal laws that prohibit the harboring of illegal aliens. See *United States v. Alabama*, 691 F.3d 1269, 1285-88 (11th Cir. 2012), *cert. denied*, 133 S.Ct. 2022 (2013); *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013); *Valle del Sol v. Whiting*, 2013 U.S. App. LEXIS 20474 (9th Cir. Oct. 8, 2013). This case is an ideal vehicle for addressing the preemption arguments in both contexts.

In particular, the Third Circuit paid little heed to this Court's direction that it reconsider in light of *Whiting* its decision invalidating the employment provisions of the Ordinance. Rather than carefully examining its own analysis and attempting to conform its decision to *Whiting*, the Third Circuit doubled down and reached the same decision again. The court's rationale for doing so was transparently weak, relying on picayune distinctions between the employment provisions of the Hazleton Ordinance and the federal IRCA, as explained below.

II. The Third Circuit Circumvented *Whiting* in Holding on Remand that the Employment Provisions are Preempted.

Despite this Court's express direction to the Third Circuit to reconsider its decision in light of *Whiting*, the Third Circuit *again* found the employment provisions of the IIRAO to be conflict preempted. In *Whiting*, this Court sustained against a preemption challenge Arizona's Legal Arizona Workers Act of 2007 ("LAWA"), which does the same two things that the IIRAO employment provisions do: (1) prohibit the employment of unauthorized aliens, and (2) encourage or require businesses to use E-Verify.

Judge McKee admitted that *three of his previous bases* for finding conflict preemption were expressly rejected in *Whiting*. App. 15-17. Instead of then reaching the natural conclusion that the employment provisions of the IIRAO were therefore not preempted, he

argued that his *fourth* basis for conflict preemption – that IRCA’s “delicate balance” would be upset if employers were “burdened” by compliance with the Hazleton ordinance – was “not disturbed.” App. 17-34. He reached this conclusion by focusing on minor distinctions between the IIRAO employment provisions and IRCA, while ignoring the fact that this argument too was rejected by the *Whiting* majority.

A. The Third Circuit Adopted the Dissent’s View of Preemption in *Whiting*, that Minor Differences Between a State and Federal Law Suffice to Cause Conflict Preemption.

This Court in *Whiting* made clear that “a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.” *Whiting*, 131 S.Ct. at 1984. Accordingly, a fundamental rule guides conflict preemption cases: where there are differences between state and federal law, the court should reconcile those differences, not use them as a rationale for finding conflict preemption. “The proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.” *De Canas v. Bica*, 424 U.S. 351, 357 n.5 (1976) (quoting *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973)) (internal quotation omitted). “To hold otherwise would be to ignore the teaching of this Court’s decisions which enjoin seeking out conflicts between state and federal regulation

where none clearly exists.” *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960).

The court below ignored this rule. Seeking to preserve the court’s prior (vacated) holding that the employment provisions of the IIRAO were conflict preempted, Chief Judge McKee seized on three alleged minor distinctions between the IIRAO and IRCA. Those distinctions are not only insignificant, but also illusory. First he argued that the IIRAO extends to both employers and independent contractors, but IRCA does not. App. 17-18. But he brushed aside the fact that under federal law once an employer becomes aware that an independent contractor has hired unauthorized aliens (as occurs under the IIRAO), IRCA also treats that relationship as an employer-employee one under 8 U.S.C. §1324a(a)(4). App. 21, n.13. Second, he pointed out that the IIRAO does not provide an affirmative defense to employers who fill out I-9 forms, whereas IRCA does. App. 25-31. But the affirmative defense in IRCA only allows the employer to avoid criminal penalties. The employer still must terminate the unauthorized alien’s employment. In contrast, the IIRAO utilizes an *administrative* proceeding that allows the employer to correct his violation by terminating the employee and completely avoiding any penalty. See App. 28-29. Third, he argued that under IRCA complaints must have a “substantial probability of validity” to trigger an investigation, whereas in IIRAO the complaint need only be “superficially valid.” App. 31 (quoting 8 U.S.C. §1324a(e)(1)(B)). But he misstated what the IIRAO

says. A complaint will only be investigated if it is “valid,” §4.B(3); App. 63 – virtually the same standard as IRCA’s.

Chief Judge McKee’s argument is not one that the *Whiting* Court failed to consider. In fact, it is *precisely* the argument that Justice Breyer made in dissent. See *Whiting*, 131 S.Ct. at 1990-92 (Breyer, J., dissenting). Justice Breyer pointed to essentially the same three differences between IRCA and Arizona’s LAWA. He reasoned that because Arizona’s LAWA “bring[s] nearly all businesses within its scope,” *id.* at 1992, and because it did not “facilitate the presentation of a defense” as easily as IRCA, *id.*, and because “any citizen of the State can complain” to trigger a mandatory investigation, *id.* at 1990, it was therefore preempted. However, Justice Breyer’s argument garnered only two votes on this Court.⁵ The *Whiting* majority found no preemption in these minor differences. Thus, Chief Judge McKee’s line of reasoning is one that this Court has already considered and rejected.

By seizing on minor differences between the IIRAO and IRCA, Judge McKee ignored this Court’s conflict preemption standard. A state statute is not conflict preempted if it is possible to find a difference between the relevant state and federal law. Under that standard, *every* state law would be preempted. The correct standard is whether “the state law

⁵ Justice Ginsburg joined the dissent.

‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Arizona*, 132 S.Ct. at 2501 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). That standard is not met here.

B. The *Whiting* Court Rejected the “Disruption of Balance” Argument Relied upon Below.

Chief Judge McKee argued that his collection of minor distinctions “undermine[s] the delicate balance Congress erected for enforcing the prohibition on hiring unauthorized aliens.” App. 33. In support of this “delicate balance” concept, he quoted *Whiting*. But *Chief Judge McKee quoted Whiting out of context*, saying: “As the Supreme Court noted, ‘Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA.’” *Id.* (quoting *Whiting*, 131 S.Ct. at 1984). However in the sentences immediately thereafter, this Court explained what it meant – something quite different from what Chief Judge McKee suggested:

As with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA. Part of that balance, however, involved allocating authority between the Federal Government and the States. The principle that Congress adopted in doing so was not that the Federal Government can impose large sanctions, and the States only small ones. IRCA instead

preserved state authority over a particular category of sanctions – those imposed “through licensing and similar laws.” *Of course Arizona hopes that its law will result in more effective enforcement of the prohibition on employing unauthorized aliens.*

131 S.Ct. at 1984-85 (emphasis supplied). Chief Judge McKee distorted *Whiting* severely. This Court never suggested that slight differences between state and federal approaches would upset a “delicate balance” and therefore be conflict preempted.

On the contrary, *Whiting* recognized that Congress left states the authority to discourage the employment of unauthorized labor through their licensing laws. And *Whiting* made clear that much more than minor distinctions between IRCA and a licensing law is necessary to produce conflict preemption. “Implied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives’; such an endeavor ‘would undercut the principle that it is Congress rather than the courts that preempts state law.’” *Whiting*, 131 S.Ct. at 1984 (quoting *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring)). Chief Judge McKee’s conflict preemption argument relies solely on such tension, at best. This Court directed the Third Circuit to reconsider its decision in light of *Whiting*. The Third Circuit has attempted to evade *Whiting*, not follow it.

III. The Deep Split Among the Third, Fifth, and Eighth Circuits Warrants Granting the Writ.

Implied preemption in the immigration context occurs in one of three ways – (1) when a state or municipality impermissibly enacts a constitutionally-preempted “regulation of immigration,” *De Canas v. Bica*, 424 U.S. 351, 355 (1976), (2) through field preemption, *id.* at 357-58, or (3) through conflict preemption, *id.* at 358. The Third, Fifth, and Eighth Circuits are in disagreement on all three of these forms of implied preemption, in their review of three similar ordinances.

A. The Circuits are Sharply Divided on the Issue of What Constitutes a Preempted “Regulation of Immigration.”

This Court has provided a narrow definition of a constitutionally-proscribed regulation of immigration: “[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially 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.

The Third Circuit below failed to apply the *De Canas* definition. Ignoring the word “legal” in this Court’s phrase “the conditions under which a legal entrant may remain,” *id.* at 355, the court below concluded that prohibiting the harboring of illegal aliens in apartments constituted a constitutionally-forbidden

“regulation of immigration.” App. 38-40. “By barring aliens lacking lawful immigration status from rental housing in Hazleton, the housing provisions go to the core of an alien’s residency. States and localities have no power to regulate residency based on immigration status.” App. 40. Under the Third Circuit’s overbroad redefinition of “regulation of immigration,” anything that discourages illegal aliens from residing within a city qualifies. The court acknowledged that it was creating a circuit split with the Eighth Circuit: “The Eighth Circuit also concluded that the rental restrictions do not determine who should or should not be admitted into the country and do not conflict with federal anti-harboring law.... [W]e disagree with those conclusions as well.” App. 45, n.26.

In sharp contrast to the court below, the Eighth Circuit carefully followed *De Canas*. Instead of attempting to redefine what constitutes a “regulation of immigration,” the Eighth Circuit adhered to this Court’s definition. “[T]hese provisions neither determine ‘who should or should not be admitted into the country,’ nor do they more than marginally affect ‘the conditions under which a legal entrant may remain.’” *Fremont*, 719 F.3d at 941 (quoting *De Canas*, 424 U.S. at 355).

In the Fifth Circuit, the nine-judge majority divided internally on the question of whether the ordinance constituted a “regulation of immigration.” Only four of the nine (Judges Reavley, Graves, Dennis, and Prado) concluded that this form of preemption applied.

In his concurring opinion, Judge Reavley applied a broader definition of “regulation of immigration” than that given by this Court. Under his theory, any law that encourages illegal aliens to voluntarily leave a city is an impermissible regulation of immigration. He argued that the Farmers Branch ordinance, “works to exclude and remove aliens from the City’s borders. This is because no alien with an unlawful status will be able to obtain the basic need of shelter through a rental contract. Illegal aliens will therefore have no recourse but to self-deport from Farmers Branch.” *Farmers Branch*, 2013 U.S. App. LEXIS 14953 at *50. Judge Dennis agreed in his concurrence, arguing that the Ordinance “effectively excludes certain noncitizens.” *Id.* at *70.

The rest of the Fifth Circuit correctly concluded that the Ordinance falls outside of this Court’s definition of a “regulation of immigration.” As Judges Jones and Elrod pointed out:

The Reavley and Dennis opinions do not, because they cannot, demonstrate that the Ordinance runs afoul of the test in *De Canas*. The Ordinance does not determine the entry or exit of anyone into or out of the United States. It does not determine the conditions under which a “lawful” immigrant may remain. And the Ordinance’s grants or denials of rental licenses are designed to follow and correspond with federal determinations

concerning each applicant. This should be the end of the constitutional preemption issue.

2013 U.S. App. LEXIS 14953 at *131-*132 (Jones and Elrod, J.J., dissenting).

In sum, of the twenty-one judges on the three circuits who ruled on this “regulation of immigration” challenge to the ordinances, thirteen rejected it and eight agreed with it. Granting the writ is warranted to eliminate this confusion among the circuits.

B. The Circuits are Sharply Divided on Whether Field Preemption Displaces Such Ordinances.

The three circuits are also fractured on the field preemption question. The plaintiffs in these cases argued various field preemption theories, claiming that the ordinances intruded on the fields of alien registration, harboring, and removal, alternatively.

The Third Circuit below had no hesitation in finding the Hazleton ordinances to be field preempted in not one, but two, fields. He concluded that the ordinances “intrude on the ... occupied field of alien harboring,” App. 43, and that they “intrude on the field occupied by federal alien registration law.” App. 54. In reaching the former holding, Chief Judge McKee conceded that 8 U.S.C. §1324(c) expressly *invites* state and local law enforcement to make arrests for harboring; but he nevertheless concluded that field preemption still existed, even though federal law invites state and local governments into the

field. See App. 42-43. In reaching the latter holding, Chief Judge McKee cited this Court's field preemption holding in *Arizona* which invalidated Arizona's attempt to impose criminal penalties for violations of the federal alien registration laws, and argued that the City has "attempt[ed] to create a local alien registration requirement[.]" App. 56.

Here too, the Eighth Circuit reached the opposite holding, rejecting all of the plaintiffs' field preemption arguments. In forcefully rejecting the same "alien registration" field preemption argument adopted by the Third Circuit, Judge Loken stated:

The occupancy license scheme at issue is nothing like the state registration laws invalidated in *Hines* and in *Arizona*.... Although prospective renters must disclose some of the same information that aliens must disclose in complying with federal alien registration laws, that does not turn a local property licensing program into a preempted alien registration regime. To hold otherwise would mean that any time a State collects basic information from its residents, including aliens – such as before issuing driver's licenses – it impermissibly intrudes into the field of alien registration and must be preempted. It defies common sense to think the Congress intended such a result.

Fremont, 719 F.3d at 943. He was equally skeptical of the claim that Congress had preempted all state activity relating to harboring illegal aliens: "We find nothing in an anti-harboring prohibition contained in

one sub-part of one section of 8 U.S.C. §1324 that establishes a ‘framework of regulation so pervasive ... that Congress left no room for the States to supplement it...’” *Id.* (quoting *Arizona*, 132 S.Ct. at 2501 (internal citations omitted)). Judge Bright apparently agreed, as his dissent did not rely on any field preemption claim. See *Fremont*, 719 F.3d at 953-60.

In the Fifth Circuit, field preemption internally divided the nine-judge majority. Only two judges (Reavley and Graves) concluded that the Ordinance impermissibly intruded in a preempted field. 2013 U.S. App. LEXIS 14953 at *53-*59. Judge Reavley suggested that the Ordinance impermissibly treaded upon the “field of alien removal.” *Id.* at *59. The other judges in the majority distanced themselves from any field preemption holding. Judge Higginson, who authored the plurality opinion, concurred separately and rejected field preemption: “Because no such comprehensive federal regulation has emerged, or been identified to us, that governs the housing of non-citizens present in the country contrary to law, I do not perceive that the Supremacy Clause acts as a ‘complete ouster of state power’ in this area.” *Id.* at *79 (quoting *De Canas*, 424 U.S. at 357) (Higginson, J., concurring). The dissenting judges were equally critical of the field preemption claim. “Taken together, *De Canas*, *Whiting* and *Arizona* demonstrate how narrow the scope of field preemption is regarding local legislation that concerns illegal aliens.” *Id.* at *137 (Jones and Elrod, J.J., dissenting); *Id.* at *98 (Owen, J., concurring and dissenting).

The Third Circuit is not the only lower court that has been confused by this Court's field-preemption holding in *Arizona* and has expanded that holding beyond laws involving alien-registration schemes. On October 15, 2013, the Supreme Court of Louisiana also adopted this expansive field-preemption theory, citing *Arizona* and declaring a driver's license law concerning aliens to be field preempted. *Louisiana v. Sarrabea*, No. 2013-K-1271 (La. Oct. 15, 2013). The dissenting opinion relied upon the Eighth Circuit's rejection of the same argument in *Fremont. Id.*, slip op. at dissent 5-6 (Victory, J., dissenting).

In sum, of the twenty-one judges in the three circuits who adjudicated the various field-preemption claims against the ordinances, sixteen rejected the claims and five agreed with them. Here, too, this disagreement warrants granting the writ. This case presents an ideal vehicle for clarifying that (1) the field-preemption holding of *Arizona* does not render every collection of information involving aliens a preempted "registration law," and (2) one sub-subsection of federal harboring law does not sweep the states from the harboring field. The confusion among the lower courts will persist until this Court brings clarity to the matter.

C. The Circuits are Sharply Divided on Whether Such Ordinances are Conflict Preempted.

Of all of the forms of implied preemption at issue, the three circuits are most fractured with respect to conflict preemption. Offering a variety of theories based on hypothetical scenarios, the judges who found the ordinances to be preempted all came up with at least one theory of conflict preemption.

The court below found conflict preemption in the hypothetical possibility that a landlord might be forced to evict an illegal alien tenant whom the Executive Branch did not deem to be a high-priority for removal. “Hazleton may not unilaterally prohibit those lacking lawful status from living within its boundaries, without regard for the Executive Branch’s enforcement and policy priorities.” App. 47. The court also found conflict preemption in the fact that the Hazleton ordinance prohibited landlords from knowingly providing rental housing to illegal aliens while the Third Circuit’s definition of federal “harboring,” requires a showing that the harboring party attempt to “hide from detection” an illegal alien. App. 51-52.

Chief Judge McKee acknowledged that the Third Circuit was at odds with the Eighth Circuit on this point. App. 45, n.26. Rejecting the argument that would later be embraced by the Third Circuit, Judge Loken wrote for the Eighth Circuit:

Plaintiffs’ conflict preemption argument suffers from the same infirmity. As the rental

provisions do not ‘remove’ any alien from the United States (or even from the City), federal immigration officials retain complete discretion to decide whether and when to pursue removal proceedings. Unlike §6 of the state law invalidated in *Arizona*, the rental provisions do not require local officials to determine whether an alien is removable from the United States....

Fremont, 719 F.3d at 944. The Eighth Circuit also rejected the claim that the ordinance was conflict preempted because a landlord might evict an illegal alien tenant whom the federal government declined to place in removal proceedings:

As the Ordinance’s rental provisions would only indirectly effect the “removal” of any alien from the City, this reasoning is far too broad. It would apply equally to the California law upheld in *De Canas* and the Arizona law upheld in *Whiting*, because denying aliens employment inevitably has the effect of “removing” some of them from the State. See *Truax v. Raich*, 239 U.S. 33, 42 (1915) (“In ordinary cases [aliens] cannot live where they cannot work.”) Conflict preemption analysis requires far greater specificity.

719 F.3d at 944. The split between the Third and Eighth Circuits on the conflict-preemption question could not be wider.

As with the other forms of implied preemption, the Fifth Circuit was divided on the matter. The plurality opinion by Judge Higginson maintained that

the Ordinance was conflict preempted, finding obstacles to the achievement of congressional objectives in: (1) the slight differences between the conduct that is prohibited by the Ordinance and the harboring that is criminalized at 8 U.S.C. §1324(a)(1)(A)(iii), (2) the desire of federal immigration authorities for illegal aliens to have “a reliable address,” and (3) interference with a “careful balance” purportedly struck by Congress in the non-enforcement of anti-harboring laws. *Farmers Branch*, 2013 U.S. App. LEXIS 14953 at *13-*19. Judge Dennis argued in his concurrence that the Ordinance also conflicted with the executive branch’s decision not to expend its resources removing a particular alien. *Id.* at *67-*68.

The dissenting judges emphatically rejected these conflict-preemption arguments. As Judge Owen explained, any difference between the scope of the ordinance and the federal harboring statute does not give rise to conflict preemption:

The Ordinance does not stand as an obstacle to the accomplishment and execution of the full congressional purposes and objectives in enacting the harboring laws. The harboring laws encompass and proscribe conduct that is far broader than the Ordinance. The federal harboring law and the Ordinance may be enforced simultaneously. Additionally, ... federal law provides that most, if not all, aliens who are unlawfully present in the United States are not eligible for any State or local public benefit, including public or assisted housing, that is provided by State- or

local-government-appropriated funding unless a State affirmatively so provides by enacting a state law.

Id. at *103-*104. Judges Jones and Elrod were even more critical of this argument:

On the most general level, the Higginson opinion embodies the troubling concept that a federal criminal statute, standing alone, can preempt local police power regulations. The fact that the federal government has chosen to criminalize the behavior of harboring illegal aliens does not indicate Congress's intent to prevent local authorities from legislating within their traditional spheres of concern.

Id. at *162.

As for the notion that the Ordinance conflicts with some implicit "balance" struck by Congress, the Fifth Circuit's dissenters said the following:

This complaint is at too high a level of generality: Any local licensing regulation touching the immigrant status – for instance, the refusal to issue drivers' licenses – could be said to conflict with the goals of federal immigration law.... No extant federal law regulates the housing of illegal aliens. There is thus no evidence of a deliberate congressional choice on the subject; if anything, we ought to infer congressional ambivalence from the fact that Congress passed no law concerning either "sanctuary cities" or, at the

opposite pole, cities that have attempted to discourage influxes of illegal aliens.

Farmers Branch, 2013 U.S. App. LEXIS 14953, at *147-*148 (Jones and Elrod, J.J., dissenting).

In sum, of the twenty-one judges to rule on the conflict-preemption question, thirteen found the ordinances to be conflict preempted, and eight found no conflict preemption. Granting the writ is therefore necessary to provide much-needed guidance to the lower courts on this question.

IV. The Third Circuit's Opinion Regarding the Rental Provisions Conflicts with this Court's Controlling Precedents.

The Third Circuit's circumvention of this Court's remand regarding the employment provisions of the IIRAO, and the disarray among the circuits over the housing provisions of such ordinances are reason enough to grant the writ. However, this Court should grant review of the housing portion of the decision below also because it contradicted the holdings of this Court in *Arizona*, *Whiting*, and *De Canas*. There are six ways in which the decision below contradicted these precedents.

A. The Third Circuit Adopted the Notion Rejected in *Arizona* that Executive Branch “Enforcement Priorities” Have Preemptive Effect.

The Third Circuit’s conflict-preemption analysis attempts to revive an argument based on agency “discretion” that was rejected by this Court in *Arizona* and that is inconsistent with longstanding preemption doctrine. In *Arizona*, the United States argued that the executive branch’s enforcement priorities could have preemptive effect. See *Arizona*, 132 S.Ct. at 2527 (Alito, J., concurring in relevant part). The United States claimed that if the state queried the federal government about the immigration status of an alien the executive branch did not rank as a high priority for removal, the state law requiring the query would be preempted. This Court rejected that claim, stating that “federal enforcement priorities” have no 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).

Id. at 2508. Justice Alito rebuked the United States in even stronger terms:

The United States' attack on §2(B) is quite remarkable. The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities. Those priorities, however, are not law. They are nothing more than agency policy. I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force.... If accepted, the United States' pre-emption argument would give the Executive unprecedented power to invalidate state laws that do not meet with its approval, even if the state laws are otherwise consistent with federal statutes and duly promulgated regulations. This argument, to say the least, is fundamentally at odds with our federal system.

Id. at 2527 (Alito, J., concurring in relevant part). It is well established that “[i]t is Congress – not the [Department of Defense] – that has the power to pre-empt otherwise valid state laws....” *North Dakota v. United States*, 495 U.S. 423, 442 (1990).

Nevertheless, the Third Circuit ignored this holding in *Arizona*. The court below held that the revocation of an occupancy permit held by an illegal alien would conflict with federal enforcement priorities if

the executive branch declined to spend enforcement resources to remove that alien: “[T]he housing provisions interfere with the federal government’s discretion in deciding whether and when to initiate removal proceedings.” App. 44-45. “Hazleton may not unilaterally prohibit those lacking lawful status from living within its boundaries, without regard for the Executive Branch’s enforcement and policy priorities.” App. 47.

Granting the writ is especially important with respect to this argument. *Arizona* stated that an executive branch enforcement policy does not have the constitutionally-significant consequence of invalidating state laws that are consistent with federal statutes. The Third Circuit’s disregard of *Arizona* is particularly dangerous to our federal system. It threatens to disrupt not only the balance between the federal government and the states, but also the balance between the executive and legislative branches of the federal government.

B. The Third Circuit Ignored the Field Preemption Holding of *De Canas*.

As noted *supra*, at Section III.B., the Third Circuit maintained that the federal harboring statute occupies that particular field, preempting all state or local laws, even harmonious ones, that deal with the subject of harboring. Chief Judge McKee’s conclusion that the Hazleton ordinances “intrude on the ... occupied field of alien harboring,” App. 43, is not only

unsupported by any of this Court's precedents, it is *directly contrary* to *De Canas*.

In sharp contrast, none of the fifteen judges of the Fifth Circuit embraced the harboring field-preemption argument. Judge Owen explained that finding field preemption in the harboring field was plainly foreclosed by *De Canas*:

I respectfully submit that the Supreme Court unequivocally held in *De Canas* that the federal harboring laws do not give rise to field preemption. In *De Canas*, the federal harboring law in existence at the time expressly provided that “‘employment (including the usual and normal practices incidental to employment) shall not be deemed to constitute harboring.’” But a California law criminalized knowingly employing an unlawfully present alien if that employment would have an adverse effect on lawful resident workers. If the federal harboring statute occupied either the field of harboring aliens or the field of employing aliens, then a state would not have been permitted to legislate at all in these areas, and certainly, a state would not be permitted to criminalize conduct that the federal law explicitly said was not an offense.

2013 U.S. App. LEXIS 14953 at *98 (internal citations omitted).

Granting the writ is necessary to bring the Third Circuit into conformity with *De Canas*. The Eleventh, Fourth, and Ninth Circuits have recently come to the

same incorrect conclusion. See *Alabama*, 691 F.3d at 1285-87, *cert. denied*, 133 S.Ct. 2022 (2013); *South Carolina*, 720 F.3d 518; *Valle del Sol v. Whiting*, 2013 U.S. App. LEXIS 20474. If this Court's *De Canas* holding is to be maintained as binding precedent, this Court must grant the writ.

C. The Third Circuit Disregarded the Three Factors in *Arizona* that Militated Against Conflict Preemption.

In *Arizona* this Court identified three elements of Section 2(B) of the Arizona law that weighed 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, 132 S.Ct. at 2507-08 (internal citations omitted). The court below did not even mention these factors, much less take note of the fact that all three are present in the Hazleton ordinances.

The first factor is somewhat inapposite, because the ordinances do not deal with arrest authority. Nevertheless, there is a presumption of status in the IIRAO; and it is even *more generous* than that in the Arizona law. When verification of any alien's lawful presence occurs, the City relies entirely on the federal government's verification pursuant to 8 U.S.C. §1373(c). IIRAO §7.G; App. 75. A tentative or inconclusive verification report triggers no adverse action. An alien is presumed to be lawfully present unless the federal government unequivocally reports otherwise. IIRAO §7.E; App. 74.

The second limit described in *Arizona* is evident on the face of the IIRAO. 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." App. 68. The third limit is also included in the text of the IIRAO. Indeed, the ordinance contains language that is nearly identical to the SB 1070 text approved in *Arizona*: "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; App. 70.

The court below disregarded these factors entirely. Given the virtually identical wording in relevant subsections of the IIRAO and §2(B) of the Arizona law, one would have expected the court below to explain why the presence of these *Arizona* factors did not weigh in favor of the Ordinance. No explanation was offered.

D. The Third Circuit Disregarded the Deference to Federal Determinations of Immigration Status that was Decisive in Both *Whiting* and *Arizona*.

In both *Whiting* and *Arizona*, this Court stressed that reliance on federal immigration classifications and federal determinations of immigration status was of decisive importance in the rejection of the conflict preemption challenges in those cases. In *Whiting*, this Court sustained the LAWA against a conflict preemption challenge in part because of this consistency:

Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects. The Arizona law begins by adopting the federal definition of who qualifies as an "unauthorized alien." ... Not only that, the Arizona law expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and 'shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.' §23-212(B). What is more, a state court 'shall consider only the federal government's determination' when deciding 'whether an employee is an unauthorized alien.' §23-212(H) (emphasis supplied). *As a result, there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage. The federal determination on which*

the State must rely is provided under 8 U.S.C. §1373(c).

Whiting, 131 S.Ct. at 1981 (emphasis supplied, internal citations omitted). The same two factors are present in the IIRAO. The terms and immigration classifications mentioned in the ordinances are expressly tied to the terms and classifications of federal law. §§3.D-E; App. 61-62. In addition, the IIRAO contains language nearly identical to Arizona’s requiring local officials to rely solely on federal determinations of immigration status: “At no point shall any City official attempt to make an independent determination of any alien’s legal status, without verification from the federal government, pursuant to United States Code Title 8, Subsection 1373(c).” §7.E; App. 74.

Likewise, in *Arizona*, this Court sustained the provision of the Arizona law most similar to the IIRAO – Section 2(B). *Arizona*, 132 S.Ct. at 2507-10. Both Arizona Section 2(B) and the IIRAO expressly rely on 8 U.S.C. §1373(c), which requires the federal government to provide the inquiring local official the immigration status of any alien “for any purpose.” Ariz. Rev. Stat. §11-1051(B); IIRAO §§7.E, 7.G; App. 74, 75. As this Court observed, “Congress has obligated ICE to respond to any request made by state officials for verification of a person’s citizenship or immigration status.” *Arizona*, 132 S.Ct. at 2508. Where a city or state relies upon the federal government’s determination of an alien’s immigration status, conflict preemption is unlikely. “As a result, there can be

definition be no conflict” between the IIRAO and federal law. *Whiting*, 131 S.Ct. at 1981.

In contrast, this Court found Section 6 of the Arizona law to be preempted precisely because it contemplated that state officers would be making *independent determinations of aliens’ removability*, “without any input from the federal government.” *Arizona*, 132 S.Ct. at 2506. The IIRAO steers well clear of such independent determinations by expressly forbidding them.

Faced with this Court’s statement that local reliance upon a federal status determination under 8 U.S.C. §1373(c) means “there can by definition be no conflict between state and federal law,” *Whiting*, 131 S.Ct. at 1981, the Third Circuit attempted to dodge the matter entirely. Chief Judge McKee declared that since the IIRAO was field preempted, “[i]t is therefore irrelevant that [the housing provisions] would be imposed pursuant to a valid status verification under §1373(c). Hazleton simply does not have the authority to take that action...” App. 53. In other words, he assumed the correctness of his field preemption holding in order to avoid the fact that his conflict preemption holding was inconsistent with *Whiting* and *Arizona*. The Third Circuit’s disregard of this dispositive factor in *Whiting* and *Arizona* warrants granting the writ.

E. The Third Circuit Rejected the *Salerno* Standard for Facial Challenges.

Facial challenges like those in the instant case must clear the high hurdle of the *Salerno* standard: “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 supplied). This Court reiterated the *Salerno* standard in 2008: “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.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

However, prior to *Arizona*, it was argued that the standard did not apply in the preemption context. In *Arizona*, this Court put that argument to rest. “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*, 132 S.Ct. at 2510.

Chief Judge McKee was not persuaded. He *flatly refused* to apply the *Salerno* standard to this facial

challenge, ignoring the quotation above because the *Arizona* majority did not specifically cite *Salerno*:

Although Justice Scalia's and Justice Alito's opinions in *Arizona* cite *Salerno* and espouse the City's approach, see *Arizona*, 132 S.Ct. at 2515 (Scalia, J., concurring in part and dissenting in part); *id.* at 2534 (Alito, J., concurring in part and dissenting in part), no part of the majority opinion in *Arizona*, and no part of *Whiting*, references *Salerno* at all.... That approach would reject a conflict pre-emption claim in a facial challenge whenever a defendant can conjure up just one hypothetical factual scenario in which implementation of the state law would not directly interfere with federal law.

Chief Judge McKee essentially conceded that the ordinance could be applied constitutionally. Rather than find the ordinance not preempted, he did what this Court has admonished lower courts not to do – he hypothesized about possible scenarios as his basis for finding the ordinance preempted. For example, he relied on a hypothetical ICE decision to forego removal proceedings in a hypothetical future case where the illegal alien is evicted as a result of the ordinance. See App. 44-45.

Chief Judge McKee seemed concerned that application of the *Salerno* standard would make it too difficult for the plaintiffs to prevail. But that is precisely what this Court has stated. “A facial challenge to a legislative Act is, of course, the most difficult

challenge to mount successfully....” *Salerno*, 481 U.S. at 745. This Court has made clear that “[f]acial challenges are disfavored....” *Washington State Grange*, 552 U.S. at 450.

Granting of the writ is necessary to bring the Third Circuit into conformity with this Court’s well-established standard for facial challenges.

F. The Third Circuit Rejected the Presumption Against Preemption.

This Court made clear in *Arizona* that the presumption against preemption applies in immigration-related cases. “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*, 132 S.Ct. at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); and citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). The presumption against preemption applies in “*all* pre-emption cases.” *Wyeth*, 555 U.S. at 565 (emphasis supplied).

In *Whiting*, this Court explained just how difficult it is to defeat this presumption: “Our precedents ‘establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act.’” *Whiting*, 131 S.Ct. at 1985 (quoting *Gade*, 505 U.S. at 110 (Kennedy, J., concurring)).

The court below not only failed to apply this presumption, it considered and expressly rejected the presumption with respect to the rental provisions of the ordinances:

We find unpersuasive the City's argument that we erred in failing to apply the presumption against preemption to the housing provisions and see nothing in *Arizona* or *Whiting* suggesting otherwise. The housing provisions attempt to regulate who may live within Hazleton based solely on immigration status. In this area of "significant federal presence," we will not apply the presumption against pre-emption.

App. 37, n.23 (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)).

The dissenting judges in the Fifth Circuit rightly applied the presumption against preemption. In so doing, they revealed the error in the Third Circuit's reasoning:

The Ordinance, correctly viewed, falls within the traditional police power of the City to regulate housing by means of licensing.... Because the Ordinance involves the local police power, it is entitled to a strong presumption of constitutionality. This presumption operates generally in federal preemption law.... It operates specifically in cases where local regulations within the police power are

asserted to be preempted by federal immigration law.

Farmers Branch, 2013 U.S. App. LEXIS 14953 at *122-*125 (Jones and Elrod, J.J., dissenting) (citing *Wyeth*, 555 U.S. at 565; *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008)).

The presumption against preemption is a fundamental principal in our federalist system. Without it, courts can rely on tenuous preemption arguments and hypothetical scenarios to sweep aside the laws of states and municipalities, as the court below did. The Third Circuit's purposeful rejection of the presumption against preemption justifies the granting of the writ.

◆

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 24, 2013

**PEDRO LOZANO; HUMBERTO HERNANDEZ;
ROSA LECHUGA; JOHN DOE 1; JOHN DOE 2;
JOHN DOE 3, a Minor, By His parents;
JANE DOE 1; JANE DOE 2; JANE DOE 3;
JOHN DOE 4, a Minor, By His parents,
BRENDA LEE MIELES; CASA DOMINICANA
OF HAZLETON, INC.; HAZLETON HISPANIC
BUSINESS ASSOCIATION; PENNSYLVANIA
STATEWIDE LATINO COALITION; JANE DOE
5; JOHN DOE 7; JOSE LUIS LECHUGA, v.
CITY OF HAZLETON, Appellant.**

No. 07-3531

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

724 F.3d 297

**August 15, 2012, Argued
July 26, 2013, Opinion Filed**

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JUDGES: Before: McKEE, Chief Judge, NYGAARD and VANASKIE, Circuit Judges.

OPINION BY: McKEE

OPINION

OPINION OF THE COURT

McKEE, *Chief Judge*.

This case is before us on remand from the United States Supreme Court. The City of Hazleton previously appealed the District Court’s judgment permanently enjoining enforcement of two Hazleton ordinances that attempt to prohibit employment of unauthorized aliens and preclude them from renting housing within the City.¹ In a precedential Opinion and Judgment filed on September 9, 2010, we upheld the permanent injunction. Thereafter, the Supreme Court granted Hazleton’s petition for a writ of certiorari and remanded this case so that we could reconsider our analysis in light of *Chamber of Commerce v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011). See *City of Hazleton v. Lozano*, 563 U.S. ___, 131 S. Ct. 2958, 180 L. Ed. 2d 243 (2011). Subsequently, the Court also decided *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012). Both *Whiting* and *Arizona* address the extent to which federal immigration law pre-empts various state laws pertaining to the treatment of

¹ For reasons explained in *Lozano v. City of Hazleton*, 620 F.3d 170, 176 n.1 (3d Cir. 2010) (“*Lozano II*”), *vacated and remanded*, 563 U.S. ___, 131 S. Ct. 2958, 180 L. Ed. 2d 243 (2011), we will use the term “unauthorized alien” when discussing issues of employment, and we will use either “aliens not lawfully present” or “aliens lacking lawful immigration status” when referring to persons who are not legally in this country.

unauthorized aliens. On remand, we asked for supplemental briefing on whether either of those decisions alter our original analysis upholding the District Court's injunction.

Having thoroughly considered the additional submissions of the parties and the Court's decisions in *Whiting* and *Arizona*, we again conclude that both the employment and housing provisions of the Hazleton ordinances are pre-empted by federal immigration law. Accordingly, we will again affirm the District Court's order enjoining enforcement of these provisions.

I. BACKGROUND

The factual and procedural background underlying this case have been extensively described in the District Court's decision, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) ("*Lozano I*"), and our earlier decision, *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010) ("*Lozano II*"), *vacated and remanded*, 131 S. Ct. 2958, 180 L. Ed. 2d 243 (2011). Accordingly, we need not reiterate that history as thoroughly as we otherwise would. However, context and clarity require that we first set forth those facts underlying our analysis on remand.

This litigation involves a series of immigration ordinances enacted by the City of Hazleton between July 2006 and March 2007. The two ordinances at issue are: (1) the Illegal Immigration Relief Act Ordinance ("IIRAO"), which consists of Ordinance

2006-18, as amended by Ordinance 2006-40, and Ordinance 2007-6; and (2) the Rental Registration Ordinance (“RO”), which consists of Ordinance 2006-13.² These ordinances attempt to regulate the employment of unauthorized aliens, and the provision of rental housing to aliens lacking lawful immigration status, within Hazleton.

The relevant employment provisions make it unlawful for any person “to knowingly recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct” any person without work authorization “to perform work in whole or in part within the City.” IIRAO § 4A. The IIRAO also provides for public monitoring and prosecution, and sanctions violators by suspending their business permits. *Id.* § 4B. “Safe harbor” from the IIRAO’s sanctions is available for businesses that verify work authorization using the federal E-Verify program. *Id.* § 4B(5).³ The IIRAO also

² The full text of the IIRAO and RO are set forth as an Appendix to *Lozano II*, 620 F.3d at 224-38. For convenience, we again attach the full text of these ordinances as an Appendix to this opinion.

³ “E-Verify is an internet-based system that allows an employer to verify an employee’s work-authorization status. An employer submits a request to the E-Verify system based on information that the employee provides. . . . In response to that request, the employer receives either a confirmation or a tentative nonconfirmation of the employee’s authorization to work.” *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1975, 179 L. Ed. 2d 1031 (2011) (internal quotation marks and citations omitted). For a more complete description of the E-Verify

(Continued on following page)

requires City agencies and certain businesses to enroll in the E-Verify program. *Id.* §§ 4B(6)(b), 4C, 4D.

The disputed housing provisions are found in both the IIRAO and the RO. The IIRAO makes legal immigration status a condition precedent to entering into a valid lease. *Id.* § 7B. The IIRAO also provides that it is “unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien” is unauthorized. *Id.* § 5A. “Harboring” is broadly defined to include “let[ting], leas[ing], or rent[ing] a dwelling unit to an illegal alien.” *Id.* § 5A(1).

The anti-harboring provisions in the IIRAO operate in conjunction with the rental registration scheme established in the RO. The RO requires that prospective occupants of rental housing over the age of eighteen obtain an occupancy permit. RO §§ 1m, 6a, 7b. The application for an occupancy permit requires submission of “[p]roper identification showing proof of legal citizenship and/or residency.” *Id.* § 7b(1)(g). Landlords are prohibited from allowing anyone over the age of eighteen to rent or occupy a rental unit without an occupancy permit. *Id.* § 6a. Violators are subject to fines and possible imprisonment. RO § 10.

program, including its evolution and history, see *Whiting*, 131 S. Ct. at 1986.

As explained in *Lozano II*, numerous plaintiffs sued alleging the ordinances were invalid and the District Court permanently enjoined enforcement of the ordinances after a two-week bench trial. The court concluded that the ordinances are pre-empted by federal law and contrary to the Due Process Clause of the Fourteenth Amendment, 42 U.S.C. § 1981, as well as a number of state laws limiting the authority of municipalities in Pennsylvania. See *Lozano II*, 620 F.3d at 181.⁴

We thereafter affirmed the ultimate judgment of the District Court, although we differed in our reasoning.⁵ In short, we held that the employment provisions in the IIRAO, though not expressly pre-empted, are conflict pre-empted because they stand as an

⁴ The District Court dismissed Plaintiffs' Equal Protection, Fair Housing Act, privacy, and Pennsylvania Landlord and Tenant Act claims. Those portions of the District Court's ruling were not appealed.

⁵ We first held that at least one Plaintiff had standing to challenge the employment and housing provisions of the Hazleton ordinances generally, but no Plaintiff had standing to challenge a severable private cause of action provision in the IIRAO. *Lozano II*, 620 F.3d at 184-94. We also held that certain Plaintiffs could proceed anonymously and that the confidentiality agreement between the parties did not violate 8 U.S.C. § 1373(a). *Id.* at 194-96. In addition, we concluded that Hazleton had waived any issues of severability except with respect to the private cause of action provision. *Id.* at 182. Hazleton did not seek review of these holdings in its petition for a writ of certiorari, and did not raise these issues in its supplemental briefing following remand. Accordingly, these portions of our earlier decision are not at issue here.

obstacle to the accomplishment and execution of federal law. *Lozano II*, 620 F.3d at 210-19. We also held that the housing provisions in the IIRAO and RO are invalid because they impermissibly “regulate immigration” and are both field and conflict pre-empted by federal immigration law. *Id.* at 219-24.⁶

As we noted at the outset, after we issued our decision in *Lozano II*, the Supreme Court granted the City’s petition for a writ of certiorari, vacated our decision, and remanded for reconsideration in light of that Court’s intervening decision in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011). In *Whiting*, the Supreme Court affirmed the decision of the Court of Appeals for the Ninth Circuit in *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009). There, the Court of Appeals for the Ninth Circuit had upheld the Legal Arizona Workers Act against claims of express and implied pre-emption. *Chicanos Por La Causa*, 558 F.3d at 866, 867. After the decision in *Whiting*, the Supreme Court decided *Arizona v. United States*, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012). There, the Court held that three of four challenged provisions of Arizona’s immigration law, known as “S.B. 1070,” were pre-empted. However, the Court overturned a preliminary injunction with respect to the fourth provision and remanded for additional fact finding.

⁶ Because we affirmed on pre-emption grounds, it was not necessary to reach the other grounds the District Court relied upon in imposing the injunction.

III. [sic] DISCUSSION⁷

The question before us on remand remains whether federal law pre-empts the employment and/or housing provisions of the Hazleton ordinances.

As we explained in *Lozano II*, “[t]he pre-emption doctrine is a necessary outgrowth of the Supremacy Clause,” which “provides that the laws of the United States ‘shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’” *Lozano II*, 620 F.3d at 203 (quoting U.S. Const. art. VI, cl. 2). Pre-emption may be either express or implied, and implied pre-emption includes both field pre-emption and conflict pre-emption. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992).

Field pre-emption occurs “[w]hen Congress intends federal law to ‘occupy the field.’” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). “The intent to displace state law altogether can be inferred from a framework of regulation ‘so pervasive . . . that Congress left no room for the States to supplement it’ or where there is a ‘federal interest . . . so dominant that

⁷ The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court’s conclusions of law *de novo* and its factual findings for clear error. *See, e.g., McCutcheon v. America’s Servicing Co.*, 560 F.3d 143, 147 (3d Cir. 2009).

the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Arizona v. United States*, 132 S. Ct. 2492, 2501, 183 L. Ed. 2d 351 (2012) (internal quotation marks and citation omitted). To determine the boundaries that Congress sought to occupy within the field, “we look to the federal statute itself, read in the light of its constitutional setting and its legislative history.” *De Canas v. Bica*, 424 U.S. 351, 360 n.8, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 78-79, 61 S. Ct. 399, 85 L. Ed. 581 (1941) (Stone, J., dissenting)), *superseded by statute on other grounds as stated in Whiting*, 131 S. Ct. at 1974-75.

Conflict pre-emption can occur in one of two ways: where “compliance with both federal and state regulations is a physical impossibility,” or “where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Arizona*, 131 S. Ct. at 2501 (internal quotation marks and citations omitted). Courts must utilize their judgment to determine what constitutes an unconstitutional impediment to federal law, and that judgment is “informed by examining the federal statute as a whole and identifying its purpose and intended effects.” *Crosby*, 530 U.S. at 373.

Nothing the Court said in *Whiting* or *Arizona* altered this framework for pre-emption analysis. The Court, did, however provide important guidance for our application of the pre-emption doctrine to the Hazleton ordinances. The Court upheld Arizona’s

efforts to regulate the employment of unauthorized aliens through a business licensing law in *Whiting*, but largely rejected Arizona’s efforts to enact its own immigration policies, both within and outside of the employment context, in *Arizona*. With those cases as our compass, we now reconsider our prior ruling upholding the District Court’s permanent injunction.

A. The Employment Provisions

The relevant employment provisions of the IIRAO regulate and prohibit a broad range of economic interactions with unauthorized aliens. Section 4 of the IIRAO renders it “unlawful for any business entity to knowingly recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct” any person without work authorization “to perform work in whole or in part within the City.” IIRAO § 4A. “Work” is defined to include “any job, task, employment, labor, personal services, or any other activity for which compensation is provided, expected, or due, including but not limited to all activities conducted by business entities.” *Id.* § 3F. The IIRAO’s prohibitions also apply to any “agreement to perform any service or work or to provide a certain product in exchange for valuable consideration.” *Id.* § 3C. “Every business entity that applies for a business permit” must “sign an affidavit . . . affirming that they do not knowingly utilize the services of or hire any person who is an unlawful worker.” *Id.* § 4A.

Any City resident may submit a complaint to Hazleton's Code Enforcement Office ("HCEO") alleging a violation of the employment provisions. *Id.* § 4B(1). Upon receipt of such a complaint, the HCEO requests identifying information about the alleged unlawful worker from the employing or contracting business entity. That business entity must then provide the requested information within three business days, or Hazleton will suspend its business license. *Id.* § 4B(3). The HCEO then submits the identity information to the federal government, pursuant to 8 U.S.C. § 1373, for verification of "the immigration status of such person(s)." *Id.*⁸

If the HCEO confirms that the worker lacks authorization to work in the United States, the business must terminate that worker within three business days or the City will suspend its business license. *Id.* § 4B(4). A business whose license has been suspended under the IIRAO regains its license one business day after it submits an affidavit affirming that it has terminated the unauthorized worker. *Id.* § 4B(6). After a second or subsequent violation of the IIRAO,

⁸ 8 U.S.C. § 1373(a) provides:

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

Hazleton suspends the business's license for a minimum of twenty days and reports the violation to the federal government. *Id.* § 4B(7).

Safe harbor from the IIRAO's sanctions is available for businesses that verify the work authorization of their workers using the federal E-Verify program. *Id.* § 4B(5). In addition, the IIRAO requires that City agencies and businesses that contract with the City for amounts greater than \$10,000 must enroll in E-Verify. *Id.* §§ 4C, 4D. Those business entities found to have utilized the work of two or more unlawful workers at one time must enroll in E-Verify in order to recover their license. *Id.* § 4B(6)(b).

We previously held that the IIRAO's employment provisions, though not expressly pre-empted, are conflict pre-empted. *Lozano II*, 620 F.3d at 210-19. However, in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011), the Supreme Court upheld an Arizona statute that allowed state courts to suspend or revoke the business licenses of employers who knowingly or intentionally employ unauthorized aliens and required that all Arizona employers use E-Verify. Accordingly, we will first consider whether our analysis in *Lozano II*, concluding that the IIRAO conflicts with federal law, survives *Whiting*.

In *Whiting*, the Supreme Court considered whether the employer sanctions provisions of the Legal Arizona Workers Act ("LAWA") were pre-empted by the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (codified at 8

U.S.C. §§ 1324a-1324b). The Court held that those provisions were not expressly pre-empted because they fell “squarely” within the confines of IRCA’s savings clause. That provision of IRCA “expressly preempts States from imposing ‘civil or criminal sanctions’ on those who employ unauthorized aliens, ‘*other than through licensing and similar laws.*’” *Whiting*, 131 S. Ct. at 1977 (quoting 8 U.S.C. § 1324a(h)(2)) (emphasis added).⁹ The Court also held that Arizona’s licensing law did not conflict with federal law, and therefore was not impliedly pre-empted. *Whiting*, 131 S. Ct. at 1981-85. The Court noted that the Arizona statute “simply implement[ed] the sanctions that Congress expressly allowed Arizona to pursue through licensing laws,” and “Arizona went the extra mile in ensuring that its law closely tracks IRCA’s provisions in all material respects.” *Id.* at 1981.¹⁰

⁹ This part of the decision in *Whiting* is consistent with our analysis in *Lozano II*. There, we held that the employment provisions in the IIRAO were not expressly pre-empted because they constituted a “licensing [or] similar law[],” exempted from express pre-emption under 8 U.S.C. § 1324a(h)(2). *Lozano II*, 620 F.3d at 207-10. Like Arizona’s licensing law, the employment provisions here “fall[] . . . within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted.” *Whiting*, 131 S. Ct. at 1981.

¹⁰ For example, the Arizona law: (i) “adopt[s] the federal definition of who qualifies as an ‘unauthorized alien’”; (ii) “expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government” and prohibits any independent state determination; (iii) like the federal law, prohibits “‘knowingly’ employing an unauthorized alien” and requires that the prohibition be interpreted

(Continued on following page)

The Court in *Whiting* also held that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in various sections of 8 U.S.C.), which established the optional program now known as E-Verify, did not pre-empt Arizona’s requirement that all employers use E-Verify. *Whiting*, 131 S. Ct. at 1985-86. The Court reasoned that the IIRIRA provision setting up E-Verify “contains no language circumscribing state action,” *id.* at 1985, and Arizona’s use of E-Verify “in no way obstructs achieving [Congress’s] aims,” *id.* at 1986.

The plurality opinion in *Whiting* rejected or otherwise undermined several aspects of our analysis in *Lozano II* insofar as we held that the IIRAO’s employment provisions were conflict pre-empted.

First, *Whiting* contradicts our conclusion that the employment provisions in Hazleton’s ordinance impede congressional objectives by creating a separate and independent process for determining whether an employer is guilty of employing unauthorized aliens. Compare *Whiting*, 131 S. Ct. at 1981 (rejecting the Chamber’s argument that Congress intended the federal system to be exclusive and therefore any state

consistently with federal laws; and (iv) “provides employers with the same affirmative defense for good-faith compliance with the I-9 process as does the federal law” and provides employers “a rebuttable presumption of compliance with the law when they use E-Verify.” *Whiting*, 131 S. Ct. at 1981-82. We will describe the “I-9” verification process *infra*.

system necessarily conflicts with federal law) *with Lozano II*, 620 F.3d at 213 (“The crux of this conflict . . . is rooted in the fact that Hazleton has established an alternate system *at all*.”). Since Congress expressly allowed states to pursue sanctions through licensing laws, the *Whiting* plurality reasoned that “Congress did not intend to prevent the States from using appropriate tools to exercise that authority.” *Whiting*, 131 S. Ct. at 1981.

Second, in *Lozano II*, we reasoned that, by imposing additional sanctions on employers who hire unauthorized aliens without including an express anti-discrimination provision, the IIRAO would create “the exact situation that Congress feared: a system under which employers might quite rationally choose to err on the side of discriminating against job applicants they perceive to be foreign.” *Lozano II*, 620 F.3d at 218. However, the *Whiting* plurality rejected a similar argument. Those Justices reasoned that LAWA did not displace IRCA’s anti-discrimination provisions, and that other federal and state laws provide “further protection . . . and strong incentive for employers not to discriminate.” *Whiting*, 131 S. Ct. at 1984. Thus, the Court believed that, even without an express anti-discrimination provision in the state law, “[t]he most rational path for employers is to obey the law – both the law barring the employment of unauthorized aliens and the law prohibiting discrimination.” *Id.*

Finally, the *Whiting* plurality undermined our reasoning in *Lozano II* to the extent that we found

pre-emption because the City's employment provisions "coerce[] [the] use of E-Verify." *Lozano II*, 620 F.3d at 214. That conclusion is now foreclosed by *Whiting's* approval of Arizona's requirement that *all* employers use E-Verify. *Whiting*, 131 S. Ct. at 1985-86. There, the Court concluded that the requirement does not conflict with the federal scheme because the consequences for failure to use E-Verify under both the Arizona law and federal law were the same: the employer forfeits an otherwise available rebuttable presumption of compliance. *Id.* The Court further reasoned that the requirement does not obstruct federal objectives because "the Federal Government has consistently expanded and encouraged the use of E-Verify." *Id.* at 1986.

Nevertheless, Plaintiffs here argue that even after *Whiting*, Hazleton's employment provisions remain impliedly pre-empted. Plaintiffs point first to the fact that the IIRAO's restrictions apply to a much broader range of actors and activities than Congress intended under IRCA. According to Plaintiffs, this basis for our prior finding of conflict preemption was not disturbed by *Whiting*. We agree.

Section 4 of the IIRAO makes it "unlawful for any business entity to knowingly recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work . . . within the City." IIRAO § 4A. The IIRAO defines "business entity" to include any person "engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or

livelihood, whether for profit or not for profit.” *Id.* § 3A. The term specifically includes “self-employed individuals, partnerships, corporations, contractors,¹¹ and subcontractors,” *Id.* § 3A(1), and any entity that “possesses a business permit, . . . is exempt from obtaining such a business permit, . . . [or] is operating unlawfully without such a business permit.” *Id.* § 3A(2).

In sharp contrast to the IIRAO, the federal prohibition in IRCA reaches only “hir[ing]” or “re-cruit[ing] or refer[ring] for a fee, *for employment* in the United States.” 8 U.S.C. § 1324a(a)(1)(A) (emphasis added). In striking the intricate balance that led to the enactment of IRCA, Congress deliberately excluded independent contractors and other non-employees from the scope of the restrictions contained in the statute. *Arizona*, 132 S. Ct. at 2504. (“Congress enacted IRCA as a comprehensive framework for ‘combating the *employment* of illegal aliens.’”) (emphasis added) (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002)). As we explained previously:

In drafting IRCA, Congress explicitly declined to sanction employers based on the work authorization status of “casual hires

¹¹ The term “contractor” is further defined to include any “person, employer, subcontractor or business entity that enters into an agreement to perform any service or work or to provide a certain product in exchange for valuable consideration.” IIRAO § 3C.

(i.e., those that do not involve the existence of an employer/employee relationship).” H.R. Rep. No. 99-682(I), [at 57], 1986 U.S.C.C.A.N. 5649, 5661. This was not an unreasoned choice, but part of the crafting of the statute to minimize the burden placed on employers. As the court explained in *Edmondson*, “[e]mployers are not required [under federal law] to verify the work eligibility of independent contractors” because it “would increase the burdens on business.” 594 F.3d at 767. Businesses utilize independent contractors, in part, to reduce the costs and liabilities associated with procuring labor when an enduring and structured relationship is not needed. Compelling businesses to concern themselves with the work authorization status of contractors alters this relationship, and also raises costs.

Lozano II, 620 F.3d at 216-17 (alterations in original).

Under IRCA, employers are not required to verify contractors’ work eligibility, as they must with employees. *See* 8 C.F.R. § 274a.2(b) (requiring employers to verify work eligibility of employees); § 274a.1(f) (excluding “independent contractor” and “those engaged in casual domestic employment” from the definition of “employee”); *id.* § 274a.1(g) (excluding those who use “contract labor” from the definition of “employer”).¹²

¹² Employers are, however, liable for *knowingly* utilizing the services of independent contractors who lack work authorization. 8 U.S.C. § 1324a(a)(4) (“[A] person or other entity who uses a
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Given the intricate framework of IRCA, we cannot assume that the distinction is immaterial. Rather, it appears to be a deliberate distinction that Congress included as part of the balance it struck in determining the scope and impact of IRCA's employer sanctions. However, Hazleton's ordinance does not distinguish between employees, on the one hand, and independent contractors or casual hires, on the other.

The breadth of the reach of the IIRAO's sanctions operates in tandem with the fact that the IIRAO provides a safe harbor only if "prior to the date of the violation, the business entity had verified the work authorization of the alleged unlawful worker(s)" using the E-Verify program. IIRAO § 4B(4). Accordingly, the Hazleton scheme compels employers to verify the status of independent contractors and casual hires in order to obtain a safe harbor. In *Lozano II*, we determined that although the IIRAO only coerces, without directly requiring, verification of non-employees' work authorization, the coercion is equally problematic for pre-emption purposes because the

contract, subcontract, or exchange . . . to obtain the labor of an alien . . . knowing that the alien is an unauthorized alien . . . shall be considered to have hired the alien for employment . . . in violation of [8 U.S.C. § 1324a](1)(A)."). However, this provision does not undermine Congress's intent to restrict IRCA's applicability to the employer/employee context. Rather, the purpose was to close a "loophole" so that employers may not use independent contractors to circumvent IRCA's prohibition on the employment of unauthorized workers. See H.R. Rep. No. 99-682(I), at 62, 1986 U.S.C.C.A.N. 5649, 5666.

IIRAO subjects employers to sanctions if those non-employees lack work authorization. *Lozano II*, 620 F.3d at 217.¹³

Moreover, we must assess the extraordinarily broad definition of the persons and entities covered by the IIRAO together with the equally broad definition of the *activities* covered by the IIRAO. The IIRAO defines “work” to include “any job, task, employment, labor, personal services, or any other activity for which compensation is provided, expected, or due, including but not limited to all activities conducted by business entities.” IIRAO § 3F. The

¹³ The City argues that, in practice, the IIRAO would treat independent contractors in a manner similar to federal law under 8 U.S.C. § 1324a(a)(4) – only those who *knowingly* use the services of contractors who lack work authorization would face sanctions. For the reasons explained above, we disagree. Further, the IIRAO’s terms reach as far as union organizing activity and the activity of not for profit organizations that refer individuals for employment but without a fee or profit motive. See IIRAO § 3A, 4A. Federal regulations specifically exclude “union hiring halls that refer union members or non-union individuals who pay union membership dues.” 8 C.F.R. § 274a.1(d)-(e); see also H.R. Rep. 99-682(I), at 57, 1986 U.S.C.C.A.N. 5649, 5660 (noting exception for unions and similar entities). These “[f]ederal regulations have no less pre-emptive effect than federal statutes.” *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). Moreover, as we will explain, in addition to reaching a broader range of actors, the IIRAO’s employment provisions also sanction a broader range of activities than does IRCA. Because the terms of the IIRAO sweep so broadly, even if we were to accept the City’s position that the IIRAO and IRCA treat independent contractors similarly, it would not save the IIRAO from preemption.

IIRAO’s prohibitions also apply to any “agreement to perform any service or work or to provide a certain product in exchange for valuable consideration.” *Id.* § 3C. Moreover, there is no requirement that the alleged unauthorized work be performed at the location associated with an entity’s business license, or even in connection with the activities for which an entity has a business license, for it to be considered a violation of the IIRAO.¹⁴ Thus, under a literal reading of the IIRAO, the HCEO may revoke the business license of any person or entity if, for example, s/he purchases used items at a yard sale from an unauthorized alien, buys a glass of lemonade from an undocumented child’s lemonade stand, or pays an undocumented neighbor to mow her lawn – even if such conduct is entirely unrelated to the actor’s licensed business activity.

Indeed, it is difficult for us to conceive of any activity that is even remotely economic in nature, conducted by any person or entity in Hazleton, that would not be swept into the broad expanse of the IIRAO. We believe that prohibiting such a broad array of commercial interactions, based solely on immigration status, under the guise of a “business licensing” law is untenable in light of Congress’s deliberate decision to limit IRCA’s reach to the employer-employee relationship.

¹⁴ Rather, the IIRAO expressly states that “work” includes, but “*is not limited to* all activities conducted by business entities.” IIRAO § 3F (emphasis added).

Whiting is not to the contrary. The City argues that the Court in *Whiting* was not troubled by the fact that Arizona’s law applied to independent contractors. However, the provisions to which the City refers were added as part of a 2008 amendment to LAWA, and as the Supreme Court expressly noted, the 2008 amendments “were not part of the statute when [the] suit was brought, they are not before us and we do not address their interaction with federal law.” *Whiting*, 131 S. Ct. at 1986 n.10; *see also Arizona Contractors Ass’n v. Candelaria*, 534 F. Supp. 2d 1036, 1053 (D. Ariz. 2008) (“[L]ike IRCA, [LAWA’s] restrictions apply only with respect to those persons who have an ‘employment relationship’ with an employer, so it does not include casual hires.”), *aff’d sub nom. Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *aff’d sub nom., Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011).

Thus, unlike the IIRAO, the Arizona law upheld by the Supreme Court “closely track[ed] IRCA’s provisions in all material respects,” *Whiting*, 131 S. Ct. at 1981, including IRCA’s precisely tailored reach.¹⁵ Thus, *Whiting* alone does not support the proposition

¹⁵ Indeed, the Court in *Whiting* noted that the Arizona law tracked the provisions of the federal law so tightly that if the Arizona law was pre-empted, “there really is no way for the State to implement licensing sanctions, contrary to the express terms of the savings clause.” 131 S. Ct. at 1987. That is clearly not the situation here with the IIRAO.

that an ordinance that diverges from federal law to the extent the IIRAO does is similarly sheltered from the reach of federal pre-emption.

The Supreme Court's more recent decision in *Arizona v. United States*, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012), further undermines the contention that the IIRAO should be upheld as a protected business licensing law. The Court in *Arizona* affirmed that "the existence of an express pre-emption provisio[n] does not bar the ordinary working of conflict pre-emption principles or impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause." *Arizona*, 132 S. Ct. at 2504-05 (internal quotation marks and citation omitted) (alteration in original). Moreover, the Court's reasons for finding that § 5(C) of Arizona's S.B. 1070 law conflicted with IRCA apply with equal force to the IIRAO's attempt to extend its regulations beyond the employer-employee relationship. Section 5(C) of S.B. 1070 made it a state crime to seek or engage in work without federal authorization. In concluding that that provision was pre-empted, the Supreme Court stated, "Congress enacted IRCA as a comprehensive framework for 'combating the employment of illegal aliens,'" and IRCA, by design, "does not impose federal criminal sanctions on the employee side (*i.e.*, penalties on aliens who seek or engage in unauthorized work)." *Arizona*, 132 S. Ct. at 2504. Thus, the Court concluded that "[a]lthough § 5(C) attempts to achieve one of the same goals as federal law – the deterrence of unlawful employment – it involves a conflict in the

method of enforcement” and is therefore pre-empted. *Id.* at 2505. Just as purposely as Congress limited the scope of IRCA’s coverage to exclude independent contractors, Hazleton purposely stretched the IIRAO to include them. The result is a local ordinance that conflicts with Congress’s intent to limit IRCA’s application to the employer/employee relationship. *See Arizona*, 132 S. Ct. at 2505 (“[A] ‘[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.’” (citing *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971))). Accordingly, like § 5(C) of Arizona’s S.B. 1070, the IIRAO employment provisions conflict with IRCA.

In *Lozano II*, we also concluded that the IIRAO conflicts with IRCA because it does not provide an affirmative defense to employers who comply with the I-9 process to verify immigration status. *Lozano II*, 620 F.3d at 214-15.¹⁶ Plaintiffs argue that this

¹⁶ The “I-9” process derives its name from the form that IRCA requires employers to complete.

IRCA requires that employers . . . confirm an employee’s authorization to work by reviewing the employee’s United States passport, resident alien card, alien registration card, or other document approved by the Attorney General; or by reviewing a combination of other documents such as a driver’s license and social security card. § 1324a(b)(1)(B)-(D). The employer must attest under penalty of perjury on Department of Homeland Security Form I-9 that he “has verified that the individual is not an unauthorized alien” by reviewing these documents. § 1324a(b)(1)(A).

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conclusion was also not disturbed by *Whiting* because the Arizona law at issue there provided a safe harbor for I-9 compliance. Once again, we agree.

As we have explained:

Congress paid considerable attention to the costs IRCA would impose on employers, *see e.g.*, H.R. Rep. No. 99-682(I), at [90], 1986 U.S.C.C.A.N. 5649, 5694 (“Considerable discussion was generated during the processing of [this bill] to the effect the employer sanctions provisions were placing an undue burden on employers in requiring them to do the paperwork and keep records on employees.”), and drafted the legislation in a manner that would minimize those burdens, *see, e.g.*, 132 Cong. Rec. H10583-01 (daily ed. Oct. 15, 1986) (statement of Rep. Bryant) (IRCA has been “carefully designed for the minimum burden necessary . . . to be effective.”).

Lozano II, 620 F.3d at 211. As part of this effort, Congress created the I-9 process as a uniform federal system by which employers must verify the work authorization of new hires. Under IRCA, good-faith compliance with the I-9 process provides an employer with an affirmative defense if charged with a violation of

The form I-9 itself “and any information contained in or appended to [it] . . . may not be used for purposes other than for enforcement of” IRCA and other specified provisions of federal law. § 1324a(b)(5).

Whiting, 131 S. Ct. at 1974.

8 U.S.C. § 1324a. 8 U.S.C. § 1324a(a)(3); H.R. Rep. No. 99-682(I), at 57. However, Hazleton's scheme does not provide any safe harbor for employers who use the I-9 process. The IIRAO's employment provisions thus contravene congressional intent for the I-9 process to serve as an acceptable way of protecting against sanctions and Congress's desire to avoid placing an undue burden on employers. As we previously explained:

By making the I-9 system a uniform national requirement, Congress limited the compliance burden on interstate corporations while facilitating uniform enforcement. A uniform system reduces costs for employers with multiple locations throughout the country by ensuring that the same human resources procedures can be used in all locations. Hazleton's scheme denies interstate employers who use the I-9 process the benefits of uniformity. Interstate employers with locations in Hazleton (who wish to ensure safe harbor in all locations) would either have to adhere to different regulations in different locations, or use E-Verify in all locations.

Lozano II, 620 F.3d at 215 (internal quotation marks and citation omitted).

Although the Supreme Court in *Whiting* upheld Arizona's requirement that all employers enroll in E-Verify, the Court's holding did not negate the importance of the I-9 process to the federal scheme. Rather, the Court's holding was based upon its conclusion that "the consequences of not using E-Verify

under the Arizona law are the same as . . . under the federal law,” *Whiting*, 131 S. Ct. at 1985,¹⁷ and “[t]he Arizona law provides employers with the same affirmative defense for good-faith compliance with the I-9 process as does the federal law,” *id.* at 1982. Thus, although Arizona “required” employers to use E-Verify, that “requirement” was exactly the same as the federal law’s treatment of E-Verify, and similarly, Arizona treated I-9 compliance the same way that federal law treated I-9 compliance.

The City argues that the lack of an affirmative defense for I-9 compliance is irrelevant given the structure of the Hazleton scheme, which does not rely on a judicial process for proving that an employer knowingly hired an unauthorized alien and assessing

¹⁷ Under both the Arizona and federal law, the only consequence of not using E-Verify is forfeiture of the otherwise available rebuttable presumption of compliance with the law. *Whiting*, 131 S. Ct. at 1985-86. As we explained, *supra*, the Supreme Court explicitly noted that, during the course of the litigation, Arizona had amended its statute. The amendments included, *inter alia*, the attachment of “other consequences, such as the loss of state-allocated economic development incentives” to a failure to use E-Verify. *Id.* at 1986 n.10. Because those amendments “were not part of the statute when [the] suit was brought,” the Court was careful to explain that “they are not before us and we do not address their interaction with federal law.” *Id.* In this regard, we note that the IIRAO attaches an additional penalty to a failure to use E-Verify: disqualification from city contracts greater than \$10,000. IIRAO § 4D. This additional sanction for failure to use E-Verify goes beyond a mere licensing provision and is yet another reason the IIRAO conflicts with federal law.

a penalty. In addition to highlighting procedural due process concerns, this assertion elevates form over function and misses the point. The significance of the I-9 affirmative defense is the safe harbor it provides for employers. We are therefore not impressed with a distinction between judicially imposed sanctions and administratively imposed sanctions. The resulting impact on a given business appears indistinguishable. Whether a judicial officer or an administrator is charged with imposing sanctions is irrelevant. The City insists that the drafters of Hazleton's ordinances attempted to construct a parallel regulatory scheme that would comply with IRCA's savings clause. However, the City's decision to omit a safe harbor for I-9 compliance, while providing one for those who use E-Verify, *see* IIRAO § 4B(5), is not as inconsequential as the City would have us believe. A scheme providing a safe harbor for both verification procedures would have been much closer to the parallel regulatory scheme that the Court upheld in *Whiting*. Absent that, an important aspect of the federal scheme is undermined.

Geier v. American Honda Motor Co., 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000), further illustrates how Hazleton's disregard of the I-9 process impedes federal objectives. There, Alexis Geier suffered serious injuries when the Honda she was driving crashed into a tree. She sued the auto company alleging that her injuries resulted from the absence of airbags, which she claimed was a design defect. *Id.* at 865. However, Geier's car had automatic belts and

thus complied with applicable federal safety standards, which, rather than requiring airbags, “allow[ed] manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies.” *Id.* at 878. The applicable federal statute, however, also stated that “[c]ompliance with a federal safety standard does not exempt any person from liability under common law.” *Id.* at 868 (internal quotation marks omitted, bracket in original). Nonetheless, the manufacturer argued that the plaintiff’s claim for damages was pre-empted by federal law. The Court had to decide “whether the Act pre-empts a state common-law tort action in which the plaintiff claims that the . . . manufacturer, who was in compliance with the standard, should nonetheless have equipped [her] automobile with airbags.” *Id.* at 865.

The Supreme Court held that the tort action conflicted with federal law and was thus pre-empted. *Id.* at 874. The Court reasoned that federal regulations sought “a variety and mixture of [safety] devices” and “deliberately imposed” a “gradual passive restraint phase in.” *Id.* at 881. Notwithstanding the savings clause, allowing the action to proceed when plaintiff’s car complied with the applicable federal safety standard “would have stood ‘as an obstacle to the accomplishment and execution of’ [those] important . . . federal objectives.” *Id.* (quoting *Hines*, 312 U.S. at 67). Similarly, permitting Hazleton to impose sanctions on employers who have complied with, and relied upon, the I-9 process would obstruct important

federal objectives. Congress wanted to make the I-9 process available as a uniform means of protecting against such sanctions and minimizing the burden on employers. *See also Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156, 102 S.Ct. 3014, 73 L. Ed. 2d 664 (1982) (finding conflict pre-emption where state law limited the availability of due-on-sale provisions in loan instruments, which federal regulators deemed “essential to the economic soundness of the thrift industry”).

The IIRAO’s lack of procedural protections presents yet another “obstacle to the accomplishment and execution of the full purposes and objectives” of federal law. *See Arizona*, 132 S. Ct. at 2501 (quoting *Hines*, 312 U.S. at 67). The IIRAO provides substantially fewer procedural protections than IRCA, which circumscribed sanctions with a detailed hearing and adjudication procedure. Under IRCA, only complaints with a “substantial probability of validity” are investigated. 8 U.S.C. § 1324a(e)(1)(B). In contrast, under the IIRAO, any superficially valid complaint is investigated. IIRAO §§ 4B(1), (3). In addition, when enacting IRCA, Congress mandated that an employer be provided with notice and an opportunity for a hearing, 8 U.S.C. § 1324a(e)(3)(A), and an administrative law judge must find the employer guilty of violating IRCA by a preponderance of the evidence before any sanctions can be imposed, *id.* § 1324a(e)(3)(C). That employer also has a right to an administrative appeal and judicial review. *Id.* § 1324a(e)(7)-(8). In marked contrast, the IIRAO *requires* the HCEO to *immediately* suspend

the business license of any entity that fails to provide requested information about alleged unlawful workers within three business days. IIRAO § 4B(3).¹⁸ If a business entity does not terminate an unauthorized worker within three days of being notified that the worker is not authorized, the City immediately suspends that entity's business license. *Id.* § 4B(4).¹⁹ Thus, the burdens imposed on businesses under the Hazleton scheme are greater than those Congress elected to impose under the similar, but distinct approach of IRCA.

The procedures in LAWA (the Arizona statute upheld in *Whiting*), substantially track the procedures Congress established under IRCA. In contrast to the immediate suspension of business licenses authorized by the IIRAO, sanctions under LAWA, like under IRCA, could only be imposed after the attorney general or county attorney brings an enforcement action in state court. A.R.S. § 23-212(D) (effective Sept. 19, 2007 to Apr. 30, 2008). The state court was directed to provide a "hearing at the earliest practicable date," *id.* § 22-212(E), and sanctions could

¹⁸ IIRAO § 4B(3) states: the HCEO "shall suspend the business permit of any entity which fails, within three business days after receipt of the request [for identity information regarding alleged unlawful workers], to provide such information."

¹⁹ IIRAO § 4B(4) provides that the HCEO "shall suspend the business permit of any business entity which fails [to] correct a violation of this section within three business days after notification of the violation by the [HCEO]."

only be imposed by the court after determining that there had been a violation, *id.* § 23-212(F).²⁰

Conversely, the lack of procedural protections in the IIRAO's employment provisions undermines the delicate balance Congress erected for enforcing the prohibition on hiring unauthorized aliens. Congress was clearly concerned with avoiding undue burdens on employers. *See, e.g.*, H.R. Rep. No. 99-682(I), at 56 (describing desire for employer sanctions to be implemented in a manner that "would be the least disruptive to the American businessman"); S. Rep. No. 99-132, at 35 (1985) (expressing concern regarding "harassment . . . against innocent employers" and noting that "[s]pecific protections have been included to minimize the risk of these undesirable results"). As the Supreme Court noted, "Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA." *Whiting*, 131 S. Ct. at 1984.²¹ It is therefore apparent that the lack of minimal procedural protections in Hazleton's ordinance further

²⁰ *See also Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 868-69 (9th 2009) (describing procedures to be followed under LAWA and holding that LAWA provided adequate due process).

²¹ The Court in *Whiting* concluded that a failure to include an express anti-discrimination provision was not fatal to Arizona's employer sanctions law and that the Arizona law did not otherwise upset the balance of interests that Congress intended. *Whiting*, 131 S. Ct. at 1984. However, nothing in *Whiting* undermines the conclusion that IRCA indeed represents a careful congressional balance of competing interests, including, *inter alia*, preventing undue burden on employers.

undermines the express congressional objective of minimizing undue burdens on, and harassment of, employers.

Accordingly, although the Court’s recent decisions in *Whiting* and *Arizona* alter some of our previous analysis, neither opinion alters the outcome of this dispute. For the reasons we have set forth above, we again hold that the employment provisions of the IIRAO are pre-empted because they “stand[] as an obstacle to the accomplishment and execution” of IRCA’s objectives, *Hines*, 312 U.S. at 67, and were properly enjoined by the District Court.²²

²² The City argues that the standard articulated in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), precludes a finding of pre-emption and that *Arizona* supports its position in this regard. We disagree. Although Justice Scalia’s and Justice Alito’s opinions in *Arizona* cite *Salerno* and espouse the City’s approach, see *Arizona*, 132 S. Ct. at 2515 (Scalia, J., concurring in part and dissenting in part); *id.* at 2534 (Alito, J., concurring in part and dissenting in part), no part of the majority opinion in *Arizona*, and no part of *Whiting*, references *Salerno* at all. The plurality in *Whiting* and majority in *Arizona* did not adopt the approach the City asks us to adopt. That approach would reject a conflict preemption claim in a facial challenge whenever a defendant can conjure up just one hypothetical factual scenario in which implementation of the state law would not directly interfere with federal law. Indeed, if this were the standard governing the Supreme Court’s review of Arizona’s S.B. 1070 law, many of the sources of conflict with federal law described by the Court would have been irrelevant to the Court’s conflict pre-emption analysis. For example, the Court in *Arizona* concluded that § 6, which authorized state and local police to arrest certain potentially removable individuals, conflicted with federal law in part because it interfered with

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B. The Housing Provisions

The housing provisions at issue in this litigation are found in both the IIRAO and the RO. The RO sets up a rental registration scheme that operates in conjunction with anti-harboring provisions in the IIRAO to prohibit unauthorized aliens from residing in any rental housing within the City.

The RO requires any prospective occupant of rental housing over the age of eighteen to apply for and receive an occupancy permit. RO § 1m, 6a, 7b. To receive the permit, the prospective occupant must pay a ten-dollar fee and submit certain basic information and “[p]roper identification showing proof of legal citizenship and/or residency” to the HCEO. *Id.* § 7b.

federal enforcement discretion and could target and harass individuals the federal government does not seek to remove. *Arizona*, 132 S. Ct. at 2506-07. However, under the City’s approach, this conflict is irrelevant in a facial challenge because, in at least *some* circumstances, the local police could be arresting individuals whom the federal government *does* want removed and whose arrest would not otherwise conflict with federal policy. To the contrary, however, the Court in *Arizona* found this potential conflict consequential.

The analysis of § 2(B) in *Arizona* also fails to support the City’s position. The Court vacated a preliminary injunction against § 2(B) and remanded for further fact finding because the provision, on its face, was ambiguous, and Arizona’s courts may construe § 2(B) in a way that would preclude any unconstitutional applications of the law. *Arizona*, 132 S. Ct. at 2509-10. The Court, however, did not reject a facial challenge against the provision pursuant to the City’s theory, *i.e.*, because implementation of § 2(B), in *some* circumstances may be in harmony with federal law.

Landlords must inform all prospective occupants of this requirement, and landlords are prohibited from allowing anyone over the age of eighteen to rent or occupy a rental unit without registering with the City and receiving a permit. *Id.* § 6a, 7b. A landlord found guilty of violating these requirements must pay an initial fine of \$1000 per unauthorized occupant. *Id.* § 10b. That landlord is also subject to an additional fine of \$100 per day, per unauthorized occupant, until the violation is corrected. Authorized occupants of rental housing who allow anyone without an occupancy permit to reside with them are subject to the same fines. *Id.* § 10c.

As we mentioned earlier, the anti-harboring provisions in the IIRAO make legal immigration status a condition precedent to entering into a valid lease. IIRAO § 7B. A tenant lacking lawful status “who enters into such a contract shall be deemed to have breached a condition of the lease.” *Id.* The IIRAO makes it “unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law.” *Id.* § 5A. “Harboring” is broadly defined to include “let[ting], leas[ing], or rent[ing] a dwelling unit to an illegal alien.” *Id.* § 5A(1). An “illegal alien” is defined as “an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq.” *Id.* § 3D.

We previously found the housing provisions in the IIRAO and the RO pre-empted on three separate pre-emption grounds.²³ No part of *Whiting* or *Arizona* considered provisions of a state or local ordinance that, like the housing provisions here, prohibit, and define “harboring” to include, allowing unauthorized aliens to reside in rental housing. Moreover, nothing in *Whiting* or *Arizona* undermines our analysis of the contested housing provisions here. On the contrary, the Court’s language reinforces our view that Hazleton’s attempt to prohibit unauthorized aliens from renting dwelling units in the City are pre-empted.

²³ In *Lozano II*, we determined that the presumption against pre-emption applied to our analysis of the employment provisions, *Lozano II*, 620 F.3d at 206-07, but did not apply to our analysis of the housing provisions, *id.* at 219. We find unpersuasive the City’s argument that we erred in failing to apply the presumption to the housing provisions and see nothing in *Arizona* or *Whiting* suggesting otherwise. The housing provisions attempt to regulate who may live within Hazleton based solely on immigration status. In this area of “significant federal presence,” we will not apply the presumption against pre-emption. See *United States v. Locke*, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000); see also *United States v. Alabama*, 691 F.3d 1269, 1296-97 (11th Cir. 2012) (concluding that state law prohibiting courts from recognizing contracts with aliens lacking lawful immigration status “constitutes a thinly veiled attempt to regulate immigration under the guise of contract law,” and thus, the presumption against pre-emption does not apply, but even if it does, the law is pre-empted), *cert. denied*, 569 U.S. ___, 133 S. Ct. 2022, 185 L. Ed. 2d 905 (2013).

1. *The Housing Provisions Constitute Impermissible Regulation of Immigration and Are Field Pre-empted.*

We begin this part of our analysis by noting that the Supreme Court was careful in *Arizona* to stress the important national interests that are implicated when local governments attempt to regulate immigration and the concomitant need to leave such regulation in the hands of the federal government.

The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.

Arizona, 132 S. Ct. at 2498. In finding three of the four challenged provisions in *Arizona* pre-empted, the Court reiterated the primacy of the federal government's concern for the treatment and regulation of aliens in this country.

In *Lozano II*, we held that the housing provisions impermissibly "regulate immigration" in contravention of the Supreme Court's pronouncement that a state or locality may not determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.'" *Lozano II*, 620 F.3d at 220 (quoting *De Canas*, 424

U.S. at 355, 96 S. Ct. 933).²⁴ In concluding that the housing provisions constituted impermissible regulation of immigration, we recognized that “the fact that aliens are the subject of a state statute does not render it a regulation of immigration.” *De Canas*, 424 U.S. at 355. We did not hold that the housing provisions were a regulation of immigration simply because “aliens are the subject of” those provisions. Rather, we determined that “[t]hrough its housing provisions, Hazleton attempts to regulate *residence based solely on immigration status*.” *Lozano II*, 620 F.3d at 220 (emphasis added). Thus, we concluded that enforcement of the housing provisions must be enjoined because “[d]eciding which aliens may live in the United States has always been the prerogative of the federal government.” *Id.* The housing provisions

²⁴ See also *Villas at Parkside Partners v. Farmers Branch*, ___ F.3d ___, 2013 U.S. App. LEXIS 14953, 2013 WL 3791664, at *15 (5th Cir. July 22, 2013) (en banc) (Reavley, J., concurring) (“Because the sole purpose and effect of this [housing] ordinance is to target the presence of illegal aliens within the city . . . and to cause their removal, it contravenes the federal government’s exclusive authority on the regulation of immigration and the conditions of residence in this country, and it constitutes an obstacle to federal authority over immigration and the conduct of foreign affairs.”); 2013 U.S. App. LEXIS 14953, [WL] at *16 (Dennis, J., concurring) (“[T]he Ordinance is preempted in all of its core provisions by the comprehensive and interrelated federal legislative schemes governing the classification of noncitizens, the adjudication of immigration status, and the exclusion and deportation of noncitizens from the United States, enacted pursuant to the federal government’s constitutional authority to administer a uniform national immigration policy.”).

of Hazleton’s ordinances are nothing more than a thinly veiled attempt to regulate residency under the guise of a regulation of rental housing. By barring aliens lacking lawful immigration status from rental housing in Hazleton, the housing provisions go to the core of an alien’s residency. States and localities have no power to regulate residency based on immigration status.

For these same reasons, we also concluded that the housing provisions are field pre-empted by the INA. That statute is centrally concerned with “the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully admitted.” *Id.* (quoting *De Canas*, 424 U.S. at 359). The INA’s comprehensive scheme “plainly precludes state efforts, whether harmonious or conflicting, to regulate residence in this country based on immigration status.” *Id.* We noted that although Hazleton’s housing provisions do not control actual physical entry into, or expulsion from, Hazleton or the United States, “in essence, that is precisely what they attempt to do.” *Id.* at 220 (internal quotations marks and citation omitted). Again, we see nothing in the Supreme Court’s decisions in *Whiting* or *Arizona* that undermines these conclusions.

Since our decision in *Lozano II*, a number of courts have concluded that state or local laws proscribing the harboring of aliens lacking lawful status are also field pre-empted because they intrude on the field of alien harboring. *See, e.g., Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250,

1263-65 (11th Cir. 2012) (“*GLAHR*”) (concluding that federal law occupies the field with respect to “the entry, movement, and residence of aliens within the United States” and state law proscribing, *inter alia*, harboring is field pre-empted); *United States v. Alabama*, 691 F.3d 1269, 1285-87 (11th Cir. 2012) (same), *cert. denied*, 569 U.S. ___, 133 S. Ct. 2022, 185 L. Ed. 2d 905 (2013); *United States v. South Carolina*, 906 F. Supp. 2d 463, 468 (D.S.C. 2012) (concluding that provisions of state law proscribing transporting or sheltering aliens lacking lawful status “infringe upon a comprehensive federal statutory scheme”), *aff’d*, ___ F.3d ___, 2013 U.S. App. LEXIS 14917, 2013 WL 3803464 (4th Cir. July 23, 2013); *Valle del Sol v. Whiting*, No. 10-1061, 2012 U.S. Dist. LEXIS 172196, 2012 WL 8021265, at *5 (D. Ariz. Sept. 5, 2012) (concluding that state law proscribing, *inter alia*, harboring of aliens lacking lawful status is field pre-empted).

As the Eleventh Circuit Court of Appeals explained:

The INA provides a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens. Pursuant to 8 U.S.C. § 1324(a)(1)(A)(ii)-(iv), it is a federal crime for any person to transport or move an unlawfully present alien within the United States; to conceal, harbor, or shield an unlawfully present alien from detection; or to encourage or induce an alien to “come to, enter, or reside in the United States.” . . .

Section 1324(c) permits local law enforcement officers to arrest for these violations of federal law, but the federal courts maintain exclusive jurisdiction to prosecute for these crimes and interpret the boundaries of the federal statute. *See id.* § 1329. Subsection (d) of § 1324 further dictates evidentiary rules governing prosecution of one of its enumerated offenses, and subsection (e) goes so far as to mandate a community outreach program to “educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.”

GLAHR, 691 F.3d at 1263-64. We agree with the Eleventh Circuit and other courts that have held that “the federal government has clearly expressed more than a ‘peripheral concern’ with the entry, movement, and residence of aliens within the United States and the breadth of these laws illustrates an overwhelmingly dominant federal interest in the field.” *Id.* at 1264 (citation omitted).

The City argues that, by authorizing state and local officials to arrest individuals guilty of harboring, *see* 8 U.S.C. § 1324(c), Congress specifically invited state and local governments into this field. According to the City, this “invitation” – along with the requirement in 8 U.S.C. § 1373 that federal agencies respond to inquiries from states and localities regarding any alien’s immigration status – forecloses any argument that the housing provisions are field pre-empted. However, while § 1324(c) allows state

officials to arrest for violations of crimes enumerated in that section, the federal statute does not authorize states to prosecute those crimes. Instead, under federal law, the prosecution of such violations must take place in federal court and is at the sole discretion of federal officials. *See* 8 U.S.C. § 1329. “In the absence of a savings clause permitting state regulation in the field, the inference from these enactments is that the role of the state is limited to arrest for violations of federal [anti-harboring] law.” *GLAHR*, 691 F.3d at 1264.

For the reasons explained above, we again hold that the housing provisions in the IIRAO and RO constitute an impermissible regulation of immigration and are field preempted because they intrude on the regulation of residency and presence of aliens in the United States and the occupied field of alien harboring.

2. *The Housing Provisions Are Conflict Preempted.*

In *Lozano II*, we concluded that the housing provisions are also conflict pre-empted because they interfere with the federal government’s discretion in, and control over, the removal process. The exercise of that discretion implicates important foreign policy considerations. *Arizona*, 132 S. Ct. at 2499. We also concluded that the housing provisions are inconsistent with federal anti-harboring law. Again, the subsequent decisions of the Supreme Court have not

undermined our reasoning. In fact, as suggested above and explained below, the Court’s subsequent decisions reinforce our prior conflict pre-emption analysis with respect to the housing provisions.

In *Arizona*, the Court emphasized that “[a] principle feature of the [INA’s] removal system is the broad discretion exercised by immigration officials.” *Arizona*, 132 S. Ct. at 2499. “Federal officials . . . must decide whether it makes sense to pursue removal at all [and,] [i]f removal proceedings are commenced, [whether] aliens may seek . . . discretionary relief allowing them to remain in the country or at least to leave without formal removal.” *Id.*²⁵ Yet, by prohibiting the only realistic housing option many aliens have, Hazleton is clearly trying to prohibit unauthorized aliens from living within the City. As we explained in *Lozano II*, the housing provisions, in effect, constitute an attempt to remove persons from the City based entirely on a snapshot of their current immigration status. Accordingly, the housing provisions interfere with the federal government’s discretion in

²⁵ See also *Holder v. Martinez Gutierrez*, 566 U.S. ___, 132 S. Ct. 2011, 2015, 182 L. Ed. 2d 922 (2012) (“The immigration laws have long given the Attorney general discretion to permit certain otherwise-removable aliens to remain in the United States.”); *Fid. Fed. Sav. & Loan Ass’n*, 458 U.S. at 154, 102 S. Ct. 3014 (“Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.”).

deciding whether and when to initiate removal proceedings. See *Lozano II*, 620 F.3d at 221-22.²⁶

Indeed, interference with the federal removal process and the discretion entrusted to the Executive Branch are key reasons for the Supreme Court's conclusions that § 6 and § 3 of Arizona's S.B. 1070 law are conflict pre-empted. The Court reached that conclusion even though neither provision purports to physically remove any aliens from Arizona or the United States. In affirming an injunction against § 6, which would have given Arizona police authority to arrest an individual based on probable cause to

²⁶ In *Keller v. City of Fremont*, ___ F.3d ___, 2013 U.S. App. LEXIS 13299, 2013 WL 3242111 (8th Cir. June 28, 2013), a divided panel of the Court of Appeals for the Eighth Circuit has recently concluded that a local ordinance, almost identical to the housing provisions in the RO and IIRAO, does not interfere with federal removal discretion. The majority reasoned that the "rental provisions would only indirectly effect 'removal' of any alien from the City," in a manner comparable to how "denying aliens employment inevitably has the effect of 'removing' some of them from the State." 2013 U.S. App. LEXIS 13299, [WL] at *8. We disagree. Restricting housing touches directly on residency and federal removal discretion. As we explained in *Lozano II*, "[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." *Lozano II*, 620 F.3d at 220-21 (internal quotation marks and citation omitted). The Eighth Circuit also concluded that the rental restrictions do not determine who should or should not be admitted into the country and do not conflict with federal anti-harboring law. See *Keller*, 2103 U.S. App. LEXIS 13299, 2013 WL 3242111, at *5, *7. For the reasons explained above, we disagree with these conclusions as well.

believe the individual has committed a removable offense, the Court determined that the provision “would allow the State to achieve its own immigration policy,” which could result in “unnecessary harassment of some aliens . . . whom federal officials determine should not be removed.” *Arizona*, 132 S. Ct. at 2506. The Court also found that “[b]y authorizing state officers to decide whether an alien should be detained for being removable, § 6 violates the principles that the removal process is entrusted to the discretion of the Federal Government.” *Id.* Similarly, in invalidating § 3, which criminalized failure to carry an alien registration document in violation of federal law, the Court noted that, in addition to intruding on a field occupied by Congress, the provision also conflicts with federal law because it would give Arizona the power to act “even in circumstances where federal officials . . . determine that prosecution would frustrate federal policies.” *Id.* at 2503.

The same infirmities are evident here. Like the preempted provisions in *Arizona*, the housing provisions constitute an attempt to unilaterally attach 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. Congress has not banned persons who lack lawful status or proper documentation from obtaining rental or any other type of housing in the United States. Hazleton’s decision to impose this “distinct, unusual and extraordinary burden[] . . . upon aliens” impermissibly intrudes into

the realm of federal authority. *Hines*, 312 U.S. at 65-66. Through the housing provisions, Hazleton is seeking to achieve “its own immigration policy,” one which will certainly result in “unnecessary harassment of some aliens . . . whom federal officials determine should not be removed.” *Arizona*, 132 S. Ct. at 2506.

Hazleton may not unilaterally prohibit those lacking lawful status from living within its boundaries, without regard for the Executive Branch’s enforcement and policy priorities. “If every other state enacted similar legislation to overburden the lives of aliens, the immigration scheme would be turned on its head.” *United States v. Alabama*, 691 F.3d at 1295 n.21. Accordingly, the housing provisions conflict with federal law.

In addition to undermining the comprehensive procedures under which federal officials determine whether an alien may remain in this country, Hazleton’s housing provisions would create significant foreign policy and humanitarian concerns. As the Court in *Arizona* emphasized, federal decisions in this arena “touch on foreign relations and must be made with one voice.” *Id.* at 2506-07. “One of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.” *Arizona*, 132 S. Ct. at 2498-99 (quoting *Hines*, 312 U.S. at 64). “It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the

United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate states.” *Id.* at 2498. In addition, “[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.” *Id.* Accordingly, “[s]ome discretionary decisions [in the enforcement of immigration law] involve policy choices that bear on this Nation’s international relations,” and the exercise of such discretion “embraces immediate human concerns.” *Id.* at 2499. “Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission.” *Id.*

The Supreme Court’s recognition of the primacy of the national interest in regulations directly affecting aliens in this country reinforces our holding in *Lozano II* that Hazleton’s attempt to regulate where aliens can live implicates strong national interests and must be done with a single voice.²⁷ Other federal courts that have addressed this issue agree that

²⁷ We realize, of course, that “[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States.” *Arizona*, 132 S. Ct. at 2500. Nonetheless, “[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.” *Fid. Fed. Sav. & Loan Ass’n*, 458 U.S. at 153, 102 S. Ct. 3014 (quoting *Free v. Bland*, 369 U.S. 663, 666, 82 S. Ct. 1089, 8 L. Ed. 2d 180 (1962)); see also *id.* (Conflict pre-emption “principles are not inapplicable here simply because real property law is a matter of special concern to the States.”)

attempts to proscribe harboring or restrict certain forms of housing for aliens lacking lawful immigration status are conflict pre-empted. Similarly, when the issue has been presented in the context of a preliminary injunction, courts have found a substantial likelihood of conflict pre-emption for reasons similar to those we have described. *See, e.g., Villas at Parkside Partners v. Farmers Branch*, ___ F.3d ___, 2013 U.S. App. LEXIS 14953, 2013 WL 3791664, at *8, *10 (5th Cir. July 22, 2013) (en banc) (concluding that local housing ordinance analogous to Hazleton’s housing provisions conflicts with federal anti-harboring law and federal removal procedures); *GLAHR*, 691 F.3d at 1265-67 (concluding that state law proscribing, *inter alia*, harboring aliens lacking lawful status “presents an obstacle to the execution of the federal statutory scheme and challenges federal supremacy in the realm of immigration”); *United States v. Alabama*, 691 F.3d at 1287-88 (same); *United States v. South Carolina*, 906 F. Supp. 2d at 468 (concluding that provisions of state law proscribing transporting or sheltering aliens lacking lawful status would interfere with federal enforcement discretion), *aff’d*, ___ F.3d ___, 2013 U.S. App. LEXIS 14917, 2013 WL 3803464 (4th Cir. July 23, 2013); *Valle del Sol*, 2012 U.S. Dist. LEXIS 172196, 2012 WL 8021265, at *6 (concluding that state law proscribing, *inter alia*, harboring of aliens lacking lawful status conflicts with federal law because it interferes with federal enforcement discretion); *Keller v. City of Fremont*, 853 F. Supp. 2d 959, 972-73 (D. Neb. 2012), *rev’d*, 2013 U.S. App. LEXIS 13299, 2013 WL 3242111 (8th Cir.

June 28, 2013) (concluding that city ordinance penalizing harboring or the lease or rental of dwelling units to aliens lacking lawful status would impair “the structure Congress has established for classification, adjudication, and potential removal of aliens”).

Despite the obvious trespass into matters that must be left to the national sovereign, the City continues to insist there is no conflict pre-emption because it is merely engaging in “concurrent enforcement” of federal immigration laws. Under that theory, virtually any local jurisdiction could prohibit activity that is also prohibited by federal law as long as the local prohibition is not expressly pre-empted and the locality is not acting in a field that is occupied by federal law. The City cites to a decision from the Ninth Circuit Court of Appeals in support of its contention: “Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized.” *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999). However, that argument collapses under its own weight. It requires that local enforcement activity *not impair federal regulatory interests*. It says nothing about the propriety of concurrent enforcement when the local enforcement *does* impair federal regulatory interests; yet, that is the situation here.

Moreover, the City’s argument simply cannot be reconciled with the Supreme Court’s holding in *Arizona*. There, the Court reasoned that “[a]lthough § 5(C) attempts to achieve one of the same goals as

federal law – the deterrence of unlawful employment – it involves a conflict in the method of enforcement.” *Arizona*, 132 S. Ct. at 2505. The Court went on to explain that it had previously “recognized that a [c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.” *Id.* (quoting *Motor Coach Employees*, 403 U.S. at 287, 91 S. Ct. 1909). Thus, the Court found § 5(C) pre-empted even though the provision imposed sanctions only on conduct already prohibited under federal law.²⁸

Furthermore, it must be remembered that the housing provisions are not “concurrent” with federal law, despite Hazleton’s argument to the contrary. In addition to interfering with federal removal discretion, the housing provisions conflict with federal law because they define “harboring” to include simple landlord-tenant relationships. Although the Supreme Court has yet to define “harboring” as that term is used in 8 U.S.C. § 1324(a)(1)(A)(iii), we have found that culpability requires some act of concealment

²⁸ While we acknowledge that § 5(C) attempted to enact “a state *criminal* prohibition where no federal counterpart exists,” *Arizona*, 132 S. Ct. at 2503 (emphasis added), federal law does nonetheless prohibit unauthorized employment and imposes civil penalties on aliens who seek or engage in unauthorized work. *See id.* at 2504 (listing civil penalties imposed on aliens who seek or engage in work without authorization). Thus, § 5(C) is an example of a state’s “concurrent enforcement” effort, as that term is defined by the City, which was nonetheless found to be conflict pre-empted by the Supreme Court.

from authorities. *See Lozano II*, 620 F.3d at 223. “We . . . define ‘harboring’ as conduct ‘tending to substantially facilitate an alien’s remaining in the United States illegally *and to prevent government authorities from detecting the alien’s unlawful presence.*” *Id.* (quoting *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008) (emphasis added)); *see also United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999) (Harboring “encompasses conduct tending substantially to facilitate an alien’s remaining in the United States illegally and to prevent government authorities from detecting his unlawful presence.”). Renting an apartment in the normal course of business is not, without more, conduct that prevents the government from detecting an alien’s unlawful presence. Thus, it is highly unlikely that renting an apartment to an unauthorized alien would be sufficient to constitute harboring in violation of the INA.²⁹

The City also argues that *Whiting* held that a verification under 8 U.S.C. § 1373(c) is an accurate assessment of an alien’s immigration status and a sufficient basis for state or local action with respect to that alien. The City overlooks, however, that the state

²⁹ *See also Villas at Parkside Partners*, 2013 U.S. App. LEXIS 14953, 2013 WL 3791664, at *5 (concluding that, “by criminalizing conduct that does not have the effect of evading federal detection, and by giving state officials authority to act as immigration officers outside the ‘limited circumstances’ specified by federal law,” local housing ordinance conflicts with federal anti-harboring law).

or locality must *first* have authority to take the underlying action with respect to an alien. Only then is verification under 8 U.S.C. § 1373(c) relevant to support permissible state or local action. Because the *Whiting* plurality held that Arizona's employer sanctions law was a valid licensing law not pre-empted by IRCA, it followed that a federal verification of immigration status is a proper basis upon which Arizona may impose its licensing sanctions. That is not the case with respect to the housing provisions in Hazleton's ordinances.

As we have explained, the housing provisions are themselves pre-empted. It is therefore irrelevant that they would be imposed pursuant to a valid status verification under § 1373(c). Hazleton simply does not have the legal authority to take that action even if done pursuant to a valid determination of status under federal law. *See Arizona*, 132 S. Ct. at 2505 (explaining why § 5(C) of Arizona's S.B. 1070 law, which attempted to impose sanctions on unauthorized workers, was conflict pre-empted); A.R.S. § 13-2928(E) (providing that "[i]n the enforcement of [§ 5(C)], an alien's immigration status may be determined . . . pursuant to 8 [U.S.C] § 1373(c)").

For the foregoing reasons, we again hold that the housing provisions conflict with federal law and are thus pre-empted.

3. *The Rental Registration Provisions in the RO Are Field Pre-empted Even When Divorced from the Harboring Provisions in the IIRAO.*

The approach throughout this litigation has been to consider the relevant housing provisions in the RO in conjunction with those in the IIRAO. Nonetheless, it is theoretically possible that the rental registration scheme in the RO may not conflict with federal immigration law if divorced from the harboring provisions and sanctions in the IIRAO.³⁰ However, we conclude that the housing provisions in the RO, even if considered separately from the anti-harboring provisions in the IIRAO, are pre-empted because they intrude upon the field occupied by federal alien registration law.³¹

³⁰ See *Arizona*, 132 S. Ct. at 2508-09 (vacating injunction against § 2(B) of Arizona’s S.B. 1070 law because Congress “has encouraged the sharing of information [between federal and state officials] about possible immigration violations” and § 2(B) could be read to avoid constitutional concerns); 8 U.S.C. § 1357(g)(10)(A)-(B) (requiring no formal agreement for state and local authorities to “communicate with the Attorney General regarding the immigration status of any individual” or “otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States”).

³¹ We previously concluded that “[t]he sole severability issue Hazleton has not waived concerns the IIRAO’s private cause of action.” *Lozano II*, 620 F.3d at 182. As we explained in *supra* note 5, that holding is not at issue here. However, we acknowledge that our prior severability holding may not necessarily foreclose a decision to uphold the RO, and the rental registration scheme, if considered separately from the related anti-harboring

(Continued on following page)

As we have explained, the RO requires those seeking to occupy rental housing to register with the City and obtain an occupancy permit. To obtain an occupancy permit, the applicant need only pay the requisite registration fee and submit the name and address of the prospective occupant, the name of the landlord, the address of the rental unit, and “proof of legal citizenship and/or residency.” RO § 7b. As the City itself points out, under the terms of the RO alone, all applicants are issued an occupancy permit upon providing the required information and the requisite fee – even if the applicant indicates that she lacks legal status. Those who occupy rental housing without complying with this registration scheme are subject to fines of \$100 to \$300, or imprisonment for up to 90 days in default of payment. RO § 10a. Thus, the rental registration scheme of the RO standing alone operates as a requirement that a subset of Hazleton’s population – those residing in rental housing – register their immigration status with the City.

It is beyond dispute that states and localities may not intrude in the field of alien registration. *Arizona*, 132 S. Ct. at 2502 (reiterating holding in *Hines*, 312 U.S. at 70, that “the Federal Government has occupied the field of alien registration”). Thus, in

provisions in the IIRAO. Indeed, those provisions appear in *separate statutes*. This does not impact the outcome here, however, because, as we explain below, the rental registration scheme in the RO is itself field pre-empted.

Arizona, the Supreme Court found pre-empted § 3 of Arizona’s S.B. 1070 law, which forbade “willful failure to complete or carry an alien registration document” in violation of federal law. *Arizona*, 132 S. Ct. at 2501. Hazleton’s rental registration scheme similarly intrudes into the field of alien registration. One of the rental registration scheme’s primary functions is to require rental housing occupants to report their immigration status to the City of Hazleton and penalize the failure to register and obtain an occupancy permit pursuant to that requirement. This attempt to create a local alien registration requirement is field pre-empted.

In arguing that the RO is nothing like an alien registration system, the City claims “the most notable difference” is that the RO applies equally to citizens and aliens alike while the federal Alien Registration Act applies only to noncitizens.³² We are not persuaded. It is highly unlikely that the local registration laws invalidated on field pre-emption grounds in *Hines* or *Arizona* would have been upheld if they applied to citizens and aliens alike. The RO’s registration scheme cannot avoid pre-emption merely because it requires both citizens and noncitizens to declare

³² The Court of Appeals for the Eighth Circuit adopted this argument and concluded that a similar rental registration scheme is not field pre-empted. See *Keller*, 2013 U.S. App. LEXIS 13299, 2013 WL 3242111, at *6 (“The occupancy license scheme at issue is nothing like the state registration laws invalidated in *Hines* and in *Arizona* [because it] requires *all* renters, including U.S. citizens and nationals, to obtain an occupancy license. . . .”).

their immigration status.³³ The City also argues that a finding that the RO constitutes an alien registration system is implausible because it would require the invalidation of laws limiting drivers' licenses to lawfully present aliens. This argument is also unpersuasive. Basing eligibility for certain state privileges on immigration status is distinct from requiring aliens to register. The RO's rental registration scheme serves no discernible purpose other than to register the immigration status of a subset of the City's population. It can only be viewed as an impermissible alien registration requirement.³⁴

IV. [sic] Conclusion

For the reasons set forth above, we conclude that the employment provisions in the IIRAO are

³³ Indeed, Hazleton's requirement that citizens, in addition to non-citizens, register their immigration status is an even worse transgression into the field of alien registration law as it imposes burdens on U.S. citizens that are absent from federal law. Since Congress has not seen fit to require U.S. citizens to prove their citizenship status before obtaining rental housing, we are at a loss to understand Hazleton's argument that imposing this burden on citizens saves the RO's registration scheme from pre-emption.

³⁴ The RO is also distinguishable from § 2(B) of Arizona's S.B. 1070, which the Supreme Court did not enjoin in *Arizona*. Section 2(B), unlike the rental registration scheme in the RO, did not impose any registration obligation on aliens. Rather, § 2(B) imposed only an obligation on local police to verify the immigration status of persons stopped, detained or arrested. *Arizona*, 132 S. Ct. at 2507-10.

distinguishable from the Arizona law upheld in *Whiting*, and the Supreme Court's reasoning in *Whiting* and *Arizona* does not otherwise undermine our conclusion that both the employment and housing provisions in the IIRAO and RO are pre-empted by federal law. Accordingly, we will again affirm in part and reverse in part the District Court's order permanently enjoining Hazleton's enforcement of the IIRAO and RO.

V. [sic] Appendix

A. The Illegal Immigration Relief Act Ordinance (Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-7)

ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE BE IT ORDAINED BY THE COUNCIL OF THE CITY OF HAZLETON AS FOLLOWS:

SECTION 1. TITLE

This chapter shall be known and may be cited as the "City of Hazleton Illegal Immigration Relief Act Ordinance."

SECTION 2. FINDINGS AND DECLARATION OF PURPOSE

The People of the City of Hazleton find and declare:

A. That state and federal law require that certain conditions be met before a person may be authorized to work or reside in this country.

B. That unlawful workers and illegal aliens, as defined by this ordinance and state and federal law, do not normally meet such conditions as a matter of law when present in the City of Hazleton.

C. That unlawful employment, the harboring of illegal aliens in dwelling units in the City of Hazleton, and crime committed by illegal aliens harm the health, safety and welfare of authorized U.S. workers and legal residents in the City of Hazleton. Illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life.

D. That the City of Hazleton is authorized to abate public nuisances and empowered and mandated by the people of Hazleton to abate the nuisance of illegal immigration by diligently prohibiting the acts and policies that facilitate illegal immigration in a manner consistent with federal law and the objectives of Congress.

E. That United States Code Title 8, subsection 1324(a)(1)(A) prohibits the harboring of illegal aliens. The provision of housing to illegal aliens is a fundamental component of harboring.

F. This ordinance seeks to secure to those lawfully present in the United States and this City, whether or not they are citizens of the United States, the right to live in peace free of the threat crime, to

enjoy the public services provided by this city without being burdened by the cost of providing goods, support and services to aliens unlawfully present in the United States, and to be free of the debilitating effects on their economic and social well being imposed by the influx of illegal aliens to the fullest extent that these goals can be achieved consistent with the Constitution and Laws of the United States and the Commonwealth of Pennsylvania.

G. The City shall not construe this ordinance to prohibit the rendering of emergency medical care, emergency assistance, or legal assistance to any person.

SECTION 3. DEFINITIONS

When used in this chapter, the following words, terms and phrases shall have the meanings ascribed to them herein, and shall be construed so as to be consistent with state and federal law, including federal immigration law:

A. "Business entity" means any person or group of persons performing or engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for profit or not for profit.

(1) The term business entity shall include but not be limited to selfemployed [sic] individuals, partnerships, corporations, contractors, and subcontractors.

(2) The term business entity shall include any business entity that possesses a business permit, any business entity that is exempt by law from obtaining such a business permit, and any business entity that is operating unlawfully without such a business permit.

B. “City” means the City of Hazleton.

C. “Contractor” means a person, employer, subcontractor or business entity that enters into an agreement to perform any service or work or to provide a certain product in exchange for valuable consideration. This definition shall include but not be limited to a subcontractor, contract employee, or a recruiting or staffing entity.

D. “Illegal Alien” means an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq. The City shall not conclude that a person is an illegal alien unless and until an authorized representative of the City has verified with the federal government, pursuant to United States Code Title 8, subsection 1373(c), that the person is an alien who is not lawfully present in the United States.

E. “Unlawful worker” means a person who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law, including but not limited to a minor disqualified by nonage, or an unauthorized alien as

defined by United States Code Title 8, subsection 1324a(h)(3).

F. “Work” means any job, task, employment, labor, personal services, or any other activity for which compensation is provided, expected, or due, including but not limited to all activities conducted by business entities.

G. “Basic Pilot Program” means the electronic verification of work authorization program of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, P.L. 104-208, Division C, Section 403(a); United States Code Title 8, subsection 1324a, and operated by the United States Department of Homeland Security (or a successor program established by the federal government.)

SECTION 4. BUSINESS PERMITS, CONTRACTS, OR GRANTS

A. It is unlawful for any business entity to knowingly recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City. Every business entity that applies for a business permit to engage in any type of work in the City shall sign an affidavit, prepared by the City Solicitor, affirming that they do not knowingly utilize the services or hire any person who is an unlawful worker.

B. Enforcement: The Hazleton Code Enforcement Office shall enforce the requirements of this section.

(1) An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any City official, business entity, or City resident. A valid complaint shall include an allegation which describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred.

(2) A complaint which alleges a violation on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.

(3) Upon receipt of a valid complaint, the Hazleton Code Enforcement Office shall, within three business days, request identity information from the business entity regarding any persons alleged to be unlawful workers. The Hazleton Code Enforcement Office shall suspend the business permit of any business entity which fails, within three business days after receipt of the request, to provide such information. In instances where an unlawful worker is alleged to be an unauthorized alien, as defined in United States Code Title 8, subsection 1324a(h)(3), the Hazleton Code Enforcement Office shall submit identity data required by the federal government to verify, pursuant to United States

Code Title 8, section 1373, the immigration status of such person(s), and shall provide the business entity with written confirmation of that verification.

(4) The Hazleton Code Enforcement Office shall suspend the business permit of any business entity which fails to correct a violation of this section within three business days after notification of the violation by the Hazleton Code Enforcement Office.

(5) The Hazleton Code Enforcement Office shall not suspend the business permit of a business entity if, prior to the date of the violation, the business entity had verified the work authorization of the alleged unlawful worker(s) using the Basic Pilot Program.

(6) The suspension shall terminate one business day after a legal representative of the business entity submits, at a City office designated by the City Solicitor, a sworn affidavit stating that the violation has ended.

(a) The affidavit shall include a description of the specific measures and actions taken by the business entity to end the violation, and shall include the name, address and other adequate identifying information of the unlawful workers related to the complaint.

(b) Where two or more of the unlawful workers were verified by the federal government to be unauthorized aliens, the legal representative of the business

entity shall submit to the Hazleton Code Enforcement Office, in addition to the prescribed affidavit, documentation acceptable to the City Solicitor which confirms that the business entity has enrolled in and will participate in the Basic Pilot Program for the duration of the validity of the business permit granted to the business entity.

(7) For a second or subsequent violation, the Hazleton Code Enforcement Office shall suspend the business permit of a business entity for a period of twenty days. After the end of the suspension period, and upon receipt of the prescribed affidavit, the Hazleton Code Enforcement Office shall reinstate the business permit. The Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate federal enforcement agency, pursuant to United States Code Title 8, section 1373. In the case of an unlawful worker disqualified by state law not related to immigration, the Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate state enforcement agency.

C. All agencies of the City shall enroll and participate in the Basic Pilot Program.

D. As a condition for the award of any City contract or grant to a business entity for which the value of employment, labor or, personal services shall exceed \$10,000, the business entity shall provide

documentation confirming its enrollment and participation in the Basic Pilot Program.

E. Private Cause of Action for Unfairly Discharged Employees

(1) The discharge of any employee who is not an unlawful worker by a business entity in the City is an unfair business practice if, on the date of the discharge, the business entity was not participating in the Basic Pilot program and the business entity was employing an unlawful worker.

(2) The discharged worker shall have a private cause of action in the Municipal Court of Hazleton against the business entity for the unfair business practice. The business entity found to have violated this subsection shall be liable to the aggrieved employee for:

(a) three times the actual damages sustained by the employee, including but not limited to lost wages or compensation from the date of the discharge until the date the employee has procured new employment at an equivalent rate of compensation, up to a period of one hundred and twenty days; and

(b) reasonable attorney's fees and costs.

SECTION 5. HARBORING ILLEGAL ALIENS

A. It is unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.

(1) For the purposes of this section, to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall be deemed to constitute harboring. To suffer or permit the occupancy of the dwelling unit by an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall also be deemed to constitute harboring.

(2) A separate violation shall be deemed to have been committed on each day that such harboring occurs, and for each adult illegal alien harbored in the dwelling unit, beginning one business day after receipt of a notice of violation from the Hazleton Code Enforcement Office.

(3) A separate violation of this section shall be deemed to have been committed for each business day on which the owner fails to provide the Hazleton Code Enforcement Office with identity data needed to obtain a

federal verification of immigration status, beginning three days after the owner receives written notice from the Hazleton Code Enforcement Office.

B. Enforcement: The Hazleton Code Enforcement Office shall enforce the requirements of this section.

(1) An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any official, business entity, or resident of the City. A valid complaint shall include an allegation which describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred.

(2) A complaint which alleges a violation on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.

(3) Upon receipt of a valid written complaint, the Hazleton Code Enforcement Office shall, pursuant to United States Code Title 8, section 1373(c), verify with the federal government the immigration status of a person seeking to use, occupy, lease, or rent a dwelling unit in the City. The Hazleton Code Enforcement Office shall submit identity data required by the federal government to verify immigration status. The City shall forward identity data provided by the owner to the federal government, and shall provide

the property owner with written confirmation of that verification.

(4) If after five business days following receipt of written notice from the City that a violation has occurred and that the immigration status of any alleged illegal alien has been verified, pursuant to United States Code Title 8, section 1373(c), the owner of the dwelling unit fails to correct a violation of this section, the Hazleton Code Enforcement Office shall deny or suspend the rental license of the dwelling unit.

(5) For the period of suspension, the owner of the dwelling unit shall not be permitted to collect any rent, payment, fee, or any other form of compensation from, or on behalf of, any tenant or occupant in the dwelling unit.

(6) The denial or suspension shall terminate one business day after a legal representative of the dwelling unit owner submits to the Hazleton Code Enforcement Office a sworn affidavit stating that each and every violation has ended. The affidavit shall include a description of the specific measures and actions taken by the business entity to end the violation, and shall include the name, address and other adequate identifying information for the illegal aliens who were the subject of the complaint.

(7) The Hazleton Code Enforcement Office shall forward the affidavit, complaint, and associated documents to the appropriate

federal enforcement agency, pursuant to United States Code Title 8, section 1373.

(8) Any dwelling unit owner who commits a second or subsequent violation of this section shall be subject to a fine of two hundred and fifty dollars (\$250) for each separate violation. The suspension provisions of this section applicable to a first violation shall also apply.

(9) Upon the request of a dwelling unit owner, the Hazleton Code Enforcement Office shall, pursuant to United States Code Title 8, section 1373(c), verify with the federal government the lawful immigration status of a person seeking to use, occupy, lease, or rent a dwelling unit in the City. The penalties in this section shall not apply in the case of dwelling unit occupants whose status as an alien lawfully present in the United States has been verified.

SECTION 6. CONSTRUCTION AND SEVERABILITY

A. 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.

B. If any part of provision of this Chapter is in conflict or inconsistent with applicable provisions of federal or state statutes, or is otherwise held to be invalid or unenforceable by any court of competent jurisdiction, such part of provision shall be suspended

and superseded by such applicable laws or regulations, and the remainder of this Chapter shall not be affected thereby.

SECTION 7. IMPLEMENTATION AND PROCESS

A. *Prospective Application Only.* The default presumption with respect to Ordinances of the City of Hazleton – that such Ordinances shall apply only prospectively – shall pertain to the Illegal Immigration Relief Act Ordinance. The Illegal Immigration Relief Act Ordinance shall be applied only to employment contracts, agreements to perform service or work, and agreements to provide a certain product in exchange for valuable consideration that are entered into or are renewed after the date that the Illegal Immigration Relief Act Ordinance becomes effective and any judicial injunction prohibiting its implementation is removed. The Illegal Immigration Relief Act Ordinance shall be applied only to contracts to let, lease, or rent dwelling units that are entered into or are renewed after the date that the Illegal Immigration Relief Act Ordinance becomes effective and any judicial injunction prohibiting its implementation is removed. The renewal of a month-to-month lease or other type of tenancy which automatically renews absent notice by either party will not be considered as entering into a new contract to let, lease or rent a dwelling unit.

B. *Condition of Lease.* Consistent with the obligations of a rental unit owner described in Section 5.A., a tenant may not enter into a contract for the

rental or leasing of a dwelling unit unless the tenant is either a U.S. citizen or an alien lawfully present in the United States according to the terms of United States Code Title 8, Section 1101 et seq. A tenant who is neither a U.S. citizen nor an alien lawfully present in the United States who enters into such a contract shall be deemed to have breached a condition of the lease under 68 P.S. Section 250.501. A tenant who is not a U.S. citizen who subsequent to the beginning of his tenancy becomes unlawfully present in the United States shall be deemed to have breached a condition of the lease under 68 P.S. Section 250.501.

C. Corrections of Violations – Employment of Unlawful Workers. The correction of a violation with respect to the employment of an unlawful worker shall include any of the following actions:

(1) The business entity terminates the unlawful worker's employment.

(2) The business entity, after acquiring additional information from the worker, requests a secondary or additional verification by the federal government of the worker's authorization, pursuant to the procedures of the Basic Pilot Program. While this verification is pending, the three business day period described in Section 4.B.(4) shall be tolled.

(3) The business entity attempts to terminate the unlawful worker's employment and such termination is challenged in a court of the Commonwealth of Pennsylvania.

While the business entity pursues the termination of the unlawful worker's employment in such forum, the three business day period described in Section 4.B.(4) shall be tolled.

D. *Corrections of Violations – Harboring Illegal Aliens.* The correction of a violation with respect to the harboring of an illegal alien in a dwelling unit shall include any of the following actions:

(1) A notice to quit, in writing, issued and served by the dwelling unit owner, as landlord, to the tenant declaring a forfeiture of the lease for breach of the lease condition describe in Section 7.B.

(2) The dwelling unit owner, after acquiring additional information from the alien, requests the City of Hazleton to obtain a secondary or additional verification by the federal government that the alien is lawfully present in the United States, under the procedures designated by the federal government, pursuant to United States Code Title 8, Subsection 1373(c). While this second verification is pending, the five business day period described in Section 5.B.(4) shall be tolled.

(3) The commencement of an action for the recovery of possession of real property in accordance with Pennsylvania law by the landlord against the illegal alien. If such action is contested by the tenant in court, the dwelling unit owner shall be deemed to have complied with this Ordinance while the

dwelling unit owner is pursuing the action in court. While this process is pending, the five business day period described in Section 5.B.(4) shall be tolled.

E. *Procedure if Verification is Delayed.* If the federal government notifies the City of Hazleton that it is unable to verify whether a tenant is lawfully present in the United States or whether an employee is authorized to work in the United States, the City of Hazleton shall take no further action on the complaint until a verification from the federal government concerning the status of the individual is received. At no point shall any City official attempt to make an independent determination of any alien's legal status, without verification from the federal government, pursuant to United States Code Title 8, Subsection 1373(c).

F. *Venue for Judicial Process.* Any business entity or rental unit owner subject to a complaint and subsequent enforcement under this ordinance, or any employee of such a business entity or tenant of such a rental unit owner, may challenge the enforcement of this Ordinance with respect to such entity or individual in the Magisterial District Court for the City of Hazleton, subject to the right of appeal to the Luzerne County Court of Common Pleas. Such an entity or individual may alternatively challenge the enforcement of this Ordinance with respect to such entity or individual in any other court of competent jurisdiction in accordance with applicable law, subject to all rights of appeal.

G. *Deference to Federal Determinations of Status.* The determination of whether a tenant of a dwelling is lawfully present in the United States, and the determination of whether a worker is an unauthorized alien shall be made by the federal government, pursuant to United States Code Title 8, Subsection 1373(c). A determination of such status of an individual by the federal government shall create a rebuttable presumption as to that individual's status in any judicial proceedings brought pursuant to this ordinance. The Court may take judicial notice of any verification of the individual previously provided by the federal government and may request the federal government to provide automated or testimonial verification pursuant to United States Code Title 8, Subsection 1373(c).

B. Rental Registration Ordinance (Ordinance 2006-13)

ESTABLISHING A REGISTRATION PROGRAM FOR RESIDENTIAL RENTAL PROPERTIES; REQUIRING ALL OWNERS OF RESIDENTIAL RENTAL PROPERTIES TO DESIGNATE AN AGENT FOR SERVICE OF PROCESS; AND PRESCRIBING DUTIES OF OWNERS, AGENTS AND OCCUPANTS; DIRECTING THE DESIGNATION OF AGENTS; ESTABLISHING FEES FOR THE COSTS ASSOCIATED WITH THE REGISTRATION OF RENTAL PROPERTY; AND PRESCRIBING PENALTIES FOR VIOLATIONS BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF HAZLETON AND

IT IS HEREBY ORDAINED AND WITH THE AUTHORITY OF THE SAME AS FOLLOWS:

SECTION 1. DEFINITIONS AND INTERPRETATION.

The following words, when used in this ordinance, shall have the meanings ascribed to them in this section, except in those instances where the context clearly indicates otherwise. When not inconsistent with the context, words used in the present tense include the future; words in the plural number include the singular number; words in the singular shall include the plural, and words in the masculine shall include the feminine and the neuter.

a. AGENT – Individual of legal majority who has been designated by the Owner as the agent of the Owner or manager of the Property under the provisions of this ordinance.

b. CITY – City of Hazleton

c. CITY CODE – the building code (property Maintenance Code 1996 as amended or superceded) officially adopted by the governing body of the City, or other such codes officially designated by the governing body of the City for the regulation of construction, alteration, addition, repair, removal, demolition, location, occupancy and maintenance of buildings and structures.

d. ZONING ORDINANCE – Zoning ordinance as officially adopted by the City of Hazleton, File of Council # 95-26 (as amended).

e. OFFICE – The Office of Code Enforcement for the City of Hazleton.

f. DWELLING UNIT – a single habitable unit, providing living facilities for one or more persons, including permanent space for living, sleeping, eating, cooking and bathing and sanitation, whether furnished or unfurnished. There may be more than one Dwelling Unit on a Premises.

g. DORMITORY – a residence hall offered as student or faculty housing to accommodate a college or university, providing living or sleeping rooms for individuals or groups of individuals, with or without cooking facilities and with or without private baths.

h. INSPECTOR – any person authorized by Law or Ordinance to inspect buildings or systems, e.g. zoning, housing, plumbing, electrical systems, heat systems, mechanical systems and health necessary to operate or use buildings within the City of Hazleton. An Inspector would include those identified in Section 8 – Enforcement.

i. FIRE DEPARTMENT – the Fire Department of the City of Hazleton or any member thereof, and includes the Chief of Fire or his designee.

j. HOTEL – a building or part of a building in which living and sleeping accommodations are used primarily for transient occupancy, may be rented on a daily basis, and desk service is provided, in addition to one or more of the following services: maid,

telephone, bellhop service, or the furnishing or laundering of linens.

k. LET FOR OCCUPANCY – to permit, provide or offer, for consideration, possession or occupancy of a building, dwelling unit, rooming unit, premise or structure by a person who is not the legal owner of record thereof, pursuant to a written or unwritten lease, agreement or license, or pursuant to a recorded or unrecorded agreement or contract for the sale of land.

l. MOTEL – a building or group of buildings which contain living and sleeping accommodations used primarily for transient occupancy, may be rented on a daily basis, and desk service is provided, and has individual entrances from outside the building to serve each such living or sleeping unit.

m. OCCUPANT – a person age 18 or older who resides at a Premises.

n. OPERATOR – any person who has charge, care or control of a Premises which is offered or let for occupancy.

o. OWNER – any Person, Agent, or Operator having a legal or equitable interest in the property; or recorded in the official records of the state, county, or municipality as holding title to the property; or otherwise having control of the property, including the guardian of the estate of any such person, and the executor or administrator of the estate of such person

if ordered to take possession of real property by a Court of competent jurisdiction.

p. OWNER-OCCUPANT – an owner who resides in a Dwelling Unit on a regular permanent basis, or who otherwise occupies a nonresidential portion of the Premises on a regular permanent basis.

q. PERSON – any person, partnership, firm, association, corporation, or municipal authority or any other group acting as a single unit.

r. POLICE DEPARTMENT – the Police Department of the City of Hazleton or any member thereof sworn to enforce laws and ordinances in the City, and includes the Chief of Police or his designee.

s. PREMISES – any parcel of real property in the City, including the land and all buildings and structures in which one or more Rental Units are located.

t. RENTAL UNIT – means a Dwelling Unit or Rooming Unit which is Let for Occupancy and is occupied by one or more Tenants.

u. ROOMING UNIT – any room or groups of rooms forming a single habitable unit occupied or intended to be occupied for sleeping or living, but not for cooking purposes.

v. TENANT – any Person authorized by the Owner or Agent who occupies a Rental Unit within a Premises regardless of whether such Person has executed a lease for said Premises.

SECTION 2. APPOINTMENT OF AN AGENT AND/OR MANAGER

Each Owner who is not an Owner-occupant, or who does not reside in the City of Hazleton or within a ten (10) mile air radius of the City limits, shall appoint an Agent who shall reside in the City or within a ten (10) mile air radius of the City limits.

SECTION 3. DUTIES OF THE OWNER AND/OR AGENT

a. The Owner has the duty to maintain the Premises in good repair, clean and sanitary condition, and to maintain the Premises in compliance with the current Codes, Building Codes and Zoning Ordinance of the City of Hazleton. The Owner may delegate implementation of these responsibilities to an Agent.

b. The duties of the Owner and/or Agent shall be to receive notices and correspondence, including service of process, from the City of Hazleton; to arrange for the inspection of the Rental Units; do or arrange for the performance of maintenance, cleaning, repair, pest control, snow and ice removal, and ensure continued compliance of the Premises with the current Codes, Building Codes and Zoning Ordinance in effect in the City of Hazleton, as well as arrange for garbage removal.

c. The name, address and telephone number of the Owner and Agent, if applicable, shall be reported to the Code Enforcement Office in writing upon registering the Rental Units.

d. No Dwelling Unit shall be occupied, knowingly by the Owner or Agent, by a number of persons that is in excess of the requirements outlined in 2003 International Property Maintenance Code, Chapter 4, Light, Ventilation, and Occupancy Limits, Section PM-404.5, Overcrowding, or any update thereof, a copy of which is appended hereto and made a part hereof.

SECTION 4. NOTICES

a. Whenever an Inspector or Code Enforcement Officer determines that any Rental Unit or Premises fails to meet the requirements set forth in the applicable Codes, the Inspector or Code Enforcement Officer shall issue a correction notice setting forth the violations and ordering the Occupant, Owner or Agent, as appropriate, to correct such violations. The notice shall:

- 1) Be in writing;
- 2) Describe the location and nature of the violation;
- 3) Establish a reasonable time for the correction of the violation.

b. All notices shall be served upon the Occupant, Owner or Agent, as applicable, personally or by certified mail, return receipt requested. A copy of any notices served solely on an Occupant shall also be provided to the Owner or Agent. In the event service is first attempted by mail and the notice is returned by the postal authorities marked "unclaimed" or

“refused”, then the Code Enforcement Office or Police Department shall attempt delivery by personal service on the Occupant, Owner or Agent, as applicable. The Code Enforcement Office shall also post the notice at a conspicuous place on the Premises. If personal service directed to the Owner or Agent cannot be accomplished after a reasonable attempt to do so, then the notice may be sent to the Owner or Agent, as applicable, at the address stated on the most current registration application for the Premises in question, by regular first class mail, postage prepaid. If such notice is not returned by the postal authorities within five (5) days of its deposit in the U.S. Mail, then it shall be deemed to have been delivered to and received by the addressee on the fifth day following its deposit in the United States Mail.

c. For purposes of this Ordinance, any notice hereunder that is given to the Agent shall be deemed as notice given to the Owner.

d. There shall be a rebuttable presumption that any notice that is given to the Occupant, Owner or Agent under this ordinance shall have been received by such Occupant, Owner or Agent if the notice was served in the manner provided by this ordinance.

e. Subject to paragraph 4.d above, a claimed lack of knowledge by the Owner or Agent, if applicable, of any violation hereunder cited shall be no defense to closure of rental units pursuant to Section 9, as long as all notices prerequisite to such

proceedings have been given and deemed received in accordance with the provisions of this ordinance.

f. All notices shall contain a reasonable time to correct, or take steps to correct, violations of the above. The Occupant, Owner or Agent to whom the notice was addressed may request additional time to correct violations. Requests for additional time must be in writing and either deposited in the U.S. Mail (post-marked) or handdelivered to the Code Enforcement Office within five (5) days of receipt of the notice by the Occupant, Owner or Agent. The City retains the right to deny or modify time extension requests. If the Occupant, Owner or Agent is attempting in good faith to correct violations but is unable to do so within the time specified in the notice, the Occupant, Owner or Agent shall have the right to request such additional time as may be needed to complete the correction work, which request shall not be unreasonably withheld.

g. Failure to correct violations within the time period stated in the notice of violation shall result in such actions or penalties as are set forth in Section 10 of this ordinance. If the notice of violation relates to actions or omissions of the Occupant, and the Occupant fails to make the necessary correction, the Owner or Agent may be required to remedy the condition. No adverse action shall be taken against an Owner or Agent for failure to remedy a condition so long as the Owner or Agent is acting with due diligence and taking bona fide steps to correct the violation, including but not limited to pursuing remedies

under a lease agreement with an Occupant or Tenant. The City shall not be precluded from pursuing an enforcement action against any Occupant or Tenant who is deemed to be in violation.

SECTION 5. INSURANCE

In order to protect the health, safety and welfare of the residents of the City, it is hereby declared that the city shall require hazard and general liability insurance for all property owners letting property for occupancy in the City.

a. Minimum coverage; use of insurance proceeds. All Owners shall be required to obtain a minimum of fifty thousand (\$50,000.00) dollars in general liability insurance, and hazard and casualty insurance in an amount sufficient to either restore or remove the building in the event of a fire or other casualty. Further, in the event of any fire or loss covered by such insurance, it shall be the obligation of the Owner to use such insurance proceeds to cause the restoration or demolition or other repair of the property in adherence to the City Code and all applicable ordinances.

b. Property owners to provide City with insurance information. Owners shall be required to place their insurance company name, policy number and policy expiration date on their Rental Property Registration form, or in the alternative, to provide the Code Enforcement Office with a copy of a certificate of insurance. A registration Certificate (see Section 6 below) shall not be issued to any Owner or Agent

unless the aforementioned information has been provided to the Code Enforcement Office. The Code Enforcement Office shall be informed of any change in policies for a particular rental property or cancellation of a policy for said property within thirty (30) days of said change or cancellation.

SECTION 6. RENTAL REGISTRATION AND LICENSE REQUIREMENTS

a. No Person shall hereafter occupy, allow to be occupied, advertise for occupancy, solicit occupants for, or let to another person for occupancy any Rental Unit within the City for which an application for license has not been made and filed with the Code Enforcement Office and for which there is not an effective license. Initial application and renewal shall be made upon forms furnished by the Code Enforcement Office for such purpose and shall specifically require the following minimum information:

- 1) Name, mailing address, street address and phone number of the Owner, and if the Owner is not a natural person, the name, address and phone number of a designated representative of the Owner.
- 2) Name, mailing address, street address and phone number of the Agent of the Owner, if applicable.
- 3) The street address of the Premises being registered.
- 4) The number and types of units within the Premises (Dwelling Units or Rooming

Units) The Owner or Agent shall notify the Code Enforcement Office of any changes of the above information within thirty (30) days of such change.

b. The initial application for registration and licensing shall be made by personally filing an application with the Code Enforcement Office by November 1, 2006. Thereafter, any new applicant shall file an application before the Premises is let for occupancy, or within thirty (30) days of becoming an Owner of a currently registered Premises. One application per property is required, as each property will receive its own license.

c. Upon receipt of the initial application or any renewal thereof and the payment of applicable fees as set forth in Section 7 below, the Code Enforcement Office shall issue a Rental Registration License to the Owner within thirty (30) days of receipt of payment.

d. Each new license issued hereunder, and each renewal license, shall expire on October 31 of each year. The Code Enforcement Office shall mail license renewal applications to the Owner or designated Agent on or before September 1 of each year. Renewal applications and fees may be returned by mail or in person to the Code Enforcement Office. A renewal license will not be issued unless the application and appropriate fee has been remitted.

SECTION 7. FEES.

a. Annual License Fee. There shall be a license fee for the initial license and an annual renewal fee

thereafter. Fees shall be assessed against and payable by the Owner in the amount of \$5.00 per Rental Unit, payable at the time of initial registration and annual renewal, as more specifically set forth in Section 6 above.

b. Occupancy Permit Fee. There shall be a one-time occupancy permit fee of \$10.00 for every new Occupant, which is payable by the Occupant. For purposes of initial registration under this ordinance, this fee shall be paid for all current Occupants by November 1, 2006. Thereafter, prior to occupying any Rental Unit, all Occupants shall obtain an occupancy permit. It shall be the Occupant's responsibility to submit an occupancy permit application to the Code Enforcement Office, pay the fee and obtain the occupancy permit. If there are multiple Occupants in a single Rental Unit, each Occupant shall obtain his or her own permit. Owner or Agent shall notify all prospective Occupants of this requirement and shall not permit occupancy of a Rental Unit unless the Occupant first obtains an occupancy permit. Each occupancy permit issued is valid only for the Occupant for as long as the Occupant continues to occupy the Rental Unit for which such permit was applied. Any relocation to a different Rental Unit requires a new occupancy permit. All Occupants age 65 and older, with adequate proof of age, shall be exempt from paying the permit fee, but shall be otherwise required to comply with this section and the rest of the Ordinance.

1. Application for occupancy permits shall be made upon forms furnished by the Code Enforcement Office for such purpose and shall specifically require the following minimum information:

- a) Name of Occupant
- b) Mailing address of Occupant
- c) Street address of Rental Unit for which Occupant is applying, if different from mailing address
- d) Name of Landlord
- e) Date of lease commencement
- f) Proof of age if claiming exemption from the permit fee
- g) Proper identification showing proof of legal citizenship and/or residency

2. Upon receipt of the application and the payment of applicable fees as set forth above, the Code Enforcement Office shall issue an Occupancy Permit to the Occupant immediately.

SECTION 8. ENFORCEMENT

a. The following persons are hereby authorized to enforce this Ordinance:

1. The Chief of Police
2. Any Police Officer

3. Code Enforcement Officer
4. The Fire Chief
5. Deputy Fire Chief of the City of Haz-
leton.
6. Health Officer
7. Director of Public Works

b. The designation of any person to enforce this Ordinance or authorization of an Inspector, when in writing, and signed by a person authorized by Section 8.a to designate or authorize an Inspector to enforce this Ordinance, shall be prima facie evidence of such authority before the Magisterial District Judge, Court of Common Pleas, or any other Court, administrative body of the City, or of this commonwealth, and the designating Director or Supervisor need not be called as a witness thereto.

SECTION 9. FAILURE TO CORRECT VIOLATIONS.

If any Person shall fail, refuse or neglect to comply with a notice of violation as set forth in Section 4 above, the City shall have the right to file an enforcement action with the Magisterial District Judge against any Person the City deems to be in violation. If, after hearing, the Magisterial District Judge determines that such Person or Persons are in violation, the Magisterial District Judge may, at the City's request, order the closure of the Rental Unit(s), or assess fines in accordance with Section 10 below, until such violations are corrected. Such order shall

be stayed pending any appeal to the Court of Common Pleas of Luzerne County.

SECTION 10. FAILURE TO COMPLY WITH THIS ORDINANCE; PENALTIES

a. Except as provided in subsections 10.b and 10.c below, any Person who shall violate any provision of the Ordinance shall, upon conviction thereof after notice and a hearing before the Magisterial District Judge, be sentenced to pay a fine of not less than \$100.00 and not more than \$300.00 plus costs, or imprisonment for a term not to exceed ninety (90) days in default of payment. Every day that a violation of this Ordinance continues shall constitute a separate offense, provided, however, that failure to register or renew or pay appropriate fees in a timely manner shall not constitute a continuing offense but shall be a single offense not subject to daily fines.

b. Any Owner or Agent who shall allow any Occupant to occupy a Rental Unit without first obtaining an occupancy permit is in violation of Section 7.b and shall, upon conviction thereof after notice and a hearing before the Magisterial District Judge, be sentenced to pay a fine of \$1,000 for each Occupant that does not have an occupancy permit and \$100 per Occupant per day for each day that Owner or Agent continues to allow each such Occupant to occupy the Rental Unit without an occupancy permit after Owner or Agent is given notice of such violation pursuant to Section 4 above. Owner or Agent shall not be held liable for the actions of Occupants who

allow additional occupancy in any Rental Unit without the Owner or Agent's written permission, provided that Owner or Agent takes reasonable steps to remove or register such unauthorized Occupant(s) within ten (10) days of learning of their unauthorized occupancy in the Rental Unit.

c. Any Occupant having an occupancy permit but who allows additional occupancy in a Rental Unit without first obtaining the written permission of the Owner or Agent and without requiring each such additional Occupant to obtain his or her own occupancy permit is in violation of Section 7.b of this ordinance and shall, upon conviction thereof after notice and a hearing before the Magisterial District Judge, be sentenced to pay a fine of \$1,000 for each additional Occupant permitted by Occupant that does not have an occupancy permit and \$100 per additional Occupant per day for each day that Occupant continues to allow each such additional Occupant to occupy the Rental Unit without an occupancy permit after Occupant is given written notice of such violation by Owner or Agent or pursuant to Section 4 above.

SECTION 11. APPLICABILITY AND EXEMPTIONS TO THE ORDINANCE

The provisions of the ordinance shall not apply to the following properties, which are exempt from registration and license requirements:

- a. Hotels, Motels and Dormitories.
- b. Rental Units owned by Public Authorities as defined under the Pennsylvania Municipal Authorities

Act, and Dwelling Units that are part of an elderly housing multi-unit building which is 75% occupied by individuals over the age of sixty-five.

c. Multi-dwelling units that operate under Internal Revenue Service Code Section 42 concerning entities that operate with an elderly component.

d. Properties which consist of a double home, half of which is let for occupancy and half of which is Owner-occupied as the Owner's residence.

SECTION 12. CONFIDENTIALITY OF INFORMATION

All registration information collected by the City under this Ordinance shall be maintained as confidential and shall not be disseminated or released to any individual, group or organization for any purpose except as provided herein or required by law. Information may be released only to authorized individuals when required during the course of an official City, state or federal investigation or inquiry.

SECTION 13. SAVINGS CLAUSE

This ordinance shall not affect violations of any other ordinance, code or regulation existing prior to the effective date thereof and any such violations shall be governed and shall continue to be punishable to the full extent of the law under the provisions of those ordinances, codes or regulations in effect at the time the violation was committed.

SECTION 14. SEVERABILITY

If any section, clause, provision or portion of this Ordinance shall be held invalid or unconstitutional by any Court of competent jurisdiction, such decision shall not affect any other section, clause, provision or portion of this Ordinance so long as it remains legally enforceable without the invalid portion. The City reserves the right to amend this Ordinance or any portion thereof from time to time as it shall deem advisable in the best interest of the promotion of the purposes and intent of this Ordinance, and the effective administration thereof.

SECTION 15. EFFECTIVE DATE

This Ordinance shall become effective immediately upon approval. This Ordinance repeals Ordinance number 2004-11 and replaces same in its entirety.

SECTION 16.

This Ordinance is enacted by the Council of the City of Hazleton under the authority of the Act of Legislature, April 13, 1972, Act No. 62, known as the "Home Rule Charter and Optional Plans Law", and all other laws enforceable the State of Pennsylvania.

**PEDRO LOZANO, HUMBERTO HERNANDEZ,
ROSA LECHUGA, JOSE LUIS LECHUGA,
JOHN DOE 1, JOHN DOE 3, JOHN DOE 7,
JANE DOE 5, CASA DOMINICA OF
HAZLETON, INC., HAZLETON HISPANIC
BUSINESS ASSOCIATION,
and PENNSYLVANIA STATEWIDE
LATINO COALITION, Plaintiffs v.
CITY OF HAZLETON, Defendant**

No. 3:06cv1586

**UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA**

496 F. Supp. 2d 477; 2007 U.S. Dist. LEXIS 54320

July 26, 2007, Decided

July 26, 2007, Filed

COUNSEL: For Pedro Lozano, Humberto Hernandez, Rosa Lechuga, Hazleton Hispanic Business Association, Plaintiffs: David Vaida, LEAD ATTORNEY, Law Office of David Vaida, Allentown, PA; Denise Alvarez, Foster Maer, Ghita Schwarz, Jackson Chin, Richard Bellman, LEAD ATTORNEYS, Puerto Rican Legal Defense and Education Fund, New York, NY; Doreen Y. Trujillo, Ilan Rosenberg, Linda S. Kaiser, Thomas B. Fiddler, Thomas G. Wilkinson, Jr., William J. Taylor, LEAD ATTORNEYS, Cozen O'Connor, Philadelphia, PA; Douglas W. Frankenthaler, LEAD ATTORNEY, Cozen O'Connor, Cherry Hill, NJ; Elena Park, LEAD ATTORNEY, Cozen O'Connor, West Conshohocken, PA; George R. Barron, LEAD ATTORNEY, Wilkes-Barre, PA; Jennifer C. Chang, LEAD ATTORNEY, American Civil Liberties Union

Foundation, San Francisco, Ca; Lee Gelernt, LEAD ATTORNEY, American Civil Liberties Union Foundation, Immigrants' Rights Project, New York, NY; Lucas Guttentag, LEAD ATTORNEY, American Civil Liberties Union Foundation, Immigrants' Rights Project, San Francisco, CA; Mary Catherine Roper, Witold J. Walczak, LEAD ATTORNEY, American Civil Liberties Union of Pennsylvania, Philadelphia, PA; Omar C. Jadwat, LEAD ATTORNEY, American Civil Liberties [sic] Union Foundation, New York, NY.

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For Pennsylvania Statewide Latino Coalition, Plaintiff: Denise Alvarez, Ghita Schwarz, Jackson Chin, LEAD ATTORNEYS, Foster Maer, Puerto Rican Legal Defense and Education Fund, New York, NY; Linda S. Kaiser, Thomas B. Fiddler, LEAD ATTORNEYS, Doreen Y. Trujillo, Ilan Rosenberg, Cozen O'Connor, Philadelphia, PA; Richard Bellman, LEAD ATTORNEY, Puerto Rican Legal Defense & Education Fund, New York, NY; Douglas W. Frankenthaler, Cozen O'Connor, Cherry Hill, NJ; Elena Park, Cozen O'Connor, West Conshohocken, PA; George R. Barron, Wilkes-Barre, PA; Jennifer C. Chang, American Civil Liberties Union Foundation, San Francisco, Ca; Lucas Guttentag, American Civil Liberties Union Foundation, Immigrants' Rights Project, San Francisco, CA; Omar C. Jadwat, American Civil Liberties [sic] Union Foundation, New York, NY.

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For Jose Luis Lechuga, Plaintiff: Denise Alvarez, Ghita Schwarz, LEAD ATTORNEYS, Puerto Rican Legal Defense and Education Fund, New York, NY; Linda S. Kaiser, LEAD ATTORNEY, Thomas B. Fiddler, Cozen O'Connor, Philadelphia, PA; Richard Bellman, LEAD ATTORNEY, Puerto Rican Legal Defense & Education Fund, New York, NY; George R. Barron, Wilkes-Barre, PA.

For City of Hazleton, Defendant: Carla P. Maresca, Harry G. Mahoney, LEAD ATTORNEYS, Deasey, Mahoney & Bender, LTD, Philadelphia, PA; Kris W. Kobach, LEAD ATTORNEY, Kansas City, MI [sic]; Michael M. Hethmon, LEAD ATTORNEY, Immigration Reform Law Institute, Washington, DC; William Perry Pendley, LEAD ATTORNEY, Elizabeth Gallaway, Mountain States Legal Foundation, Lakewood, CO; Andrew B. Adair, Deasey, Mahoney & Bender, Philadelphia, PA.

For Chamber of Commerce of the United States of America, Amicus: Juan P. Morillo, LEAD ATTORNEY, Sidley Austin Brown & Wood LLP, Washington, DC; Peter L. Matson, LEAD ATTORNEY, Lewisburg, PA; Steven Thomas Cottreau, LEAD ATTORNEY, Sidley Austin LLP, Washington, DC.

For Judicial Watch, Inc., Amicus: Leonard G. Brown, Clymer & Musser, P.C., Lancaster, PA; Randall L. Wenger, Boyle & Wenger, Camp Hill, PA.

For Pennsylvania Immigrant Rights Coalition, Amicus: Meetali Jain, LEAD ATTORNEY, International Human Rights/Rule of Law Project, Center for Social Justice, Seton Hall, University School of [sic], Newark, NJ.

JUDGES: James M. Munley, JUDGE.

OPINION BY: James M. Munley

OPINION

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DECISION

This case addresses Defendant City of Hazleton’s authority to enact ordinances that regulate the presence and employment of illegal aliens.¹ Before the court for disposition is plaintiffs’ complaint challenging the validity of those ordinances. Trial has been held on this matter, and the parties have filed briefs setting forth their respective positions. The matter is thus ripe for disposition.

Background including findings of fact

Defendant City of Hazleton is located in Luzerne County in northeastern Pennsylvania. The city’s executive is a mayor and the city’s legislature is a city council. Under Pennsylvania law, Hazleton is a City

¹ The parties vary in their use of the terms “illegal alien,” “unauthorized alien,” “illegal immigrant” and “undocumented alien.” We will use the terms interchangeably.

of the Third Class and operates under an Optional Plan B form of government. (Notes of trial testimony (hereinafter "N.T") 3/15/07 at 204-05).

At the time of the 2000 census, Hazleton's population was 23,000. (N.T. 3/16/07 at 145-46). Since 2000, Hazleton's population has increased sharply, and now has an estimated 30,000 to 33,000 residents. (P-148, 2007 Budget Proposal, at 1-2; N.T. 3/19/07 at 163-64).

The increase in Hazleton's population can be explained largely by a recent influx of immigrants, most of whom are Latino. (N.T. 3/16/07 at 146). After the September 11, 2001 terrorist attacks, many Latino families moved from New York and New Jersey to Hazleton seeking a better life, employment and affordable housing. (N.T. 3/12/07 at 66-67; N.T. 3/14/07 at 29-30). Those moving to Hazleton included United States citizens, lawful permanent residents and undocumented immigrants. (N.T. 3/13/07 at 161; N.T. 3/14/07 at 29-30).

The number of undocumented immigrants in Hazleton is unknown. (N.T. 3/16/07 at 146). Immigrants, both legal and undocumented, support the local economy through consumer spending, paying rent and paying sales taxes. (N.T. 3/14/07 at 67-70).

Beginning on July 13, 2006, the City of Hazleton enacted numerous ordinances aimed at combating what the city viewed as the problems created by the presence of "illegal aliens." On July 13, 2006, Ordinance 2006-10, the city's first version of its "Illegal

Immigration Relief Act Ordinance” was passed. This ordinance prohibits the employment and harboring of undocumented aliens in the City of Hazleton. On August 15, 2006, the city passed the “Tenant Registration Ordinance,” Ordinance 2006-13 (“RO”). This ordinance requires apartment dwellers to obtain an occupancy permit. To receive such a permit, they must prove they are citizens or lawful residents.

On September 21, 2006, Hazleton enacted Ordinance 2006-18, entitled the “Illegal Immigration Relief Act Ordinance” (“IIRA”) and Ordinance 2006-19, the “Official English Ordinance.” These two ordinances replaced the original Illegal Immigration Relief Act. On December 28, 2006, Hazleton enacted Ordinance 2006-40, which amended IIRA by adding an “implementation and process” section. During the trial of the above matter, the city enacted the final ordinance at issue in this case, Ordinance 2007-6, which made minor, but important, changes to the language of portions of IIRA.²

At issue in the instant case are IIRA³ and RO.⁴ IIRA defines “illegal alien” as an “alien who is not

² Ordinance 2007-6 eliminated the phrase “solely and primarily” from sections 4.B.2 and 5.B.2 of IIRA and inserted the word “knowingly” to section 4.A of Ordinance 2006-18.

³ For the remainder of the opinion we will refer to Ordinance 2006-18, as amended by Ordinance 2006-40 and Ordinance 2007-6 collectively as “IIRA” or “Ordinance.”

⁴ The details of these ordinances are discussed more fully below where appropriate.

lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq.” (IIRA § 3.D.). Title 8, section 1101, *et seq.* is commonly referred to as the Immigration and Nationality Act or “INA”. The INA provides no definition for the term “illegal alien” or the term “lawfully present.” (N.T. 3/19/07 at 130).

Generally, under federal law, aliens can be present in the country as: 1) lawfully admitted non-immigrants, i.e., visitors, those in the country temporarily; and 2) lawful immigrants, lawful permanent residents, referred to sometimes as “green card holders.” (N.T. 3/19/07 at 112-13). Lawfully admitted for permanent residence status can be attained in various ways, including family or employment characteristics, the “green card lottery” or relief such as asylum. (*Id.* at 112-13).

A third category of aliens present in the country are “undocumented aliens” who lack lawful immigration status. These aliens may have overstayed their time in the United States or entered the country illegally. (*Id.* at 113). The number of these individuals is approximately twelve million. (*Id.*). Hazleton’s use of the term “illegal alien” evidently is aimed at these individuals.

On August 15, 2006, plaintiffs filed the instant action to challenge the validity of the Hazleton ordinances. On October 30, 2006, an amended complaint was filed along with a motion for a preliminary

injunction and temporary restraining order seeking to enjoin the defendant from enforcing the ordinances.

On October 31, 2006, the court granted the plaintiffs' request for a Temporary Restraining Order. (Doc. 35). The court ordered that the Temporary Restraining Order remain in effect until November 14, 2006 and scheduled a hearing on the preliminary injunction motion for November 13, 2006. (Doc. 36). In order to conduct discovery and fully brief the issues raised in the amended complaint, the parties entered into a stipulation to extend the Temporary Restraining Order for 120 days or until trial and resolution of the matter. (Doc. 39).

On January 12, 2007, plaintiffs filed a second amended complaint. (Doc. 82). The second amended complaint seeks a declaratory judgment that IIRA and RO violate the Supremacy Clause, the Due Process Clause and the Equal Protection Clause of the Constitution of the United States. Plaintiffs also claim that the ordinances violate 42 U.S.C. § 1981; the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*; plaintiffs' privacy rights; Pennsylvania's Home Rule Charter Law, 53 PA. CONS. STAT. §§ 2961; *et seq.*, the Landlord and Tenant Act 68 PENN. STAT. §§ 250.101 *et seq.*; and its police powers.

The following plaintiffs filed the second amended complaint:

– Pedro Lozano, a lawful permanent resident of the United States, who immigrated from Colombia in January 2002 in search of a better life. (N.T. 3/12/07 at 161). He served as an official in the National Police force for thirty-five years in Colombia. (N.T. 3/12/07 at 162). He moved to Hazleton from New York City to find affordable housing and better employment. (N.T. 3/12/07 at 164).

– Jose Luis Lechuga and his wife, Rosa Lechuga, who immigrated illegally to the United States from Mexico in 1982 to forge a better life for themselves and their children. (N.T. 3/12/07 at 118-119). In the late 1980s, they received amnesty and became lawful permanent residents. (N.T. 3/12/07 at 119-120). In 1991, the Lechugas moved to Hazleton for its employment opportunities. (N.T. 3/12/2007 at 122-123).

– Humberto Hernandez is listed in the complaint as a plaintiff. (Doc. 81, ¶¶ 3-4). Plaintiffs presented no testimony at trial regarding Hernandez; therefore, he will be dismissed.

– John Doe 1 has lived in Hazleton for six years, but was born in Mexico. (*See* Doc. 189, Dep. John Doe 1 at 12). John Doe 1 is not a United States citizen or legal permanent resident, though his father filed a document with the federal government seeking to change his immigration status. (*Id.* at 16, 19). John Doe 1 is unsure of his immigration status, though he thought that the federal

government could order him removed from the country. (*Id.* at 22). John Doe 1 is also unsure of whether he has legal authorization to work. (*Id.*).

– John Doe 3 moved to Hazleton four years ago. (Doc. 190, Dep. John Doe 3 at 8). He is not a U.S. citizen or a lawful permanent resident. (*Id.* at 11).

– Jane Doe 5 and John Doe 7 moved to Hazleton more than five years ago. (Doc. 191, Dep. Jane Doe 5 at 13). Neither is a U.S. citizen nor a lawful permanent resident. (Doc. 191, Dep. Jane Doe 5 at 15, Doc. 192, Dep. John Doe 7 at 10-11). They were both born in Colombia, where John Doe 7 worked as an architect, and have been married for over twenty-eight years. (Doc. 191, Dep. Jane Doe 5 at 16, Doc. 192, Dep. John Doe 7 at 9-11).

– Hazleton Hispanic Business Association is an organization comprised of approximately twenty-seven Hispanic business and property owners from the Hazleton area. (N.T. 3/12/07 at 77, 78, 80, 98). Members include landlords in the city of Hazleton. (*Id.* at 98).

– Pennsylvania Statewide Latino Coalition is a not-for-profit organization with a mission to promote the social, political, economic and cultural development of Pennsylvania Latinos and to develop leadership and create networks among Latino leaders and communities. (N.T. 3/12/07 at 20-22).

– Casa Dominicana de Hazleton, Inc. is an organization that provides assistance, orientation and education to the Latino community in Hazleton and attempts to unify ties between the Latino and non-Latino communities. (N.T. 3/14/07 at 7-9). It provides members with information, legal referrals and assistance with economic difficulties. (*Id.* at 8-9). It also works to keep youth from joining gangs. (Vol. 3, 27-28).⁵

Plaintiffs seek an injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining Hazleton from implementing or enforcing the ordinances. Additionally, plaintiffs seek the costs incurred in this litigation including attorneys' fees pursuant to 42 U.S.C. § 1988.

On January 23, 2007, defendant filed a motion to dismiss the second amended complaint. (Doc. 84). Plaintiffs filed a brief in opposition to the motion to dismiss and a motion for summary judgment on February 12, 2007. (Doc. 106). On February 22, 2007, we held a pretrial conference where we indicated that we would consolidate the motion to dismiss and the motion for summary judgment into the trial. Defendant filed a memorandum in opposition to the summary judgment motion on March 2, 2007. (Doc. 150).

⁵ Further factual findings are made below where appropriate. However, as most of the issues we face are purely legal, we need not make extensive factual findings.

The court held a hearing on the preliminary injunction motion from March 12, 2007 through March 22, 2007. We notified the parties that this hearing would be the final trial on the injunctive matter. *See* FED. R. CIV. PRO. 65(a)(2) (“Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.”). After the completion of the trial transcript on April 20, 2007, the parties submitted their post-trial briefs on May 14, 2007. (Doc. 218, 219). The matter is thus ripe for disposition.

Jurisdiction

As this case is brought pursuant to federal statutes and the federal constitution, we have jurisdiction pursuant to 28 U.S.C. § 1331 (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). We have authority to issue a declaratory judgment under 28 U.S.C. § 2201 (explaining that “any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration[.]”). We have supplemental jurisdiction over the plaintiffs’ state law claims pursuant to 28 U.S.C. § 1367.

Discussion

Before we address the merits of plaintiffs' complaint we must address several preliminary matters. These matters include standing, the propriety of several plaintiffs proceeding anonymously and which version of the ordinances should be addressed.

I. Preliminary issues

A. Standing

Defendant argues that all plaintiffs lack standing to bring this lawsuit. Courts have identified two types of standing, constitutional and prudential, and defendant contends that plaintiffs fail to meet the requirements of either type. We will address each in turn.

1. Constitutional Standing

“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 37, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). Standing provides “justiciability: whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III.” *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). The Supreme Court has held that “the standing question in its Art. III aspect is whether the

plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.’” *Simon*, 426 U.S. at 38 (quoting *Warth*, 422 U.S. at 498-99). The Court has described three elements that comprise the “irreducible constitutional minimum of standing.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). A plaintiff must first “have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized [citations omitted] and (b) ‘actual or imminent’, not ‘conjectural or hypothetical.’” *Id.* (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)). The injury suffered by the plaintiff must also be causally connected to the conduct of which the plaintiff complains: “the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.’” *Id.* (quoting *Simon*, 426 U.S. at 41-42). Finally, “it must be ‘likely’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Id.* (quoting *id.* at 38, 43).

“The party invoking federal jurisdiction bears the burden” of proof to demonstrate standing. *Lujan*, 504 U.S. at 561. The level of proof required of a party conforms to “the manner and degree of evidence required at the successive stages of the litigation.” *Id.* In the initial stage of the litigation, when the plaintiff need

only meet the pleading standards, “general factual allegations of injury resulting from the defendant’s conduct may suffice.” *Id.* When the issue in question is summary judgment, though, “the plaintiff can no longer rest on such ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts,’ which for purposes of the summary judgment motion will be taken as true.” *Id.* (quoting FED. R. CIV. P. 56(e)). At trial, “those facts (if controverted) must be ‘supported adequately by the evidence adduced at trial.’” *Id.* (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979)).

a. Named Plaintiffs

i. Landlord Plaintiffs

Defendant argues that the landlord plaintiffs lack standing to bring this suit.⁶ Those plaintiffs, defendant claims, did not suffer an injury caused by the ordinances which this court could redress. Plaintiff Pedro Lozano, a native of Columbia who is a legal resident of the United States, lives in Hazleton. (N.T. 3/12/07 at 161, 163). Lozano and his wife purchased a two-family home in Hazleton in April 2005. (*Id.* at 164). They planned to rent half of the house to “have

⁶ At the time the plaintiff [sic] filed the lawsuit, the defendant challenged the standing of the two named landlord plaintiffs. One of those plaintiffs has been dropped from the suit, but the defendant’s arguments nevertheless apply to the remaining landlord plaintiff.

assistance with the mortgage.” (*Id.* at 164). This rental property, Lozano insists, forms the basis for his standing in this case. The defendant disputes this assertion.

We reject the defendant’s position and find that Lozano has standing to sue regarding both the tenant registration and the employer portions of Hazleton’s ordinances. First, Lozano has suffered an injury that is both concrete and particular and actual or imminent. Lozano rented the property immediately after signing the mortgage, and continued to do so until the City passed the ordinances.⁷ (*Id.* at 165). Once the ordinances passed, Lozano had more difficulty renting the property, “and the tenants that were there ran away.” (*Id.*). His tenants left after he informed them that they may have to obtain a permit from the City to rent the apartment. (*Id.* at 167). After the ordinances passed, Lozano “sporadically” rented the property, but the house was not occupied “continuously.” (*Id.* at 168). He showed the apartment to at least five or six people, who seemed interested in the property

⁷ Cross-examination revealed that Lozano had not made a profit on his rental of the property in 2005, and that the apartment may not have been occupied continually during that period. (*See* N.T. 3/15/07 at 177-181). We note, however, that Lozano testified that at least part of his purpose for renting the apartment was to assist with his mortgage payments. In that sense, the purpose of the investment appears to extend beyond simply making money, and we should not evaluate standing based solely on previous profitability. Defendant has demonstrated, however, that renting the apartment may not have been as easy as Lozano claimed.

but failed to complete the transaction. (*Id.*). Lozano's difficulties in renting the apartment constitute an injury.

Lozano also had hired others to do more complicated repairs on his property, such as roofing. (*Id.* at 175). He anticipated hiring a contractor to repair his roof sometime in the future. (*Id.*). He would thus be forced, as an employer of labor, to comply with the employer requirements of the IIRA, adding a burden of time and expense to his operations. Therefore, he has suffered an actual or imminent injury sufficient to meet the constitutional standing requirements. See *Pennell v. City of San Jose*, 485 U.S. 1, 8, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988) (finding that landlords who challenged zoning requirements related to hardship tenants had standing because “[t]he likelihood of enforcement, with the concomitant probability that a landlord’s rent will be reduced below what he or she would otherwise be able to obtain in the absence of the ordinances, is a sufficient threat of actual injury to satisfy Art. III’s requirement that ‘a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement.’”) (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)).⁸

⁸ We note that our database incorrectly cited *Babbitt v. Farm Workers* as 422 U.S. 289, 95 S. Ct. 2336, 45 L. Ed. 2d 191. The correct citation for that case is 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979).

We disagree with the defendant that these injuries cannot be recognized by the law because they constitute a complaint about an inability to rent to illegal immigrants. The plaintiffs testified that they were unaware of the immigration status of their renters. No evidence, therefore, indicates that the renters they lost were illegal immigrants. Such tenants may have been legal residents who did not desire to live in a town that appeared (to them) to seek to exclude Spanish-speaking residents. Such tenants may also have concluded that they did not want to register with the town and provide private information to the City as a condition of residing there. Perhaps they found the fees required for a permit onerous. In any case, we will not assume that the renters plaintiff lost were necessarily illegal immigrants.

Further, Lozano's injuries are caused by the defendant's ordinances. Potential renters' concerns with the registration requirements of the ordinances and the attitude towards immigrants their passage conveyed undermined Lozano's ability to secure tenants. Lozano had informed the prospective tenants that the ordinance's registration requirements mandated that they bring immigration documents to the City, and those prospective renters never returned. (N.T. 3/12/07 at 168). In addition, complying with the ordinances requires action that will cause him time and expense and expose Lozano to potential adverse enforcement actions. If the ordinances did not exist, the landlord plaintiffs would not be required to follow

these procedures. The injury Lozano claims is therefore caused by the defendant's actions. *See Lujan*, 504 U.S. at 561-62 (holding that “[w]hen the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will address it.”).

Redressability is also apparent: if this court declares the ordinances unconstitutional and enjoins their enforcement, Lozano and the other landlord plaintiffs will not be forced to comply with them. As a result, those plaintiffs will not be required to examine and ensure the immigration status of their tenants, facing the possibility of fines and other penalties from the City for failing to do so. The burdens they face from such compliance will not exist, and their injury will be eliminated.

ii. Rosa and Luis Lechuga

Defendant also challenges the standing of the plaintiffs Rosa and Luis Lechuga, who when they filed suit were business owners in the City. Plaintiff Jose Lechuga, a resident of Hazleton, had lived in the City of Hazleton with his wife Rosa and their five

children for sixteen years. (N.T. 3/12/07 at 118). When he came originally to the United States from Mexico in 1982, he did not have legal authorization to do so, but he is now a legal permanent resident of the country. (*Id.* at 118-19). He and his wife used a 1980s federal amnesty program to adjust their immigration status. (*Id.* at 120).

Lechuga opened a store, Lechuga's Mexican Products, in 2000. (*Id.* at 128). The store sold "[t]ortillas, cheese, chorizo, canned chiles, different canned products, [and] also sodas from Mexico." (*Id.*). His family worked in the store with him, including his wife and children. (*Id.* at 129). The business was not always profitable; in 2005 the Lechugas "didn't have much of a profit, but . . . [were] still in business." (*Id.* at 130). Business improved in 2006, but began decreasing after the City passed the ordinances. (*Id.* at 131). By early 2007, business had become "terrible," and in February 2007, Lechuga closed the store. (*Id.*).

Lechuga opened another business, a restaurant called Langria Lechuga, in February 2006. (*Id.* at 132). Lechuga's wife Rosa operated that business, doing the cooking. (*Id.*). When he found the time, Lechuga helped by serving, taking orders, washing dishes and cleaning. (*Id.*). This business was no more successful than the Lechugas' store. (*Id.* at 133). Lechuga blamed his lack of business on the City's activities.⁹ (*Id.*). A police car was often parked across

⁹ Rosa Lechuga testified that the restaurant opened in February 2006, and had been profitable in its first week: "Things
(Continued on following page)

the street from the restaurant, and after a police officer paid a visit, “people began to comment that the police [were] there to take the clients away when they came to eat.” (*Id.* at 133). This made potential customers feel “intimidated, and that is the reason why we lost our business.”¹⁰ (*Id.*). In neither of these businesses did Lechuga employ anyone; he testified that he had never had any plans to employ anyone at either store. (*Id.* at 150-51).

Plaintiffs have suffered an injury here in the loss of business they experienced after the ordinances passed. To experience an injury sufficient to create standing, a plaintiff need not allege a large quantum of harm. The Third Circuit Court of Appeals, in *Belitskus v. Pizzingrilli*, 343 F.3d 632 (3d Cir. 2003), found that a plaintiff who complained that he could not afford a \$100 filing fee to campaign for public office had stated an injury sufficient to confer standing. *Id.* at 640. Plaintiff had only \$50 in campaign funds and “paying the required fee would have completely depleted his campaign funds and required him to delve into his limited personal assets.” *Id.* (holding: “All that the Article III’s injury-in-fact element requires is ‘an identifiable trifle’ of harm”) (quoting *Joint Stock Soc’y v. UDV N. Am., Inc.*, 266 F.3d 164, 177 (3d Cir. 2001) (citation omitted)). The injury of

were going very well, and then when the ordinances were enacted, my business began to suffer.” (N.T. 3/12/07 at 154-55).

¹⁰ On cross examination, “Lechuga attributed his loss of business to the ordinances.” (N.T. 3/12/07 at 138).

which plaintiffs complain, like the potential injury in *Belitskus*, is one that pushed their financial condition from bad to worse, contributing ultimately to disaster. Such an injury surely constitutes an “identifiable trifle.”

The Lechuga’s injury was caused at least in part by the defendant’s ordinances. While other factors apparently contributed to the decline of the Lechuga’s businesses, we find that they have presented evidence that Hazleton’s approval of the ordinances contributed at least in part to the decline of customers for Lechuga’s store and restaurant, and therefore, the injury they suffered is at least fairly traceable to the defendant.

Our decision on the constitutionality of the ordinances would not, however, allow the Lechugas redress from their injuries. Their businesses, unfortunately, have now closed. They did not testify that they planned to reopen their businesses pending resolution of this lawsuit, and the plaintiffs do not seek monetary damages from the defendant.¹¹ Accordingly, no action by this court would provide relief to the Lechugas, and they lack standing to sue. The Lechuga’s lack of standing, however, does not mean that other business-owner plaintiffs, who will be forced to comply with the terms of the ordinances in order to operate their business in Hazleton, lack standing to sue, as we explain below.

¹¹ Indeed, the Lechugas testified that they had decided to move out of state. *See* (N.T. 3/12/07 at 136-37).

b. Organizational Plaintiffs

Defendant argues that the organizational plaintiffs – Casa Dominicana of Hazleton, Inc., the Hazleton Hispanic Business Association and the Pennsylvania Statewide Latino Coalition – all lack standing. Defendant argues that none of the individual members of these associations have standing, and that the organizations cannot claim representational standing. Defendant also contends that none of the organizational plaintiffs can allege a concrete injury to their own interests, because any membership loss experienced by the organizations since the passage of the ordinances is connected by only a speculative thread to the ordinances themselves.¹² Any claim of public hostility to the organizations generated by the ordinances is too generalized, defendant claims, to

¹² Defendant claims that “[t]he loss of membership is not an injury to a legally cognizable interest, where maintaining desired levels of membership requires continuing membership of aliens unlawfully present in the United States.” (Memorandum of Law in Support of Defendant’s Motion to Dismiss (Doc. 87) at 22). Plaintiffs’ claim is not that the ordinances, by attempting to exclude illegal aliens from Hazleton, have harmed the organizations’ ability to recruit undocumented people to their ranks. We will not assume, as defendant appears to do, that membership in such organizations is populated in large numbers by people without legal authorization to remain in the United States. Indeed, the problem highlighted by these organizations – that the ordinances have created a climate of fear which causes people to avoid association with groups that express interest in the rights of immigrants and Latinos – is partly reflected in defendant’s claims here, which seem to associate Latino political activity with illegality.

constitute an injury in fact. Defendant also contends that plaintiffs have not proved any causal connection between the ordinances and the injuries suffered by the plaintiff organizations. Finally, defendant insists that an injunction against the ordinances would not be likely to redress the injuries plaintiffs claim.

An organization seeking to participate in a lawsuit must demonstrate that it has standing to sue. While an organization can have standing in its own right, “an association may have standing solely as the representative of its members.” *Warth*, 422 U.S. at 511. Still, such standing “does not eliminate or attenuate the constitutional requirement of a case or controversy.” *Id.* Courts have found that an organization can have “representational standing” when “(1) the organization’s members would have standing to sue on their own, 2) the interests the organization seeks to protect are germane to its purpose, and 3) neither the claim asserted nor the relief requested requires individual participation by its members.” *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 70 (3d Cir. 1990) (quoting *Hunt v. Washington Apple Advertising Comm’n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)).

Defendant challenges the standing of the Hazleton Hispanic Business Association (“HHBA”). Rudolfo Espinal, the president of the HHBA, testified at trial as a representative of that organization. (N.T. 3/13/07 at 77). Espinal testified that the HHBA, formed in August 2006, is “a group of Hispanic businessowners that got together in the City of Hazleton to work

towards common goals,” especially to “promote the interest of our business members and to project the image of the Hispanic business community and to also help the community any way that we can.” (*Id.* at 77-78). Most of the businesses in the association are located in Hazleton, though some operate in the neighboring town of West Hazleton. (*Id.* at 78). The association promoted access to health insurance and accounting services, but also aimed to protest the anti-illegal immigration ordinances that the City had proposed. (*Id.* at 79). Twenty-seven members joined the organization. (*Id.* at 80). The passage of the ordinances harmed organization members; some lost their businesses or a significant portion of their patrons, and many members abandoned plans to expand their businesses.¹³ (*Id.* at 81). The organization also lost members, as “some of [them] didn’t want to be part of the organization anymore.” (*Id.* at 83). The HHBA lost resources, as members were required to pay \$75 in dues and fewer dues-paying members remained. (*Id.* at 84).

Espinal himself lost business as a result of the ordinances. Espinal owned three rental properties in the City of Hazleton. (*Id.* at 90). At the time of trial,

¹³ Espinal testified that “Royal Prestige had to close and move out of the City. Isabella’s Gift Shop had complained about losing revenue, and basically I would say all of my members have complained. People are talking about that they have lost sales maybe between 15 or 50 percent of what they used to have before.” (N.T. 3/13/07 at 82).

two of those units were undergoing repairs, and one was occupied. (*Id.*) That building consisted of four apartment units. (*Id.*) Espinal lived in one of those units and rented out two others. (*Id.*) The fourth sat vacant. (*Id.*) Espinal testified that after the City passed its ordinances “it is harder to rent apartments now, and besides that, I think that I lost tenants, potential tenants because of the ordinance.” (*Id.* at 92-93). After showing the apartment to prospective tenants and discussing rental prices, those tenants had indicated a desire to rent the unit. (*Id.* at 93). Following a discussion with these prospective tenants of the registration requirements under the ordinances, however, Espinal “didn’t hear from them.” (*Id.*) A similar process repeated itself with several other prospective renters. (*Id.* at 95). Espinal planned to offer his other properties for rent, but needed to perform repairs such as painting, carpeting and electrical work before doing so. (*Id.* at 96). Espinal intended to perform some of that work himself, but would also hire workers to perform “whatever area I don’t feel comfortable with.” (*Id.* at 96). As president of the HHBA, Espinal knew of other organization members who were landlords in Hazleton. (*Id.* at 98). These members had the same concerns for the effect of the ordinances on leasing their apartments. (*Id.*) Espinal also testified that he understood the ordinances to require that he obtain information on immigration status from tenants that he normally would not

seek.¹⁴ He had no “training in evaluating a person’s immigration status or their documents.” (*Id.* at 102).

The HHBA has representational standing in this case. Individual business owners who are members of the HHBA have standing to sue. Espinal, like Lozano, would have standing to sue as a landlord and as an employer. Espinal also testified that members of the HHBA would be required to comply with the procedures required for employers under the IIRA. They would then face onerous paperwork requirements created by the ordinances for maintaining their licenses. These injuries would be caused by the ordinances and could be redressed by enjoining their enforcement. Since the HHBA is designed to protect the interests of Hispanic business owners in the city and the lawsuit attacks city-created regulations of business, the organization is seeking to protect interests germane to its purpose. Finally, the claim asserted here by the organization attacks the ordinances on their face; such an attack does not require the factual specificity or individual experience required of a lawsuit over a specific event. Accordingly, the participation of individual members is not required for the court to address adequately the issues raised by the lawsuit.

¹⁴ Espinal testified that “when you rent an apartment, you ask people about their ability to pay the rent, if they are working or not, that kind of stuff. I don’t think you should ask about their family composition or their religion or anything like that or their immigration status.” (N.T. 3/13/07 at 99).

Defendant argues that the business-owner plaintiffs do not face an “actual or imminent risk” that the city will enforce the IIRA ordinance against them because these plaintiffs do not know if they have any illegal alien employees and cannot say they definitely will hire such employees in the future. In any case, defendant insists, plaintiffs have no legal right to employ illegal aliens and cannot have an injury from an ordinance that prevents such action. Because the law operates only prospectively, plaintiffs can suffer an injury from the ordinance only if they hire an unauthorized worker according to the defendant. Since no plaintiff has declared an intention to hire an undocumented alien, defendant contends, the plaintiffs have no injury. Plaintiffs who claim to have suffered a loss of business commerce as a result of the ordinances also cannot demonstrate an injury, defendant insists, since “[n]o-one has a legally cognizable interest in profiting from the continuing sales of products to aliens unlawfully present in the United States.” (Memorandum of law in Support of Defendant’s Motion to Dismiss (Doc. 87) at 18). Defendant further contends that the plaintiffs cannot prove that the alleged injuries to their businesses were caused by the ordinances and cannot meet the causation requirement for standing.

We reject this argument. The business-owner plaintiffs do not complain that the ordinances limit their ability to sell products to and hire illegal aliens. They complain that the City’s ordinances damage them by hindering the operation of their businesses

and by requiring them to seek immigration information from employees in a way that violates federal law. Their injury comes in the operation and requirements of the ordinances, not in their inability to sell, hire or rent to undocumented persons.

Defendant also challenges the standing to sue of Casa Dominicana de Hazleton (“Casa”). At trial Manuel Saldana, President of the organization, testified as a representative of the organization. (*See* N.T. 3/14/07 at 7). Casa is a not-for-profit corporation founded in August 2005. (*Id.*) The organization’s offices are located in Hazleton. (*Id.* at 10). Around fifty Casa members live in Hazleton. (*Id.* at 12). Twenty to twenty-three members may lack legal authorization to reside in the United States.¹⁵ (*Id.* at 21). Casa’s purpose is “[t]o offer assistance, orientation, education, keep the unity within the community and unify the ties between the Hazleton community and the Latin community.” (*Id.* at 7). Members of the organization included “[i]ndividuals, people renting, employees, different businesses, owners of businesses, drivers, chauffeurs,” “a cross-section of the Hazleton community[.]” (*Id.* at 9-10). To its members, the organization provides services to help with orientation

¹⁵ Saldana clarified this figure on re-direct: “I say 23 members, approximately . . . I would have to go over each individual’s case to see what their actual [immigration] status is, because many individuals have expired or lost documents or are in the process of obtaining documents. Those are the individuals that I refer to as illegals.” (N.T. at 3/14/07 at 29).

and education. (*Id.* at 8). Casa also sponsors concerts and raises money to assist members through periods of financial difficulty. (*Id.*). The organization also assists members with problems in their immigration status by directing them to attorneys and providing assistance through “orientation.” (*Id.* at 8-9).

Casa members petitioned the organization to participate in the instant lawsuit. (*Id.* at 11). They feared the impact of the ordinances. (*Id.* at 14). Members, both legal and illegal residents, expressed “fear of not being able to obtain housing at a moment when it was needed” as well as concerns about having to produce identification at work and the effect of the ordinances on their children at school.¹⁶ (*Id.*). The organization lost thirty-five members in August 2006, after the City passed its ordinances. (*Id.* at 17). One member who left the organization decided to leave Hazleton because “he found that the measures that were about to be approved were hateful and uncomfortable for him.” (*Id.* at 18). This loss of membership, Saldana testified, harmed the organization because it

¹⁶ Saldana testified that “[t]he concern was not only from the illegal residents, but also from the legal residents. An individual that has a document or visa that is expired, according to law, it is no longer valid. However, the individual is legally registered within the country, and the problem of receiving a valid document once again takes at least a month’s time, the same way as if you lose a document, and that is the case with some individuals who enter the country legally, and they are going through the process of legalizing themselves. They have a work permit, however, they don’t have residency.” (N.T. 3/14/07 at 15).

diminished the number of volunteers available to carry out the group's activities and limited the number of services Casa could offer members. (*Id.* at 18-19).

Casa has representational standing. Members of the organization are both tenants and employees in Hazleton, and would be required to comply with the terms of the ordinances. They would have to participate in the rental registration program or lose their housing in the city. They would have to supply their employers with immigration information or face losing their jobs. Those injuries for individual members would be fairly traceable to the ordinances, which institute the registration and employment regulations. If we were to enjoin enforcement of the ordinances as the plaintiffs here seek, we could redress the Casa's injuries in this case. Casa's purpose, to promote the interests of Dominicans in their relationships in the Hazleton community, would be served by this litigation. Finally, since this case consists of a facial challenge to the City's ordinances, the interests of the litigation can be advanced without requiring the participation of individual plaintiffs. Casa has representational standing for its members.

The defendant likewise challenges the standing to sue of plaintiff Pennsylvania Statewide Latino Coalition ("PSLC"). Jose Molina testified as representative of the PSLC during the trial in this case. PSLC "is a nonprofit organization that promotes social, financial, political and cultural development of the Latino community in the State of Pennsylvania."

(N.T. 3/13/07 at 20). The organization's goal "is to have a network of Latinos" addressing the interests of Latino communities statewide. (*Id.* at 21). The organization was founded by volunteers from across the state. (*Id.*). Of the 6,000 statewide PSLC members approximately twenty reside in Hazleton. (*Id.* at 52). Among the activities the PSLC has engaged in are lawsuits protesting discriminatory hiring practices for police officers and teachers, the promotion of professional certification for nurses and teachers from Puerto Rico, and promotion of voter registration and voters' rights. (*Id.* at 23). The organization also promotes education for Latinos in the state. (*Id.* at 24). Before engaging in activities like litigation, PSLC representatives "sit down with residents and people that are affected." (*Id.*). Such conversations are often initiated by these people, who reach out to the PSLC for help. (*Id.*).

The PSLC became involved in the Hazleton litigation partly as a result of requests from Hazleton community activists. (*Id.* at 25). On July 30, 2006, the PSLC organized a meeting in Hazleton to discuss the ordinances. (*Id.* at 26). Between fifty and sixty people, including "homeowners . . . business owners . . . [and] landlords," attended this meeting. (*Id.* at 27). The fears that attendees at this meeting expressed to Molina convinced him that the issues raised by the ordinances would affect people far beyond Hazleton's

borders.¹⁷ (*Id.* at 28-29). Members of the organization who expressed these concerns included several who lived in Hazleton and who “decided to join and become members right away in the thinking that this is something that may help us, because we want to stay in this community.” (*Id.* at 30).¹⁸ Among these members were Anna Arias, who rented out half of her home and “the Rubio family,” who owned a gift shop. (*Id.* at 65-66). Another member owned a barber shop, and Molina pointed to “a few more” members who were business owners. (*Id.* at 66).

The PSLC has representational standing. Members of the organization include residents of Hazleton who face actual or imminent injury from the ordinances because they are landlords or business owners who will be required to comply with the ordinances’ terms. They will have to register if they intend to rent apartments, providing personal and potentially

¹⁷ Molina described the feelings of residents: “They had people that were in fear because the police were stopping them on the sidewalks or stopping them on the driveway and asking for documentation just because of their looks. We have business-owners saying, we have bricks through our [windows], and we can’t identify who [threw the brick], but obviously it was because of the environment where we are living, where people think that it is okay to show that Latinos are not welcome here. There was all kind of fear, and what is going to happen with our sons. Should we still send them to school? What is going to happen to our church? Should we still go to our church?” (N.T. 3/13/07 at 28).

¹⁸ Jose Lechuga is a member of the PSLC. (N.T. 3/12/07 at 120-21).

confidential information to the City. If they are employees, they will also have to provide information about their immigration status. Similarly, members who are employers will be burdened with IIRA's requirements and face liability if challenged on their employment practices. Accordingly, these plaintiffs have or will suffer an imminent injury from the ordinances. These injuries, since they are or would be caused by the operation of the ordinances, are fairly traceable to the defendant's actions.

Finally, an injunction would prevent the plaintiffs from being required to comply with the terms of the ordinances, and would thus provide redress. Participation in the litigation would serve the purposes of the PSLC, since the social and financial interests of Latinos in Hazleton are threatened by the terms of the ordinances and the PSLC's involvement in the litigation seeks to protect those interests. In addition, since this is a challenge to ordinances that involves constitutional concerns rather than litigation about a particular event or interest, the individual participation of the represented members is not required to insure that their interests are protected.

c. Tenant Plaintiffs

Defendant argues that the plaintiffs who are tenants in Hazleton, all of whom attempt to proceed anonymously, lack standing to sue. These plaintiffs, defendant contends, ground their claim in a belief that they may not obtain occupancy permits from the

City and will, therefore, be required to leave Hazleton. Defendant insists that this injury is not one which the court can address. Those plaintiffs who are not lawfully present in the United States do not have a legal interest in residing in Hazleton or anywhere in the United States and cannot claim an injury from ordinances that seek to prevent their residence in the City. Defendant also argues that those tenant plaintiffs who are lawfully present in the United States cannot show that they will likely suffer any injury-in-fact. IIRA, after all, will not cause them to be removed from the City or be denied an occupancy permit. If a tenant can show proof of legal residency or citizenship, that tenant must receive a rental permit and will suffer no injury from the ordinance. Even if a resident filed a complaint against a legal resident, such a plaintiff would not be injured: “an alien lawfully present in the United States can have no reasonable expectation that the federal government would regard him as unlawfully present.” (Memorandum of Law in Support of Defendant’s Motion to Dismiss (Doc. 87) at 20).

Plaintiff John Doe 1 testified by deposition on December 8, 2006. (*See* Doc. 189, Dep. John Doe 1). He has lived in Hazleton for six years, but was born in Mexico. (*Id.* at 12). John Doe 1 is not a United States citizen or legal permanent resident, though his father filed a document with the federal government seeking to change his immigration status. (*Id.* at 16, 19). He testified that he was unsure of his immigration status, though he thought that the federal

government could order him removed from the country. (*Id.* at 22). John Doe 1 was also unsure whether he had legal authorization to work. (*Id.*). When he began working for his present employer, John Doe 1 presented identification that included an international driver's license and a Social Security card. (*Id.* at 27). John Doe 1 was forced to vacate one apartment after a landlord told him he would "have to move" after passage of the Hazleton ordinances. (*Id.* at 43). Though John Doe 1 thought he may be able to get a residency permit, his landlord told him "maybe, but he didn't want to take the risk" of having to pay a fine. (*Id.* at 44). John Doe 1 felt that his landlord wished he could stay in the apartment "because I'm a good tenant and we're family, but when he saw the ordinance, he was afraid." (*Id.* at 53).

John Doe 3 likewise testified by deposition on December 8, 2006. (*See* Doc. 190, Dep. John Doe 3). He was born in Mexico and is a citizen of that country. (*Id.* at 17). He is a tenant in Hazleton, where he lives with his wife and two daughters. (*Id.* at 12-13). Joe [sic] Doe 3 is not a lawful permanent resident of the United States. (*Id.* at 24). He understands his immigration status to be "illegal." (*Id.* at 26). If this court were to allow the Hazleton ordinances to go into effect, John Doe 3 fears that he will be evicted from his residence. (*Id.* at 31).

Jane Doe 5 testified by deposition on January 26, 2007. (*See* Doc. 191, Dep. Jane Doe 5). Jane Doe 5 rented an apartment in Hazleton, the city where she had lived for the past five years. (*Id.* at 12-13). She

was born in Columbia [sic], and is not a United States citizen or lawful permanent resident. (*Id.* at 14-15, 56). She fears apprehension and removal by United States authorities if the City enforces its ordinances. (*Id.* at 56). Jane Doe 5 does not want to lose her residence, and for that reason hopes the ordinance will not be enforced. (*Id.* at 61-62). She did not want to speak to her landlord about the registration ordinance because she feared that the landlord would feel he had to ask her family to vacate their home. (*Id.* at 74). If the ordinances were enforced, Jane Doe 5 fears that she would have trouble finding a place to live in the City. (*Id.* at 81).

John Doe 7 testified by deposition on January 26, 2007. (*See* Doc. 191, Dep. John Doe 7). Like his wife, Jane Doe 5, John Doe 7 was born in Columbia [sic]. (*Id.* at 9). He is not a United States citizen or lawful permanent resident. (*Id.* at 10). Trained as an architect, Doe 7 came to the United States in 2001. (*Id.*). For the previous seven or eight months, Doe had worked as a gardener. (*Id.* at 12). He and his wife lived in a rented home in Hazleton. (*Id.* at 14-15). John Doe 7 testified that he had not spoken frequently with his landlord out of fear that “because of the ordinances, he’s going to ask them to leave the house, evict them from the house.” (*Id.* at 58). That would require him “to find another house and it’s going to be so difficult” to do so. (*Id.*). He fears he would be forced to leave Hazleton. (*Id.*).

These plaintiffs claim that the rental registration requirements and harboring provisions of IIRA

violate their rights under federal law and the United States Constitution, including their right to privacy. We find that the anonymous plaintiffs have standing to challenge Hazleton's ordinances. They have suffered concrete and particularized injuries which are actual or imminent. These plaintiffs have either been forced from the property which they had rented or had been told by their landlords that they would have to be evicted due to the ordinances. The loss (or imminent loss) of one's apartment and the inability to rent a new one is certainly an actual and concrete injury. See *Babbitt v. United Farm Workers*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (holding that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement [citation omitted] [b]ut [one] does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."). Similarly, plaintiffs would suffer an injury to their privacy rights if forced to turn over private information in order to gain a rental permit. Such an injury is imminent, as plaintiffs intend to remain in Hazleton and would be required to obey the ordinance if it is enforced.

The tenant plaintiffs also meet the causation requirements of constitutional standing. But for IIRA's requirements that plaintiffs obtain a rental permit by presenting documentation that proves their legal immigration status, plaintiffs would not face the loss of their apartments or the exposure of potentially

private information. Plaintiffs face eviction by their landlords only because of IIRA's harboring provisions.

Plaintiffs' injuries would also be redressed by a favorable decision in this case. If plaintiffs prevail here, this court will issue a permanent injunction against the enforcement of the ordinances that has caused their injuries. The tenant plaintiffs thus have constitutional standing to proceed in this case.

We reject defendant's argument that these plaintiffs lack standing because they do not have authorization to reside in the United States and have not suffered an injury for which they could gain relief. First, the defendant appears to argue that because plaintiffs would be denied residency permits under the Hazleton ordinance they lack authorization to reside anywhere in the United States. No court has made such a determination for any of these plaintiffs. No evidence has been presented that removal orders exist for any of the anonymous tenant plaintiffs. None has ever been arrested, and none testified they were being sought by immigration authorities. In other words, as of the time of their depositions, none of these plaintiffs would have been forced by any determination of the federal government to leave the City. To find otherwise at this point would be to ignore every principle of due process. The tautology of this argument is likewise apparent: defendant contends that plaintiff would not be able to obtain a residency permit in the city and therefore cannot complain about being required to do so.

This argument appears to be a species of argument often heard in recent discussions of the national immigration issue: because illegal aliens broke the law to enter this country, they should not have any legal recourse when rights due them under the federal constitution or federal law are violated. We cannot say clearly enough that persons who enter this country without legal authorization are not stripped immediately of all their rights because of this single illegal act.¹⁹ The Fourteenth Amendment to the

¹⁹ Fundamental to the American legal tradition is the notion that those accused of and convicted of crimes possess fundamental rights which are not abrogated simply because of such person's alleged behavior. A person accused of a crime is entitled, among other rights, to be free of unreasonable search and seizure; to the presumption of innocence; to the proof of her guilt beyond a reasonable doubt; to minimally competent legal representation; to access to any potentially exculpatory evidence; to be free of cruel and unusual punishment; and to seek a writ of habeas corpus. *See, e.g.*, U.S. CONST. amends. IV, V, VIII; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (holding that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (holding that "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). We note, however, that an alien subjected to a deportation hearing "whether for crime or for other reasons, [is] protected only by the procedural requirements of the Due Process Clause." DANIEL KANSTROOM, *United States Immigration Policy at the Millenium: Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1896 (2000). The contemporary concern with and opprobrium

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United States Constitution provides that no State may “deprive any *person* of life, liberty or property, without due process of law; nor deny any *person* within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV § 1. (emphasis added). The United States Supreme Court has consistently interpreted this provision to apply to all people present in the United States, whether they were born here, immigrated here through legal means, or violated federal law to enter the country. *See Plyler v. Doe*, 457 U.S. at 210, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (holding that “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”). The anonymous plaintiffs are persons, and they seek to vindicate rights guaranteed them under the federal constitution. They have standing to sue in this court.

towards undocumented aliens does not lead us to the conclusion that those who violate the laws to enter the United States can be subject without protest to any procedure or legislation, no matter how violative of the rights to which those persons would normally be entitled as persons in the United States. Our legal system is designed to provide rights and exact justice simultaneously.

2. Prudential Standing

Having found that all plaintiffs possess constitutional standing, we now address defendant's argument that plaintiffs lack prudential standing.

Even if a court finds that plaintiffs meet the "threshold" requirements of constitutional standing, that court may nevertheless "impose" "a variety of prudential limits" on standing. Wright, Miller and Cooper, FEDERAL PRACTICE AND PROCEDURE at § 3531. Courts have concluded that "the aim of this form of judicial self-governance is to determine whether the plaintiff is 'a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Mariana v. Fisher*, 338 F.3d 189, 204 (3d Cir. 2003) (quoting *Oxford Assocs. v. Waste Sys. Auth. of E. Montgomery County*, 271 F.3d 140, 145 (3d Cir. 2001)). Courts invoking prudential standing analysis seek "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.'" *Davis v. Philadelphia Housing Auth.*, 121 F.3d 92, 96 (3d Cir. 1997) (quoting *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 538 (3d Cir. 1994)). The Third Circuit Court of Appeals has articulated a three-part test for prudential standing: 1) "a litigant [must] assert his or her own legal interests rather than those of a third party"; 2) "courts [should] refrain from adjudicating abstract questions of wide public significance amounting to generalized grievances"; and 3) "a plaintiff must demonstrate that his

or her interests are arguably within the ‘zone of interests’ that are intended to be protected by the statute, rule, or constitutional provision on which the claim is based.” *Mariana*, 338 F.3d at 205; *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) (holding that “we have explained that prudential standing encompasses ‘the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.’”) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)).

Defendant argues that none of the plaintiffs meet the requirements of prudential standing because they do not fall within the “zone of interests” of the Immigration and Nationality Act.²⁰ We note, first, that defendant faces a difficult burden to establish that these plaintiffs lack prudential standing, as they do

²⁰ We note that the defendant does not address the two other elements required for prudential standing: 1) “a litigant [must] assert his or her own legal interests rather than those of a third party”; 2) “courts [should] refrain from adjudicating abstract questions of wide public significance amounting to generalized grievances.” *Mariana*, 338 F.3d at 205. We would in any case find that plaintiffs meet these requirements, since they assert their own interests or the interests of the members of their organizations and because the grievances are specific to the ordinances and their intended application in Hazleton.

not seek to assert the rights of others or to challenge the way that an agency has applied a particular law, but instead seek to challenge ordinances which they claim would violate their rights under federal and state law.²¹ The United States Supreme Court has declared that “[w]here a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.” *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 80-81, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978).²²

²¹ The requirements of prudential standing and the zone of interests test in the Third Circuit also mean that plaintiffs’ task here is not particularly onerous. Courts use prudential standing “to ensure that only those parties who can best pursue a particular claim will gain access to the courts.” *Oxford Associates v. Waste Sys. Auth. Of E. Montgomery County*, 271 F.3d 140, 145 (3d Cir. 2001). In terms of the “zone of interests” test, the Third Circuit Court of Appeals has concluded that the test was “‘not meant to be especially demanding.’” *Id.* at 146 (quoting *Davis v. Philadelphia Hous. Auth.*, 121 F.3d 92, 101 (3d Cir. 1997)).

²² A recent Supreme Court case that determined a plaintiff lacked prudential standing, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004), turned on the fact that the respondent, who sued the school district and argued that a requirement that students use the phrase “under God” when reciting the Pledge of Allegiance violated the establishment clause of the First Amendment, had brought the case on behalf of a daughter who did not necessarily feel injured by the language to which her father objected. In addition, the girl’s mother – the ex-wife of the respondent –

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Defendant insists that plaintiffs fall outside of the zone of interests protected by the statutes and constitutional provisions invoked in this lawsuit because the Immigration and Nationality Act (“INA”) was not designed to protect “employers who unlawfully employ [sic] illegal aliens and landlords who harbor illegal aliens.” (Memorandum of Law in Support of Defendant’s Motion to Dismiss (Doc. 87) at 9). Accordingly, “those who break federal immigration law by employing or harboring illegal aliens have no standing to raise a challenge that is based on federal immigration law.” (*Id.*). Similarly, illegal aliens, the defendant contends, do not fall within the zone of interests of the INA and lack standing to raise a preemption claim under that statute; an illegal alien, defendant insists, “does not have standing to invoke the protection of the INA in attempting to displace a state or local ordinance.”²³ (*Id.* at 9).

objected to the claim. *Id.* at 17 (holding that “it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff’s claimed standing.”).

²³ Implied in this argument is again the claim that people who break the laws to enter, work or reside in this country should not have access to the courts because they are “criminals” undeserving of the rights those courts seek to protect. “Illegal means illegal,” after all. Such argument, however, flies in the face of long-established principles of constitutional law, not to mention the concept of justice. All persons in the United States have rights under the Fourteenth Amendment to the United

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The prudential standing doctrine indeed requires that “a plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.” *Bennett v. Spear*, 520 U.S. 154, 163, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997); *see also Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 300 (3d Cir. 2003). In this suit, plaintiffs invoke several different statutory and constitutional provisions in their numerous claims seeking to prevent enforcement of Hazleton’s ordinances. Plaintiffs, for instance, charge that the ordinances violate their constitutional privacy rights and the equal protection and due process guaranteed them under the Fourteenth Amendment. They also allege that the ordinances violate rights granted them by federal Fair Housing Act, 42 U.S. § 1981, and Pennsylvania statutory and

States Constitution, whether they are citizens or not. *See Plyler*, 457 U.S. at 210 (holding that “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) (holding that “[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: ‘Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’ These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”).

common law. Finally, plaintiffs claim that the regulatory scheme set out under federal immigration law pre-empts Hazleton's efforts to control the presence of illegal immigrants in the City and the ordinances violate the Supremacy Clause of the United States Constitution.

Our question, therefore, is whether these grievances fall within the zone of interests protected by the various constitutional and statutory provisions invoked by the plaintiffs in raising them. This case is different from most of the federal cases that invoke the zone of interests test, since the plaintiffs do not seek to challenge any application of a particular federal law.²⁴ *See, e.g., NCUA v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998) (finding that private banks and the American Bankers Association were within the zone of interests of the Federal Credit Union Act and had standing to challenge a federal agency's interpretation of that act's membership restrictions); *Assoc. of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970) (finding that data processing companies were within the zone of interests of

²⁴ Indeed, it appears that the "zone of interests" test should not be an issue in this case at all, since the plaintiffs here do not challenge the application of a particular provision of federal or state law, but are instead seeking to vindicate their rights against enactment of ordinances to which they are clearly subject. Litigating the "zone of interests" test in a case where the plaintiffs bring suit against ordinances aimed at them and their interests appears exceedingly pointless.

federal banking law and had standing to challenge the Comptroller of the Currency's ruling that national banks could make data processing services available to other banks and bank customers); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 91 S. Ct. 158, 27 L. Ed. 2d 179 (1970) (finding that travel agents had standing to challenge Comptroller of the Currency's ruling that banks could offer travel services). While the courts have not foreclosed application of the zone of interests test to cases that do not involve a federal agency action, such cases nevertheless involve some sort of agency action against which the plaintiffs protest. *See* 2 Am Jur 2d Administrative Law § 430 (arguing that "[t]he zone-of-interests test is relevant only where the action under attack is that of a government agency.").

Here, the action against which the plaintiffs protest is a local legislative enactment which they contend violates rights guaranteed them in a variety of ways under state and federal law. Plaintiffs do not claim that the application or interpretation of a law by some state or local agency to which they have no connection is inappropriate but instead claim that their legal rights are violated by a legislative enactment aimed directly at the operation of their businesses or their ability to work or rent property in the City of Hazleton.²⁵ Accordingly, plaintiffs arguably fall

²⁵ In any case, federal courts have found that a challenge to a state law that argues for pre-emption based on a contrary provision of federal law does not implicate the "zone of interests" test because the lawsuit does not seek to vindicate rights

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within the zone of interests of the statutes at the center of this lawsuit, and they have prudential standing to sue.

Defendant's use of *INS v. Legalization Assistance Project of the L.A. County Fed'n of Labor*, 510 U.S. 1301, 114 S. Ct. 422, 114 S. Ct. 433 [sic], 126 L. Ed. 2d 410 (1993), to argue that plaintiffs do not fall within the zone of interests here is misplaced. In that case, Justice Sandra Day O'Connor, sitting as a Circuit

secured under a particular statute, but implicates the principles protected by the Supremacy Clause of the Constitution. See *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001) (holding that “[plaintiff] has not asserted an action to enforce rights under the Medicaid statute, however, but rather a preemption-based challenge under the Supremacy Clause. In this type of action, it is the interests protected by the Supremacy Clause, not by the preempting statute, that are at issue.”); *St. Thomas-St. John Hotel & Tourism Ass’n v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000) (holding that “[w]e know of no governing authority to the effect that the federal statutory provision which allegedly preempts enforcement of local legislation by conflict must confer a right on the party that argues in favor of preemption. On the contrary, a state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption.”); *Burgio and Campofelice, Inc. v. New York State DOL*, 107 F.3d 1000, 1006 (2d Cir. 1997) (holding that “the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.”) (quoting C. Wright, A. Miller & E. Cooper, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 2d § 3566 (1984)). These cases indicate that plaintiffs’ supremacy clause challenge to local law solves any problem the plaintiffs may have with the zone of interests for their supremacy claim.

Justice,²⁶ considered the then Immigration and Naturalization Service’s (“INS”) request for a stay pending appeal of a district court’s order. *Id.* At issue in the litigation were the procedures that the INS used to determine whether immigrants in the country without legal authorization were eligible for an amnesty offered in the 1986 Immigration Reform and Control Act (“IRCA”). *Id.*; see 8 U.S.C. § 1255a. The respondents were “organizations that provide legal help to immigrants” who believed that the INS had interpreted IRCA too narrowly. *Id.* Justice O’Connor noted that these respondents sought court review of the actions of a federal agency, and that Congress “ha[d] explicitly limited such review to claims brought by ‘person[s] suffering legal wrong[s] because of agency

²⁶ Justice O’Connor described her role in that setting: “As a Circuit Justice dealing with an application like this, I must try to predict whether four [Supreme Court] Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called ‘stay equities.’ [citation omitted]. This is always a difficult and speculative inquiry, but in this case it leads me to conclude that a stay is warranted.” *Legalization Assistance Project*, 510 U.S. at 1301. Because of the nature of this decision – a speculative opinion by one Supreme Court Justice sitting as a Circuit Court Justice – and the fact the decision served only to delay implementation of an order pending appeal, we do not consider that opinion as binding, but rather as persuasive authority. We find defendant’s assessment that “[t]he Supreme Court has stated [that none of the plaintiffs are within the INA’s zone of interest] with respect to the landlords and employers of illegal aliens” to overstate both Justice O’Connor’s findings and the role that her colleagues played in that decision. (Doc. 87 at 8).

action’ (not applicable to the respondent organizations involved here) or by persons adversely affected or aggrieved by agency action within the meaning of a relevant statute.’” *Id.* (citing 5 U.S.C. § 702). Justice O’Connor found that “only in cases brought by a person whose putative injuries are ‘within the “zone of interests” sought to be protected by the statutory provision whose violation forms the legal basis for his complaint’” did a plaintiff have standing to sue over an agency decision. *Id.* (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)). The organizations, Justice O’Connor found, did not fall within the zone of interests protected by the statute because “IRCA was clearly meant to protect the interests of undocumented aliens, not the interest of organizations such as respondents.” *Id.* Though IRCA had assigned such organizations a role in the process of determining amnesty eligibility, “there is no indication that IRCA was in any way addressed to their interests.” *Id.* Accordingly, Justice O’Connor found that those organizations did not fall within the zone of interests of IRCA.

Whatever precedential value we should assign to the stay of a district court order issued by a single Supreme Court Justice sitting as a Circuit Judge, we are not persuaded that this case leads to the conclusion that plaintiffs lack prudential standing under the zone of interests test. The decision addressed the standing of advocacy groups seeking to challenge the operation of the amnesty program established under

IRCA, not the standing of employers or landlords seeking to determine whether the federal scheme of regulating immigration preempted a local ordinance. Like most zone of interest cases, the court in this case was required to consider whether a plaintiff had standing to challenge an interpretation of a federal statute that did not directly regulate that group. Defendant's reading of the decision to state a general proposition that plaintiffs lack standing in cases involving preemption under the INA, therefore, is far too broad. Indeed, Justice O'Connor concluded that illegal immigrants seeking to adjust their status *were* within the IRCA's zone of interests. Plaintiff organizations in *INS v. Legal Assistance Project* had sued the federal government. Here, by contrast, plaintiffs challenge local ordinances that would directly regulate their activities as employers, employees, landlords and tenants. Justice O'Connor's opinion is not applicable to the situation here, and does not alter our determination that plaintiffs have prudential as well as constitutional standing.

Accordingly, we find that all of the plaintiffs in this case except Jose and Rosa Lechuga have both constitutional and prudential standing, and we will deny defendant's motion to dismiss on that point. The landlord plaintiffs have standing to challenge the provisions of the ordinances related to housing, as well as the employment restrictions. The tenant plaintiffs also have standing to sue over the registration provisions of the housing ordinance, as well as for alleged violation of their privacy rights. They also have

standing [sic] to challenge the employment provisions of IIRA. In short, plaintiffs have proved standing sufficiently for all of their claims to proceed.

B. Anonymous/Doe Plaintiffs

The defendant argues that the Doe Plaintiffs may not proceed anonymously. Federal Rule of Civil Procedure 10(a), defendant contends, requires that each complaint set forth the names of all the parties. Federal Rule of Civil Procedure 17(a) mandates that every action be prosecuted in the name of the real party in interest. These pleading requirements, defendant insists, are not satisfied by the “anonymous or generic” description provided for the anonymous parties in plaintiffs’ amended complaint. (Memorandum of Law in Opposition to Plaintiffs’ Motion for Summary Judgment (Doc. 150) at 105). Additionally, defendant insists that plaintiffs did not seek leave from the court to proceed anonymously, as required by the federal rules. Defendant also argues that the disclosure of immigration status is not a matter so highly personal and sensitive that anonymity is required to protect a plaintiff’s interest. Finally, defendant insists that “a court of the United States cannot recognize and affirm any Plaintiff’s interest in evading the laws of the United States, particularly when such laws are not challenged in the case before the court.”

(*Id.* at 107).²⁷ We find no merit to the defendant's arguments, but we shall address them all.

²⁷ We do not find that Rule 17(a) applies to our decision of whether to allow plaintiffs to proceed using pseudonyms. The requirement that an action be "prosecuted in the name of the real party in interest" relates to attempts to ensure that those who have an interest in a legal action are actually represented in the case. This rule enshrines the principle that "the action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right." 6A Wright and Miller, FEDERAL PRACTICE AND PROCEDURE § 1543; see *Schupack v. Covelli*, 512 F. Supp. 1310, 1313 (W.D. Pa.1981) (finding that plaintiff was the "real party of interest" in the case because she "possessed legal title to the stock in question; . . . retained and paid plaintiff's counsel in this action; and . . . plaintiff's counsel takes his instructions solely from" her). Here, the anonymous plaintiff's claim that they live and work in Hazleton and will be harmed by the implementation of the ordinances in question. There is no doubt that they have participated in the lawsuit and that the attorneys in their case work at least in part for them. They claim the ordinance violates their rights under the United States constitution and laws of the United States and the Commonwealth of Pennsylvania. They are certainly entitled to seek enforcement of those rights and clearly are the real parties of interest in the case. The one case to which defendant cites that connects anonymity of a plaintiff to Rule 17(a) addresses a plaintiff who used an alias in pursuing a lawsuit against prison officials, and who did not seek to proceed under a pseudonym because of concerns about the consequences of using his own name but had instead used an alias at the time of his arrest to avoid deportation for a previous criminal conviction. See *Marcano v. Lombardi*, No. Civ. 02-2666, 2005 U.S. Dist. LEXIS 35548, 2005 WL 3500063, *4 (D. N.J. Dec. 20, 2005) (finding that "because Plaintiff never petitioned the Court to proceed under an alias, his persistence in maintaining his false identity mandates dismissal of his case"). The facts are clearly different here. The plaintiff in *Marcano* used an

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As set forth above, all of the John and Jane Doe plaintiffs have an uncertain immigration status. The Federal Rules of Civil Procedure demand that litigants provide “the names of all the parties.” FED. R. CIV. P. 10(a). The public nature of lawsuits and the public interest inherent in the rights vindicated in courtrooms makes open and transparent proceedings imperative to equitable outcomes. *See M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir. 1998) (holding that “[l]awsuits are public events. A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be

alias, not a pseudonym, and did so only in attempt to prevent authorities from discovering his true identity and deporting him because of a prior criminal conviction. He did not acknowledge that he was using a false name. In addition, his case had nothing to do with immigration, but was a civil rights suit based on his treatment in jail. Because plaintiff tried to fool the defendant about who he was, the court rightly concluded that the suit was not instituted in the name of the real party in interest. Here, plaintiffs are not trying to mislead the court or the defendant about who they are. They acknowledge that the pseudonyms are not their real names. We note as well that the case that defendant cites to argue that we may raise plaintiff’s failure to comply with Rule 17(a) *sue [sic] sponte* nowhere mentions that Rule. *See Doe v. United States Dep’t of Justice*, 93 F.R.D. 483 (D.Colo.1982). Indeed, the judge in that case did not act *sua sponte*, but only after both parties filed motions, the plaintiff to proceed anonymously and the defendant for a more definite statement that included the name of the plaintiff. *Id.* at 483. Accordingly, we find that Rule 17(a) does not apply to the plaintiff’s efforts to proceed anonymously.

incurred as a result of the disclosure of the plaintiff's identity. The risk that a plaintiff may suffer some embarrassment is not enough.") (quoting *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992)). Courts have long recognized, however, that the circumstances of a case, particularly where litigants may suffer extreme distress or danger from their participation in the lawsuit, may require that plaintiffs proceed without revealing their true names. Courts have found that plaintiffs could proceed anonymously because they feared that revealing their true identities would lead to physical violence, deportation, arrest in their home countries and retaliation against the plaintiffs' families for bringing suit. *Does v. Advanced Textile Corp.*, 214 F.3d 1058, 1063 (9th Cir. 2000). They have also allowed children who were undocumented immigrants to proceed without revealing their true names in a suit seeking to overturn a law that prevented their access to schools in Texas. *Plyler*, 457 U.S. at 202. People seeking access to abortions at a time when they were generally illegal also received leave to proceed using pseudonyms. *See Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Courts have allowed those suffering from mental illness to use pseudonyms. *See, e.g., Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979). Children bringing a controversial challenge to a school-sponsored religious program were also granted anonymity in the face of threatened harm for their views. *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981).

Those federal courts which have ruled on the propriety of anonymous plaintiffs have held that “a district court must balance the need for anonymity against the general presumption that parties’ identities are public information and the risk of unfairness to the opposing party.” *Advanced Textile*, 214 F.3d at 1068. The Ninth Circuit Court of Appeals, for example, has noted that “we allow parties to use pseudonyms in the ‘unusual case’ when nondisclosure of the party’s identity ‘is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment.’” *Id.* at 1067-68 (quoting *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1981)). The Fourth Circuit Court of Appeals has similarly found that “[f]ederal courts traditionally have recognized that in some cases the general presumption of open trials – including identification of parties and witnesses by their real names – should yield in deference to sufficiently pressing needs for party or witness anonymity.” *James v. Jacobson*, 6 F.3d 233, 242 (4th Cir. 1993).

The Third Circuit Court of Appeals has not articulated a standard to weigh litigants’ efforts to proceed anonymously. Federal district courts in the Third Circuit, however, have held that “[i]n determining whether a party may proceed under a pseudonym, the public’s right of access should prevail unless the party requesting pseudonymity demonstrates that her interests in privacy or security justify pseudonymity.” *Doe v. Evans*, 202 F.R.D. 173, 175 (E.D. Pa. 2001). They have also articulated factors weighing in

favor and against the use of pseudonyms for plaintiffs. Those factors include: “(1) the extent to which the identity of the litigant has been kept confidential; (2) the bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases; (3) the magnitude of the public interest in maintaining the confidentiality of the litigant’s identity; (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant’s identities; (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified; and (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives.” *Doe v. Hartford Life and Accident Ins. Co.*, 237 F.R.D. 545, 549 (D. N.J. 2006) (quoting *Doe v. Provident Life & Accident Ins. Co.*, 176 F.R.D. 464, 467-68 (E.D. Pa. 1997)). Factors against use of pseudonyms are: “(1) the universal level of public interest in access to the identities of the litigants; (2) whether, because of the subject matter of the litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant’s identities, beyond the public’s interest which is normally obtained; and (3) whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated.” *Id.* at 550 (quoting *Id.* at 468).

We find that plaintiffs are entitled to proceed anonymously in this matter.²⁸ We will consider each of

²⁸ We agree with the defendant that plaintiffs should have sought formal leave of the court to proceed anonymously. Such failure is not grounds to grant a procedural default to the defendant because we addressed this issue at a preliminary stage of the litigation and no prejudice has occurred to the defendant. Early in the discovery period, plaintiffs sought a protective order from this court directing the defendant not to request information from the Doe plaintiffs that revealed their identities or immigration status. (*See* Motion for Protective Order (Doc. 65)). Defendant offered various reasons why such an order was inappropriate, including an argument that “[n]umerous federal precedents establish clearly that anonymity may not be utilized to avoid disclosure of the identity of an illegal alien.” (Brief in Opposition to Motion for a Protective Order (Doc. 67) at 1). After considering these arguments, we granted this motion for a protective order on December 15, 2006. That protective order reads: “The John or Jane Doe Plaintiffs in this proceeding do not have to produce, or otherwise respond to discovery requests seeking disclosure of, ‘Protected Material’, i.e. those documents, things, information and testimony containing information about their immigration status, actual residence, or place of work that would allow someone to *identify them* or their immigration status.” (Memorandum and Order (Doc. 72) at 7) (emphasis added). While we recognize that our ruling on this issue did not address directly whether plaintiffs could proceed anonymously, this order did approve of the unnamed plaintiffs’ unwillingness to reveal their real names. Our order came in response to a motion from the plaintiffs for a protective order regarding discovery of their names or immigration status. This early attention to the issue of anonymity cured any prejudice that could have resulted from the failure of plaintiffs to request leave to proceed without revealing their true names. The parties were aware of the presence of this issue in the litigation, we ruled on an immediate and contentious issue related to anonymity, and the parties were able to prepare the litigation without

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the factors raised by district courts in the Third Circuit in addressing such matters.

1. Factors Favoring Anonymity

a. Preservation of Anonymity

The first factor is the extent to which the anonymity of the plaintiffs seeking to use pseudonyms has been preserved. In this case, plaintiffs have vigorously attempted to maintain their anonymity through the trial and deposition process, and no evidence suggests that those attempts have been unsuccessful. These plaintiffs have not given media interviews in which they revealed their names, they have not appeared in public in forums in which they could easily be recognized, and they did not testify live at trial. The record provides no indication that plaintiffs have waived their claim on anonymity by allowing others to discover their true names. This factor weighs in favor of plaintiffs' attempt to proceed anonymously.

b. Bases for Request of Anonymity

Second, courts evaluate the bases for the claim that anonymity is necessary and the legitimacy of those bases. Here, plaintiffs seek to avoid disclosure of their identities because they fear the consequences

the names of these plaintiffs. Accordingly, we will consider the question of anonymous plaintiffs on the merits.

of such public knowledge and are concerned that defendant may disclose their names to federal immigration authorities. The plaintiffs argue that they have “stated legitimate concerns that the public identification of the Doe Plaintiffs, amidst this highly publicized and controversial lawsuit, would make them easy targets of intense anti-immigrant and anti-Latino sentiment.” (Brief in Opposition to Defendant’s Motion to Dismiss (Doc. 106) at 97). Plaintiffs also contend that such disclosure may affect “their basic rights to shelter, education, and a livelihood.” (*Id.* at 99). We find these compelling reasons for allowing plaintiffs to proceed anonymously.

In *Jane Doe 1 v. Merten*, the Federal District Court for the Eastern District of Virginia refused to allow plaintiffs who sought to challenge a Virginia law that prevented illegal immigrants from obtaining admission to state colleges and Universities to proceed anonymously. 219 F.R.D. 387 (E.D. Va. 2004). The students had claimed: “[I]f they are required to reveal their identities, the federal government will seek to deport them or their families and they will thus likely decide not to proceed with this suit, effectively rendering them unable to vindicate their rights in this matter.” *Id.* at 390. Defendant cites to this case to support its argument that plaintiffs should be required to reveal their identities, in part because the court in that case found that the plaintiffs seeking to proceed anonymously did not have a strong interest in keeping information about their immigration status confidential.

The court in *Merten* concluded that “unlawful or problematic immigration status is simply not the type of ‘personal information of the utmost intimacy’ that warrants abandoning the presumption of openness in judicial proceedings.” *Id.* We find that the facts and context of this case lead to a different assessment of the nature of information about one’s immigration status.²⁹ Unlike *Merten*, where plaintiffs were seeking

²⁹ The court cited no authority that supported this finding about the nature of information on immigration status (though defendant cites approvingly to the holding), but instead pointed to *Southern Methodist University Association of Women Law Students v. Wynne & Jaffe*, a case that refused a request by plaintiffs who were women law students to proceed anonymously in their challenge to a law firm’s hiring practices. See *Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979). We find that the situations faced by women law students during their job search are quite different from those faced by undocumented immigrants who face the possibility that their opponents in a lawsuit will reveal information that could have dire legal consequences. The women law students did not, after all, face the possibility of deportation or exposure to an angry public convinced that their mere presence in the community was a threat to social order. The Court in *Merten* nevertheless acknowledged that in *Plyler*, the Supreme Court permitted “illegal aliens . . . to proceed anonymously in their successful constitutional challenge to the Texas law denying free public grammar school education to illegal alien children.” *Merten*, 219 F.R.D. at 391. In a footnote, the *Merten* court pointed out that “it should be noted that in neither *Plyler* nor *Roe* [*v. Wade*] does it appear that the issue of anonymity was contested or litigated.” *Id.* at 391 n.12. We assign more importance than the *Merten* court did to the fact that plaintiffs in the *Plyler* and *Roe* cases proceeded anonymously. Apparently, no federal court which examined the *Plyler* case found the use of anonymous plaintiffs troubling enough to address the issue, but instead concluded that the plaintiffs had legitimate reasons for

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admission to state colleges and universities, the plaintiffs in this case do not seek to receive any goods provided by the state. Further, their immigration status does not determine whether they will be subject to the terms of the ordinance. Accordingly, the individual identities and interests of the plaintiffs are not at issue in this case to the degree they were in *Merten* and are not necessary to reach the issues of constitutionality raised by the lawsuit. The intense public interest in this case makes the risks from exposing sensitive information about one's identity exponentially more dire than in *Merten* and make more persuasive plaintiffs' reasons for seeking to proceed without revealing their true names.

The manner in which public interest has manifested itself in this case demonstrates why anonymity is necessary for plaintiffs who lack a legal immigration status. Trial testimony indicated the intense public interest in the ordinances led at times to harassment and intimidation that created fear even among those with a more secure social and legal status than the anonymous plaintiffs. Dr. Agapito Lopez, a Hazleton resident who became a leader in the attempt to have the ordinances overturned, testified that he organized a candlelight vigil to be held

refusing the [sic] reveal their true names in that high-profile case. The fact that the parties did not litigate the issue is certainly not evidence that the use of pseudonyms was not vital to allowing the plaintiffs in that case (or in *Roe* for that matter) to vindicate their rights.

on the steps of the building where the city council met the night before the ordinances had their second reading. (N.T. 3/12/07 at 73). Attendees at the meeting were very afraid of the consequences of their participation, particularly of the city officials who at Lopez's request videotaped the crowd in an attempt to gather evidence in case of a potential disturbance.³⁰ The fear of those in his group came "because there was another group that was intimidating us at that time by showing their presence, shouting slogans, and a lot of tension in the area." (*Id.* at 75). At the ordinance's second reading the City's supporters were "very, very tense with stares at the small group of Latinos that were there." (*Id.*). While the City Council was conducting its business that evening a fight had broke out in the street between opponents and supporters of the ordinances. (*Id.* at 76-77). Lopez rushed back out to the street in front of the City Council building to find "[f]ederal justice agents, department of justice agents and policemen in the street dividing two groups." (*Id.* 77). The two groups, consisting of recent immigrants and another group of those supporting the ordinances had faced off, "and there was shouting from one side to the other side." (*Id.*).

³⁰ The protestors' reaction to these cameras, despite the benign nature of their presence, indicates that the publicity generated by the ordinances also generated fear among immigrants and particularly Latinos in Hazleton that they would be the subject of government-sponsored harassment and intimidation.

The day before the vigil organized by opponents of the ordinances, Lopez received what he described as “hate mail” underneath the door of his office. (*Id.* at 73). The letter Lopez received purported to describe the effects of illegal immigration, contending that “European Americans are being dispossessed of their own nation. We are under invasion by millions of unskilled Mexicans who threaten to bankrupt us.” (N.T. 3/13/07 at 5). The letter further warned that “coloreds” would eventually take control of state governments, Congress and the presidency, and that “[w]hites will quickly be stripped of their rights with our wealth confiscated for redistribution to non-whites as is taking place in South Africa.” (*Id.* at 6).

After the ordinances had their second reading Lopez received two other pieces of offensive mail; this mail made him feel both fearful and “offended, because it was hate mail. It indicated hate against me as a person.” (N.T. 3/12/07 at 78-79).³¹ The first piece

³¹ We note, too, that the ordinances apparently had the effect of increasing racial tension in the City. Jose Luis Lechuga, who first arrived in the United States from Mexico in 1982, had lived in Hazleton since 1991. (N.T. 3/12/07 at 118, 122). When he first came to the City, he felt “like a part of the community. People no longer looked at me like a stranger, because they knew that my wife and I were working people, and so I was accepted in the community.” (*Id.* at 123). After the passage of the ordinances, however, Lechuga discovered that “apparently the racial hatred and the racism has awoken. We notice and see that people no longer look at us – they look at us like their enemies now, not our friends.” (*Id.* at 124). That Lechuga, a legal resident of the United States, felt such discomfort as a result of the

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of mail suggested that Lopez and his “cohort, that bold, brazen Anna Arias, should spend some time on a few streets in town before defending your (Latin Community).” (N.T. 3/13/07 at 7). After describing what the letter-writer saw as the waste and crime caused by the immigrant residents of Hazleton, the author declared that “[w]e think you and Anna [Arias] had better think twice before you speak.”³² Lopez saw this letter as evidence of “the effect that the ordinance has had on the population,” which now failed to “distinguish between undocumented immigrants and Latinos. For them, they are all the same.” (*Id.* at 9). The final letter Lopez received³³ contained a clipping from a newspaper describing the effects of illegal immigration as well as a picture of a “warrior” wearing “a huge Mexican hat.” (*Id.* at 10). Scrawled near this

controversy over the ordinances demonstrates the public controversy created by the ordinances and helps to justify the fears expressed by the anonymous plaintiffs, who do not possess the same legal status as Lechuga.

³² That statement seems to be connected to a claim that activists like Lopez did nothing to address the crime present in Hazleton, but instead complained about the treatment of immigrants. The passage from which that statement was taken reads: “We think you and Anna had better think twice before you speak. Where were you Friday p.m. when Pine Street playground was once again a scene of trouble? Never see you two show your faces. Signed disgusted citizens.” (N.T. 3/13/07 at 8).

³³ The letter was postmarked Hartford, Connecticut. (N.T. 3/13/07 at 9). That the letter did not come from Hazleton demonstrates the wide publicity received by the case, which we find heightens the concerns of the most vulnerable plaintiffs about their participation in the case.

picture were the phrases, “[s]ubhuman spic scum” and “[i]f it is brown, flush it down.”³⁴ (*Id.*). Lopez interpreted this mail as an attempt to “silence” and “intimidate” him. (*Id.* at 11). He also “felt afraid” after receiving letters both at his office and at home; the mail let him know that “they know where I live and where I used to work and where my wife works.” (*Id.*).

Public expressions of support for Hazleton’s ordinances have continued to lead to controversy and confrontations, as well as anger at those who challenge the City’s position. On June 3, 2007, several hundred ordinance supporters held a rally in Hazleton to express support for the city’s attempts to control illegal immigration. Nichole Dobo, *Barletta Backers Harass Writer*, SCRANTON TIMES-TRIBUNE, June 5, 2007, at A1. Amilcar Arroyo, publisher of EL MENSAJERO, a Hazleton-based Spanish-language newspaper, attempted to cover the event for his publication. *Id.* Arroyo, an American citizen, is not involved in the lawsuit against the City. *Id.* Several members of the crowd at the rally began to shout at

³⁴ This piece of mail listed a website, www.nsm88.com, which Hazleton’s attorney discovered was attached to the “nationalist socialist movement.” (N.T. 3/13/07 at 12). After an introductory page that highlights Nazi imagery and declares the organization to be “Fighting for Race and Nation” the website declares itself “the Official Home Page of the National Socialist Movement, an organization dedicated to the preservation of our Proud Aryan Heritage, and the creation of a National Socialist Society in America and around the world.” <http://www.nsm88.com/index2.html>.

Arroyo after a rumor circulated that he was one of the plaintiffs in the lawsuit against the ordinances. *Id.* Confronting Arroyo, a few rally participants shouted at him to “get out of the country” while others chanted “traitor.” *Id.* Police escorted Arroyo from the rally for his own protection. *Id.*

We find that this record of hostility to the plaintiffs in the lawsuit and the climate of fear and hostility surrounding the debate over the ordinances creates a justified fear about revealing the anonymous plaintiffs’ identities. Dr. Lopez and Mr. Arroyo faced public condemnation and confrontation based on their real or perceived participation in the lawsuit, and they are United States citizens. Those with a more tenuous legal status have an exponentially greater concern over the dangers of participating in a lawsuit that has generated such intense sentiment.

In addition, we find that the defendant does not have a strong need to obtain the identity of the anonymous plaintiffs in order to defend against plaintiffs’ suit, thus adding to the reasonableness of plaintiffs’ request to keep their identity anonymous. Plaintiffs seek to keep their identities private largely because of their problematic immigration status; they fear the consequences of a public admission of unauthorized residence and employment in the United States. Courts have concluded that plaintiffs may refuse to turn over information on their immigration status when that status is not relevant to the lawsuit. *See Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002). Here, defendant has claimed to need information on the

unnamed plaintiffs' immigration status in order to determine whether they have standing to bring suit in the case. Plaintiffs have admitted that they lack legal authorization for their presence and employment in the country, and defendant therefore has all the information necessary to challenge the anonymous plaintiffs' presence in the suit.³⁵ Defendant's arguments about the standing of such undocumented plaintiffs are based not on the specific facts of each undocumented plaintiff's legal status, but instead on the notion that plaintiffs who are not legally in the United States cannot be injured by the ordinances. The information provided by the anonymous plaintiffs about their immigration status gives the defendant all the information necessary to make this standing claim.

Indeed, plaintiffs have expressed a legitimate fear that exposing their names could lead to adverse legal consequences that go beyond the public disapprobation they face. If threats of exposure of one's legal status can intimidate plaintiffs and prevent them from participating in a lawsuit, the defendant's own statements and actions have added weight to these fears. During discovery in this case, the parties disagreed over whether the anonymous plaintiffs should be required to turn over immigration

³⁵ We accept these plaintiffs' representations about their immigration status, since such representations are against their legal interest. These plaintiffs admit to a problematic legal status that could lead to their deportation.

documents to the defendant. After a telephone conference, this court ordered the parties to enter into a confidentiality agreement to protect the identities of the Doe plaintiffs. (*See* Order (Doc. 63)).

After the court issued this order, plaintiffs informed us that a local newspaper had quoted defendant's attorney, who claimed that the order violated 8 U.S.C. § 1373(c) by preventing the city from turning over to the federal government information on the plaintiff's immigration status. *See Munley's IIRA Order Violates Federal Law, Attorney Says, STANDARD SPEAKER*, December 13, 2006 (attached to Motion for a Protective Order (Doc. 64)). The federal law "says no government entity, federal, state or local, may in any way restrict the transfer of information concerning an alien's legal status to the federal government," Hazleton's attorney asserted. (*Id.*). The attorney expressed "surprise" at the order, which he claimed "violates federal law." (*Id.*). Plaintiffs informed us of these statements as part of their motion seeking a protective order preventing disclosure of their identities and immigration status. Given these public statements and court filings, plaintiffs could legitimately fear that defendant was determined to expose their legal status to federal authorities. Such fears could cause plaintiffs to abandon their attempt to secure rights guaranteed them under federal law. We conclude, therefore, that plaintiffs have offered good and compelling reasons for not revealing their identities. The second factor, then, weighs heavily in favor of anonymity.

c. Magnitude of the Public Interest Involved in Maintaining Confidentiality

The third factor, the magnitude of the public's interest in maintaining the confidentiality of the litigants' identities, also weighs in the anonymous plaintiffs' favor. Hazleton's ordinances have become the subject of wide public debate, and has also served as a model for other communities seeking to act against what they perceive to be the problem of illegal immigration. See Anabelle Garay, *Attempts to Curb Illegal Immigration Prove Costly*, WASHINGTON POST, May 6, 2007, at A12 (reporting that "[d]ozens of cities and counties have proposed or passed laws that prohibit landlords from leasing to illegal immigrants, penalize businesses that employ undocumented workers or train police to enforce federal immigration laws."). The public has an interest in determining the constitutionality of ordinances like the one passed in Hazleton, and particularly in determining whether such ordinances violate the constitutional rights of immigrants who lack authorization to enter or work in the United States. Without the protection of anonymity, future such plaintiffs would likely decline to participate in the lawsuit, and the public's interest in testing the constitutionality of certain aspects of such ordinances could remain unexplored.

d. Legal Nature of the Issues in the Case

The fourth factor, whether the purely legal nature of the issues in the case make for an atypically weak public interest in the actual identity of the litigants, also weighs in favor of anonymity. Because this case exists as a test of ordinances passed by Hazleton that seek to transform the role of municipalities in dealing with the presence of undocumented aliens in their jurisdictions, the issues in this case are largely related to the interaction between federal, state and local laws, the application of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, the meaning of standing in federal jurisprudence and the limits of the privacy protections afforded by the Constitution. This case does not contain the complicated factual scenarios of the typical employment discrimination or prisoner civil rights action faced daily in every federal district court. The decision in this case does not turn on judgements about the credibility of particular witnesses, but instead on an assessment of the parties' legal arguments. Indeed, the only reason defendant cites for needing to know the identity of the anonymous plaintiffs is to address their standing to sue. While standing is a clear constitutional requirement, it is also a preliminary question and one we find we can answer for the anonymous plaintiffs without discovery of their identities. Defendant makes no argument that other factual or legal issues in the case require knowing the identity of plaintiffs.

Defendant, therefore, has less interest in the identity of the particular plaintiffs than in the resolution of the legal issues in this case. This factor clearly weighs against disclosure of the plaintiffs' identities.

e. Danger of Adverse Outcome to Unnamed Plaintiffs

We find that the fifth factor, the undesirability of an outcome adverse to the pseudonymous parties and attributable to their refusal to pursue the case at the price of being publicly identified, has a neutral weight in our analysis. While an adverse outcome for the anonymous plaintiffs could have significant consequences, limiting their ability to find housing and secure employment, that adverse outcome would not be solely or even primarily attributable to the anonymous plaintiffs' refusal to participate because of the possibility of being identified publicly. This case, which will be decided largely by answering legal questions on issues like federal preemption, does not turn on the particular facts of the plaintiffs' experience with the law. Other named litigants who could press the issue of the constitutionality of the ordinances would remain, and the outcome of the case would not be determined by the decision of the anonymous plaintiffs to abandon their lawsuit. This factor, therefore, does not weigh significantly for either side of the argument.

f. Whether Plaintiffs Have Ulterior Motives for Seeking Anonymity

We find that the sixth factor, whether the plaintiffs seeking to proceed anonymously have illegitimate ulterior motives, weighs in favor of the plaintiffs' anonymity. The reason for the plaintiffs' desire to use pseudonyms in this case is clear: they wish to avoid the potential harm that will come from disclosure of their names to the defendant and to the public. They fear that disclosing their identities could expose them to danger and adverse legal action unrelated to the rights they seek to vindicate in this litigation. Defendant does not point to any improper motive of the plaintiffs in seeking to proceed without being identified.³⁶ We thus find no improper motive behind plaintiffs' request to proceed without identifying themselves. This factor weighs in favor of anonymity.

³⁶ In an earlier response to a plaintiff's motion for a protective order preventing disclosure of identity and information related to immigration status, however, defendant argued that plaintiff's [sic] had engaged in a "shell game" of substituting different anonymous plaintiffs. We found that problem not genuine at the time we issued the protective order; we find that problem even less likely now, as defendant has had the opportunity to depose the anonymous plaintiffs and has attached them to a particular set of identifying factors.

2. Factors Favoring Disclosure

a. Public Interest in Plaintiffs' Identities

Of the factors in favor of disclosure of the anonymous plaintiffs' identities, we find that the first of those factors, the universal level of public interest in access to the identities of the litigants, does not support a need for disclosure. There is widespread public interest in this case, but that interest is focused not on the identities of the plaintiffs, but on the legal issues at the heart of the case. We find no evidence of a widespread, much less universal, public interest in the identities of the plaintiffs. The public's interest in this case is in the right of Hazleton to press forward with its legislation, not in a dispute between the parties. Accordingly, the public's interest in the identities of the individual plaintiffs is not so strong as to justify the danger of disclosing the identity of plaintiffs with a legitimate fear for the consequences of that disclosure.

b. Subject Matter of the Litigation

The next factor in favor of disclosure asks whether, because of the subject matter of the litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's normal interest. This factor too does not weigh in favor of disclosure. The subject matter of this litigation is primarily constitutional law, and the identities of the particular

plaintiffs are not as important to the outcome of the litigation as the legal arguments they raise. In addition, the plaintiffs seeking anonymity here are not public figures, and thus there is scant public need to follow their activities in order to prevent abuse of some public trust.

c. Motivation for Seeking Identity

The final factor for the court to consider addresses whether the opposition to pseudonyms by counsel, the public, or the press is illegitimately motivated. While we do not find persuasive power in defendant's argument that learning the identity of the anonymous plaintiffs is necessary to determine whether they have standing to sue, we have no evidence to indicate that defendant adopted this position for illegitimate reasons. We note, however, that federal courts have recognized that inquiries into immigration status can have an *in terrorem*, effect, limiting the willingness of plaintiffs to pursue their rights out of fears of the consequences of an exposure of their position. See *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (holding that "[c]ourts have generally recognized the *in terrorem* effect of inquiring into a party's immigration status when irrelevant to any material claim."); *Zeng Liu v. Donna Karan International, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (finding that disclosing immigration status when not relevant to the case presents a "danger of intimidation [that] would inhibit plaintiffs in pursuing their rights."). In this case, then, we lack evidence that defendant had illegitimate

motives in challenging plaintiffs' use of anonymity, but recognize the potential intimidation that accompanied that challenge. We find, therefore, that this factor weighs neither for nor against disclosure.

In sum, we find that the factors in favor of confidentiality for the plaintiffs who seek to proceed anonymously outweigh those that recommend disclosure. The highly legal nature of the issues here, combined with the intense public interest and strong level of emotion connected with the issue mean that the undocumented immigrants who seek to participate in this action face extraordinary circumstances that require anonymity if they hope to proceed without facing unsupportable burdens. The public's interest in learning the identity of the litigants does not outweigh the anonymous plaintiff's concerns, and defendant can defend itself adequately without information about the anonymous plaintiffs' identities. Accordingly, we find that the anonymous plaintiffs may proceed without identifying themselves.

We note, finally, that we find misplaced defendant's concern that this court's acknowledgment of the Doe plaintiffs' right to proceed anonymously would "recognize" and "affirm" an "interest in evading the laws of the United States." (Memorandum of Law in Opposition to Plaintiffs' Cross-Motion for Summary Judgment (Doc. 150) at 107). A venerable principle of constitutional law holds that all persons in the United States have rights under the Fourteenth

Amendment to the United States Constitution, whether they are citizens or not.³⁷ See *Plyler v. Doe*, 457 U.S. 202, 210, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (holding that “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) (holding that “[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: ‘Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’ These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”). The Doe plaintiffs’ interest

³⁷ We note that the descendants of non-Asian immigrants who entered this country before the immigration restrictions of the 1920s who condemn present-day illegal immigrants by pointing out that “when my relatives came to this country, they followed the law” ignore one very crucial fact: virtually no law existed to prevent anyone from entering the country prior to that period. No federal crime for unauthorized entry existed until 1929. See Mae M. Ngai, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF AMERICA*, 60 (2004). For a broader reading on United States immigration history please see the appendix.

in this case is in vindicating rights they claim are guaranteed them under the Constitution, and those rights exist whatever their status under the nation's immigration laws. Allowing the Doe plaintiffs to proceed anonymously in the unique conditions of this case would not reward them for evading the country's immigration laws.³⁸ It would instead provide them an opportunity to secure the rights guaranteed them by the Constitution of the United States.

C. Amendments to the Ordinance

On March 15, 2007, during this court's trial of this matter, defendant introduced Ordinance 2007-6, which has since become law in the city. *See* Ordinance 2007-6 (Defense Ex. 251). This Ordinance Amended Sections 4B(2) and 5(B)(2) of IIRA. *Id.* As originally written, "a complaint which alleges a violation solely or primarily on the basis of national origin, ethnicity or race" would not be enforced. Ordinance 2006-18 at § 4B(2). The 2007 amendment removed the words "solely or primarily" from these provisions, meaning that "a complaint which alleges a violation on the basis of national origin, ethnicity or race shall be

³⁸ Indeed, even if we were to agree with every argument made by the plaintiffs in this case and issue a permanent injunction preventing Hazleton from enforcing any of the challenged ordinances, the federal government could still independently of this action discover the identities of the anonymous plaintiffs and deport those whose presence in the United States is contrary to federal law.

deemed invalid and shall not be enforced.” Ordinance 2007-6. The amendment also altered Section 4.A of the Ordinance by adding the word “knowingly” to a provision prohibiting the recruitment and hiring of illegal aliens. *Id.*; see Ordinance 2006-18 at § 4.A (establishing that: “It is unlawful for any business entity to knowingly recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City.”). At the end of the hearing on the plaintiffs’ complaint, we asked the parties for briefs on the effect of this amendment on the instant litigation.

The parties agree that the court has jurisdiction to issue a decision on the current version of the ordinance. Plaintiffs argue, however, that we should also rule on the version of the ordinance that existed until the March amendment. Defendant amended the ordinance, plaintiffs argue, to avoid having this court rule on the constitutionality of the ordinance as it then existed. That amendment did not come, plaintiffs insist, because Defendant recognized that the previous version of the ordinance violated the constitution, but simply to improve defendant’s litigation position. Accordingly, the court could reasonably conclude that defendant will not cease the illegal practice embodied in the earlier version of the ordinance.

The dispute between the parties here is over whether we should also consider the version of the ordinance that was in effect through most of the litigation in this matter. We find that we do not have

jurisdiction to rule on the constitutionality of a version of an ordinance that no longer exists, particularly when we have – as both sides admit – jurisdiction to examine the current version of that ordinance. The cases cited by the plaintiffs to argue that we should rule on that older version of IIRA all address whether a court has jurisdiction to hear a challenge to a practice or an ordinance that the defendant has voluntarily terminated, not whether a court has jurisdiction to address both the old and new versions of an amended ordinance. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982) (finding that voluntarily abandoning a challenged practice does not moot answering the question raised by the lawsuit, since “the city’s repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court’s judgement were vacated.”); *United States v. Government of the Virgin Islands*, 363 F.3d 276, 286, 45 V.I. 764 (3d Cir. 2004) (finding that “when a party does not change its ‘substantive stance’ as to the validity of the contract but merely terminates it for allegedly purely practical reasons (such as avoiding litigation), the termination of the contract does not render the case moot” because nothing would prevent the defendant from engaging in the same or similar contracts); *Penny Saver Pubs., Inc. v. Village of Hazel Crest*, 905 F.2d 150 (7th Cir. 1990)³⁹; *Reynolds v. City of Valley Park*, No. 06-CC-3802,

³⁹ The facts of this case do not support plaintiffs’ position. Plaintiffs argue that “the Circuit Court has also rejected the
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(St. Louis County, MO Circuit Court, March 12, 2007) (available at <http://clearinghouse.wustl.edu/chDocs/public/IM-MO-0001-0017.pdf>).⁴⁰ Those courts did not address whether a court could decide on two versions of the same ordinance, the second of which amended

government actor's claims of mootness where the action allegedly mooting the case was taken 'with litigation lurking a few days away' and where the circumstances suggested that the impending litigation was the cause of the determination." (Doc. 218 at 79). In that case, plaintiff, a suburban newspaper company, sought an injunction against a village ordinance that limited solicitation of real-estate clients. *Penny Saver*, 905 F.2d at 152. While the litigation was pending, the Village amended the ordinance to exempt newspapers. *Id.* Separate litigation over the amended ordinance continued. *Id.* at 153. The court found that litigation over the previous ordinance was moot "because the Ordinance, as amended, cannot be applied to Penny Saver." *Id.* The entire case was not moot, however, since the plaintiff had a "viable claim for declaratory and monetary relief" based on the village's actions in relation to the previous ordinance. *Id.* The facts of this case actually do more to support our conclusion that we lack authority to rule on the constitutionality of the previous version of the ordinance.

⁴⁰ This case dealt with a similar ordinance meant to control illegal immigration. The city of Valley Park had passed ordinances in July 2006 that penalized "'aid[ing] and abet[ting] illegal aliens or illegal immigration' and "'leasing or renting' property to illegal aliens. *Reynolds*, at ¶¶ 3-4. The City apparently repealed those ordinances after litigation began. *Id.* at ¶ 10. The court nevertheless decided that the case was not moot, since "a defendant cannot unilaterally moot the litigation by repealing the ordinance." *Id.* at Conclusions of law ¶ 2). Here, then, the court ruled on the old ordinances because they had been repealed, but no new ordinances had been passed on which the court could rule. That situation is different from the situation here, since we can rule on the current form of the ordinance, which raises concerns quite similar to the old one.

the first. Instead, they addressed whether repealing an ordinance or terminating a contract necessarily made a plaintiffs' case against that ordinance or contract moot. Like those courts, we conclude that the amendment of the IIRA did not moot the case; our duty is to address IIRA as it now stands.

In any case, the controversy over the earlier version of IIRA is moot. That ordinance no longer exists, and plaintiffs' complaints about that former ordinance are no longer operative. *See, e.g., Nextel Ptnrs. Inc., v. Kingston Twp.*, 286 F.3d at 687, 693 (holding that "[I]f a claim no longer presents a live case or controversy, the claim is moot, and a federal court lacks jurisdiction to hear it."). In addition, because we have before us a version of IIRA in which plaintiffs find constitutional infirmities similar to those in the previous IIRA, little danger exists that our decision not to rule on the previous IIRA would allow defendant to evade review and reenact that earlier ordinance. *See City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283 n.1, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001) (holding that "a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior."); *City of Mesquite*, 455 U.S. at 289 (determining that repeal of a statute did not moot the lawsuit because "the city's repeal of objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated."). Though courts have recognized that "a matter is not necessarily moot simply

because the order attacked has expired; if the underlying dispute between the parties is one ‘capable of repetition’, yet evading review, it remains a justiciable controversy within the meaning of Article III.” *New Jersey Turnpike Authority v. Jersey Central Power and Light*, 772 F.2d 25, 31 (3d Cir. 1985). Here, the fact that we will rule on the successor to the Ordinance that provoked the original suit demonstrates that the issues raised by the first set of ordinances are available for review, and we find no need to rule on the previous versions.

Now that the preliminary matters have been disposed of, we will address the underlying merits of the plaintiffs’ case. Plaintiffs’ complaint raises federal constitutional issues, federal statutory issues and state law issues. We shall address each in turn.

II. FEDERAL CONSTITUTIONAL ISSUES

Plaintiffs first three causes of action and the eighth cause of action are brought pursuant to 42 U.S.C. § 1983 (hereinafter “section 1983”) for constitutional violations. In pertinent part, section 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress[.]

42 U.S.C. § 1983.

Thus, to establish a claim under section 1983, two criteria must be met. First, the conduct complained of must have been committed by a person acting under color of state law. Second, the conduct must deprive the complainant of rights secured under the Constitution or federal law. *Sameric Corp. of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582, 590 (3d Cir. 1998).

In the instant case, no question exists as to whether the defendant acted under the color of state law in enacting the ordinances at issue. The only issue with regard to section 1983, therefore, is whether the ordinances violate plaintiffs' constitutional rights. Plaintiffs assert that the defendant violated the United States Constitution's Supremacy Clause, Due Process Clause, Equal Protection Clause and privacy guarantees. We will address each separately.

A. Federal Pre-emption

Plaintiffs' Amended Complaint asserts that Hazleton's ordinances violate the Supremacy Clause of the United States Constitution, which provides that federal law is the supreme law of the land. (Second

Amended Complaint (Doc. 82) (hereinafter “Compl.”) ¶¶ 100-131). In particular, the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

Accordingly, “[t]he Supremacy clause of the United States Constitution invalidates state laws that ‘interfere with or are contrary to’ federal law.” *New Jersey Payphone Ass’n, Inc. v. Town of West New York*, 299 F.3d 235 (3d Cir. 2002) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211, 6 L. Ed. 23 (1824)). This invalidation is termed federal pre-emption. Federal preemption can be either express or implied. *Olde Discount Corp. v. Tupman*, 1 F.3d 202, 216 (3d Cir. 1993). We will discuss each in turn. As the ordinances at issue have two distinct provisions, one directed to employment issues and one aimed at landlord/tenant issues, we will discuss each topic separately with regard to pre-emption beginning with the employment provisions.⁴¹

⁴¹ Defendant contends that we should apply a presumption that the Congress does not intend to supersede state law. In support of this proposition, defendant cites *Medtronic, Inc. v. Lohr*; (Continued on following page)

1. Employment provisions of IIRA

a. Express pre-emption

Initially, plaintiffs assert that the federal law expressly pre-empts IIRA. Under federal law, “Congress can define explicitly the extent to which its enactments pre-empt state law.” *English v. General Elec. Co.*, 496 U.S. 72, 78, 110 S. Ct. 2270, 110 L. Ed. 2d 65. Preemption is “express” when a statute explicitly commands that state law be displaced. *Green v. Fund Asset Management, L.P.*, 245 F.3d 214, 222 (3d Cir. 2001) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992)).

Plaintiffs assert that the federal Immigration Reform and Control Act of 1986 (hereinafter “IRCA”),

518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). *Medtronic* does set forth such a presumption; however, it also states that this presumption applies “particularly . . . in a field which the States have traditionally occupied.” *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). The presumption is inapplicable “when the State regulates in an area where there has been a history of significant federal presence.” *United States v. Locke*, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000). Immigration is an area of the law where there is a history of significant federal presence and where the States have not traditionally occupied the field. In fact, as set forth more fully below, immigration is a federal concern not a state or local matter. Therefore, we do not apply the presumption against pre-emption. If, however, we were to apply the presumption, our ultimate conclusion would not change as Congress has made it sufficiently clear and manifest that federal law pre-empts state law in the area covered by Hazleton’s ordinances.

which deals with the employment of unauthorized aliens, contains an express pre-emption clause that pre-empts the employer portions of IIRA. Defendant argues that IIRA does not fall within IRCA's express pre-emption clause. After a careful review, we agree with the plaintiffs that IIRA's employment provisions are expressly pre-empted.

IRCA is a "comprehensive scheme" that prohibits the employment of unauthorized workers in the United States. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L. Ed. 2d 271 (2002). "IRCA 'forcefully' made combatting the employment of illegal aliens central to [t]he policy of immigration law." *Id.* (citing *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, 112 S.Ct. 551, 116 L. Ed. 2d 546 and n.8 (1991)).

The law prohibits the employment of aliens who are 1) not lawfully present in the United States; and 2) not lawfully authorized to work in the United States. 8 U.S.C. § 1324a(h)(3). In order to prevent the employment of unauthorized workers, IRCA requires that employers verify the identity and eligibility for work of all new hires. This verification is accomplished with the employer's review of specified documents. 8 U.S.C. § 1324(a)-(b). An employer cannot hire an alien who is unable to present proper documentation. 8 U.S.C. § 1324(a)(1).

Under IRCA, where an employer unknowingly hires an unauthorized alien or if an employee becomes

unauthorized, the employer must discharge the employee when his status becomes known. 8 U.S.C. § 1324a(a)(2). Violations of IRCA by employers is punishable by civil fines and criminal prosecution. 8 U.S.C. § 1324a(e)(4)(A); 1324a(f)(1). Prospective employees are subject to criminal prosecutions and fines for providing fraudulent documents. 8 U.S.C. § 1324c(a).

IRCA contains an express pre-emption clause that pre-empts State or local laws dealing with the employment of unauthorized aliens. The preemption clause provides: “The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. § 1324a(h)(2).

The plaintiffs assert that this section expressly pre-empts IIRA. Defendant disagrees, contending that it has followed 8 U.S.C. § 1324a(h)(2) with “exacting precision.” (Doc. 87, Def. Brief at 37). According to Hazleton, it has “eschewed the imposition of criminal or civil penalties and has instead taken those actions expressly permitted by Congress.” (*Id.*). Instead of criminal and civil sanctions, IIRA penalizes a business for employing an unauthorized alien by suspending its business permit. Such a business permit suspension amounts to “licensing and similar laws” as provided by the IRCA preemption section according to the defendant. In other words, Hazleton interprets the statute so as to allow regulation of employers with regard to hiring unauthorized workers

as long as instead of a criminal or civil sanction, the sanction that is imposed is the suspension of the employer's business permit.

We reject Hazleton's interpretation of the express pre-emption provision. Under Hazleton's interpretation of the provision, a state or local municipality properly can impose any rule they choose on employers with regard to hiring illegal aliens as long as the sanction imposed is to force the employer out of business by suspending its business permit – what we could call the “ultimate sanction.” This interpretation is at odds with the plain language of the express pre-emption provision, which is concerned with state and local municipalities creating civil and criminal sanctions against employers. It would not make sense for Congress in limiting the state's authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty. Such an interpretation renders the express preemption clause nearly meaningless.

In addition to being counterintuitive to the plain language of the provision, Hazleton's interpretation is contrary to its legislative history. In House Report No. 99-682(I), the United States Congress provides its interpretation of the type of “licensing” permitted under the statute. The “licensing” that the statute discusses refers to revoking a local license for a violation of the federal IRCA sanction provisions, as opposed to revoking a business license for violation of local laws.

The Report authored by the House Committee on the Judiciary states:

The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or “fitness to do business laws,” such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. No. 99-682(I) at 5662.

Therefore, the express pre-emption clause applies generally, except for state or local laws dealing with “suspension, revocation or refusal to reissue a license” to an entity found to have violated the sanction provisions of IRCA.

In the instant case, Hazleton suspends the business permit of those who violate its Ordinance, not

those who violate IRCA.⁴² Thus, the licensing exception to State and local pre-emption is not applicable.

The other express pre-emption exception is for “fitness to do business laws” such as state farm labor contractor laws or forestry laws. 8 U.S.C. § 1324a(h)(2). Hazleton’s ordinances are not “fitness to do business laws such as state farm labor contractor laws or forestry laws.” Fitness to do business laws generally deal with a person’s character as it relates to his or her ability to be engaged in a certain business activity. An example of such a law is the California statute describing the prerequisites for issuance or renewal of a farm labor contractor license. CAL. LABOR CODE § 1684 (West 2006). This statute requires that those seeking such a license must, *inter alia*: provide a statement that they possess the character, competency and responsibility to conduct the operations of the business; provide a bond based upon the amount of their payroll; take part in certain training; and not be found in violation of certain laws and regulations.⁴³ *Id.* By way of comparison, IIRA is aimed at preventing employers from hiring undocumented aliens.

⁴² As explained more fully below, the Hazleton Ordinance differs significantly from IRCA.

⁴³ A person must also be registered as a farm labor contractor pursuant to the federal Migrant and Seasonal Agricultural Worker Project Act (“MSAWPA”, 29 U.S.C. 1801 *et seq.*) in order to obtain a license under the California law. For registration under the MSAWPA, a person must not violate IRCA. 29 U.S.C. § 1813(a)(6).

Thus, they are not fitness to do business laws. Therefore, this exception to pre-emption does not apply.

As the exceptions to pre-emption do not apply, IRCA expressly preempts the employment provisions of IIRA.

Additionally, IIRA provides more than the sanction of business permit suspension. It creates a cause of action for discharged employees. IIRA makes it an “unfair business practice” for an employer to discharge a worker who is not “unlawful” if, at the time, it employs an unlawful worker. (IIRA § 4.E.1). It provides that such a discharged worker may commence a private cause of action against the business and seek treble damages, attorney’s fees and costs. (IIRA § 4.E.2(a) and (b)). Without providing any cogent analysis, defendant asserts that this sanction is similar to licensing, and therefore, is not pre-empted. We are unconvinced. This sanction certainly falls within the express pre-emption clause. It does not involve licensing or anything similar to licensing.

For all of the above reasons, we find that IRCA’s express preemption provision applies to IIRA’s employment provisions. Thus, the Ordinance’s employment provisions violate the Supremacy Clause of the United States Constitution.

b. Implied pre-emption

Although we find IIRA is expressly preempted, for purposes of completeness we will also discuss

implied pre-emption. Even if Congress places an express pre-emption clause in a statute, implied pre-emption may still be applicable. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288-89, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995). Plaintiffs allege that IIRA unconstitutionally conflicts with federal immigration law. Implied pre-emption can be found where the scope of the federal law at issue “indicates that Congress intended federal law to occupy the field exclusively” or where state or local laws conflict with federal laws. *Id.* at 287. Implied pre-emption thus includes two separate concepts, field preemption and conflict preemption. We will discuss each.

i. Field pre-emption

Field pre-emption occurs where Congress has occupied a given subject area to the preclusion of State or local laws. Where field preemption is present “the subject matter of the federal and local laws is such that the two laws or regulatory schemes must inherently either conflict or be duplicative”. That is, under this test it is impossible to have local regulation in the subject area that does not conflict with or duplicate federal regulation. *Rogers v. Larson*, 563 F.2d 617, 621, 14 V.I. 90 (3d Cir. 1977). Field preemption exists where the federal regulatory scheme is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947). Field pre-emption is present where 1) “the pervasiveness of the

federal regulation precludes supplementation by the States”; 2) “the federal interest in the field [sic] is sufficiently dominant” or 3) “the object sought to be obtained by the federal law and the character of obligations imposed by it reveal the same purpose.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988).

In the instant case, the first two of these situations are met, and we shall discuss them separately.

aa. Federal interest in the field

The first factor we will consider is the dominance of the federal interest in the field of immigration. The history of federal regulation of immigration is one of the creation [sic] of an intricate and complex bureaucracy that restricted who could immigrate to the United States and under what terms. Those immigration regulations have also come to define the conditions under which aliens can find employment in the country. The creation of this complex federal bureaucracy not only altered the role of the federal government in relation to immigration. It also transformed the status of immigrants in American society. A foreign-born person in the United States in 1870 had a presumptively legal status [sic]; no careful legal inquiry was required to determine whether that person had a right to reside in the country. By 1990, however, determining whether a foreign-born person enjoyed a legal right to remain in the United States

demanded a detailed legal examination that involved numerous federal status [sic], several adjudicatory bodies, and a number of appeals and exceptions. More than one hundred years of federal regulation have made the federal supremacy over immigration an intricate affair. We provide here a general summary of nature of federal immigration regulation since the first such regulation appeared at the end of the nineteenth century. For a more detailed examination of the history of federal immigration regulation, see the appendix to this decision.

The federal government possesses an especially strong interest in immigration matters. The United States Constitution provides that Congress shall have the power “[t]o establish an uniform Rule of Naturalization[.]” U.S. CONST. art. I, sect. 8, cl. 4. Thus, “[t]he power to regulate immigration –an attribute of sovereignty essential to the preservation of any nation – has been entrusted by the Constitution to the political branches of the Federal Government.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). The *Valenzuela-Bernal* Court states that “[o]ne cannot discount the importance of the Federal Government’s role in the regulation of immigration.” *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976)) (“For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government”); *Galvan v. Press*, 347 U.S. 522,

531, 74 S. Ct. 737, 98 L. Ed. 911(1954) (“that the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government”).

Conversely, the individual states, or municipalities located in those states, do not have a strong interest in immigration. The Supreme Court has explained that

“[t]he States enjoy no power with respect to the classification of aliens”. *See Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). This power is “committed to the political branches of the Federal Government.” *Mathews [v. Diaz]*, 426 U.S. [67], at 81, 96 S.Ct. 1883, 48 L.Ed.2d 478 [1976]. Although it is “a routine and normally legitimate part” of the business of the Federal Government to classify on the basis of alien status, *id.*, at 85, 96 S.Ct., at 1894, and to “take into account the character of the relationship between the alien and this country,” *id.*, at 80, 96 S.Ct., at 1891, only rarely are such matters relevant to legislation by a State. *See Id.*, at 84-85, 96 S.Ct., at 1893-1894; *Nyquist v. Mauclet*, 432 U.S. 1, 7, n.8, 97 S.Ct. 2120, 2124, n.8, 53 L.Ed.2d 63 (1977).

Plyler v. Doe, 457 U.S. 202, 225, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

Bearing in mind the interests of the local government versus the federal government in the areas of immigration, we proceed to our analysis of whether the federal government has pervasively regulated this field.⁴⁴

⁴⁴ Both Hazleton's mayor and city council president acknowledged during the trial that the federal government has the power to address the immigration problem but they also expressed the opinion that the federal government is not adequately addressing the issue. (N.T. 3/14/07 at 197-98; N.T. 3/13/07 at 180-81, 195-96). A federal program exists that creates a law enforcement partnership between the Department of Homeland Security, Bureau of Immigration and Customs Enforcement and local law enforcement agencies. (P-83, HAZ 00167). The program allows local law enforcement officers to work in conjunction with U.S. Immigration and Customs Enforcement Officers and assist the federal government with processing the deportation of criminal aliens. (*Id.*, N.T. 3/20/07 at 32). It provides for the federal government to enter into "agreements with state and local enforcement agencies, permitting designated officers to perform immigration law enforcement functions, pursuant to a Memorandum of Understanding (MOU), provided that the local law enforcement officers receive appropriate training and function under the supervision of sworn U.S. Immigration and Customs Enforcement (ICE) Officers." (P-183 at HAZ 00167). Hazleton's police chief did not inquire into this program until after the instant ordinances were passed. (P-83, at HAZ 00168). The police department has since applied for the program but has not yet followed through on the application as police chief believes the benefits would not outweigh the costs. (N.T. 3/21/07 at 35-36). The police chief sees very little benefit because the ICE has already been "very responsive" to their requests regarding criminal aliens. (*Id.* at 36).

bb. Pervasiveness of regulations

The second factor we consider is the pervasiveness of the federal regulations. *Schneidewind*, 485 U.S. at 300. Congress has occupied the field of employment of unauthorized aliens with IRCA. The Supreme Court has noted that IRCA is “a **comprehensive scheme** prohibiting the employment of illegal aliens in the United States.” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S. Ct. 1275, 1282, 152 L. Ed. 2d 271 (2002) (emphasis added). The Supreme Court has explained IRCA as follows:

As we have previously noted, IRCA “forcefully” made combating the employment of illegal aliens central to “[t]he policy of immigration law.” *INS v. National Center for Immigrants’ Rights, Inc.*, 502 U.S. 183, 194, 112 S. Ct. 551, 116 L. Ed. 2d 546 and n.8 (1991). It did so by establishing an extensive “employment verification system,” § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3). This verification system is critical to the IRCA regime. To enforce it, IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. § 1324a(b). If an alien applicant is unable to present the

required documentation, the unauthorized alien cannot be hired. § 1324a(a)(1).

Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147-48, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002) (footnote omitted).

IRCA occupies the field to the exclusion of State or local laws regarding employers hiring, employing, recruiting or referring for a fee for employment unauthorized aliens. Congress has indicated that one of the central features of federal immigration policy is controlling the employment of unauthorized workers. *Id.* IRCA provides for the prohibition of employing unauthorized workers and explains the manner in which an employer may be found liable for violating the statute and also how the employer can seek review of adverse decisions. *See generally*, 8 U.S.C. § 1324a(e). It provides for various penalties. 8 U.S.C. § 1324a(e)(5) (providing for civil fines); 8 U.S.C. § 1324a(f) (providing a criminal penalty); 8 U.S.C. § 1324c (providing penalties for document fraud). IRCA also contains a section that prohibits unfair immigration-related employment practices. 8 U.S.C. § 1324b.

Thus, IRCA is a comprehensive scheme. It leaves no room for state regulation. As explained more fully below, where we discuss conflict preemption, any additions added by local governments would be either in conflict with the law or a duplication of its terms – the very definition of field pre-emption.

Accordingly, we conclude that the Ordinance as it applies to employers is field pre-empted. Immigration is a national issue. The United States Congress has provided complete and thorough regulations with regard to the employment of unauthorized aliens including anti-immigration discrimination provisions. Allowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives.

The case that defendant primarily relies upon as controlling precedent is *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 933, 47 L. Ed. 2d 43 (1976). *DeCanas* addressed a California statute that provided “(n)o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.” *Id.* at 352 quoting California Labor Code Ann. § 2805(a). A trial court in California found that federal law pre-empted the California statute. *Id.* at 353. The California Court of Appeal found the statute to be an attempt to regulate the conditions for admission of foreign nationals. *Id.* Congress has exclusive authority over immigration and naturalization, thus, the statute was preempted according to the California court. *Id.* The Supreme Court of California denied review, and the United States Supreme Court granted *certiorari*. *Id.* at 354.

The Supreme Court disagreed with the California courts. It concluded that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.” *Id.* at 354. The Court explained, however,

that just because a statute touches upon immigration, does not make it an impermissible regulation of immigration. Not “every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted.” *Id.* at 355. A “regulation of immigration . . . is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *Id.*⁴⁵

The Court proceeded to discuss field pre-emption. With regard to field pre-emption, the Court reviewed the Immigration and Naturalization Act (“INA”) and found its central concern is “with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.” *Id.* at 359. The Court noted that although the statute provided a comprehensive scheme for the regulation of immigration and naturalization “without more” it could not conclude that the employment of illegal aliens was within the “central aim” of the law. *Id.* The Court only found a peripheral concern with the employment of illegal entrants in the INA. *Id.* at 360. This peripheral concern was evidenced in a proviso to one of the statute’s sections that indicated

⁴⁵ Plaintiffs argue that the instant ordinances are impermissible regulations of immigration. Based upon this definition of “regulation of immigration” 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.

employment of an illegal entrant was not harboring. *Id.* Thus, field pre-emption with regard to the employment of illegal aliens was inapplicable.⁴⁶

Since, *DeCanas*, however, Congress has passed IRCA. Instead of employment being only addressed in a proviso to one section of the INA, a complete statutory scheme has now been enacted that addresses the employment of unauthorized workers. Therefore, defendant's reliance on *DeCanas* is misplaced.⁴⁷

⁴⁶ The Court then reviewed conflict pre-emption. It concluded that the record was not sufficiently complete to provide a conflict-preemption review and remanded the case to the California court for this determination. *DeCanas*, 424 U.S. at 363.

⁴⁷ Defendant also relies on *Incalza v. Fendi North America, Inc.*, 479 F.3d 1005 (9th Cir. 2007) to support its position that pre-emption is applicable. This case does not support the defendant's position. *Incalza* holds that it is not a conflict with IRCA for an employer to place an employee on unpaid leave while that employee's work authorization problems are remedied. *Id.* 1010-11.

The court only examined conflict pre-emption and did not discuss field pre-emption. Defendant reasons that: "If Plaintiff's sweeping field preemption theory were correct, the *Incalza* Court would have had to strike down the state law at issue, as it would have constituted impermissible state regulation in a field occupied by Congress." (Doc. 219, Def.'s Br. at 83-84). We disagree. The court simply did not decide the field preemption issue. In fact, it noted that the parties did not argue the issue of field pre-emption, and conflict pre-emption was the only type of preemption at issue. *Id.* at 1010, n.2. Defendant asserts that *Incalza* is "yet another example of a recent court holding recognizing that a state or local law designed to discourage illegal immigration is not preempted." *Id.* at 84. Defendant's interpretation of *Incalza* is incorrect. The ruling can more accurately be

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As set forth in detail above, Congress has in fact enacted a comprehensive legislative scheme with regard to the employment of unauthorized aliens and occupies the field to the exclusion of state law. See *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999) (finding implied field pre-emption with regard to air safety standards as the Federal Aviation Act and other federal regulations establish complete and thorough safety standards for interstate and international air transportation).⁴⁸

seen as providing more rights to aliens in that it holds that immediate termination is not required under IRCA when an alien is found to be unauthorized. Instead, an employee with a work authorization problem may be placed on unpaid leave until that issue is resolved.

⁴⁸ Defendant asserts that state courts have found IRCA does not preempt state laws. In support of this position defendant cites *Safeharbor Employer Servs. I, Inc. v. Cinto Velazquez*, 860 So. 2d 984, 986 (Fl. Ct. App. 2003). Defendant's reliance on *Safeharbor* is unconvincing. In that case, the District Court of Appeal of Florida held that the Florida Workers' Compensation Act allows benefits to illegal aliens, and IRCA does not preempt the award of such benefits. *Id.* at 986. *Safeharbor* does not address the issue of whether a state or municipality is pre-empted from enacting legislation addressing the issue of employment of unauthorized workers. Workers' compensation laws such as those addressed in *Safeharbor* deal with compensating workers injured on the job, not the hiring and employment of those aliens. See also, *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219 (2d Cir. 2006) (finding that federal law did not preempt New York law that allowed injured undocumented workers to recover compensatory damages for lost earnings); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 (Minn. 2003) (explaining that IRCA does not pre-empt state workers' compensation laws as it is not aimed at impairing existing state labor

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ii. Conflict pre-emption

The final form of pre-emption is conflict pre-emption.⁴⁹ Conflict preemption exists where either (1) the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” or (2) it is “impossible for a . . . party to comply with both state and federal law.” *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 899, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000).

IIRA and IRCA have similar purposes in that both address the employment of unauthorized aliens. For example, IRCA makes it unlawful “to hire, or to recruit or refer for a fee for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment” or to hire for employment an individual without first complying with the act’s verification requirements. 8 U.S.C. § 1324a(a)(1).

Likewise, IIRA provides: “It is unlawful for any business entity to recruit, hire for employment, or

protections). Once again, however, defendant has cited a case that provides rights to illegal aliens, which is inconsistent with its overall theme that such individuals have no rights.

⁴⁹ The Supreme Court has explained that field pre-emption and conflict pre-emption are not “rigidly distinct.” “Indeed, field pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation.” *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990).

continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City [of Hazleton].” (IIRA § 4.A.)

Although the federal and local laws have a similar goal, the means to reach that goal are different. Under federal law, to establish that they are not hiring unauthorized workers, employers can utilize the I-9 Employment Eligibility Verification Form. 8 C.F.R. § 274a.2(a); *Getahun v. Office of Chief Administrative Hearing Officer*, 124 F.3d 591, 596 (3d Cir. 1997). In addition to completing this form prospective employees must present documents to establish both their identity and their employment eligibility.⁵⁰ The employer must examine these documents to determine if they reasonably appear on their face to be genuine. 8 U.S.C. § 1324a(b)(1)(A)(ii).

Under the Hazleton Ordinance, an employer must collect from the employee “identification papers” and provide them to the Hazleton Code Enforcement

⁵⁰ Such documents include, *inter alia*: 1) a United States passport; 2) alien registration receipt card; 3) an unexpired foreign passport; and 4) an unexpired employment authorization document. 8 C.F.R. § 274a.2(b)(1)(v)(A). *See also* 8 U.S.C. § 1324a(b)(1)(c). Additionally, the potential employees may establish their identities with, *inter alia*, 1) a driver’s license; 2) a photographic school identification card; 3) a voter’s registration card; and 4) a U.S. military card or draft record. 8 C.F.R. § 274a.2(b)(1)(v)(B). *See also* 8 U.S.C. § 1324a(b)(1)(D).

Office.⁵¹ The Code Enforcement Office then verifies with the federal government whether the employee is an unauthorized worker. (IIRA § 4.B.(3)). The primary conflict in this area is that under federal law, the employer has the responsibility to review the documents, and in the Hazleton Ordinance, the employer is required to present the documents to the Code Enforcement Office, which contacts the federal government to determine the status of the worker. The Hazleton Ordinance, therefore, supplements the requirements of federal law.

IIRA also conflicts with federal law in that under federal law, employers need not verify the immigrant status of certain categories of workers. For example, casual domestic workers and independent contractors are not covered by the federal requirements. 8 C.F.R. § 2741 a.1. IIRA contains no such exclusions.

IRCA prohibits employers from *knowingly* hiring or *knowingly* continuing to employ aliens who are unauthorized to work in America. *See* 8 U.S.C. § 1324a(a)(1)(A). Initially plaintiffs pointed out that IIRA does not require the element of knowledge. (IIRA § 4.A.). A last minute amendment during the trial of this matter added the element of knowledge to section 4.A. Nonetheless, IIRA still provides for strict liability, without the element of knowledge, with regard to the civil cause of action that it creates. *See*

⁵¹ IIRA does not specify which “identity documents” are required.

IIRA § 4.E. The federal IRCA statute does not create such a cause of action.

IIRA also conflicts with IRCA in its treatment of the Basic Pilot Program. “The Basic Pilot Program is a voluntary, experimental program created by Congress to permit employers to electronically verify workers’ employment eligibility with the U.S. Dep. [sic] Of Homeland Security and the Social Security Administration.” Note following 8 U.S.C. § 1324a. Under federal law, participation in the Basic Pilot Program is not mandatory. Under IIRA, participation in the Basic Pilot Program is at times mandatory. *See* IIRA § 4.C. (providing that all Hazleton city agencies must participate in the Basic Pilot Program); § 4.D. (requiring that all businesses that seek a City contract or grant must participate in the Basic Pilot Program).

Another conflict exists in the time frames utilized by each enactment. Under IRCA, an employee can contest a nonconformance (that is an initial finding that he is unauthorized to work) by the Basic Pilot Program within eight (8) days. 62 C.F.R. 48309(IV)(B)(2)(a). The Social Security Administration and federal immigration officials have ten (10) federal work days to respond. (*Id.*) The employer may not terminate the employee or take other adverse action against him based upon his employment eligibility status during this time period. (*Id.*). Under IIRA, no appeal right is provided to the employee, and in fact, the employer must terminate the employee within three (3) business days. (IIRA § 4.B.3). Thus, in direct conflict with IRCA, Hazleton seeks to force

an employer to terminate an employee where under federal law the employer is prohibited from terminating that employee. Additionally, under the Hazleton Ordinance, the only appeal right appears to be held by the employer who may toll the three (3) day termination period. (IIRA § 7.C.(2)). Without providing any appeal rights to the employee, IIRA is in conflict with the federal law.

Thus, this case is analogous to *Rogers v. Larson*, 563 F.2d 617, 14 V.I. 90 (3d Cir. 1977). *Rogers* dealt with a Virgin Islands law relating to the admission and employment of nonimmigrant aliens. The law called for the termination of a nonimmigrant's employment if a qualified resident worker was available for the position. *Id.* at 619. Although federal law also addressed the employment of nonimmigrant aliens, the federal law provided more protection for the nonimmigrant aliens than the Virgin Islands law did. Nonimmigrant aliens challenged the law as federally preempted. The court noted that both the federal laws and the Virgin Island law had the same purposes of "assuring an adequate labor force . . . and to protect the jobs of citizens[.]" *Id.* at 626. However, in order to serve both these goals, "any statutory scheme . . . must inevitably strike a balance between the two goals." *Id.* In that case, as the Virgin Islands and the United States had struck the balance between the goals differently, the Virgin Islands' law amounted to "an obstacle to the accomplishment and execution of the full purposes and objectives of the" federal law. *Id.*

Likewise in the instant case, although it appears that the goals of the two laws may be similar, a different balance between the rights of businesses and workers and the goal of preventing illegal employment is struck and IIRA ultimately ignores one of IRCA's main objectives. A bit of a background on immigration enforcement is helpful to understand this issue.

Under federal law there are two types of immigration enforcement: border enforcement, which is keeping unauthorized persons from entering the country; and interior enforcement, which is distinguishing between legal and undocumented immigrants already in the country and removing the latter. (N.T. 3/15/07 at 14). In interior enforcement, officials must strike a balance between finding and removing undocumented immigrants without accidentally removing immigrants and legal citizens, all without imposing too much of a burden on employers and workers. (*Id.* at 15). Too stringent of an enforcement system will result in the wrongful removal of United States citizens and legal immigrants. (*Id.*) United States foreign relations is affected by the manner in which the balance is struck. Excessive enforcement jeopardizes our alliances and cooperation with regard to matters such as immigration enforcement, drug interdiction and counter-terrorism investigations. (*Id.* at 16-17). Accordingly, the United States political system places the responsibility for striking this balance with the United States Congress and the executive branch. (*Id.* at 15). In discussing

the ordinances in the instant case, city council and the mayor did not consider the implications of the ordinances on foreign policy. (N.T. 3/14/07 at 87-89). Their only concern, as might be expected, was for Hazleton. (*Id.*)

Thus, IRCA and IIRA share a similar purpose: to prevent the employment of persons not authorized to work in the United State [sic] while not overburdening the employer in determining whether an employee or perspective employee is an authorized worker. The two laws, however, strike a different balance between these interests. The laws, therefore, conflict.

IRCA also seeks to prevent discrimination against legally admitted immigrants. The law makes it an unfair immigration-related employment practice to discriminate against a person with respect to hiring, recruitment or referral for a fee because of a person's national origin or because of an individual's citizenship status. 8 U.S.C. § 1324b. IIRA has no anti-discriminatory provisions, and this omission represents another conflict.

This case is also analogous to *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941). In *Hines*, the Commonwealth of Pennsylvania enacted an Alien Registration Act, which required aliens 18 years of age or older to register once a year, provide certain information, pay a registration fee and receive an alien identification card that they had to carry at all times. *Id.* at 56. The law further required aliens to present the identification card

whenever demanded by a police officer or agent of the Department of Labor and Industry, and present the card before obtaining a driver's license or buying an automobile. *Id.* Violators of the act were subject to possible fines and imprisonment. *Id.* at 60. The federal government also had in effect an alien registration statute. This law required a single registration of aliens fourteen (14) years of age and older, certain information and fingerprinting. *Id.* at 60. It also provided for the secrecy of the federal files, and it did not require the aliens to carry a registration card or require them to exhibit it to the police or others. *Id.* 60-61. Violators of the act were subject to possible fines and imprisonment. *Id.* at 61.

The Pennsylvania law was challenged as precluded by the federal alien registration scheme. The Supreme Court held: “[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement the federal law, or enforce additional auxiliary regulations.” *Id.* at 66. In finding that the law was unconstitutional, the Court noted: “And it is . . . of importance that this legislation deals with the rights, liberties and personal freedoms of human beings[.]” *Id.* at 68.

In support of its position that its Alien Registration Act was constitutional, Pennsylvania cited numerous cases where state legislation was upheld

although it applied to aliens only. *Id.* 69 n.23. The Court noted, however, that in these cases Congress had not passed legislation on the subject of the various acts. *Id.*

In *Hines* as well as the instant case, however, Congress passed legislation aimed at the very issue addressed by the State or local law. Specifically, in this case, the federal government in exercising its superior authority in the field of immigration has enacted a complete scheme of regulation on the subject on the employment of unauthorized aliens. Hazleton cannot conflict, interfere, curtail or complement this law. As set forth above, Hazleton's Ordinance does conflict, interfere with and complement IRCA. It is therefore conflict pre-empted.

Defendant seems to argue that the law is constitutional because it is aimed at illegal aliens who have no right to be in the United States. Defendant's position fails to acknowledge that the law will affect more than illegal aliens. It will affect every employer, every employee who is challenged as an illegal alien and every prospective employee especially those who look or act as if they are foreign. As noted above, the Ordinance, unlike its superior federal counterpart, contains no anti-discrimination provisions.

The United States Supreme Court has noted: "Opposition to laws permitting invasion of the personal liberties of law-abiding individuals, or singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country. Hostility to

such legislation in America stems back to our colonial history[.]” *Id.* at 70. The Court further noted: “As early as 1641, in the Massachusetts ‘Body of Liberties’, we find the statement that ‘Every person within this Jurisdiction, whether Inhabitant or foreigner, shall enjoy the same justice and law that is generally for the plantation * * * .’” *Id.* at 71 n.27.

In conclusion, the employment provisions of IIRA differ from and conflict with IRCA. It is thus in violation of the Supremacy Clause of the United States Constitution.

2. Tenancy provisions

The Hazleton ordinances contain two sets of provisions affecting tenancy in the city. The first is a “harboring” provision of the IIRA that prohibits the housing of certain aliens. (IIRA §§ 5 and 7.B.) The second is the Tenant Registration Ordinance, (hereinafter “RO”), which requires all occupants of rental units to obtain an occupancy permit.⁵² In order to

⁵² The official title of the ordinance is: “ORDINANCE 2006-13, ESTABLISHING A REGISTRATION PROGRAM FOR RESIDENTIAL RENTAL PROPERTIES; REQUIRING ALL OWNERS OF RESIDENTIAL RENTAL PROPERTIES TO DESIGNATE AN AGENT FOR SERVICE OF PROCESS; AND PRESCRIBING DUTIES OF OWNERS, AGENTS AND OCCUPANTS; DIRECTING THE DESIGNATION OF AGENTS; ESTABLISHING FEES FOR THE COSTS ASSOCIATED WITH THE REGISTRATION OF RENTAL PROPERTY; AND PRESCRIBING PENALTIES FOR VIOLATIONS.” (EX. A, DOC. 82-2).

receive such a permit, an applicant must provide “proof of legal citizenship and/or residency.” (RO § 7.b.1.g). We will discuss the provisions of these two laws separately and then analyze the pre-emption arguments.

a. Housing illegal aliens

Plaintiffs assert that the “harboring” portion of IIRA is conflict pre-empted because it is directly at odds with the federal immigration system. It prohibits landlords from “harboring” “illegal aliens.” (IIRA § 5.A.) “Harboring” is defined as letting, leasing or renting a dwelling unit to an illegal alien or permitting the occupancy of a dwelling unit by an “illegal alien” knowingly or in reckless disregard of the fact that the alien has come to, entered or remains in the United States in violation of the law. (*Id.*).

Generally, IIRA provides a complaint procedure where a Hazleton official, business entity or resident can file a written complaint that a landlord is harboring an “illegal alien.” (IIRA § 5.B.(1)). The Code Enforcement Office next obtains “identity data” from the owner regarding the tenant. (IIRA § 5.B.(3)). The Code Enforcement Office then consults with the federal government to determine the tenant’s immigration status. If the verification reveals that the owner is in violation of the harboring provisions, he must

correct the violation or face fines and suspension of his rental license. (IIRA § 5.B.(4) & § 5.B.(8)).⁵³

b. Tenant Registration Ordinance

The second housing provision at issue, RO, requires, *inter alia*, that each person who seeks to occupy a rental dwelling obtain an “occupancy permit” from Hazleton.⁵⁴ In order to obtain a permit, a potential tenant must supply to the Code Enforcement Office “proper identification showing proof of legal citizenship and/or residency.” (RO § 7.b.1.g). A landlord is prohibited from allowing occupancy of a rental unit unless all the occupants have obtained an occupancy permit. (RO § 7.b.).

If a landlord allows a tenant who does not have an occupancy permit to occupy a rental unit he faces a \$1,000.00 fine “for each Occupant that does not have an occupancy permit and \$100 per Occupant per day for each day that the Owner or Agent continues to allow each such Occupant to occupy the Rental Unit without an occupancy permit after Owner or Agent is given notice of such violation[.]” (RO § 10.b.).

If a tenant has an occupancy permit, but he allows other occupants to reside at the premises who

⁵³ The provisions of the harboring regulations are addressed more particularly below with respect to the due process issues.

⁵⁴ The permit costs ten dollars, but the fee is waived for those over age 65. (RO § 7.b.).

do not have permits, he is in violation of the ordinance and faces the same \$1,000.00/\$100 per occupant per day fine.⁵⁵ (RO § 10.b.).

Plaintiffs argue that the housing provisions of IIRA and RO are conflict pre-empted. As set forth above, a local ordinance is conflict pre-empted where either (1) the local ordinance “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” or (2) it is not possible to comply with both the federal and state law. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 899, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000).

Plaintiffs assert that the IIRA and RO are in direct conflict with federal law because they are based upon the assumption that: 1) the federal government seeks the removal of all aliens who lack legal status and 2) “a conclusive determination by the federal government that an individual may not remain in the United States can somehow be obtained outside of a formal removal hearing.” (Doc. 106, Pl. Br. at 11). After a careful review, we agree.

Initially, we note that it is completely within the discretion of the federal officials to remove persons

⁵⁵ The city passed Ordinance 2006-35 subsequent to passing this ordinance. Ordinance 2006-35 has the same title as this “Tenant Registration” ordinance, but, it does not contain the occupancy permit requirements. Ordinance 2006-35 evidently did not repeal this ordinance, however, and was meant only to fill the gap with regard to registering residential rental properties while the “Tenant Registration” is challenged.

from the country who are removable.⁵⁶ Indeed, the federal government permits several categories of persons who may not be technically lawfully present in the United States to work and presumably live here. For example, the following can receive permission from the federal government to work in the United States: 1) aliens who have completed an application for asylum or withholding of removal; 2) aliens who have filed an application for adjustment of status to lawful permanent resident; 3) aliens who have filed an application for suspension of deportation; 4) aliens paroled into the United States temporarily for emergency reasons or reasons deemed strictly in the public interest; 5) aliens who are granted deferred action “an act of administrative convenience to the government which gives some cases lower priority[.]” 8 C.F.R. § 274a.12(c) ¶¶ 8-11, 14. Additionally, aliens who have a final order of deportation against them but are released on an order of supervision may obtain permission to work. *Id.* ¶ 18; *see also* 8 C.F.R. § 274a.12(a) ¶¶ 11-13; 18-20, 22, 24) (listing more categories of aliens who may be violating immigration laws but may nonetheless obtain permission to work in the United States by the federal government). In addition, aliens who have final orders of removal against them may be ordered released from detention

⁵⁶ In fact at trial, Stephen Yale-Loehr, an expert in immigration law, testified that the federal government frequently exercises its discretion not to try to remove persons from the country even though they may lack lawful immigration status. (N.T. 3/19/2007 at 114, 127).

by the courts if there is no likelihood of their removal in the foreseeable future. *See Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). Although these aliens are permitted to work and implicitly to remain in the United States, they would be denied housing in Hazleton under the IIRA and RO. The ordinances thus conflict with federal law.

Furthermore, changing status from authorized to unauthorized is complex. For example, some individuals can affirmatively apply for regularization of status. In other instances, regularization of status is only available after an individual has been placed in removal proceedings by the federal government (even if the operative facts justifying relief predate the commencement of the removal hearing). (N.T. 3/19/07 at 118-121). It may take months or years for an applicant to adjust status, obtain relief or otherwise regularize status. (N.T. 3/19.97 at 128-129). Submitting an application does not change an individual's immigration status, even if the application is bona fide and will ultimately be approved. (N.T. 3/19/07 at 116-117). A person who is proceeding through the procedure to adjust his immigration status but who currently lacks immigration status frequently will not have any documents to indicate whether he has a valid claim to remain in the country.⁵⁷ (N.T. 3/19/07 at 121).

⁵⁷ For example, during the trial testimony indicated that during the 1990s Congress enacted an adjustment of immigration
(Continued on following page)

The ordinances also conflict with federal law in that they assume that the federal government seeks the removal of all undocumented aliens. As the Supreme Court has noted: “An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen.” *See, e.g.*, 8 U.S.C. §§ 1252, 1253(h), 1254 (1976 ed. and Supp.IV). *Plyler*, 457 U.S. at 226. The United States government, however, determines whether to remove an alien only through formal procedures set forth in the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* and related regulations. Furthermore, the federal process provides procedural safeguards that include administrative appeal and judicial review. *See* 8 U.S.C. § 1229a; 8 C.F.R. 240, 1240.

Even if an alien is deemed removable after removal proceedings, they may nonetheless be allowed to stay in the United States. For example, relief from removal may be obtained by spouses and other relatives of United States citizens, 8 U.S.C. § 1154; 8

status referred to as “245(I).” This statute allowed certain persons in the United States illegally to pay a \$1,000.00 penalty and then their status would be adjusted and they would receive a green card. Hundreds of thousands of individuals applied for relief under this enactment before it expired on April 30, 2001, but they have not yet all received their green cards. Technically, these people are removable from the country although once their applications are processed they will have a green card. N.T. 3/19/07 116-117. Immigration officials use their discretion not to remove these individuals with green card applications pending. N.T. 3/19/07 at 117. These individuals would not be allowed to live in Hazleton under its ordinances.

U.S.C. § 1229b; victims of domestic violence, 8 U.S.C. § 1229b(b)(2); and those seeking protection from persecution or torture under the Convention Against Torture, 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 208.16-18.

Additionally, under 8 U.S.C. 1229b, the United States Attorney General

may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b.

Hence, the federal immigration rules and the decision whether an alien should be removed are very complex. More than resorting to the Basic Pilot Program or the Systematic Alien Verification for Entitlements (“SAVE”)⁵⁸ is necessary to determine if

⁵⁸ SAVE “is an existing federal eligibility system used to verify status for various federal-state cooperative programs such as the Aid to Families with Dependent Children (“AFDC”), Food Stamps, Medicaid and Unemployment Compensation programs under which eligibility is dependent on lawful immigration status. See 42 U.S.C. § 1320b-7(b)(1) and 45 C.F.R. § 233.50

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federal government seeks the removal of an individual from the United States.

As Supreme Court Justice Blackmun noted: “[T]he structure of the immigration statuses makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported.” *Plyler*, 457 U.S. at 236 (Blackmun, J., concurring). Additionally, Supreme Court Justice Lewis F. Powell stated: “Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country.” *Plyler*, 457 U.S. at 241 n.6 (Powell, J., concurring).

Hazleton’s ordinances burden aliens more than federal law by prohibiting them from residing in the city although they may be permitted to remain in the United States. The ordinances are thus in conflict with federal law and pre-empted.

RO is additionally in conflict with federal law because it calls upon the employees of the Hazleton Code Enforcement Office to examine the paperwork of

(AFDC); 42 U.S.C. §§ 1320b-7(b)(2) and 1396b(v)(1) (Medicaid); 7 U.S.C. § 2015(f) and 42 U.S.C. § 1320b-7(b)(4) (Food Stamps).” *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 770 (C.D.Cal. 1995). Defendant’s brief indicates that the United States Bureau of Citizenship and Immigration Services at the Department of Homeland Security confirmed with defendant’s counsel that it intended to use SAVE when responding to verification requests regarding Hazleton tenants. (Doc. 87, Def. Br. At 28-29).

those seeking permits and determine if they are properly in the country. This procedure is in direct conflict with federal law. Immigration status can only be determined by an immigration judge. 8 U.S.C. § 1229a(a)(1) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”). Further, the proceeding before the immigration judge is the “**sole and exclusive procedure** for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.” 8 U.S.C. § 1229a(a)(3) (emphasis added).

Thus, for all the reasons set forth above, the housing provisions of the IIRA and the Tenant Registration Ordinance are preempted by federal law and are unconstitutional.

B. Procedural Due Process

Plaintiffs’ second cause of action asserts that the ordinances at issue violate the procedural protections of the Due Process Clause found in the Fourteenth Amendment of the United States Constitution. (Compl. ¶¶ 132-145). The Due Process Clause prohibits a deprivation of “life, liberty or property” without due process of the law.

Plaintiffs assert that the ordinances at issue impinge on both their property and liberty interests and provide only illusory process. Defendant argues that the plaintiffs have no legitimate interest at stake, and regardless, the ordinances provide sufficient

process. After a careful review, we agree with the plaintiffs. We will address first the interests that are at stake and then examine the process provided by the ordinances. Once again we will address the employment provisions and housing provisions of the ordinances separately.

1. Employment Provisions

a. Protected interest

In order to determine whether the protections of the due process clause apply, we must first determine whether the interests involved are encompassed in the Fourteenth Amendment's protection of liberty or property. *Baraka v. McGreevey*, 481 F.3d 187, 205 (3d Cir. 2007). "‘Liberty’ and ‘property’ are broad and majestic terms. They are among the ‘(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.’" *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646, 69 S. Ct. 1173, 93 L. Ed. 1556 (1949) (Frankfurter J., dissenting) quoted in *The Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). The analysis of the interests asserted in the instant case is not overly complex; the appellate courts have already discussed interests similar to those asserted by the plaintiffs.

The employer plaintiffs, including the members of the Hazleton Hispanic Business Association, possess Fourteenth Amendment property and liberty interests in running their businesses. “[A] business is an established property right entitled to protection under the Fourteenth Amendment.” *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 361 (3d Cir. 1997). Additionally, the individual plaintiffs have an interest in their employment. The United States Supreme Court has explained that “the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). The Court further noted: “While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.” *Id.*

In a case dealing with an Arizona state statute that discriminated against aliens, the Court further noted: “It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.” *Truax v. Raich*, 239 U.S. 33, 41, 36 S. Ct. 7, 60 L. Ed. 131 (1915). These rights are both ‘liberty’ and ‘property’ rights. *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959) cited in *Piecknick*

v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1259 (3d Cir. 1994). Defendant argues that employers have no right to enter into employee contracts with unauthorized workers; therefore, no protected interests are at stake. Defendant's argument is unconvincing. The argument presupposes that the Ordinance will affect only unauthorized workers. Actually, however, the IIRA affects all who are challenged under the law and all employers who have employees challenged.

Regardless, the Due Process Clause of the Fourteenth Amendment applies to all "persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Kamara v. A.G. of the United States*, 420 F.3d 202, 216 (3d Cir. 2005) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001)); see also *Plyler v. Doe*, 457 U.S. 202, 210, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

As significant constitutional due process rights are at issue, the question then becomes whether the Ordinance provides sufficient procedural safeguards to protect these important interests. In other words, we now must determine whether the Ordinance

provides process sufficient to satisfy the Fourteenth Amendment.

b. Process due

“The fundamental requirements of due process are notice and a meaningful opportunity to be heard, but the concept is flexible, calling for procedural protection as dictated by the particular circumstances.” *Harris v. City of Philadelphia*, 47 F.3d 1333, 1338 (3d Cir. 1994 [sic]) (internal quotation marks and citation omitted). “[D]ue process’ is a flexible concept . . . the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur.” *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985).

Accordingly, we must examine the process available under the ordinances to determine whether adequate notice and hearing are provided. With regard to the employment provisions of the Ordinance, enforcement commences with the filing of a complaint alleging that a business entity employs unlawful worker(s) with the Hazleton Code Enforcement Office. (IIRA § 4.B.(1)). A complaint can be filed by “any official, business entity, or City resident.” *Id.* Next, the city determines if the complaint is valid. The Ordinance does not indicate how the validity of a complaint is determined, it merely states that a

complaint alleging a violation based upon national origin, ethnicity, or race is invalid.⁵⁹ Once a complaint is deemed valid, the city obtains “identity information” within three days from the business entity and verifies with the federal government the immigration status of the challenged employee under 8 U.S.C. § 1373(c). (IIRA § 4.B.(3)). The term “identity information” is not defined in the Ordinance.

If the employer fails to provide the identity information within three (3) days, the Code Office must suspend the employer’s business permit. (IIRA § 4.B.3). This suspension is mandatory and it is not dependent upon a finding that an “unlawful worker” has been hired.

⁵⁹ Robert Dougherty, Hazleton’s Director of Planning and Public Works oversees the Code Enforcement Office, which includes the Rental Registration Office. (N.T. 3/16/07 at 39-40). As such, Dougherty is designated to oversee the implementation and enforcement of IIRA. (*Id.* at 48-49). Dougherty indicated that not all complaints will be deemed valid. *Id.* at 72. To be valid, the complaint must be in writing, have an address for the violation and the type of violation. It would have to be signed by the complainant and dated. *Id.* at 99. An investigatory process would be utilized to determine if the complaint was valid. *Id.* at 72, 99. Examples of an investigation include driving by the property and calling the complainant to obtain additional information. *Id.* at 99. He also testified that they would attempt to notify the tenant and employee that a complaint had been lodged. *Id.* at 110. Nothing in the Ordinance requires such notice or explains the investigation that the [sic] Dougherty intends to implement. As we are dealing with a facial challenge to the Ordinance and not an “as applied” challenge, we do not have to take into consideration the testimony of the manner in which the Code Enforcement Office intends to enforce the ordinances.

If the employer fails to provide the identity information, and the challenge to the worker is that he is an unauthorized alien as defined in 8 U.S.C. § 1324a(h)(3), the Code Office must “submit the identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373, the immigration status of such person(s)[.]” 4.B.3. The Ordinance does not provide a procedure for such verification besides reference to 8 U.S.C. § 1373, which does not establish a verification mechanism. It merely requires the Immigration and Naturalization Service to respond to inquiries from federal, state and local government seeking the citizenship or immigration status of individuals.

Once the verification is completed, the Code Office provides the results to the employer. (IIRA § 4.B.3). If the employer is in violation of IIRA, it must correct the violation within three (3) business days. (IIRA § 4.B.4). Such correction includes either a) termination (or attempted termination) of the worker’s employment; b) acquiring from the worker additional information and requesting a secondary or additional verification from the federal government of the worker’s authorization. (IIRA § 7.C). If the employee challenges his termination in a Pennsylvania court, the three (3) day period is tolled. (IIRA § 7.C.(3)).

If the employer fails to correct the violation within the required time frame, the Code Office must suspend the entity’s business permit. (IIRA § 4.B.(4)). If, however, the business had previously used the

federal government's "Basic Pilot Program" to verify the worker's status, the Code Office will not suspend the business's permit. (IIRA § 4.B.(5)).

If a business license is suspended, it can be restored in one business day after a sworn affidavit is provided stating that the violation ended. (IIRA § 4.B.(6)). The affidavit must provide the name, address and other "adequate identifying information" of the unlawful worker. (IIRA § 4.B.(6)(a)). If the appropriate authorities verify that the business entity employed two or more workers who are unlawful due to being "unauthorized aliens" as defined in 8 U.S.C. § 1324a, the business entity also must provide documentation that it has enrolled and will participate in the Basic Pilot Program. (IIRA § 4.B.(6)(b)). Where a business entity violates the Ordinance a second time or subsequent times, its business permit is suspended for twenty days by the Code Office. (IIRA § 4.B.(7)). The sole procedural protection provided to employees or employers under the Ordinance is to file an action "in the Magisterial District Court for the City of Hazleton, subject to the right of appeal to the Luzerne County Court of Common Pleas." (IIRA § 7.(F)).

Now that we have discussed the procedures available under IIRA, we must determine if they provide notice and an opportunity to be heard. We find that they do not.

As set forth above, notice is the cornerstone of due process. IIRA fails to require that anyone provide

notice to an employee when a complaint is filed or at any time during the proceedings. In fact, when a complaint is filed, the employer could merely fire the employee and avoid the hassle of determining the employees immigration status. Nothing in IIRA provides protection to the employee from such action. Thus, it violates the fundamental principle of due process and is unconstitutional.

Additionally, when a complaint is filed, the Code Enforcement Office requires the employer to provide “identity information.”⁶⁰ IIRA does not specify the nature of this information. Therefore, the employers are left not knowing what documents they need for the “hearing.” The employer can request a second or additional verification, however, no such right is provided to the affected employee. Such notice, therefore, is inadequate.

The final level of “hearing” that both the employer and employee may use according to IIRA is resort to the Pennsylvania court system. The Pennsylvania courts, however, do not have the authority to determine an alien’s immigration status. Federal law makes no provision for a state court to make a decision regarding immigration status. Such status can only be determined by an immigration judge. 8 U.S.C.

⁶⁰ Under federal law, when identity information is required, the law sets forth specifically what type of documentation is necessary. *See, e.g.*, 8 U.S.C. § 1324a(b)(1) (setting forth the documents that an employer must examine to verify that an individual is not an authorized alien).

§ 1229a(a)(1) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”). Furthermore, the proceeding before the immigration judge is the “sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.” 8 U.S.C. § 1229a(a)(3).⁶¹

Thus, IIRA attempts to provide procedural protection to those affected by it by resorting to courts that do not have jurisdiction over determinations of immigration status. To refer those affected by IIRA to a court that cannot hear their claim is a violation of due process.

For the above reasons, we find that IIRA violates the due process rights of both the employers and employees and is thus unconstitutional.

⁶¹ We note that for federal proceedings to determine the status of an alien, significantly more rights are provided to the alien. For example, an alien has the right to counsel, the right to a reasonable opportunity to examine the evidence against him, the right to present his own evidence, and the right to cross examine witnesses. 8 U.S.C. § 1229a(b)(4). These protections are considerably different from those provided by the ordinances, which do not even require that an alien be notified when a complaint is filed.

2. Landlord/tenant provisions

a. Protected right

The other group of issues involve landlords and tenants. These individuals, like the employers and employees, possess interests protected by the Due Process Clause. According to the Supreme Court of the United States: “It cannot be disputed that tenants have a property interest in their apartments for the term of their lease.” *Lindsey v. Normet*, 405 U.S. 56, 72, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972) (explaining that a “lease or rental agreement gives [a tenant] the right to peaceful and undisturbed possession of the property.”).⁶² As owners of the property, the landlords also have an interest in it as well as in an interest in the rights to income on the property. *Id.* at 72.

b. Process due

As the landlords and tenants both have Fourteenth Amendment property interests, we must examine the process provided by IIRA to determine if sufficient process is provided.

Like the employment provisions, enforcement of IIRA commences upon the filing of a complaint with

⁶² As Justice William O. Douglas noted: “Modern man’s place of retreat for quiet and solace is the home. Whether rented or owned, it is his sanctuary. Being uprooted and put into the street is a traumatic experience.” *Lindsey v. Normet*, 405 U.S. 56, 82, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972) (Douglas, dissenting in part).

the Hazleton Code Enforcement Office that a landlord is harboring illegal aliens. (IIRA § 5.B.1). A complaint can be filed by “any official, business entity, or resident of the City.” *Id.* If the complaint is considered valid – the Ordinance does not indicate how the validity of a complaint is determined, it merely states that a complaint alleges a violation based upon national origin, ethnicity, or race is invalid – the city obtains identity information from the landlord and verifies with the federal government under 8 U.S.C. sec 1373(c), the immigration status of the person at issue.⁶³ The Code Enforcement Office then informs the landlord of the immigration status of the tenant. (IIRA § 5.B.(3)). If the tenant is an illegal alien, the landlord then has five (5) days to “correct” the violation or his rental license is suspended. (IIRA § 5.B.(4)). Corrections can be made as follows: 1) eviction of the tenant; 2) the landlord may collect additional information from the alien and request a second or additional verification under 8 U.S.C. sec 1373(c); or 3) the landlord may commence action

⁶³ Section 1373 provides:

(c) 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.

against the tenant for recovery or possession of the property. (IIRA § 7.D.).

If unsatisfied with the results of the process provided, either the tenant or landlord may bring an action in the Magisterial District Court for the City of Hazleton, with a right to appeal to the Luzerne County Pennsylvania Court of Common Pleas. (IIRA § 7.F.).

Now that we have discussed the procedures available under the Ordinance, we must determine if they provide notice and an opportunity to be heard. For the same reasons discussed above with regard to the employment provisions, we find that procedures provided in the Ordinance are not sufficient to satisfy the requirements of due process.

First and foremost, the Ordinance does not provide any notice whatsoever to a tenant who is the subject of a challenge. An ordinance which could cause people to lose their residences but provides them no notice before eviction certainly does not meet the requirements of due process.⁶⁴ Thus, the determination can be made without the challenged individual's participation at all.

⁶⁴ The IIRA is silent as to the process the city engages in to obtain "identity data" after a complaint has been filed. Evidently, the Code Enforcement Office obtains the information from the owner of the property and has no dealings at all with the challenged tenant. (IIRA § 5.B.3).

Additionally, the statute that the defendant relies upon for the proposition that the federal government must reply to their inquiry with regard to immigration status, 8 U.S.C. § 1373, does not state the nature of the “identity data” that is needed to verify the tenant’s immigration status. Therefore, the owners are left not knowing what documents they need for the “hearing.” To provide for a hearing for which an interested party cannot adequately prepare is a violation of due process.

The owner/landlord can request a second or additional verification, however, no such right is provided to the affected tenant. (IIRA § 7.D.(2)).

The final level of “hearing” that both the tenant and owner/landlord may use is resort to the Pennsylvania court system – this is actually the first level of review provided to the tenant. However, as set forth more fully above, the Pennsylvania courts do not have the authority to determine an alien’s immigration status. Such status can only be determined by an immigration judge. Once again, the IIRA seeks to provide a remedy in a court that lacks jurisdiction. This procedure does not comport with the requirements of due process.

Because the IIRA does not provide notice to challenged employees or tenants, does not inform the employers and owners/landlords of the types of identity information needed, and provides for judicial review in a court system that lacks jurisdiction, it violates the due process rights of employers, employees,

tenants and owners/landlords. It is therefore unconstitutional.

C. Equal Protection

Plaintiffs' third cause of action claims that IIRA violates the Equal Protection Clause of the Fourteenth Amendment by allowing the City to consider race, ethnicity or national origin in determining whether a complaint under the Ordinance is "valid." (Compl. ¶¶ 146-155). Even though defendant amended IIRA to remove language that plaintiffs argued gave explicit sanction to racial classification, plaintiffs continue to insist that IIRA violates their right to equal protection of the laws. Defendant argues that IIRA implicates neither a fundamental right or a suspect class, and therefore must be judged by the most deferential form of scrutiny. Under this form of scrutiny, defendant contends, IIRA does not violate plaintiffs' right to equal protection.

The Fourteenth Amendment to the United States Constitution declares that a State may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1. When a plaintiff challenges a policy established by the government, the key question becomes the level of scrutiny to apply to that policy. For policies that implicate a fundamental right or use "[s]uspect classifications, such as those based on race, national origin, or alienage" the "most exacting scrutiny" applies. *United States v. Williams*, 124 F.3d 411, 422 (3d Cir. 1997)

(quoting *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988)); see also *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (invalidating a state anti-miscegenation law on equal protection grounds in part because “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”). The United States Supreme Court has called this type of examination “‘strict scrutiny.’” *Gratz [sic] v. Bollinger*, 539 U.S. 306, 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (quoting *Adarand Constructors v. Peña*, 515 U.S. 200, 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)). “This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.” *Id.* Courts use this level of scrutiny “to ‘smoke out’ illegitimate uses of race [or other suspect classifications] by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool.” *Id.* (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)). If, however, no suspect class or fundamental right and no classification based on sex is involved, “the statute must be sustained if it bears a rational relationship to a legitimate state interest.” *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46, 53 (3d Cir. 1985).⁶⁵

⁶⁵ Defendant refers to this level of scrutiny as “minimal scrutiny.” We prefer the term “rational basis” as it derives from
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In their complaint and pre-trial briefing, plaintiffs argued that the City's scheme for enforcing IIRA, where the City responded to complaints from the public about improper hiring or housing of immigrants, violated equal protection rights. This system required the City's Code Enforcement Office to seek identity information from landlords and employers whenever a City resident, official or business entity submitted a "valid" complaint. Ordinance 2006-18 at §§ 4.B.1, 4.B.3. IIRA also declared that "[a] complaint which alleges a violation solely or primarily on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced." *Id.* at § 4.B.2. Plaintiffs contended that this language allowed the City to consider race, ethnicity or national origin in enforcing IIRA, and that the policy therefore implicated a suspect classification. They argued that the City had articulated no compelling state interest for the policy, and that the court must therefore find that IIRA violates Equal Protection.

As set forth above, the City has amended IIRA since the plaintiffs filed their second amended complaint. As presently amended, the Ordinance holds invalid "[a] complaint which alleges a violation on the basis of national origin, ethnicity, or race." In informing the court of this amendment, Hazleton's trial counsel argued that the City had made this change "in an effort to simplify this issue and remove the

the court cases that established the test, better describes the legal standard and does less to imply the outcome of the inquiry.

equal protection challenge” from the case. (N.T. 3/12/07 at 52).⁶⁶ We have already determined that we should evaluate the latest version of the statute, and will do so here. *See supra*, section IC.

Plaintiffs argue that the latest version of IIRA violates equal protection, even though the City removed language that required enforcement on the basis of race, ethnicity or national origin. They have apparently shifted their emphasis from a focus on the language of the policy itself to an inquiry into the defendant’s intent in amending IIRA. This approach requires a slightly different analysis. The equal protection “clause prohibits states from intentionally discriminating between individuals on the basis of race.” *Antonelli v. New Jersey*, 419 F.3d 267, 274 (3d Cir. 2005). “To prove intentional discrimination by a facially neutral policy, a plaintiff must show that the relevant decisionmaker (*e.g.*, a state legislature) adopted the policy at issue ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Pryor v. NCAA*, 288 F.3d 548, 562 (3d Cir. 2002) (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)). Further, “[a] mere awareness

⁶⁶ Hazleton’s counsel declared that the City Council would meet on “Thursday, March 15th, to take out the three words that the Plaintiffs object to and have objected to continuously for page after page in all of their briefs. Those are the words solely or primarily found in Section 4B2 and 5B2 of the ordinance . . . We are doing this to try to remove the issue, to try to accommodate the Plaintiffs.” (N.T. 3/12/07 at 52).

of the consequences of an otherwise neutral policy will not suffice.” *Id.* “Even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.” *Pers. Administrator*, 442 U.S. at 272. A party can demonstrate this “intentional discrimination” by, in relevant part, demonstrating that “a facially neutral law or policy that is applied evenhandedly is motivated by discriminatory intent and has a racially discriminatory impact.” *Antonelli v. New Jersey*, 419 F.3d 267, 274 (3d Cir. 2005).

Plaintiffs point to the testimony of immigration expert Marc Rosenblum, Ph.D., to argue that IIRA will “exacerbate the phenomenon of ‘defensive hiring,’” the practice by which employers choose not to hire individuals who “‘might be illegal.’” (N.T. 3/15/07 at 48). A similar problem, he found, would exist for landlords in the same situation. (*Id.* at 52). Dr. Rosenblum also argued that employers and landlords, facing steep fines and only limited process to protect their rights, would probably choose to end a relationship with anyone accused of illegal status, whether that accusation was warranted or not. (*Id.* at 59-60). Plaintiffs contend that these actions would more likely affect Latinos than members of other groups, since employers and landlords would utilize an “‘informational shortcut’” and operate on the assumption that illegal aliens are most likely Latinos. (*Id.* at 61). The City was aware of this testimony about the likely discriminatory effect of IIRA when it passed the

amended version of it, plaintiff points out, yet did nothing to address the discrimination that would likely result. This failure to act in the face of knowledge of likely discrimination, plaintiffs argue, should lead the court to conclude that plaintiffs intended to discriminate with their revised IIRA.

Plaintiffs cannot demonstrate discriminatory intent in passing the amended IIRA. They point to the testimony of Hazleton's mayor and the actions of its council as evidence of a discriminatory intent. At trial, plaintiffs' attorney asked Louis Barletta, the mayor of Hazleton, whether he would "reconsider" the ordinances if evidence appeared that they would have a "discriminatory effect." (N.T. 3/15/07 at 263). The mayor responded that he did "not believe that it will have a discriminatory effect," but would in fact "have the opposite" impact. (*Id.*). When asked if he would repeal the ordinances if evidence indicated that they would have a discriminatory effect, the mayor responded that "I believe if the ordinances are legal, I believe we have the right to enforce them. As long as they're legal, that is my concern." (*Id.*). When asked if he would enforce the ordinances if they were declared legal but had a discriminatory effect, the mayor declared that "if they were legal, and I believe they had a discriminatory effect, I would not present it. If they are legal, and I believe they do not have a discriminatory effect, I would pass the ordinance." (*Id.*). An opinion that the ordinances were legal from a court, despite a finding by experts that they were likely discriminatory, would not cause the mayor to

change his resolve to enforce the ordinances, since “[e]ven experts have their own biases and opinions.” (*Id.* at 264). Defendant also apparently passed the amendments more quickly than is usually the case for such legislation, foregoing second and third readings of the statute.

We do not find that the mayor’s testimony or his knowledge of Dr. Rosenblum’s testimony about the potential impact of the ordinances demonstrates a discriminatory intent on the part of the mayor sufficient to find IIRA, even with its changed language, violates equal protection. “Discriminatory intent ‘implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.’” *Antonelli*, at 419 F.3d at 274 (quoting *Personnel Adm’r*, 442 U.S. at 279). At worst, Mayor Barletta testified to an intention to enforce IIRA when a court declared it legal, and he perhaps admitted that he had been aware that the ordinances potentially had a discriminatory effect. He did not testify that his desire was to discriminate or that he urged the City to amend the ordinances out of a desire to obscure its illegal intent. No evidence indicates that Mayor Barletta approved of the ordinances because of their potential discriminatory impact. Similarly, the mere fact that the defendant, in the face of litigation, amended IIRA outside of the usual procedure followed by the City Council does

not constitute evidence of a discriminatory intent.⁶⁷ Instead, the Council appeared to have acted on the advice of counsel to eliminate provisions in the original ordinance that could lead to a declaration of unconstitutionality. Plaintiffs offer no evidence that this change was designed to mask a discriminatory motive. Plaintiffs therefore have not presented evidence that the ordinances, despite their facially neutral form, were motivated by a discriminatory purpose. No equal protection violation exists on those grounds.

As another ground for an equal protection challenge, plaintiffs have argued that IIRA improperly allows the City to consider race, ethnicity or national

⁶⁷ Plaintiffs point to *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1979 [sic]) to argue that a departure from a city's normal procedures could be evidence of a discriminatory intent. The court in *Arlington Heights* did find that "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." *Id.* at 267. In providing examples of how changes to normal procedures or policies could be evidence of discrimination, the Court cited cases where cities or municipal bodies changed policies to prevent development that threatened to promote integration. *See id.* at n.16 and n.17. The court did not define what would constitute an "improper departure from a normal procedural sequence." *Id.* at 267. In distinction from the cases cited by the court (and the *Arlington Heights* case itself), however, the City Council in Hazleton did not depart from procedure by refusing to provide permits normally granted to applicants. Instead, the council rushed through an amendment to the Ordinance in an attempt to save that Ordinance from being found in violation of the United States Constitution.

origin in enforcing it. As currently written, the ordinances do not implicate a fundamental right or use a suspect classification. IIRA's enforcement provisions are now facially neutral, since they declare that no complaint that uses race, ethnicity or national origin will be enforced. The plaintiffs also do not contend that they implicate a fundamental right, such as marriage. We need not examine the policy using strict scrutiny. Accordingly, our equal protection analysis must only explore whether IIRA has "a rational relationship to a legitimate state interest." *Kranson*, 755 F.2d at 53. We agree with the defendant that the ordinances meet this standard. As its interest in passing this legislation, the City claims that it was motivated by a desire to protect public safety by limiting the crimes committed by illegal immigrants in the city and to safeguard community resources expended on policing, education and health care.⁶⁸ The City presented evidence that some crimes were committed by illegal aliens.⁶⁹ Assuming that the City has

⁶⁸ Testimony at trial indicated that funding for hospitals and schools in Hazleton did not come from the budget of the City of Hazleton. This evidence indicates that Hazleton has overstated the direct cost to the city of the presence of undocumented aliens in town. Nevertheless, we find that many costs for both the City and City residents can be associated with the increased population, particularly when those residents are undocumented workers who present special problems of communication and government-resident interaction.

⁶⁹ Certain testimony at trial concerned violated crimes committed by illegal aliens in Hazleton. The City cited these crimes as the reason for passing its ordinances. The plaintiffs disputed the connection between illegal immigration and crime

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the right to regulate the presence of illegal aliens in the city, the City program that provides penalties for those who employ or provide housing for undocumented persons in the City is rationally related to the aim of limiting the social and public safety problems caused by the presence of people without legal authorization in the City. We therefore find that Ordinance 2006-18, as amended, does not on its face violate the plaintiffs' right to the equal protection of the laws.

D. Privacy Rights

Plaintiffs' eighth cause of action claims IIRA and RO violate their right to privacy as protected in the United States and Pennsylvania Constitutions. (Compl. ¶¶ 200-212).

The City's Tenant Registration Ordinance mandates the collection of certain information from those who seek authorization to dwell in rental properties. The Ordinance requires "all Occupants" of rental properties to "obtain an occupancy permit." Ordinance 2006-13 at § 7.b. An applicant for such a permit must supply several pieces of information: "a) Name

in Hazleton, arguing that the crime rate had actually decreased during the years when increasing numbers of immigrants moved to the City. Our disposition of this matter focuses on legal issues that do not require us to resolve this dispute. For our analysis on the issue of equal protection, it is sufficient for us to find that the City identified serious crimes committed by illegal aliens as a problem.

of Occupant; b) Mailing address of Occupant; c) Street address of Rental Unit for which Occupant is applying, if different from mailing address; d) Name of Landlord; e) Date of lease commencement; f) Proof of age if claiming exemption from the permit fee; g) Proper identification showing proof of legal citizenship and/or residency.” *Id.* at § 7.b.1(a-g).

IIRA does not define what constitutes “proper identification showing proof of legal citizenship and/or residency.” *Id.* at § 7.b.1.g. RO promises to keep the information “collected by the City . . . confidential.” Ordinance 2006-13 § 12. That information “shall not be disseminated or released to any individual, group or organization for any purpose except as provided herein or required by law.” *Id.* That “[i]nformation may be released only to authorized individuals when required during the course of an official City, state or federal investigation or inquiry.” *Id.*

IIRA also requires that the City collect information about the identity of various persons. Under section 4 of IIRA, which deals with “Business Permits, Contracts, or Grants,” the Hazleton Code Enforcement Office is required, upon receipt of a “valid complaint,” to “request identity information from the business entity regarding any persons alleged to be unlawful workers.” Ordinance 2006-18 at § 4.B.3. If the unlawful worker cited in the valid complaint is alleged to be an “unauthorized alien, as defined in United States

Code Title 8, subsection 1324(a)(h)(3),”⁷⁰ the Code enforcement office is required to “submit identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373, the immigration status of such person(s)[.]”⁷¹ The

⁷⁰ That section of the United States Code defines an unauthorized alien as “an alien [who is] not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.”

⁷¹ Title 8 section 1373 of the United States Code reads:

“(a) In general. Notwithstanding any other provision of Federal, State or local law, a Federal, State or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities. Notwithstanding any other provision of Federal, State or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) 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

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“harboring” provision of IIRA requires owners to provide the Code Enforcement Office with “identity data needed to obtain a federal verification of immigration status” within three days of receiving written notice of a complaint to avoid penalties. Ordinance 2006-18 § 5.A.3. A separate provision of the Ordinance specifies that the Code Enforcement Office will “submit identity data required by the federal government to verify immigration status,” but that the Office will “forward identity data provided by the owner to the federal government.” *Id.* at § 5.B.3.

Courts have recognized two areas of privacy rights: “‘one is in the individual interest in avoiding disclosure of personal matters, and another is the

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.” We presume that the Ordinance, in declaring that the Code Enforcement Office will “submit identity data required by the federal government to verify” a workers’ status, intends to establish that the Office will provide whatever information the government requests. The Ordinance does not, however, explain what information might be required. We note that 8 U.S.C. § 1324a(b)(1)(C)(i-ii) describes the “(d)ocuments evidencing employment authorization” as “(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or (ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.” 8 U.S.C. § 1324a(b)(1)(C)(i-ii).

interest in independence in making certain kinds of important decisions.’” *United States of America v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980). This case falls into the first of those categories. “There is no absolute protection against disclosure” of such confidential information. *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 110 (3d Cir. 1987). When a court evaluates “right to privacy claims, we . . . balance a possible and responsible government interest in disclosure against the individual’s privacy interests.” *Sterling v. Borough of Minersville*, 232 F.3d 190, 195 (3d Cir. 2000). Courts have concluded that “in performing the necessary balancing inquiry . . . ‘the more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.’” *Id.* (quoting *Fraternal Order of Police*, 812 F.2d at 118). Further, in considering whether private information should be disclosed, a court weighs seven factors: “(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognizable interest favoring access.” *Doe v. Southeastern Pennsylvania Transportation Authority*, 72 F.3d 1133, 1140 (3d Cir. 1995) (citing *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 578 (3d Cir. 1980)).

For reasons that will become apparent, we will address only the question of whether the ordinances implicate private information.

The Records Requested

Hazleton’s ordinances do not explain with precision which documents are required to complete a valid tenant registration, answer a valid complaint about an illegal worker, or meet the requirements of IIRA’s harboring provisions. The ordinances require only that an applicant under RO provide “proper identification showing proof of legal citizenship and/or residency.” Ordinance 2006-18 at § 7.b.1.g. In its brief, defendant contends that the information required by the Ordinance would “[include]: name, address, telephone number, date of birth and proof of citizenship (passport, birth certificate or naturalization document), or in the case of aliens, documentation of status (documentation of lawful permanent residency or ‘green card,’ nonimmigrant visa, or other relevant document issued by the federal government).”⁷²

⁷² We note that none of these documents are mentioned in the ordinances. Since we must judge the ordinances on their face, and not how defendant claims the ordinances will be implemented, we cannot accept defendant’s version of the meaning of “proper identification showing proof of legal citizenship and/or residency.” We are also unsure what constitutes other “relevant document[s] issued by the federal government” to establish a legal right to reside in the United States.

IIRA is even less clear on what records will be required of businesses and landlords attempting to refute the charges contained in a valid complaint. Business owners charged with employing an unlawful worker are required to “submit identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373, the immigration status of such person(s)[.]” Ordinance 2006-18 § 4.B.3. Landlords charged with “harboring” illegal aliens must supply the City with “identity data needed to obtain a federal verification of immigration status.” *Id.* at § 5.A.3.

We are left to conclude that the ordinances are too vague for us to determine on their face exactly what documents renters, employers and landlords must submit in order to comply. Testimony at trial did not clarify this matter. The ordinances do not require the presentation of any specific documents, and even the sections of the immigration statute that the ordinances cite do not provide a list of documents the government would use to answer the City’s request for a verification of status. *See* 8 U.S.C. § 1373(c). Without a clearer statement of the documents required from those seeking rental permits or fighting off complaints under IIRA, we cannot determine the discrete types of documents at issue in this case.

We find that we lack adequate information to balance the plaintiffs’ privacy interest in the data requested with the City’s need for that information. Neither party has presented sufficient evidence of what type of information will be required from

plaintiffs, and plaintiffs have not adduced case law that would allow us to conclude that immigration information is on its face private data. We will therefore dismiss the plaintiffs' privacy rights complaint.

III. FEDERAL STATUTORY CAUSES OF ACTION

In addition to federal constitutional claims, plaintiffs' complaint raises issues with regard to the federal Fair Housing Act and 42 U.S.C. § 1981. We now turn our attention to these issues.

A. Fair Housing Act

The plaintiff's fourth cause of action asserts that the ordinances violate the federal Fair Housing Act (hereinafter "FHA"), 42 U.S.C. §§ 3601 *et seq.* (Second Am. Compl. ¶¶ 157-164.) The FHA prohibits discrimination in residential real estate-related transactions on the basis of "race . . . or national origin." 42 U.S.C. § 3604(a). Plaintiffs assert that the Defendant's ordinances discriminate based upon race and national origin in violation of the FHA. (Second Am. Compl. ¶ 163).

Plaintiffs challenge the harboring provisions of the IIRA under the FHA. At the time that plaintiffs filed the Second Amended Complaint, these provisions provided: "A complaint which alleges a violation **solely or primarily** on the basis of national origin, ethnicity, or race shall be deemed invalid and shall

not be enforced.” (IIRA § 5.B.2) (emphasis added). Plaintiffs’ position is that the wording of the Ordinance allows national origin and race to be relied upon, in part, for a complaint, therefore, the Ordinance violates the FHA.

Plaintiffs also challenge Hazleton’s Tenant Registration Ordinance under the FHA. The Tenant Registration Ordinance requires tenants to show proof of lawful immigration in order to obtain an occupancy permit. (Ordinance 2006-13). This ordinance, however, does not contain a prohibition against discrimination by housing providers. Plaintiffs assert that because the ordinance fails to prohibit discrimination, minority housing seekers will suffer an adverse disparate impact in obtaining housing. In other words, plaintiffs assert that the Tenant Registration Ordinance will be discriminatory in its effect.

We find that plaintiffs’ challenge to these ordinances based upon the FHA is without merit. The defendant amended the IIRA in March 2007, and the Ordinance now reads: “A complaint which alleges a violation on the basis of national origin, ethnicity or race shall be deemed invalid and shall not be enforced.” (Def. Ex. 251, Ord. 2007-7). As the defendant removed the offending language from the Ordinance, plaintiffs now argue that, like the Tenant Registration Ordinance, the IIRA will be discriminatory in effect.

Plaintiffs cite the testimony of Dr. Rosenblum that the ordinances are likely to increase discrimination in

housing, particularly against those of Latino descent. (See, e.g., Vol. 4/21:5-12; 47:17-48:20). We are unconvinced by plaintiffs' argument.

Plaintiffs present a facial challenge to the ordinances, not an "as-applied" challenge.⁷³ Therefore, we must determine whether the statutes, as written, could not be read to conform to the law. See *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (holding that "[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 exists under which the Act would be valid."); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 648 n.10 (3d Cir. 2003) (holding that "[i]n order to successfully prosecute such a challenge, plaintiffs would have to establish that no set of circumstances exist under which mandatory filing fees are valid."). In any case, because the statutes have not yet gone into effect, we cannot know whether they would have the discriminatory effect that plaintiffs claim. We therefore cannot find a Fair Housing Act violation based on Professor Rosenbaum's [sic] testimony on the predicted effects of the ordinances.

⁷³ Plaintiffs could not bring an "as-applied" challenge as the ordinances have not yet been applied.

B. Section 1981

The Fifth Cause of Action found in plaintiffs' complaint asserts a violation of 42 U.S.C. § 1981 (hereinafter "section 1981"). (Compl. ¶¶ 165-172). Section 1981 provides that "all persons" shall, *inter alia*, have the same right to make and enforce contracts and have the full and equal benefit of all laws to the same extent enjoyed by "white citizens."⁷⁴

Plaintiffs' position is that section 1981 prohibits discrimination based upon alienage and race and that the Ordinance violates this prohibition. More

⁷⁴ Section 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

particularly, the plaintiffs claim that defendant violates § 1981 by making it impossible for unauthorized aliens to enter into lease agreements due to the Tenant Registration Ordinance and the housing portions of the IIRA. Defendant asserts that illegal aliens are not persons under section 1981 and therefore, they are not afforded its protections. We disagree with the defendant.

Generally, an alien is a “person” as that term is used under section 1981. *Takahashi v. Fish and Game Comm’n*, 334 U.S. 410, 419, 68 S. Ct. 1138, 92 L. Ed. 1478 (1948), *see also Graham v. Richardson*, 403 U.S. 365, 377, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971) (“The protection of this statute has been held to extend to aliens as well as to citizens.”). The Supreme Court, however, has not yet addressed whether the protections of section 1981 extend to undocumented aliens, i.e. whether an undocumented alien is a “person” under section 1981. The Court has, in the context of the Fourteenth Amendment, held that “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.” *Plyler*, 457 U.S. at 210. This reasoning applies equally to a section 1981 analysis as to the Fourteenth Amendment analysis, especially because the language used in section 1981 is based in part on the language of the Fourteenth Amendment. *Takahashi*, 334 U.S. at 420. Accordingly,

we find that aliens, regardless of their status under the immigration laws, are persons under section 1981.

Defendant contends that section 1981 is not commensurate with the Fourteenth Amendment. We agree, but that does not alter our analysis. Plaintiffs do not argue that section 1981 is commensurate with the Fourteenth Amendment, but rather that the definition of “person” found in section 1981 should be construed to include undocumented workers just as the same term has been construed under the Fourteenth Amendment. Therefore, the cases that defendant cites to establish that gender discrimination, religious discrimination, national origin discrimination and age discrimination are not covered by section 1981 are not persuasive.

Further, defendant argues that to find that undocumented aliens have rights under section 1981 would be inconsistent with Congress’s intent of prohibiting employment of such persons as evidenced by the passage of IRCA. This argument is unconvincing.

When Congress passes two laws which conflict, the more recent law can be viewed as a [sic] implied repeal of the earlier act in order to bring it in line with the newer law. *Posadas v. Nat’l City Bank of New York*, 296 U.S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936) (explaining that when two statutes “are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.”) quoted in *Tineo v. Ashcroft*, 350 F.3d

382, 391 (3d Cir. 2003). Thus, as the more recent of the laws, IRCA can be viewed as an implied repeal of the earlier statute to the extent of any conflict. The conflict that we are presented with is that section 1981 provides that undocumented aliens have the same right to contract as “white citizens.” IRCA provides that unauthorized aliens do not have the right to enter into employment contracts.⁷⁵ IRCA works as a repeal of section 1981 to the extent that section 1981 would allow unauthorized workers to enter into employment contracts. Otherwise, the unauthorized workers have the same right to contract as other citizens.

Accordingly, section 1981 forbids the defendant from prohibiting undocumented aliens from entering into leases. Thus, the Tenant Registration Ordinance and the housing provisions of the IIRA, which forbid such contracts, are in violation of section 1981.

IV. STATE LAW CAUSES OF ACTION

The final causes of action we need to address are plaintiffs’ state law claims. Plaintiffs assert that the ordinances violate the Pennsylvania Home Rule

⁷⁵ IRCA involves the employment of unauthorized workers. It does not mention other types of contracts including contracts to provide housing. Further, as discussed above with regard to pre-emption, the federal government allows certain aliens to work in the United States and implicitly to live here. To forbid these individuals from entering into housing contracts would be inconsistent with their being allowed to remain in the country.

Charter Law and the Pennsylvania Landlord and Tenant Act. In addition, plaintiffs assert that in enacting the ordinances defendant exceeded its legitimate police powers. We will address these issues *in seriatim*.

A. Pennsylvania Municipality Law

Plaintiffs' sixth cause of action argues that the employment provisions of IIRA violate Pennsylvania municipality law. (Compl. ¶¶ 174-186). The City limits the conditions under which an employer may discharge an employee and provides discharged employees with a cause of action. Plaintiffs contend that Hazleton has added conditions to the terms of employment in the city in violation of the Third-Class City Code.⁷⁶ Since Pennsylvania is an at-will employment state, Hazleton may not add conditions to employment through an anti-illegal immigration ordinance. Defendant argues that plaintiffs have not demonstrated that IIRA violates any particular provision of Pennsylvania law or the Pennsylvania Constitution, and that nothing in IIRA is contrary to such

⁷⁶ In their briefs, the parties disagree over whether Hazleton is a Home-Rule Charter City or a municipality organized under some other plan. (See Doc. 87 at 76, Doc. 82 at ¶ 174; Doc. 106 at 64-65; Doc. 150 at 83). The arguments they provide are premised on the powers enjoyed by these different types of cities. Because the testimony makes clear that Hazleton is a city of the Third Class with an Optional Plan B (strong mayor-council) form of government, we will base our analysis on the powers accorded such cities in Pennsylvania law.

law. In addition, defendant argues that Pennsylvania law does not prohibit IIRA's restrictions on employment based on immigration status. Such restricts [sic], defendant contends, already exist in provisions of federal law that prohibit businesses from knowingly employing workers without proper documentation. In addition, "at will" employment does not preclude a worker from filing suit for wrongful discharge, and defendant merely provides a private cause of action for workers seeking to vindicate such rights.

Hazleton is a City of Third Class with an Optional Plan B form of government. (N.T. 3/15/07 at 204). The powers a city has in Pennsylvania are limited, and are defined largely by the plan of government that locality adopts. Under Pennsylvania law, "[m]unicipalities are not sovereigns; they have no original or fundamental power of legislation; they have the right and power to enact only those ordinances which are authorized by an act of the legislature." *Genkinger v. City of New Castle*, 368 Pa. 547, 84 A.2d 303, 304, 43 Mun. L Rep. 234 (Pa. 1951); see also *Cleaver v. Board of Adjustment of Tredyffrin Twp.*, 414 Pa. 367, 200 A.2d 408, 412 (Pa. 1964); *Devlin v. City of Philadelphia*, 580 Pa. 564, 862 A.2d 1234, 1242 (Pa. 2004); *Denbow v. Borough of Leetsdale*, 556 Pa. 567, 729 A.2d 1113, 1118 (Pa. 1999) (holding that "[m]unicipal corporations have no inherent powers and may do only those things which the Legislature has expressly or by necessary implication placed within their power to do."). "Any fair, reasonable doubt as to the existence of power is resolved by the courts against its existence in the corporation, and therefore

denied.’” *Kline v. City of Harrisburg*, 362 Pa. 438, 68 A.2d 182, 185 (Pa. 1949) (quoting DILLON ON MUNICIPAL CORPORATIONS, § 89).

Pennsylvania law defines the basic powers of a City of the Third Class in 53 PENN. STAT. § 37402. Under that section, a Third-Class city may “(1) sue and be sued; (2) purchase land and hold real and personal property for the use of the city”; “(3) lease, sell and convey any real or personal property owned by the city,” make orders that serve the interests of the city in doing so; (4) form contracts in order to carry out city affairs; “(5) have and issue a corporate seal”; (6) display the Pennsylvania flag on public buildings; and (7) appropriate and use money appropriated to the city by other sources. 53 PENN. STAT. 37402(1-7).

In addition, the Third Class City Code enumerates sixty-eight specific powers enjoyed by such municipalities. These powers include the power to pay debts and expenses, arrange for garbage collection and removal, dispose of dangerous dogs, inspect and regulate fireplaces, number buildings, prohibit nuisances, regulate signs and prevent riots. 53 PENN. STAT. § 37403(1), (6), (9), (10), (19), (16), (17), (25). A third-class city also has the power “to make and adopt all such ordinances, by-laws, rules and regulations, not inconsistent with or restrained by the Constitution and laws of this Commonwealth, as may be expedient or necessary for the proper management, care and control of the city and its finances, and the maintenance of the peace, good government,

safety and welfare of the city, and its trade, commerce and manufactures.” 53 PENN. STAT. § 37403(60). A city may pass legislation “necessary in and to the exercise of the powers and authority of local self-government in all municipal affairs.” *Id.* A city can establish fines for violations of ordinances, but may not enact ordinances that “[contravene] or [violate] any of the provisions of the Constitution of the United States or the Commonwealth, or of any act of the Assembly heretofore or that may be hereafter passed and in force in said city.” *Id.*

In general, Hazleton has the power to issue licenses for businesses to operate within the City. *See Girard Trust Co. v. Philadelphia*, 336 Pa. 433, 9 A.2d 883, 884 (Pa. 1939) (holding that “[t]he authority to inspect and license elevators is based upon the exercise of police power, the residual source of which is in the Commonwealth and inheres in its subdivisions upon their creation.”). Thus, “municipalities in the exercise of the police power may regulate certain occupations by imposing restrictions which are in addition to, and not in conflict with, statutory regulations.” *Western Pennsylvania Restaurant Ass’n v. Pittsburgh*, 366 Pa. 374, 77 A.2d 616, 620, 42 Mun. L Rep. 161 (Pa. 1951). In a general sense, then, Hazleton has the power to license businesses under any terms that are not in conflict with state law. Since no state statute regulates the employment of illegal aliens, Hazleton’s restrictions on the employment of such workers do not violate state law.

The private right of action supplied by the city to workers who lose their jobs to illegal aliens, however, alters the terms of employment established under state law and exceeds Hazleton's power as a municipality by contradicting the terms of state law. Pennsylvania is an at-will employment state, meaning that an employee can "be discharged at any time unless her discharge was wrongful in that it violated a clearly recognized public policy." *McCartney v. Meadowview Manor, Inc.*, 353 Pa. Super. 34, 508 A.2d 1254 (Pa. Super. Ct. 1986). Thus, "[a]bsent a statutory or contractual provision to the contrary, the law has taken for granted the power of either party to terminate an employment relationship for any or no reason." *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174, 176 (Pa. 1974); *see also Knox v. Bd. of Directors of Susquenita School Dist.*, 585 Pa. 171, 888 A.2d 640, 647 (Pa. 2005) (holding that "Pennsylvania has long subscribed to the at-will employment doctrine. Exceptions to that doctrine have generally been limited to instances where a statute or contract limits the power of an employer unilaterally to terminate the employment relationship.").

IIRA disrupts this well-settled principle of state law. An employer in any other Pennsylvania city is not liable to civil suit from that employee if the

employer happens to employ an “unlawful worker.”⁷⁷ At-will employment means that an employer can terminate a workers’ employment at any time unless the termination violates a clearly defined statutory right or public policy.⁷⁸ Here, in the absence of the

⁷⁷ We note that this cause of action appears to impose strict liability on the employer, as it defines as an “unfair business practice” “the discharge of any employee who is not an unlawful worker by a business entity in the City” and provides the “discharged worker” with a private right of action against the employer for this unfair practice. IIRA § 4.E(1-2). Presumably, an employee who brought that cause of action would not have to prove any *mens rea* on the employer’s part, but need only show that the employer had employed an unauthorized worker to prevail in that private claim. Such a private cause of action would thus appear to serve as a positive enforcement mechanism, requiring an employer to take positive steps to insure that no “unlawful workers” remained on the payroll to avoid an expensive lawsuit.

⁷⁸ An employer who is sued after terminating an employee on the basis of “race, color family status, religious creed, ancestry, handicap or disability, age, sex, national origin, the use of a guide or support animal because of blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals” cannot resort to the defense that Pennsylvania is an “at-will” employment state because such an employee has a clear legal right to dispute such firing. 43 PENN. STAT. § 953; *see also, Cisco v. United Parcel Services, Inc.*, 328 Pa. Super. 300, 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984) (holding that “[t]he sources of public policy [which may limit the employer’s right of discharge] include legislation; administrative rules, regulation, or decision; and judicial decision. In certain instances, a professional code of ethics may contain an expression of public policy Absent legislation, the judiciary must define the cause of action in case-by case determinations.”) (quoting *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505, 512 (N.J. 1980)). We note here that this

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Ordinance, an employer would not face civil liability under Pennsylvania law for terminating a worker's employment while employing another worker defined by the Hazleton Ordinance as "unlawful." Whatever liability an employer might face under federal law for employing such a worker, neither state nor federal law gives discharged employees the right to sue based on an employer's unlawful employment of another.⁷⁹

statute gives no cause of action to a worker discriminated against because of legal immigration status.

⁷⁹ Marc Rosenblum, an expert witness for the plaintiffs, testified that no "comparable provision" like the private right of action in Section 4.E exists under federal law. (N.T. 3/15/07 at 60). On cross-examination, defendant challenged this claim, arguing that "the 1996 [Illegal Immigration Reform and Immigration Responsibility] act amended Title 18, Section 1961 of the U.S. Code and created a private right of action for employees who have suffered economic injury by employers because of employers who hire unauthorized aliens[.]" (*Id.* at 138). That statute, counsel pointed out, allowed injured employees to recover treble damages against employers who violate the act. (*Id.* at 139). Defense counsel cited to three cases which he claimed underscored the similarity between Hazleton's private right of action and provisions of federal law authorizing workers to sue their employers for firing them while continuing to employ undocumented workers, *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (11th Cir. 2005), *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) and *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004). We find this claim unpersuasive; those cases do not hold what defendant claims they do. The statute to which defendant cites, 18 U.S.C. § 1961, is part of the Racketeer Influenced and Corrupt Organizations Act (RICO), a section of the United States Code that addresses organized crime. One provision of that act indeed offers a private right of action, providing that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter [18 U.S.C.

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§ 1962] may sue therefor in any appropriate court and shall recover threefold the damages he sustains and the cost of the suit.” 18 U.S.C. § 1964(c). To prevail on a claim under the statute, a plaintiff must prove “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Sedima v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). Further, “a plaintiff may sue under § 1964(c) only if the alleged RICO violation was the proximate cause of the plaintiff’s injury.” *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 126 S. Ct. 1991, 1994, 164 L. Ed. 2d 720 (2006). In *Williams*, the court found that a plaintiff could state a civil RICO claim against an employer who had violated section 274 of the Immigration and Nationality Act, “related to bringing in and harboring certain aliens.” *Williams*, 411 F.3d at 1257. Plaintiff had alleged that defendant engaged in a scheme to hire hundreds of illegal immigrant workers, and that this conduct could constitute part of a racketeering claim. *Id.* We find that defendant reads this case – and other cases that find that plaintiffs can state a RICO claim (in part) by alleging that defendant violated federal immigration law – too broadly. A plaintiff cannot, as defendant insists, state a claim for damages against an employer merely because that employer hired an unauthorized worker. Instead, to state a RICO claim a plaintiff must also allege that the employer’s illegal conduct was part of an enterprise engaged in a pattern of illegal activity and that the employer’s conduct was the proximate cause of plaintiff’s injury. Under the Hazleton Ordinance, by contrast, a plaintiff must only demonstrate that the employer knowingly kept a single unauthorized worker on staff after terminating the plaintiff. Indeed, the only real similarities between the Hazleton Ordinance and the RICO statute are the availability of treble damages to plaintiffs and the fact that employment of an unauthorized worker could be part of the basis for a lawsuit. To adopt defendant’s reasoning that Hazleton’s private cause of action “matches” that available under RICO, we would have to ignore all of the elements of a civil RICO claim except the fact that damages are trebled. We decline to do so. No private cause of action mirroring that in the Hazleton Ordinance exists in federal law.

Defendant's argument that the ability of a discharged worker to bring a cause of action for wrongful termination in Pennsylvania courts, "whether or not" the cause is "meritorious" is unavailing; defendant's Ordinance would make meritorious a cause of action that would previously have been dismissed as lacking a legal basis. Accordingly, the private right of action contained in IIRA is "inconsistent with or restrained by the Constitution and laws of this Commonwealth," and is invalid.⁸⁰ 53 PENN. STAT. § 37403(60).

While the Pennsylvania legislature could add a private right of action to Pennsylvania law that did not violate the federal constitution or disrupt a federal statutory scheme,⁸¹ the distribution of powers

⁸⁰ The City, in its post-trial memorandum, again points to the RICO statute to argue that the private cause of action created by IIRA is not a "novel" provision, but is instead one grounded in rights expressly established by federal law. (Doc. 219 at 87). Defendant points to the cases cited in the previous footnote and declares that "[p]laintiffs would do well to familiarize themselves with these federal statutes. The IIRA Ordinance Section 4.E is based upon them." (*Id.*). Plaintiffs' post-trial memorandum makes clear that they have familiarized themselves with the private cause of action contained in the RICO statute. Indeed, unlike the defendant, plaintiffs have recognized the elements required to maintain a private cause of action under the RICO statute. Defendant fails to recognize that causes of action are not similar simply because both offer the possibility of treble damages for certain violations of immigration laws.

⁸¹ We reject the defendant's contention that IIRA does not disrupt the employer-employee relationship in Pennsylvania because employers are required to examine employee's identification documents by federal law, and because federal law prohibits the knowing employment of an illegal alien. Citing 8

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between the Commonwealth and subdivisions of the Commonwealth does not permit a municipality to burden the Commonwealth's courts with new causes of action. Hazleton could argue that the city's power to enforce ordinances permitted the use of this private right of action, but such private causes of action are unnecessary to the city's regulatory scheme.⁸² The city has its own system for enforcing this portion of

U.S.C. § 1324. This argument seems contrary to the principles of preemption discussed *supra* at part IIA. If federal law prohibits employment of undocumented workers and provides an enforcement mechanism for doing so, Hazleton's efforts to add new document checks and private rights of action to enforce those provisions of federal law appear to interfere with a scheme already established by federal legislation. We decline to adopt the argument that a city may avoid restrictions on its action under state law by claiming a right to enforce federal law, especially when that federal law contains no provisions for such enforcement.

⁸² Indeed, the City's scheme as presently constructed appears inconsistent: an employer is liable to fines from the City only when that employer "knowingly" employs an illegal alien. Ordinance 2007-6. The employer may avoid liability by participating in the Basic Pilot program. Ordinance 2006-18 § 4.B.5. Under the private right of action, however, the City makes an employer liable to any discharged worker who shows continued employment of an unauthorized worker. *Id.* at § 4.E. That liability applies regardless of whether the employer knew of the violation or not. *Id.* at § 4.E.1 (establishing that "[t]he discharge of any employee who is not an unlawful worker by a business entity in the City is an unfair business practice if, on the date of the discharge, the business entity was not participating in the Basic Pilot program and the business entity was not employing an unlawful worker."). In other words, an employer can comply with IIRA and still be liable to ex-employees under IIRA.

IIRA and its own penalties for those who employ unlawful workers. An employer is not found in violation of IIRA by a court decision that grants an “aggrieved worker” compensation for lost wages, but instead after an investigation by the Code Enforcement Office. We conclude that this private right of action contained in IIRA is simply an attempt to add to the rights workers have in the city, and such action is prohibited by the Third Class City Code and the effort of Pennsylvania to operate as an at-will employee state.

Accordingly, we find that the provisions of Section 4.E of IIRA that provides a private right of action to discharged worker are *ultra vires* and may not be enforced. Since provisions of IIRA are severable, our decision on this matter affects only Section 4.E of the IIRA. *See* Ordinance 2006-18 at § 6.B (establishing that “[I]f any part of [sic] provision of this Chapter is in conflict or inconsistent with applicable provisions of federal or state statutes, or is otherwise held to be invalid or unenforceable by any court of competent jurisdiction, such part of [sic] provision shall be suspended and superseded by such applicable laws or regulations, and the remainder of this Chapter shall not be affected thereby.”).

B. Landlord and Tenant Act

Count VI of plaintiffs’ second amended complaint asserts a cause of action under Pennsylvania’s Landlord and Tenant Act of 1951, 68 PENN. STAT.

§ 250.101 *et seq.* (hereinafter L/T Act). Plaintiff argues that the L/T Act is meant to be the sole source of rights, remedies and procedures governing the landlord/tenant relationship in Pennsylvania and municipalities may not alter or supplement the law. The Hazleton ordinances, according to the plaintiffs, add requirements to landlords and tenants and thus violates the L/T Act. Defendant contends that the ordinances do not violate the L/T Act. We agree with the defendant.

Generally, the L/T Act governs the relationship between landlords and tenants including rights and duties for both, and it also provides procedures for eviction. *See, generally*, 68 PENN. STAT. §§ 250.101 *et seq.* In addition, the L/T Act provides: “All other acts and parts of acts, general, local and special, inconsistent with or supplied by this act, are hereby repealed. It is intended that this act shall furnish a complete and exclusive system in itself.” 68 PENN. STAT. § 250.602. Plaintiffs assert that this clause and the remainder of the L/T Act pre-empts the ordinances.

The Pennsylvania Supreme Court, however, has held that the L/T Act sets forth the procedures for eviction and does not address the substantive issue of when a landlord has a right to evict. *Warren v. City of Philadelphia*, 382 Pa. 380, 115 A.2d 218, 221 (Pa. 1955). *Warren* holds that Pennsylvania did not pass the L/T Act pursuant to its police powers; therefore, local municipalities may enact local laws affecting landlord/tenant law pursuant to their police powers

as long as those laws do not conflict with the L/T Act. *Id.* at 221.

Plaintiffs assert that the ordinances do conflict with the L/T Act. After a careful review, we disagree. Plaintiffs argue that the time frame provided by IIRA conflicts with the L/T Act because it requires that a landlord correct a violation within five (5) days of notice of the violation from Hazleton. (IIRA § 5.B.(3)). Under the L/T Act, according to the plaintiffs' calculations – which we accept as true for the purposes of this analysis – a tenant cannot be evicted for a minimum of twenty-three (23) days. We find no conflict here. In order to correct a violation under IIRA, the landlord merely has to provide a notice to quit or commence an action for the recovery of possession of the property. (IIRA § 7.D.). In other words, the landlord must begin the eviction process within five days, it does not have to be completed within those five days. Thus, the laws do not conflict.

Plaintiff also argues that the Tenant Registration Ordinance conflicts with the L/T Act because it requires a landlord to take reasonable steps to “remove or register” unregistered occupants of apartments within ten (10) days of learning of the unauthorized occupancy. (RO § 9.b.). Once again, this section does not conflict with the L/T Act. It does not require an eviction within ten days, it merely requires that reasonable steps be taken within that period. Reasonable steps would be steps in compliance with the L/T Act.

Next, plaintiffs argue that the Tenant Registration Ordinance violates the L/T Act because it requires additional occupants of a rental unit to obtain the written permission of the landlord and obtain an occupancy permit. (RO § 10.b.) Plaintiffs argue that this requirement is in conflict with the L/T Act's because under the L/T Act tenants have a right to invite social guests, family, or visitors for a reasonable period of time.

We agree that the L/T Act permits such visitors. *See* 68 PENN. STAT. § 250.504-A. The Tenant Registration Ordinance, however, does not forbid visitors or guests. The occupancy permit requirements apply to one who is an "occupant." "Occupant" is defined in the Ordinance as "a person age 18 or older who resides at a Premises." (RO § 1.m.). Thus, it is inapplicable to social guests and visitors and not in conflict with the L/T Act. For the above reasons, we find that the harboring provisions of IIRA and RO do not violate the L/T Act.

C. Police powers

Plaintiffs' ninth cause of action is that defendant's ordinances exceed its legitimate police powers. (Compl. ¶¶ 214-237). Defendant contends that the passage of the ordinances was a legitimate exercise of its police powers.

Generally, a municipality possesses "police powers" that can be used to enact legislation to promote public health, safety and general welfare. *Balent v.*

City of Wilkes-Barre, 542 Pa. 555, 669 A.2d 309, 314 (Pa. 1995).

[T]he police power delegated by the state is not infinite and unlimited. The action taken thereunder must be reasonable, it must relate to the object which it purports to carry out, and it must not invade the fundamental liberties of the citizens. *Warren v. Philadelphia*, 382 Pa. 380, 115 A.2d 218 (1955); *Otto Milk Company v. Rose*, 375 Pa. 18, 99 A.2d 467 (1953). It must also be remembered that even legitimate legislative goals cannot be pursued by means which stifle fundamental personal liberty when the goals can be otherwise more reasonably achieved. See *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960).

Commonwealth v. Sterlace, 24 Pa. Commw. 62, 354 A.2d 27 (Pa. Commw. Ct. 1976) (finding that a municipality's ordinance dealing with the distribution of advertising material unconstitutionally burdened the First Amendment).

As we have found that the defendant's ordinances violate the plaintiffs' fundamental rights under the United States Constitution we need not determine whether they are otherwise a valid exercise of its police powers.⁸³ In other words, enacting an

⁸³ We note that generally, it is "within the mainstream of . . . police power regulation" to prohibit the knowing employment of aliens who are not entitled to permanent residence. *DeCanas*, 424 U.S. at 356. Additionally, the Pennsylvania Supreme Court

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unconstitutional ordinance is in itself a violation of the defendant's police powers. *See id.*

Accordingly, we find that plaintiff has prevailed on its ninth cause of action in that the defendant violated its police powers with these ordinances.

Conclusion

Federal law prohibits Hazleton from enforcing any of the provisions of its ordinances. Thus, we will issue a permanent injunction enjoining their enforcement. With respect to each particular count we conclude as follows:

We find for the plaintiffs on Count I of the complaint. Federal law pre-empts IIRA and RO. The ordinances disrupt a well-established federal scheme for regulating the presence and employment of immigrants in the United States. They violate the Supremacy Clause of the United States Constitution and are unconstitutional.

has held that "rent and eviction controls are valid exercises of the police power." *Warren v. City of Philadelphia*, 382 Pa. 380, 115 A.2d 218, 220 (Pa. 1955).

Plaintiffs' argument is very fact-based. They assert that testimony at the trial established that the ordinances do not serve the health safety and welfare of the 'citizens of Hazleton'. We need not address these factual issues to determine that the enactment of the ordinances was in fact an improper exercise of the police powers.

We find for the plaintiffs on Count II of the complaint as well. The Hazleton ordinances violate the procedural due process protections of the Fourteenth Amendment to the United States Constitution. They penalize landlords, tenants, employers and employees without providing them the procedural protections required by federal law, including notice and an opportunity to be heard. Our analysis applies to illegal aliens as well as to legal residents and citizens. The United States Constitution provides due process protections to *all* persons.

We will dismiss Counts III and IV of the complaint regarding Equal Protection and the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*, respectively. Neither IIRA nor RO facially discriminate on the basis of race, ethnicity or national origin.

On Count V, which alleges a violation of plaintiffs' right to contract under 42 U.S.C. § 1981, we find for the plaintiffs. Just as with the Fourteenth Amendment analysis, illegal aliens are "persons" under that statute, and the City may not burden their right to contract more than that of other persons.

Plaintiffs prevail in part on Count VI, which challenges the power of the City under Pennsylvania law to enact the employment-related provisions of IIRA. The defendant acted *ultra vires* in enacting the portion of IIRA which creates a private cause of action for a dismissed employee. The City, however, has the power to license businesses in ways that do not

violate Pennsylvania law. Thus, we will dismiss the remaining portion of the count.

We will dismiss Count VII, which challenges the power of the City to enact the housing provisions of the ordinances under the Pennsylvania Landlord Tenant Act, 68 PENN. STAT. §§ 250.101 *et seq.* The ordinances provide renters the procedural protections the statute requires.

We find that we lack sufficient evidence to make a determination on Count VIII of the complaint, which contends that the Hazleton ordinances violate plaintiffs' privacy rights. As written, the ordinances are too vague for us to analyze what information will be required from workers and tenants. We therefore cannot determine whether the ordinances violate plaintiffs' privacy rights.

Plaintiffs prevail on Count IX, which contends that defendant exceeded its police powers. Defendant exceeded its police powers by enacting unconstitutional ordinances.

Whatever frustrations officials of the City of Hazleton may feel about the current state of federal immigration enforcement, the nature of the political system in the United States prohibits the City from enacting ordinances that disrupt a carefully drawn federal statutory scheme. Even if federal law did not conflict with Hazleton's measures, the City could not enact an ordinance that violates rights the Constitution guarantees to every person in the United States, whether legal resident or not. The genius of our

Constitution is that it provides rights even to those who evoke the least sympathy from the general public. In that way, all in this nation can be confident of equal justice under its laws. Hazleton, in its zeal to control the presence of a group deemed undesirable, violated the rights of such people, as well as others within the community. Since the United States Constitution protects even the disfavored, the ordinances cannot be enforced. An appropriate order follows.

VERDICT

AND NOW, to wit, this 26th day of July 2007, we hereby **DECLARE** that Hazleton Ordinance Nos. 2006-18, 2006-40 and 2007-6 (hereinafter "IIRA") and Hazleton Ordinance No.2006-13, (hereinafter "RO"), are unconstitutional. We **PERMANENTLY ENJOIN** the defendant from enforcing IIRA and RO.

All the plaintiffs have standing to pursue this action except Rosa Lechuga and Jose Luis Lechuga. The Lechugas lack standing because this lawsuit would not remedy the injury they have suffered.⁸⁴

Due to the unique nature of the issues in this lawsuit, the intense public interest in the outcome and the public antipathy expressed towards participants in the case, the unnamed plaintiffs are allowed to proceed anonymously.

⁸⁴ Plaintiff Humberto Hernandez is dismissed as plaintiffs have presented no evidence regarding him.

We have addressed the ordinances as amended through March 2007. The ordinances in their amended versions do not eliminate the grounds for plaintiffs' constitutional challenges.

With regard to each count of the complaint, our verdict is as follows: Count I, the Supremacy Clause, we find **FOR PLAINTIFFS**. Federal law pre-empts IIRA and RO.

Count II, Due Process, we find **FOR PLAINTIFFS**. IIRA and RO violate the procedural due process protections of the Fourteenth Amendment to the United States Constitution.

Counts III and IV, Equal Protection and the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*, respectively, are **DISMISSED**. Neither IIRA nor RO facially discriminate on the basis of race, ethnicity or national origin.

Count V, 42 U.S.C. § 1981, we find **FOR PLAINTIFFS**. Illegal aliens are "persons" under 42 U.S.C. § 1981. IIRA and RO impermissibly burden their right to contract.

Count VI, Home Rule Charter Law, we find partially **FOR PLAINTIFFS**, and we **DISMISS** partially. We find **FOR PLAINTIFFS** with regard to the portion of IIRA which creates a private cause of action for a dismissed employee. With regard to the other portions of IIRA and RO, defendant did not act beyond its municipal powers, and we **DISMISS** that portion of the count.

Count VII, Pennsylvania Landlord and Tenant Act, 68 PENN. STAT. §§ 250.101 *et seq.* is **DISMISSED**. Neither IIRA nor RO violate the procedural protections required under the Landlord and Tenant Act.

Count VIII, privacy rights, is **DISMISSED**. We lack sufficient evidence to make a determination with regard to plaintiffs' privacy rights.

Count IX, police powers, we find **FOR PLAINTIFFS**. Enacting unconstitutional laws is beyond the defendant's police powers.

BY THE COURT:

s/ **James M. Munley**

JUDGE

United States District Court

APPENDIX

HISTORY OF IMMIGRATION REGULATION IN AMERICA

The history of federal regulation of immigration is one of a transformation from a largely open system to one where federal rules govern nearly every aspect of the immigrant experience, from the conditions under which new residents may enter to the terms under which they may labor. Prior to the end of the nineteenth century, immigration restriction was minimal: the government "counted the number of immigrants for statistical purposes, and it decreed certain minimum living conditions aboard ship."

JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925*, 43 (1983); *see also* SUCHENG CHAN, *European and Asian Immigration into the United States in Comparative Perspective, 1820s to 1920s*, in *IMMIGRATION RECONSIDERED: HISTORY, SOCIOLOGY AND POLITICS*, 62 (Virginia Yans-McLaughlin, ed., 1990) (finding that “[e]xcept for the sedition laws passed in the early years of the republic, the United States had no immigration laws until 1875, when prostitutes and convicts were excluded.”).⁸⁵ In 1882, Congress denied entry to “convicts, lunatics, idiots, and persons likely to become a public charge.” *Id.* This law added to the basic restrictions first instituted by the federal government in 1875, when Congress excluded from entry “persons convicted of ‘crimes involving moral turpitude’ and prostitutes.” MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA*, 59 (2004).

Though these federal laws restricted who could enter the United States, they did not place any numerical quotas or absolute restrictions on any class of persons. Reflecting a society dominated by the proposition that racial identity determined one’s capacity to participate in society, however, late nineteenth-century immigration law enacted much more robust

⁸⁵ Although this does not signify that all groups immigrating to America before the late nineteenth century were welcomed. From the earliest colonial settlements in the 1600s, more-established residents often reacted negatively to immigrants perceived as different or in some way threatening.

restrictions on immigration from countries identified by contemporary ideology as populated by “inferior” races.⁸⁶ Years of agitation led to new restrictions on who could enter the United States in the years during and after the First World War.⁸⁷ In 1917, Congress

⁸⁶ Congress often aimed such legislation at Asians. Examples include: the 1882 Chinese Exclusion Act; the “Gentlemen’s Agreement of 1907,” which prevented the immigration of Japanese men; and the 1924 Immigration Act’s exclusion of “aliens ineligible for citizenship,” which included “peoples of all the nations of East and South Asia.” Ngai at 37. An 1877 Congressional Report on the proposed Chinese Exclusion Act demonstrates the racial attitudes that drove these policies: the report contended that “[t]here is not sufficient brain capacity in the Chinese race to furnish motive power for self-government’. Upon the point of morals, there is no Aryan or European race which is not far superior to the Chinese.” Kitty Calavita, *The Paradoxes of Race, Class, Identity, and “Passing”: Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 LAW & SOC. INQUIRY 1, 4.

⁸⁷ This opposition to immigration came from a wide variety of groups and perspectives. Labor unions, fearful that immigrants drove down wages, frequently agitated for restrictions on entry, though their positions were equivocal; many union leaders – like Samuel Gompers of the American Federation of Labor – were immigrants or deeply connected to the immigrant experience. Higham at 70-72. The Ku Klux Klan, originally organized in the South after the Civil War to intimidate black voters, reappeared in northern areas in 1915 to take part in the debate about immigration, arguing for restrictions. See Higham, 286-99. This version of the Klan, unlike “the first Klan, which admitted white men of every type and background . . . accepted only native-born Protestant whites and combined an anti-Negro with an increasingly anti-foreign outlook.” *Id.* at 288. Other groups argued that immigrants were responsible for crime and disorder in America’s rapidly growing cities, and that social order and control required restrictions on who could enter the country. See, e.g. Higham at 90 (finding that “[a]nti-foreign

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restricted immigration by political radicals⁸⁸ and imposed a literacy test on those seeking entry.⁸⁹ Higham at 202. The 1921 Immigration Act tightened restrictions on immigration, establishing “the first sharp and absolute numerical restrictions on European

sentiment filtered through a specific ethnic stereotype when Italians were involved; for in American eyes they bore the mark of Cain. They suggested the stiletto, the Mafia, the deed of impassioned violence.”). Finally, some contended that immigrants, particularly those who were from southern and eastern Europe and were Catholic or Jewish, were diluting American culture by undermining its traditional bases. *See* Higham at 95-96 (establishing that “[h]ardly had the new [southern and eastern European] immigration begun to attract attention when race-conscious intellectuals discovered its hereditary taint. In 1890 the Brahmin president of the American Economic Association alerted his fellow scholars to the new tide of ‘races . . . of the very lowest stage of degradation.’ About the same time [U.S. Senator] Henry Cabot Lodge noticed the shift away from northwestern Europe and began to bristle at its racial consequences.”). *See also* Ngai, IMPOSSIBLE SUBJECTS at 93 (finding that “[t]he Johnson-Reed Immigration Act of 1924 was motivated primarily by political concerns over the country’s ethnic and racial composition, but economic factors were still relevant.”).

⁸⁸ The law “exclude[d] from the United States not only individual advocates of violent revolution but also those who advocated sabotage or belonged to revolutionary organizations; [and] second, [determined] to deport any alien who at any time after entry was found preaching such doctrines.” Higham at 202.

⁸⁹ The literacy test prevented entry for “adult immigrants unable to read a simple passage in some language,” with only two exceptions: “[a]n admissible alien might bring in members of his immediate family despite their illiteracy, and in the interest of Russian Jews the same exemption applied to all aliens who could prove they were fleeing from religious persecution . . . refugees from political prosecution received no such exemption.” Higham at 203.

immigration” in United States history and implementing “a nationality quota system based on the pre-existing composition of the American population.” *Id.* at 311. These attempts at restricting immigration culminated in the Immigration Act of 1924, which capped yearly entries into the United States at 150,000, with quotas assigned to each country based on two percent of the foreign-born individuals of each nationality in the United States in 1890. RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS*, 209 (2d ed., 1998). The Act also excluded “aliens ineligible for citizenship” from entry, adding Japanese people to the list of those who were excluded from immigrating altogether.⁹⁰ The Act did not, however, restrict immigration from Mexico or other countries in the Western Hemisphere, though it did establish

⁹⁰ Previous laws had excluded Chinese and Asian Indian immigrants from entering the United States; the 1924 Act simply solidified these efforts to restrict Asian immigration. Takaki at 209. Because the Philippines became a United States possession after the 1898 war with Spain, however, the act did not restrict Filipino migration to Hawaii or the United States mainland. Filipino migration therefore increased dramatically after 1924 as more jobs became available. Ngai at 103. In 1930, 56,000 Filipinos, most of them men, lived on the west coast. *Id.* That number represented a tenfold increase from 1920. *Id.* Their presence sometimes led to violence from locals. In 1927, a Washington apple grower brought eleven Filipino workers he hired to a local jail for protection after he learned that white people had threatened to “deport” them. *Id.* at 105. At the same time, more than 500 Filipinos left the Yakima Valley region “after white residents threatened to attack them.” *Id.*

regulations for entry.⁹¹ Ngai, *IMPOSSIBLE SUBJECTS* at 50.

Historian Mae Ngai has noted that passage of the 1924 act meant “that numerical restriction created a new class of persons within the national body – illegal aliens – whose inclusion in the nation was at once a social reality and a legal impossibility.” Ngai, *IMPOSSIBLE SUBJECTS* at 57. Much of federal immigration law in subsequent decades would be aimed at identifying and controlling these illegal residents, provisions not previously present in American law.⁹² Before the changes brought by the immigration regulation of the 1910s and 1920s, the process of entering the United States as an immigrant was fairly simple, if invasive: an immigrant need only present

⁹¹ According to historian Mae Ngai, “while practicing exclusion toward Asia and restriction toward Europe, Congress imposed no practical restrictions on immigration from the countries of the Western Hemisphere.” Ngai continues to say that many nativistic Americans, however, supported exclusion or restriction of Mexican immigrants, who were considered part of an “unstable ‘mongrel race.’” Mae Ngai, *The Lost Immigration Debate: Border Control Didn’t Always Dictate Policy*, 3, *BOSTON REVIEW* (September/October 2006). Retrieved July 23, 2007 from <http://bostonreview.net/BR31.5/ngai.html>.

⁹² We note that the descendants of non-Asian immigrants who entered this country before the restrictions of the 1920s who condemn present-day illegal immigrants by pointing out that “when my relatives came to this country, they followed the law” ignore one very crucial fact: virtually no law existed to prevent anyone from entering the country prior to that period. No federal crime for unauthorized entry existed until 1929. See Ngai, *IMPOSSIBLE SUBJECTS* at 60.

herself at the border for inspection.⁹³ Once immigrants cleared this initial hurdle (represented to many by Ellis Island), they were free to enter the country, and did not need to carry any documents or do anything to prove particular status.⁹⁴ The passage of quotas and other restrictions on immigration, however, meant that the status of many aliens in the United States had become far from clear.⁹⁵ Much of the subsequent history of American immigration law is the history of an attempt to determine the status of

⁹³ Historian Mae Ngai notes that Mexican immigrants were still subject to immigration requirements in the 1924 law, which included presentation of a passport or visa; payment of a head tax; and inspection at entry. Ngai, *Lost Immigration Debate* at 4. Ngai describes this process as it occurred for Mexicans seeking to enter the United States in a later period: “inspection at the Mexican border involved a degrading procedure of bathing, delousing, medical-line inspection, and interrogation. The baths were new and unique to Mexican immigrants, requiring them to be inspected while naked, have their hair shorn, and have their clothing and baggage fumigated. Line inspection, modeled after the practice formerly used at Ellis Island, required immigrants to walk in single file past a medical officer.” Ngai, *IMPOSSIBLE SUBJECTS* at 68.

⁹⁴ One notable exception would be Chinese immigrants who had fraudulently obtained reentry certificates or become “paper sons.”

⁹⁵ Mae Ngai points out that after the 1924 Act, “many Mexicans entered the United States through a variety of means that were not illegal but comprised irregular, unstable categories of lawful admission, making it more difficult to distinguish between those who were lawfully in the country and those who were not.” Ngai, *IMPOSSIBLE SUBJECTS* at 70.

aliens living in the United States.⁹⁶ Only in 1929 did the United States first provide penalties for unlawful entry, making the first such entry a misdemeanor punishable by up to a year in jail or a \$1,000 fine and the second offense a felony, punishable by two years imprisonment or a \$2,000 fine. Ngai, *IMPOSSIBLE SUBJECTS* at 60.

Congress made occasional changes to this immigration system over the next forty years,⁹⁷ but the use

⁹⁶ This situation was reflected by the changing role that deportation played in federal policy. An 1875 federal law that excluded convicts and prostitutes from entry failed to “provide for their deportation except as an immediate part of the exclusion process.” Daniel Kanstroom, *United States Immigration Policy at the Millenium: Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1909 (2000). Only in 1891 did Congress pass legislation providing for the deportation of aliens who became public charges within a year of their arrival, provided that the condition that caused the alien’s hardship existed prior to arrival in the country. Ngai, *IMPOSSIBLE SUBJECTS* at 59. The steamship companies that had carried such an immigrant to the country was [sic] liable for the cost of the immigrant’s return. *Id.* Congress otherwise established no means or funding for deportation.

⁹⁷ Examples of such changes include: the establishment of contract labor programs involving West Indian agricultural laborers in the Southeast, Puerto Rican agricultural workers in the Northeast (who were U.S. citizens) and the well-known *Bracero* Program, by which 4.6 million Mexican workers traveled to the United States to work in agriculture between 1942 and 1964 (Ngai, *IMPOSSIBLE SUBJECTS* at 138-39); the end of Chinese exclusion in 1943 (*Id.* at 204); the Chinese Confession Program that began in 1956 and allowed Chinese persons who confessed that they “had entered the country by fraudulent

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of quotas and the principal of national exclusion remained central to the federal scheme. The most fundamental change in federal regulation of immigration came with the passage of the Immigration Act of 1965. This act abolished the national-origins quotas established in the 1924 act and allowed an annual admission of 170,000 Immigrants from the Eastern Hemisphere and 120,000 from the Western. Takaki, at 419. The restrictions on immigration for the Western Hemisphere represented a radical change in restrictions on immigration from that part of the world.⁹⁸ Ngai, IMPOSSIBLE SUBJECTS at 258. The

means” the opportunity to adjust their status (under law current at the time seven years of continuous United States residency or ninety days service the armed forces could lead to permanent residency) (*Id.* at 218); the 1948 Displaced Persons Act, which “provided for the admission of 202,000 European refugees over two years” (*Id.* at 236); the 1952 McCarran-Walter Act, which “brought many fragments of the nation’s immigration and naturalization laws under a single code,” capped immigrants at 155,000 per year under the quota system, maintained the national origins basis for national quotas, imposed quotas on former British colonies in the Caribbean and lifted restrictions on Japanese and Korean immigration (*Id.* at 238); and the asylum extended by the United States government to Vietnamese “boat people” in the 1970s. Aristide R. Zolberg, *Reforming the Back Door: The Immigration Reform and Control Act of 1986 in Historical Perspective*, 322, in IMMIGRATION RECONSIDERED (YANS-MCLAUGHLIN, ed.).

⁹⁸ Ngai notes that a change in the law in 1976 that assigned a 20,000 annual-immigrant quota to all countries in the western hemisphere “recast Mexican migration as ‘illegal.’ When one considers that in the early 1960s annual ‘legal’ Mexican migration comprised 200,000 braceros and 35,000 regular admissions for permanent residency, the transfer of migration to ‘illegal’

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law still provided for national quotas, but distributed them equally, not on the basis of previous immigration in particular years. Takaki at 419. The law also exempted from the quota spouses, minor children and parents of United States citizens. *Id.* Immigrants would be admitted according to certain preference categories for adult family members, professionals, workers for unfilled positions and refugees. *Id.* These changes led to an even more active role for the federal government in investigating and determining the status of immigrants, since “strict positive certification was required to ensure that they would not compete with Americans.” Aristide R. Zolberg, *Reforming the Back Door: The Immigration Reform and Control Act of 1986 in Historical Perspective*, 320, in IMMIGRATION RECONSIDERED (YANS-MCLAUGHLIN, ed.). Still, the 1965 Act represented a major change in the focus of immigration policy from a race-based policy to one that: “clearly institutionalized family reunion as the leading principle governing general immigration.” *Id.*⁹⁹

form should have surprised no one.” Ngai, IMPOSSIBLE SUBJECTS at 261.

⁹⁹ Congress has established other means by which potential immigrants can enter the country outside of the established immigration-regulation measures. The most prominent of these is asylum, “which offers permanent protection for aliens who fear future persecution, or who have suffered past persecution, in their home country.” Patricia A. Seith, *Note: Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1816 (1997). A person seeking asylum must file an application with Immigration and

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Congress extended its reach over the lives of aliens in the United States with the 1986 Immigration Reform and Control Act (“IRCA”). The Act established sanctions for employers who hired illegal aliens, providing a civil penalty of \$250 to \$2,000 for each worker hired and criminal penalties for a “pattern and practice” of illegal hiring, including a fine of up to \$3,000 and six month prison sentences. Zolberg at 334. Such employers also had to verify the immigration status of all job applicants. *Id.* at 335. The Act also provided a means for illegal aliens to obtain amnesty by “apply[ing] for legal status within an eighteenth-month period starting six months after the bill became law.” *Id.* at 334.¹⁰⁰

During the 1990s Congress implemented procedures to limit the rights of aliens to court review of

Customs Enforcement after arrival in the United States. *Id.* An officer reads the application and interviews the applicant. *Id.* If the applicant does not convince this officer to grant him asylum, he is generally referred to an immigration judge for removal. *Id.* at 1816-17. An applicant who faces an unfavorable decision can appeal to the Board of Immigration Appeals, and eventually to the federal courts. *Id.* at 1817. That process might take years. *Id.*

¹⁰⁰ Gloria Sandrino-Glasser describes the provisions of IRCA as: “(1) legalization of undocumented immigrants residing in the U.S. continuously since 1982; (2) sanctions for employers who hire undocumented aliens; (3) reimbursement of governments for added costs of legalization; (4) screening of welfare applicants for migration status; and (5) special programs to bring in agricultural laborers.” Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinolas’ Race and Ethnicity*, 19 CHICANO-LATINO L.REV. 69 at n.38.

administrative determinations of their status. The Anti-terrorism and Effective Death Penalty Act (“AEDPA”) of 1996 “eliminated judicial review of deportation and exclusion orders for noncitizens convicted of ‘aggravated felonies.’” Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 Conn. L. Rev. 1411, 1412. The act also removed a long-established waiver of deportability for long-term lawful United States residents. *Id.* at 1412. That same year, Congress placed new restrictions on immigration and review of agency removal decisions in the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRAIRA”). *Id.* That legislation increased resources for enforcement of the immigration laws, made more aliens eligible for deportation or exclusion, limited agency discretion to change immigrants’ status and increased the penalties for violating immigration laws. Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1633 (1997). That act also limited review of deportation orders in certain circumstances, particularly those who had been convicted of certain crimes or based their petition on certain “disfavored claims.”¹⁰¹ *Id.* at 1645.

¹⁰¹ The most important provisions of this act in relation to review of immigration status included “new, and more restrictive, procedures for the granting of discretionary waivers of removal on hardship grounds . . . new grounds of excludability (now called ‘inadmissibility’) and deportability, some of them designed to visit more lasting disabilities on former illegal aliens

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The history of federal regulation of immigration, then, is one of the creation of an intricate and complex bureaucracy that restricted who could immigrate to the United States and under what terms. Those immigration regulations have also come to define the conditions under which aliens can find employment in the country. The creation of this complex federal bureaucracy not only altered the role of the federal government in relation to immigration; it also transformed the status of immigrants in American society. A foreign-born person in the United States in 1870 had a presumptively legal status; no careful legal

. . . substantially revised the procedures and criteria for granting asylum to refugees . . . made deep inroads on the availability of judicial review, both in individual cases and in class litigation . . . imposed massive reliance on detention of aliens who may be subject to removal . . . established new procedures for the ‘expedited removal’ of certain categories of arriving aliens . . . revised . . . benefits restrictions and affidavit of support procedures, and expanded the exclusion ground for aliens deemed likely to become a public charge.” Gerald L. Neuman, *Symposium: Admissions and Denials: A Dialogic Introduction to the Immigration Law Symposium*, 29 CONN. L. REV. 1395, 1396-97 (1997). The IIRAIRA also permitted states to develop “pilot programs under which undocumented aliens are denied driver’s licenses” and allowed the Attorney General of the United States “to deputize state and local authorities to enforce federal immigration law.” Spiro at 1645. The Personal Responsibility Act, passed at around the same time as this other legislation, permitted “the states to extend certain benefits to aliens at their option. With respect to federally funded Medicare and what is colloquially known as ‘welfare’ (now called ‘temporary assistance to needy families’), states may make independent determinations on the eligibility of legal resident aliens.” *Id.* at 1637.

inquiry was required to determine whether that person had a right to reside in the country. By 1990, however, determining whether a foreign-born person enjoyed a legal right to remain in the United States demanded a detailed legal examination that involved numerous federal statutes, several adjudicatory bodies, and a number of appeals and exceptions. More than one hundred years of federal regulation have made the federal supremacy over immigration an intricate affair.
