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

PEDRO LOZANO, *et al.*, **Plaintiffs,** **v.** **CITY OF HAZLETON,** **Defendant.**	**Cause No. 3:06cv1586** **(Judge James M. Munley)**

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. IN SUPPORT OF DEFENDANT CITY OF HAZLETON

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STATEMENT OF THE INTEREST OF *AMICUS CURIAE*

Judicial Watch, Inc. ("Judicial Watch") is a not-for-profit, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly monitors on-going litigation, files *amicus curiae* briefs, and prosecutes lawsuit on matters it believes are of public importance.

As part of its efforts to promote fidelity to the rule of law, Judicial Watch has supported local government policies and legislative enactments when it finds such policies and enactments consistent with the rule of law. Conversely, Judicial Watch has opposed such policies and enactments when it finds them to be contrary to law.[1] In doing so, Judicial Watch has undertaken extensive research on

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[1] *See, e.g., Karunakaram, et al. v. Town of Herndon, et al.*, No. CH 2005 4013 (Fairfax Co., Va. Cir. Ct.) (lawsuit by Judicial Watch on behalf of residents challenging use of taxpayer resources to operate day laborer site facilitating employment of undocumented aliens); *Garcia, et al. v. City of Laguna Beach, et al.*, No. 06CC10595 (Orange Co., Calif. Super. Ct.) (same); *Sturgeon v. Bratton, et al.*, No. BC351646 (Los Angeles Co., Calif. Super. Ct.) (lawsuit by Judicial Watch on behalf of taxpayer challenging Los Angeles Police Department policy regarding contacts with undocumented aliens and federal immigration officials); *Judicial Watch, Inc. v. Chicago Police Dept.*, No. 06CH28084 (Cook Co., Ill. Cir. Ct.) (open records lawsuit to compel release of records relating to Chicago Police Department's policies regarding contacts with undocumented aliens and federal immigration officials).

immigration laws, and, in particular, the interaction of federal, state, and local laws and policies touching on immigration issues and the doctrine of federal preemption. Judicial Watch respectfully wishes to share the results of its considerable research with the Court by filing this *amicus curiae* brief.

DISCUSSION

I. Background.

"But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." *License Cases*, 46 U.S. (5 How.) 504, 582 (1847). "It may be said in a general way that the police power extends to all the great public needs." *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) (citation omitted). "It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Id.* The United States Supreme Court has stated that the municipal police power exists for the "public safety, public health, morality, peace and quiet, and law and order." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

In the case at bar, the City of Hazleton has found it both reasonable and necessary for the public health and welfare to exercise its police power by enacting Ordinance 2006-13, otherwise known as the Rental Registration Ordinance, and

Ordinance 2006-18, otherwise known as the Illegal Immigration Relief Act Ordinance ("IIRA Ordinance") (collectively "the Ordinances").[2] The subject matter regulated – the employment and harboring of persons "not entitled to lawful residence in the United States, let alone to work here – is certainly within the mainstream of [the City of Hazleton's] police power . . .." *De Canas v. Bica*, 424 U.S. 351, 356 (1976). The pertinent sections at issue in the Rental Registration Ordinance require a person who desires to rent a dwelling unit in the City of Hazleton to submit an application for and obtain an occupancy permit. *See* Ordinance 2006-13 §§ 6 and 7. The IIRA Ordinance prohibits any business entity in the City of Hazleton that holds a business permit from employing an illegal alien. *See* Ordinance 2006-18 § 4. The IIRA Ordinance also prohibits any person or business entity who owns a dwelling unit in the City of Hazleton from harboring an illegal alien in the dwelling unit. *See* 2006-18 Ordinance § 5.

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[2] On December 28, 2006, the City of Hazelton enacted two additional ordinances, Ordinance 2006-35 and Ordinance 2006-40, concerning the Ordinances at issue in this litigation. Neither of the new ordinances change substantively the arguments raised herein. In fact, Ordinance 2006-40 further demonstrates that the City of Hazelton does not in any way intend to make determinations about the legal status of anyone, but instead intends to on determinations made by federal immigration authorities. Ordinance 2006-40 § 7(E).

II. Applicable Standards of Review.

A. This Facial Challenge Is Disfavored and Plaintiffs Bear a Heavy Burden.

Plaintiffs in this case have not alleged that the City of Hazleton or its agents have taken any action to enforce the Ordinances at issue against them or anyone else. Thus, Plaintiffs are arguing that the Ordinances are unconstitutional on their face. As a result, they confront a "heavy burden" in advancing their claims. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). The Supreme Court has stated that "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) and citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored")).

This Court has stated that the standard of review for a facial challenge of an ordinance "imposes a 'heavy burden' on the plaintiffs, because 'the fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . .'" *Lock Haven Property Owners' Ass'n v. City of Lock Haven*, 911 F. Supp. 155, 158 (M.D. Pa. 1995) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Indeed, a

court may not find an ordinance to be facially unconstitutional "unless every reasonable interpretation of the statute would be unconstitutional." *Id.* (citing *Salerno*, 481 U.S. at 745 and *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796-97 (1984)). Conversely, to defeat a facial challenge under the Supremacy Clause, a party need "merely to identify a possible application" of the state law not in conflict with federal law. *Baltimore and Ohio Railroad Co. v. Oberly*, 837 F.2d 108, 116 (3rd Cir. 1988) (quoting *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987)).

The Supreme Court's disfavor for facial challenges and rationale for the heavy burden on the party advancing facial challenges is obvious. When a legislative enactment is facially attacked, a court is at a disadvantage because it does not know how the law will be applied or construed by the enforcing authorities. The law might be applied or construed in such a way that avoids any constitutional issues. What this means for this case is that, if there exists *any* possible application or construction of the Ordinances at issue that avoids a conflict with federal law, it must be applied to save the Ordinances.

B. The Ordinances at Issue Are Presumed to be Constitutional.

Every legislative act, whether it be a state statute or city ordinance, is presumed to be constitutional. *See Bush v. Vera*, 517 U.S. 952, 992 (1995) ("Statutes are presumed constitutional"); *Tower Realty, Inc. v. East Detroit*, 196 F.2d 710, 718 (6th Cir. 1952) ("With regard to the presumption of constitutionality, the rule applicable to ordinances of a city government is the same as that applied to statutes passed by the legislature."); *Bilbar Construction Co. v. Easttown Township Board of Adjustment*, 393 Pa. 62, 70-71 (Pa. 1958) ("All presumptions are in favor of the constitutionality of acts and courts are not to be astute in finding or sustaining objections to them . . . The same presumption of constitutional validity that attends an act of the legislature is equally applicable to municipal ordinances whether they be enacted by the council of a city, town or borough or by the supervisors of a township.") (citations omitted).[3] This presumption will prevail unless there is a "clear showing that [the challenged ordinance] transgresses constitutional limitations." *National Mut. Insurance Co. of Dist. of Col. v. Tidewater Transfer Co.*, 337 U.S. 582, 604 (1949); *see also Bilbar Construction Co.*, 393 Pa. at 70 ("A legislative enactment can be declared void only when it

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[3] Though *Bilbar Construction Co.* is not controlling, it is a well-reasoned opinion, and, thus, instructive here.

violates the fundamental law clearly, palpably, plainly and in such manner as to leave no doubt or hesitation in the minds of the court.").

C. The Burden Is on Plaintiffs and Never Shifts.

"It is a salutary principle of judicial decision, long emphasized and followed by [the Supreme] Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it . . . ." *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580, 584 (1935); *see also Bilbar Construction Co.*, 393 Pa. at 70 ("The rule is well established that the burden of proving clearly and unmistakably the unconstitutionality of a legislative enactment is upon the person so asserting."). The burden of proof never shifts. *Bilbar Construction Co.*, 393 Pa. at 70.

D. When the Action of a Lawmaking Body Is Within the Scope of its Power, Fairly Debatable Questions as to its Reasonableness, Wisdom and Propriety Are Not for the Determination of Courts.

The "legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs." *Berman*, 348 U.S. at 32 (citations omitted). As a result, "[w]hen the action of a legislature is within the scope of its power, fairly debatable questions as to its

reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision." *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 190-91 (1938) (citations omitted); *see also Bilbar Construction Co.*, 393 Pa. at 71 ("Even where there is room for difference of opinion as to whether an ordinance is designed to serve a proper public purpose, or if the question is fairly debatable, the courts cannot substitute their judgment for that of the authorities who enacted the legislation."). "So long as it [the legislature] acts within its constitutional power to legislate in the premises, courts do well not to intrude their independent ideas as to the wisdom of the particular legislation." *Bilbar Construction Co.*, 393 Pa. at 72.

III. The Ordinances at Issue Are Not Preempted Under the Supremacy Clause of the United States Constitution.

The Supremacy Clause provides that the "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." U.S. Const., art. VI, cl. 2. "[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to a

federal law, must yield." *Gade v. Nat'l Solid Waste Management Assoc.*, 505 U.S. 88, 108 (1992) (internal quotation marks omitted).

"Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *C.E.R. 1988, Inc. v. Aetna Cas. & Sur. Co.*, 386 F.3d 263, 268-69 (3rd Cir. 2004) (quoting *Bldg. & Const. Trades Council of Metro. Dist. v. Assoc. Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224 (1993)). Indeed, a court must be "generally reluctant to infer pre-emption" and "it would be particularly inappropriate to do so [where] the basic purposes of the state statute and [the federal statute] are similar." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978) (citations omitted). What is more, there is a "presumption against preemption in situations where Congress has 'legislated . . . in a field which States have traditionally occupied.'" *Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214, 228 (3rd Cir. 2001) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-86 (1996)). The "party claiming preemption bears the burden of demonstrating that federal law preempts state law." *Green*, 245 F.3d at 230 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)).

In *De Canas*, 424 U.S. 351, the Supreme Court established a three-part test to determine if a state legislative enactment touching on aliens was constitutionally

preempted under the Supremacy Clause.[4] If the legislative enactment fails any of the prongs of the *De Canas* test, it is constitutionally preempted. As will be shown below, the Ordinances at issue are in harmony with federal law, not at odds with it. The Ordinances pass all three prongs of the *De Canas* test, and, therefore, are not constitutionally preempted.

A. The Ordinances at Issue Do Not Regulate Immigration.

Under the first prong of the *De Canas* test, a court must determine whether the legislative enactment regulates immigration. *De Canas*, 424 U.S. at 355. The "[p]ower to regulate immigration is exclusively a federal power." *Id.* at 354. As a result, any legislative enactment that regulates immigration is constitutionally preempted.

The Supreme Court has stated that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration . . . ." *Id.* at 355. In fact, "even if such local regulation has some purely speculative and indirect impact

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[4] Although *De Canas* involved a state legislative enactment and not a city ordinance as in this case, it is still applicable here, as municipalities are creatures and extensions of a state. *See Reynolds v. Sims*, 377 U.S. 533, 575 (1964) ("Political subdivisions of States – counties, cities, or whatever – never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.").

on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve." *Id.* at 355-56. A legislative enactment is a regulation of immigration only if it makes "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355. "In other words, it is the creation of standards for determining who is and is not in this country legally that constitutes a regulation of immigration in these circumstances, not whether a state's determination in this regard results in the actual removal or inadmissibility of any particular alien, for the standards themselves are 'a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.'" *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 602-03 (E.D. Va. 2004) (quoting *De Canas*, 424 U.S. at 355).

Much like the IIRA Ordinance at issue in this case, the California statute at issue in *De Canas* prohibited employers from knowingly employing an alien who is "not entitled to lawful residence in the United States." *De Canas*, 424 U.S. at 352 n.1. The Supreme Court found that the statute did not regulate immigration because the statute had adopted federal immigration standards regarding who was "entitled to lawful residence in the United States." *Id.* at 355-56. Thus, the statute

did not make "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* The fact that the statute might have an "indirect impact on immigration" made no difference to the High Court. *Id.*

The IIRA Ordinance at issue in this case likewise adopts federal immigration standards regarding who is "entitled to lawful residence in the United States." Specifically, the IIRA Ordinance defines an "illegal alien" as a person:

> 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. (Emphasis added).

Ordinance 2006-18 § 3(D). The IIRA Ordinance also defines an "unlawful worker" as 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).* (Emphasis added).

Ordinance 2006-18 § 3(E). The IIRA Ordinance does not in any way make "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-

56, but instead relies entirely on federal immigration standards and federal agency verification of who is "entitled to lawful residence in the United States." As a result, the IIRA Ordinance does not regulate immigration. *See also League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 770 (C.D. Cal. 1995) ("LULAC") (Proposition that denied state benefits to illegal aliens based on federal immigration standards did not regulate immigration.); and *Merten*, 305 F. Supp. 2d at 603 (School policies that deny admission to illegal aliens based on federal immigration standards do not regulate immigration.).

What is more, the fact that the IIRA Ordinance might have "some indirect impact on immigration," such as causing illegal aliens to move out of the City of Hazleton, or deter them from ever entering Hazleton, does not make it a regulation of immigration. *De Canas*, 424 U.S. at 355-56; *see also LULAC*, 908 F. Supp. at 770 (Although benefits denial provision might "indirectly or incidentally affect immigration by causing such persons to leave the state or deterring them from entering California," the provision was not a regulation of immigration under *De Canas*). Because the IIRA Ordinance does not regulate immigration, it passes the first prong of the *De Canas* test.

Similarly, the Rental Registration Ordinance cannot be said to regulate immigration either. The Rental Registration Ordinance requires only that

occupants of rental units (as those terms are defined in the ordinance) obtain an "occupancy permit." In order to obtain such a permit, an applicant must provide, *inter alia*, "proper identification showing proof of legal citizenship and/or residency." Ordinance 2006-13 § 7(B)(1)(g). Thus, the ordinance does not involve a determination by local officials of whether an applicant should or should not be admitted into the United States or the conditions under which an applicant should be allowed to remain in the United States. It requires only that the applicant demonstrate what his or her status is. Thus, the Rental Registration Ordinance passes the first prong of the *De Canas* test as well. *See De Canas*, 424 U.S. at 355-56.

B. Congress Has Not Expressed a "Clear and Manifest Purpose" to Effect a "Complete Ouster of State Power – Including State Power to Promulgate Laws Not in Conflict with Federal Laws" in the Field of the Regulation of Aliens.

Under the second prong of the *De Canas* test, a court must determine whether it is the "clear and manifest purpose of Congress" to effect a "complete ouster of state power – including state power to promulgate laws not in conflict with federal laws" with respect to the subject matter the legislative enactment attempts to regulate. *De Canas*, 424 U.S. at 357. In other words, a legislative enactment is preempted where Congress intended to "occupy the field" the

legislative enactment attempts to regulate. *Id.* Preemption under this part of the *De Canas* test is known as "field preemption."

Field preemption is the most difficult part of the *De Canas* test to apply. The Supreme Court itself has stated, "It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (citations omitted).[5]

The first step to determine if Congress has completely occupied a field of regulation is to look at the federal law or regulation to determine the boundaries of the "field." In *De Canas*, the Supreme Court stated, "[e]very Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history." *De Canas*, 424

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[5] To further demonstrate the difficulty in defining the contours of preemption law, the Supreme Court has declared, with respect to the three-part test set forth in *De Canas*, that these three categories are not "rigidly distinct." *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990). "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." *Id.*

U.S. at 360 n.8 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 78-79 (1941) (Stone, J., dissenting)).

Next, once the field is identified, a court should note whether the subject matter of the state legislative enactment at issue is one that has traditionally been occupied by the States. If so, a presumption against federal preemption of state law exists. *See Green*, 245 F.3d at 223 n.7 (citing *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001)). The court should proceed "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice,* 331 U.S. at 230; *see also De Canas*, 424 U.S. at 357 (Congress must express a "clear and manifest purpose" to effect a "complete ouster of state power – including state power to promulgate laws not in conflict with federal laws" – to preempt a state legislative enactment.). "This assumption provides assurance that 'the federal-state balance,' *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). A federal regulation, therefore, "should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so

ordained." *De Canas*, 424 U.S. at 356 (quoting *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)).

In *De Canas*, the Supreme Court looked to the pertinent federal regulation, *i.e.*, the Immigration and Nationality Act ("INA"), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.*, to determine if Congress had completely occupied the field of the regulation of aliens. In its discussion of the first prong of the *De Canas* test, the High Court delineated the boundary of the field covered by the INA as the regulation of immigration, or, stated differently, 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 High Court then noted that the subject matter of the California statute at issue was not the regulation of immigration, but rather the regulation of the employment relationship, an area traditionally regulated by States through their police powers. *Id.* at 356. The Court declared that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Id.* The Court found that prohibiting employers from knowingly employing "persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation." *Id.*

Because the California statute regulated an area traditionally regulated by States, the High Court applied a presumption against preemption. "Only a demonstration that complete ouster of state power – including state power to promulgate laws not in conflict with federal laws – was the clear and manifest purpose of Congress" would justify the conclusion that the California statute was preempted. *Id.* (citations and internal quotation marks omitted). The Court found that there is no "specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." *Id.* at 358. The Court also found that neither "can such intent be derived from the scope and detail of the INA. The central concern of the INA 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 did, however, find evidence in the form of another federal statute that Congress intended "that States may, to the extent consistent with federal law, regulate the employment of aliens." *Id.* at 361-62. Specifically, the Farm Labor Contractor Registration Act, 88 Stat. 1652, 7 U.S.C. § 2041 *et seq.*, contained a clause that stated, "[this] chapter and the provisions contained herein are intended to supplement State action and compliance with this chapter shall not excuse

anyone from compliance with appropriate State law and regulation." *Id.* at 362 (quoting 7 U.S.C. § 2051). The Court found this as "persuasive evidence that the INA should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations in matters affecting employment of illegal aliens, and therefore barring state legislation . . . ." *Id.*

Ultimately, the Supreme Court could not "conclude that preemption of the California regulation of employment of illegal aliens was required either because 'the nature of the . . . subject matter [regulation of employment of illegal aliens] permits no other conclusion,' or because 'Congress has unmistakably so ordained' that result." *Id.* at 356.

In the instant case, as in *De Canas*, the pertinent federal regulation to examine to determine whether Congress has completely "occupied the field" is the INA and its subsequent amendments. As the Supreme Court found in *De Canas*, the boundary of the field covered by the INA is the regulation of immigration, or, stated differently, a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain. *Id.* at 355. Here, the subject matter of the Ordinances at issue is not the regulation of immigration, but rather the regulation of the landlord-tenant and employment relationships, areas traditionally regulated by States through their police powers.

See id. at 356 ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."); *Yee v. City of Escondido*, 503 U.S. 519, 528-29 (1992) (". . . States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular. . . ."). Indeed, it cannot be disputed that there exist comprehensive state laws regulating such relationships in every state.

Because the Ordinances at issue regulate areas traditionally regulated by States, a presumption against preemption must be applied here. "Only a demonstration that complete ouster of state power – including state power to promulgate laws not in conflict with federal laws – was the clear and manifest purpose of Congress" can justify the conclusion that the Ordinances are preempted. *De Canas*, 424 U.S. at 357 (citations and internal quotation marks omitted). There can be no such demonstration here.

As found in *De Canas*, there is no "specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." *De Canas*, 424 U.S. at 358. Indeed, no section of the INA contains an explicit statutory command indicating that federal law preempts and thereby displaces the type of Ordinances at issue here. In fact, Congress has

explicitly indicated just the opposite in regards to the prohibition of the employment of illegal aliens. Specifically, section 1324a(h)(2) of the INA provides:

> 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. § 1324a(h)(2) (emphasis added). In other words, Congress has *expressly* authorized state or local employment licensing laws touching on illegal aliens. The IIRA Ordinance enacted by the City of Hazleton is clearly an employment licensing law as it mandates the suspension of the business permit of any business that employs illegal aliens. *See* IIRA Ordinance §§ 4.B.(4) and (7). As a result, the IIRA Ordinance is not preempted, but instead expressly authorized under 8 U.S.C. § 1324a(h)(2).

In *De Canas*, the Court found as persuasive evidence that Congress intended "that States may, to the extent consistent with federal law, regulate the employment of aliens" the existence of a federal statute that expressly validated state laws touching on aliens. *De Canas*, 424 U.S. at 361-62. Likewise in this case, the existence of the exception in 8 U.S.C. § 1324a(h)(2) expressly authorizing employment "licensing and similar laws" touching on aliens is "persuasive

evidence that the INA should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations in matters affecting employment of illegal aliens, and therefore barring state legislation . . . ." *Id.*

What is more, as the United States Court of Appeals for the Third Circuit ("Third Circuit") has stated, the very existence of "a statutory provision explaining when and how state regulation is to be preempted would hardly be necessary in a statute manifesting Congress's intent to occupy a particular regulatory field." *Baltimore and Ohio Railroad Co.*, 837 F.2d at 113. Thus, the fact that 8 U.S.C. § 1324a(h)(2) even exists proves that Congress did not intend to occupy the field of the regulation of aliens, and, more particularly, the employment of illegal aliens. Nor does the absence of a similar, express statutory provision with respect to state or local regulation of the landlord-tenant relationship warrant a different result because, again, states have "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular." *Yee*, 503 U.S. at 528-29.

Lastly, here, as in *De Canas*, Congress' intent to occupy the field of the regulation of aliens cannot be derived from the scope and detail of the INA. *De Canas*, 424 U.S. at 359. As the High Court put it, "[g]iven the complexity of the matter addressed by Congress . . . , a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent." *Id.* at

359-60 (quoting *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 415 (1973)).

Because neither the INA nor any other federal statute demonstrates that it was the clear and manifest purpose of Congress to oust harmonious state laws in the area of landlord-tenant and employment relationships touching on illegal aliens, the Ordinances at issue pass the second prong of the *De Canas* test.

C. The Ordinances at Issue Do Not Stand as an Obstacle to the Accomplishment and Execution of the Full Purposes and Objectives of Congress, Nor Do They Conflict with Federal Law.

Under the third prong of the *De Canas* test, a court must determine whether the legislative enactment at issue burdens or conflicts with federal law. *De Canas*, 424 U.S. at 358 n.5, 363. Preemption under this part of the test is known as "conflict preemption." A conflict exists "when it is impossible to comply with both state and federal law, or if the state law is an obstacle to the accomplishment of the full purposes and objectives of Congress in enacting the federal legislation." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (internal quotation marks and citations omitted). Even so, "conflicting law, absent repealing or exclusivity provisions, should be pre-empted . . . only to the extent necessary to protect the achievement of the aims of the federal law, since 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*, 424 U.S. at 358 n.5 (citations and internal quotation marks omitted).

In the instant matter, the Ordinances at issue are not in conflict with any federal law, particularly the INA. First, it clearly is possible to comply with both the INA and the Ordinances at issue here. The INA prohibits the employment and harboring of illegal aliens. *See* 8 U.S.C. §§ 1324 and 1324a. The IIRA Ordinance prohibits the same, *using the standards contained in 8 U.S.C. §§ 1324 and 1324a. See* IIRA Ordinance §§ 3.D., 3.E., 4, and 5. The two laws are thus not in conflict, but rather are in harmony. Likewise, the Rental Registration Ordinance requires only that applicants for occupancy permits provide proof of legal residency, a measure that is consistent with, rather than in conflict with, the INA's prohibition on harboring illegal aliens. *See* Ordinance 2006-13 § 7(B)1(g). Therefore, "no direct conflict exists between state law and federal law in this case. *Cf., e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963) ('That would be the situation here if, for example, the federal orders forbade the picking and marketing of any avocado testing more than 7 oil, which the California test excluded from the State any avocado measuring less than 8 oil content.')." *Green*, 245 F.3d at 223 n.8.

In addition, the fact that the INA and the Ordinances happen to touch on related activity does not create a conflict as "establishing that federal law overlaps state law is, by itself, insufficient to establish that federal law preempts state law." *Id.* at 228. Indeed, the "creation of a federal [prohibition] does not necessarily eradicate existing state law [prohibitions] or require that the federal [prohibition] be exclusive." *Id.* at 227 (citing *Medtronic, Inc.*, 518 U.S. at 495-501 (holding that § 360(k) of the Medical Device Amendments of 1976 does not preempt overlapping state tort law)).[6]

Also, the Ordinances at issue are not in conflict with federal law as they do not stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Schneidewind*, 485 U.S. at 300. In "deciding whether state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the Court "must focus on and attempt to

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[6] Plaintiffs erroneously argue that the IIRA Ordinance conflicts with the INA because the IIRA Ordinance does not mirror its federal counterpart in every detail. *See* Memorandum of Law in support of Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order at 20-26. The Third Circuit, however, has emphatically rejected such an argument as it "finds no support in relevant federal case law and is actually contrary to the Supreme Court's preemption jurisprudence." *Green*, 245 F.3d at 227-28 (citing *Medtronic, Inc.*, 518 U.S. at 495-96 and *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 141-43); *see also LULAC*, 908 F. Supp. at 786 (State law provision withstood preemption challenge even though there existed a federal law outlawing the same conduct with different criminal penalties.).

discern the intent of Congress in enacting [the federal law]." *Green*, 245 F.3d at 224. Congress' intent can be discovered by examining the legislative history of the federal law. *Id.*

The legislative history of the federal prohibition on harboring illegal aliens contained in 8 U.S.C. § 1324 reveals that "the purpose of the section is to keep unauthorized aliens from entering *or remaining* in the country." *United States v. Acosta De Evans*, 531 F.2d 428, 430 (9th Cir. 1976), *cert. denied*, 429 U.S. 836 (1976) (citing 1952 U.S. Code Cong. & Admin. News 1653) (emphasis in original). The legislative history of the federal prohibition on employing illegal aliens contained in 8 U.S.C. § 1324a makes clear that the section "was enacted to reduce the influx of illegal immigrants into the United States by eliminating the job magnet." *Egbuna v. Time-Life Libraries*, 153 F.3d 184, 187 (4th Cir. 1998) (citing Statement by President Ronald Reagan Upon Signing S. 1200, 22 Weekly Comp. Pres. Doc. 1534 (Nov. 10, 1986)). In the instant matter, the Ordinances at issue do not stand as an obstacle to these purposes, but, rather, will actually further these congressional objectives. Indeed, the Ordinances may assist in achieving the same goals articulated by Congress in enacting the INA and its subsequent amendments. Thus, it would be "particularly inappropriate" to infer preemption "[where] the

basic purposes of the state statute and [the federal statute] are similar." *Exxon Corp.*, 437 U.S. at 132 (citations omitted).

Because it is possible to comply with the Ordinances at issue and federal law, and "neither the language" of the relevant provisions in the INA "nor the legislative history indicates, or even suggests" that the Ordinances at issue stand "as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress," the Ordinances pass the third prong of the *De Canas* test. *Green*, 245 F.3d at 228.

CONCLUSION

For the foregoing reasons, this Court should find that the Ordinances at issue are not preempted by the Supremacy Clause of the United States Constitution, but rather are in harmony with the goals, objectives, and the express language of the INA.

Dated: March 2, 2007

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