IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 07-3531

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-Appellees,

v.

CITY OF HAZLETON,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF REVERSAL FOR CITY OF HAZLETON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Paul J. Orfanedes
James F. Peterson
JUDICIAL WATCH, INC.
501 School Street, S.W., Suite 500
Washington, DC 20024
(202) 646-5172

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus curiae* Judicial Watch, Inc. ("Judicial Watch") certify that (1) Judicial Watch has no parent corporation, (2) no publicly held companies hold 10 percent or more of any stock or ownership interest in Judicial Watch.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes, Rules and Regulations

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Judicial Watch is a 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 lawsuits 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's immigration policies and legislative enactments when it finds them 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]

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[1] *See*, *e.g.*, *Karunakaram v. Town of Herndon*, No. CH 2005 4013 (Cir. Ct. of Fairfax County, Virginia, filed September 1, 2005) (Judicial Watch lawsuit on behalf of town residents to prohibit continued local government violation of state and federal law by committing public funds and resources to facilitate illegal employment of illegal aliens); *Garcia, et al. v. City of Laguna Beach, et al.*, No. 06CC10595 (Super. Ct. of St. of CA, Orange County, filed October 3, 2006) (same); *Sturgeon, et al. v. Bratton, et al.*, No. BC351646 (Super. Ct. of St. of CA, Los Angeles County, filed April 28, 2006) (Judicial Watch lawsuit on behalf of taxpayer challenging the Los Angeles Police Department's policy prohibiting police officers from inquiring about an individual's immigration status and reportedly restricts police officers from cooperating with federal immigration officials); *Judicial Watch v. Chicago Police Dept.*, No. 06CH28084 (Cir. Ct. Of Cook County, Illinois, filed December 22, 2006) (Open records lawsuit to compel release of documents related to department's policies concerning illegal immigration).

In doing so, Judicial Watch has undertaken extensive research on immigration laws, and, in particular, the interaction of federal, state, and local laws 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.

Counsel for the parties have consented to the filing of this brief.

ARGUMENT

I. Background

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). The police power extends to "all the great public needs." *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) (citation omitted). It is a power that "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.* In short, the police power is "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).

In the case at bar, the City of Hazleton has found it both reasonable and

necessary for the public welfare to exercise its police power by enacting a certain ordinances directed at addressing the effects of the presence of illegal aliens in the community. The ordinances at issue are the (1) Rental Registration Ordinance (Ord. No. 2006-13); and (2) Illegal Immigration Relief Act Ordinance (Ord. No. 2006-18) ("IIRA Ordinance"). The Rental Registration Ordinance merely requires that a person seeking to rent a "dwelling unit" within city submit an application in order to receive an occupancy permit. *See* Rental Registration Ordinance §§ 6 and 7. The IIRA Ordinance requires that any entity applying for a business permit simply affirm that it will not knowingly hire an illegal alien. *See* IIRA Ordinance at § 4. Finally, the IIRA Ordinance also prohibits any person or entity who owns a dwelling unit in the City of Hazleton from harboring an illegal alien in the dwelling unit. *See* IIRA Ordinance at § 5.

As discussed herein, the subject matter of these ordinances – the regulation of the landlord-tenant and employment relationships – are well within the traditional police and licensing powers of the City. Because the ordinances do not seek specifically to regulate immigration, they are not preempted by federal immigration law. In fact, the ordinances work in harmony with federal law and are entirely consistent with purposes set forth by Congress in enacting legislation

concerning immigration. They also fit comfortably within well-established case law authorizing local government actions.

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")).

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 . . . .'" *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. *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 placed on persons advancing such challenges is manifest. When a legislative enactment is facially attacked, a court is at a disadvantage because it does not know how the law will be applied nor construed by the enforcing authorities. The law might be applied or construed in such a way by the enforcing authorities that avoids any constitutional issues. For this case, this means 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 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).[2] This presumption will prevail unless there is a "clear showing that it 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 violates the fundamental law clearly, palpably, plainly and in such manner as to leave no doubt or hesitation in the minds of the court.").

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

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).

It is fundamental that "[c]onsideration 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" upon aliens is constitutionally preempted under the Supremacy Clause.[3] If the legislative

[3] Although *De Canas* involved a state legislative enactment and not a city ordinance, it is still applicable here, as municipalities are creations 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

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 harmonious with federal law and actually facilitate, rather than conflict with, the accomplishment of congresssional purposes. Because the Ordinances satisfy all three prongs of the *De Canas* test, they 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 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

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governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.").

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. As described by one court:

> 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 aliens who are "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 it had adopted federal immigration standards regarding who was "entitled to lawful residence in the United States," and, thus, 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.* at 355-56. The fact that the statute might have an "indirect impact on immigration" made no difference to the 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, Section 3.D. of 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).

Section 3.E. of the IIRA Ordinance 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).

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") (law 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.).

Moreover, even if the IIRA Ordinance might have "some indirect impact on immigration," such as deterring illegal aliens from seeking work in Hazleton, this does not transform the ordinance into 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," provision was not a regulation of immigration under *De Canas*).

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" from the City before renting a dwelling unit within the City limits. 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). Again, 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. The Ordinance only requires the collection of information from an applicant. 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. The District Court properly found in this case that neither ordinance regulates immigration and "are not unconstitutional on that ground." *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 524 n.45 (M.D. Pa. 2007).

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" that 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, "[i]t 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).

The first step to determine if Congress has "occupied the field" and effected a complete ouster of state power 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 U.S. at 360 n.8 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 78-79 (1941) (Stone, J., dissenting)).

Once the field is identified, a court should examine whether the subject matter of the state legislative enactment at issue is one that traditionally has 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,' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). 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 found 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 Court applied the 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 [Immigration and Nationality Act ("INA"), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.*] 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 (construing the INA prior to the 1986 amendments). 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 if Congress has completely occupied the field of the regulation of aliens 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."); and *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, the City of Hazleton is entitled to 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" can justify the conclusion that the Ordinances are preempted. *De Canas*, 424 U.S. at 357 (citations and internal quotation marks omitted). There is no clear and manifest ouster of state power here.

The District Court wholly failed to apply this presumption. Indeed, instead

of focusing its analysis on the fact that the Ordinances at issue touch on areas of traditional state and local concern – employment and landlord-tenant relationships – the District Court wrongly focused its analysis on the federal interest in regulating immigration. *See Lozano*, 496 F. Supp. 2d at 522. However, neither Ordinance here regulates immigration, a fact the District Court recognized correctly elsewhere in its decision. *Id.* at 524 n.45. Thus, the District Court erred in failing to apply this presumption.

In addition, and 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, Congress has explicitly indicated just the opposite. The INA expressly 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 *expressly* demonstrated its intent not to preempt state and local licensing and similar laws that might touch on the employment of unauthorized 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 persons determined by federal immigration authorities to be unauthorized aliens. *See* IIRA Ordinance §§ 4.B.(4) and (7). Far from being preempted, the IIRA Ordinance instead is expressly authorized under 8 U.S.C. § 1324a(h)(2).[4] Nor does any section of the INA contain an explicit statutory command that federal law preempts local licensing laws regarding the landlord-tenant relationship and the rental of dwelling units to illegal aliens.

The District Court found that the ordinances at issue are not "licensing and similar laws." *Lozano*, 496 F. Supp. 2d at 519. It reasoned that Congress would not provide localities with the power to impose what the District Court called the "ultimate sanction" of suspending a business license if it specifically reserved the right for itself to impose the "lesser" penalties of criminal and civil sanctions. This conclusion is contradicted by the very legislative history cited by the District Court later in its opinion. Specifically, a report by the House Committee on the Judiciary expressly states that the law does not preempt local processes that suspend, revoke or refuse to reissue a license. *Id.* at 519-20 (quoting H.R. No. 99-682(1) at 5662).

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[4] Given this express statutory statement of what is not preempted, Appellees would appear to face an even more substantial hurdle to prevail on their facial challenge.

The District Court relied on this Committee Report to conclude that the exception for "licensing and similar laws" is limited to localities revoking business licenses for violating federal law only. *Lozano*, 496 F. Supp. 2d at 519-20. The Supreme Court in reviewing this same report, however, has stated that it is a "slender reed" to base any conclusion as to what Congress intended in the Immigration Reform and Control Act of 1986 ("IRCA"). *See Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 149 n.4 (2002) ("[A] single Committee Report from one House of a politically divided Congress" is a "rather slender reed."). Even so, nothing in this report suggests that the example given is exclusive and categorical rather than illustrative of the application of the exception. Indeed, no where does the report suggest that localities are prevented from revoking a business license for violating local laws, nor would such a conclusion make sense considering that business licensing and employment laws are traditionally areas of local concern. *See De Canas*, 424 U.S. at 356 ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."). Consequently, the report provides no basis to overlook the plain words of the statute. *See Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in judgment) ("The law *is* what the law *says*,

and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.").

After ignoring the presumption against preemption, the District Court found that the Ordinances at issue were preempted because the INA and its subsequent amendments comprise a pervasive and comprehensive scheme of federal regulation concerning aliens that leaves no room for local laws and that "occupied the field" with respect to immigration matters. *Lozano*, 496 F. Supp. 2d at 520-24. The District Court clearly erred. 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 federal immigration law. *De Canas*, 424 U.S. at 359. As the Court stated, "[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)).

The existence of the exception in 8 U.S.C. § 1324a(h)(2) expressly disavowing preemption of state and local "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. Moreover, as this Court 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 existence of 8 U.S.C. § 1324a(h)(2) clearly demonstrates that Congress did not intend to occupy the field of the regulation of aliens, but instead left room for local laws like the IIRA. Nor does the absence of a similar, express statutory provision with respect to 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.

Because federal law does not demonstrate a clear and manifest purpose of Congress to preempt harmonious state laws in the area of landlord-tenant and employment relationships touching 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 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). As explained by a sister court of appeals:

> The conflict standard for preemption is strict. As Chief Justice Rehnquist, the author of the Court's opinion in *Hoffman Plastic*, cautioned, federal preemption cannot be premised on 'unwarranted speculations' as to Congress's intent. *Jones v. Rath Packing Co.*, 430 U.S. at 544 (Rehnquist, J., concurring in part and dissenting in part). A 'clear demonstration of conflict . . . must exist before the mere existence of a federal law may be said to pre-empt state law operating in the same field.' *Id.*

Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 238 (2nd Cir. 2006). "The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." *Id.* at 241. 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. First, it cannot be said that it is impossible to comply with both federal immigration law and the Ordinances at issue here. The federal law prohibits the employment and harboring of illegal aliens while making clear that the law is not intended to preempt state and local licensing and similar laws. *See* 8 U.S.C. §§ 1324 and 1324a. The IIRA Ordinance simply adopts 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 federal 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.[5]

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[5] Recently, the court in *Gray v. City of Valley Park, Missouri*, No. 4:07CV00881, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. filed January 31, 2008), upheld a licensing ordinance concerning the employment of illegal aliens virtually identical to the IIRA Ordinance at issue here. In *Gray*, the plaintiffs advanced the same arguments that the District Court advanced here to strike down the IIRA

The District Court erroneously found that several provisions of the IIRA Ordinance and Rental Registration Ordinance conflict with the INA because the provisions do not mirror their federal counterparts in every detail and at times supplement them. *See Lozano*, 496 F. Supp. 2d at 526-33. This Court, however, has emphatically rejected such an argument, as it has "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.). The fact that the INA and the Ordinances happen to regulate the same 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." *Green*, 245 F.3d 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

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Ordinance. The court in *Gray*, however, easily disposed of these arguments and found no conflict between federal law and the ordinance at issue.

Amendments of 1976 does not preempt overlapping state tort law)).

Also, the Ordinances at issue are not in conflict with federal law because 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 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, rather they are in harmony with and further those purposes, and do so *using the standards contained in 8 U.S.C. §§ 1324 and 1324a*. Indeed, they achieve the same ends. 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 neither the "language" of federal immigration law "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.

CONCLUSION

For the foregoing reasons, this Court should find that the Ordinances at issue are not preempted by the federal immigration laws and reverse the District Court.

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ James F. Peterson
Paul J. Orfanedes
James F. Peterson
501 School Street, SW, Suite 500
Washington, DC 20024
Tel: (202) 646-5172
Fax: (202) 646-5199

Attorneys for Amicus Curiae

CERTIFICATE OF BAR MEMBERSHIP

I , Paul J. Orfanedes, hereby certify that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit and that I am a member in good standing of the Court.

/s/ Paul J. Orfanedes

CERTIFICATE OF BAR MEMBERSHIP

I , James F. Peterson, hereby certify that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit and that I am a member in good standing of the Court.

/s/ James F. Peterson

CERTIFICATE OF COMPLIANCE

I, James F. Peterson**,** hereby certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief contains 6,736 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ James F. Peterson

CERTIFICATE OF SERVICE

I certify that on February 14, 2008, ten copies of the foregoing Brief Amicus Curiae of Judicial Watch, Inc. In Support of Defendant-Appellant City of Hazleton were filed with the Clerk of the Court by overnight delivery service for next-day delivery, an electronic copy in PDF format was e-mailed to the Clerk's Office at electronic_briefs@ca3.uscourts.gov, and two true and correct copies of the brief were served, via first-class U.S. mail, postage prepaid, on the following:

Attorneys for Plaintiffs-Appellees

Thomas G. Wilkinson, Jr.
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103

Foster Maer
Ghita Schwarz
Jackson Chin
Puerto Rican Legal Defense and Education Fund
99 Hudson Street, 14th Floor
New York, NY 10013

Lee Gelernt
Omar C. Jadwat
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Jennifer C. Chang
Lucas Guttentag
ACLU Foundation
39 Drumm Street
San Francisco, CA 94111

Witold J. Walczak
American Civil Liberties Union of Pennsylvania
105 North Front Street, Suite 225
Harrisburg, PA 17101

Shamaine A. Daniels
Community Justice Project
118 Locust Street
Harrisburg, PA 17101

Attorneys for Defendant-Appellant

Harry G. Mahoney
Carla Maresca
Andrew B. Adair
Deasey, Mahoney & Bender, Ltd.
1800 John F. Kennedy Boulevard
Suite 1300
Philadelphia, PA 19103-2978

Kris W. Kobach
University of Missouri – Kansas City
School of Law
5100 Rockhill Road
Law 1-200
Kansas City, MO 64110

Elizabeth S. Gallaway
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, CO 80227

/s/ James F. Peterson