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

PEDRO LOZANO, ET AL.	:	CIVIL ACTION
	:	NO. 3:06-cv-01586-JMM
	:	(Hon. James M. Munley)
Plaintiffs,	:	
v.	:	
CITY OF HAZLETON,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO HAZLETON'S MOTION TO DISMISS AND CROSS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND PROCEDURAL HISTORY

Beginning in July 2006, the City of Hazleton ("Hazleton") introduced and passed four ordinances (collectively "Ordinances") to target and expel so-called "illegal aliens" from Hazleton. Hazleton and its representatives have argued that such Ordinances are required to address the alleged deficiencies in the federal government's immigration policy. To further this political agenda and using the city and its residents as a test case, Hazleton has repeatedly tinkered with the Ordinances in response to Plaintiffs' legal challenges in this Court, in an attempt to disguise the flaws imbedded in the Ordinances. Although none of these Ordinances are currently being enforced pursuant to Court order and stipulations between the parties, there nevertheless has been tangible harm to Plaintiffs and other residents of Hazleton. Since the original ordinances were introduced, businesses have shut down, customers and renters have dwindled, and families have left or are planning to leave town. Moreover, as set forth in this brief, the underlying violations of the federal and Pennsylvania state laws and constitutions found in the ordinances remain.

The procedural history of this case is set forth in Plaintiffs' Second Amended Complaint. On July 13, 2006, Hazleton passed the "Illegal Immigration Relief Act Ordinance" ("Prior Ordinance") and announced that such Ordinance would take effect in sixty days. A Complaint was filed with this Court on August 15, 2006 challenging that Prior Ordinance on several constitutional and other grounds and, on September 2, 2006, this Court approved a Stipulation whereby Hazleton agreed not to enforce the Prior Ordinance and Plaintiffs agreed not to seek an injunction of such Ordinance.

Thereafter, on September 21, 2006, Hazleton enacted Ordinance 2006-18, also entitled the "Illegal Immigration Relief Act Ordinance" ("Immigration Ordinance"). In response, on October 30, 2006, the Plaintiffs filed a First Amended Complaint challenging, *inter alia*, the Immigration Ordinance on several constitutional and other grounds. On October 31, 2006, the Court entered a Temporary Restraining Order prohibiting Hazleton from enforcing the Immigration Ordinance until November 14, 2006. On November 3, 2006, the Court approved a Stipulation and Order, wherein the Court's restraining Order was extended for 120 days or until a consolidated trial was held and a decision was rendered, whichever date was earlier.

On December 28, 2006, in response to the First Amended Complaint, Hazleton City Council adopted Ordinance 2006-40, which amended the Immigration Ordinance by adding §7 (Implementation and Process). Herein, the Immigration Ordinance as amended by Ordinance 2006-40 is referred to as the "Revised Immigration Ordinance."

In addition to the Prior and Revised Immigration Ordinances, Hazleton enacted Ordinance 2006-13 ("Tenant Registration Ordinance") on August 15, 2006. On December 28, 2006, Hazleton enacted Ordinance 2006-35 ("Property Registration Ordinance"). Hazleton plans to implement and enforce the Tenant Registration Ordinance, notwithstanding its adoption of the Property Registration Ordinance, once this Court's Order staying such implementation and enforcement is lifted.

On January 15, 2007, Plaintiffs filed their Second Amended Complaint. On January 23, 2007, Hazleton filed a Motion to Dismiss Plaintiffs' Second Amended

Complaint or, in the alternative, for entry of summary judgment in favor of Hazleton ("Motion to Dismiss"), together with a memorandum of law in support of Hazleton's Motion to Dismiss ("Def. Brief"). However, as set forth in this memorandum of law, Hazleton's Motion to Dismiss must be denied by the Court because it misstates the facts, is lacking in legal precedent and falls far short of demonstrating that the Second Amended Complaint is legally deficient or that Hazleton is entitled to summary judgment.

Simultaneously with this memorandum of law, Plaintiffs cross-move for partial summary judgment pursuant to Federal Rule of Civil Procedure 56(a). Because the arguments showing that Hazleton's Motion to Dismiss must fail are primarily the same arguments that show Plaintiffs are entitled to Summary Judgment, for sake of judicial economy, this memorandum is submitted both in opposition to Hazleton's motion and in support of Plaintiffs' cross motion for summary judgment.

II. STATEMENT OF FACTS

The Plaintiffs incorporate by reference the separate Statement of Facts filed along with this Memorandum of Law.

III. STANDARD OF REVIEW

When considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court "must accept the allegations of the complaint as true and draw all reasonable inferences in the light most favorable to the Plaintiffs." *Langford v. City of Atlantic City*, 235 F.3d 845, 850 (3d Cir. 2000) (citation omitted). The issue to be decided "is not whether [plaintiff] will ultimately prevail in a trial on the merits, but whether [a plaintiff] should be

afforded an opportunity to offer evidence in support of [its] claims." In re *Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 215 (3d Cir. 2002). Thus, a Court may not grant a motion to dismiss for failure to state a claim "unless it appears beyond doubt that [a] plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." 311 F.3d at 215 (emphasis added). *See also Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984) (observing that the Court may grant a motion to dismiss only if no possible construction of alleged facts would entitle plaintiff to relief).

Applying this standard to the allegations in Plaintiffs' Second Amended Complaint, the Court should deny Hazleton's Motion to Dismiss. Accepting as true all of the allegations in Plaintiffs' Second Amended Complaint together with all reasonable inferences therefrom, and without regard any additional supporting facts that Plaintiffs will learn through discovery which is ongoing, it is clear that Plaintiffs have stated valid claims against Hazleton and are entitled to relief under the several legal theories raised in their Second Amended Complaint.

Summary judgment is appropriate only when it is demonstrated that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 111 (3d Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)); *see also* Fed. R. Civ. P. 56(c). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). In deciding a motion for summary judgment, all reasonable inferences must be drawn in favor of the non-movant. *Id.* Applying this standard in this case, it is clear that

there are no genuine issues as to any material fact relating to Counts I-VII of the Second Amended Complaint and summary judgment should be granted on these Counts as a matter of law.

IV. QUESTIONS PRESENTED

A. Have Plaintiffs stated a claim that the Revised Immigration and Tenant Registration Ordinances violate the Supremacy Clause? Do the Revised Immigration and Tenant Registration Ordinances violate the Supremacy Clause?

Suggested Answer: Yes.

B. Have Plaintiffs stated a claim that the Revised Immigration Ordinance violate Plaintiffs' Procedural Due Process rights? Does the Revised Immigration Ordinance violate Plaintiffs' Procedural Due Process rights?

Suggested Answer: Yes.

C. Have Plaintiffs stated a claim that the Revised Immigration Ordinance violate Plaintiffs' Equal Protection rights? Does the Revised Immigration Ordinance violate Plaintiffs' Equal Protection rights?

Suggested Answer: Yes.

D. Have Plaintiffs stated a claim that the Revised Immigration and Tenant Registration Ordinances violate the Fair Housing Act? Do the Revised Immigration and Tenant Registration Ordinances violate the Fair Housing Act?

Suggested Answer: Yes.

E. Have Plaintiffs stated a claim that the Revised Immigration Ordinance violate 42 U.S.C. §1981? Does the Revised Immigration Ordinance violate 42 U.S.C. §1981?

Suggested Answer: Yes.

F. Have Plaintiffs stated a claim that the Revised Immigration and Tenant Registration Ordinances violate Plaintiffs' privacy rights

under the United States and Pennsylvania Constitution? Do the Revised Immigration and Tenant Registration Ordinances violate Plaintiffs' privacy rights under the United States and Pennsylvania Constitution?

Suggested Answer: Yes.

G. Have Plaintiffs stated a claim that the Revised Immigration Ordinance violates the Pennsylvania Home Rule Charter Law? Does the Revised Immigration Ordinance violates the Pennsylvania Home Rule Charter Law?

Suggested Answer: Yes.

H. Have Plaintiffs stated a claim that the Tenant Registration Ordinance violates the Pennsylvania Landlord and Tenant Act? Does the Tenant Registration Ordinance violate the Pennsylvania Landlord and Tenant Act?

Suggested Answer: Yes.

I. Have Plaintiffs stated a claim that the Revised Immigration and Tenant Registration Ordinances exceed Hazleton's legitimate police powers? Do the Revised Immigration and Tenant Registration Ordinances exceed Hazleton's legitimate police powers?

Suggested Answer: Yes.

J. Do the Plaintiffs possess standing to invoke the jurisdiction of this Court?

Suggested Answer: Yes.

K. May the certain unnamed undocumented Plaintiffs proceed anonymously in this action?

Suggested Answer: Yes.

V. LEGAL ARGUMENT

A. The Ordinances Are Preempted By Federal Immigration Law And Encroach On Exclusive Federal Authority To Regulate Immigration

In its Motion to Dismiss, Hazleton asserts that neither the Revised Immigration Ordinance nor the Registration Ordinance violates the Supremacy Clause of the United States Constitution. Def. Brief at 5. As Plaintiffs explain below, Hazleton's arguments are unavailing and it is plain that the challenged Ordinances indeed violate the Supremacy Clause in multiple ways. Accordingly, Hazleton's Motion to Dismiss must be denied and Plaintiffs' motion for summary judgment on Count I of the Second Amended Complaint should be granted.

1. Framework of Supremacy Clause Analysis

Local laws concerning immigration and foreign nationals are invalid under the Supremacy Clause of the United States Constitution if they (1) are *conflict* preempted because they "burden[] or conflict[] in any manner with any federal laws or treaties," or "[stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress;" (2) are *field* preempted because they are an attempt to legislate in a field occupied by the federal government or (3) attempt to regulate immigration, which is "unquestionably exclusively a federal power." *De Canas v. Bica*, 424 U.S. 351, 354, 362, 363 (1976).

The Supreme Court has struck down numerous state statutes relating to non-citizens on one or more of the three grounds explained above. *See, e.g.*, *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (invalidating state denial of student financial aid to certain visa holders); *Graham v. Richardson*, 403 U.S. 365, 377-80 (1971) (invalidating state welfare restriction); *Takahashi v. Fish & Game Comm'n*, 334

U.S. 410, 418-20 (1948) (invalidating state denial of commercial fishing licenses); *Hines v. Davidowitz*, 312 U.S. 52, 62-68 (1941) (invalidating state alien registration scheme); *Truax v. Raich*, 239 U.S. 33, 42 (1915) (invalidating state employer sanctions scheme under Fourteenth Amendment and suggesting Supremacy Clause violation); *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (invalidating state statute that authorized state official to classify certain arriving immigrants as undesirable and indirectly bar their entry); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876) (invalidating state bond requirement for arriving immigrants).

Courts are especially sensitive to Supremacy Clause concerns in the immigration area for several reasons. First, the U.S. Constitution itself establishes the "preeminent role of the Federal Government with respect to the regulation of aliens within our borders." *Toll*, 458 U.S. at 10. In addition, laws relating to foreign nationals are inextricably intertwined with international relations and are therefore a particular concern of the federal government. *Hines*, 312 U.S. at 66-67; *see also American Ins. Assoc. v. Garamendi*, 539 U.S. 396, 420 & n.11 (2003) (discussing preemption concerns in foreign relations context); Mexico President Urges U.S. to Act Soon on Migrants, New York Times, Sept. 6, 2001 (noting the Mexican President raised issue of treatment of undocumented workers in bilateral meetings with President Bush). There is a special need for nationwide consistency in matters affecting foreign nationals, given the "explicit constitutional requirement of uniformity" (*Graham*, 403 U.S. at 382) in immigration matters and the myriad problems that would result for citizens and non-citizens alike if each of the 50 states – or, as in this case, each of the thousands of localities like Hazleton

across the 50 states – adopted its own rules for the treatment of aliens. *See Graham*, 403 U.S. at 382; *see also Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (recognizing "the Nation's need 'to speak with one voice' in immigration matters").

Given the exceptionally strong federal interests in the area of immigration and the history of federal legislation directly addressing the same topics as the Ordinances, Hazleton's assertion that a "presumption against preemption" should be applied in this case cannot stand. *See United States v. Locke*, 529 U.S. 89, 108 (2000) ("an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence"). In any event, any such presumption is easily overcome in this case, where the Ordinances are preempted for multiple independent reasons.

a) The Ordinances are Preempted Because they Conflict with Federal Law.

Plaintiffs note at the outset that the case on which Hazleton places much reliance, *De Canas v. Bica*, did *not* find that the California statute at issue in that case was constitutional. Instead, *De Canas* explicitly reserved the question of whether the statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," 424 U.S. at 363-64 (quoting *Hines v. Davidowitz*, discussed below), and remanded the case for a determination of that question.[1]

[1] The case was "dropped" on remand, so the conflict-preemption issues not never decided. *See*

Separate and apart from issues of field and constitutional preemption, which are addressed in subsequent sections below, the Ordinances challenged in this case are invalid on the grounds reserved in *De Canas:* because they conflict with multiple provisions of federal law and because the Ordinances stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

b) The Ordinances Conflict With Individual Provisions Of Federal Law

(1) Housing Provisions

The Revised Immigration Ordinance attempts to deny "alien[s] not lawfully present in the United States" the ability to obtain housing in Hazleton based on their immigration status, by providing that it is unlawful to knowingly "let, lease, or rent a dwelling unit to" such individuals, prohibiting such persons from "enter[ing] into a contract for the rental or leasing of a dwelling unit," and deeming it a "breach[] of a condition of the lease" for an individual to enter into a lease for a dwelling unit while not lawfully present or to become unlawfully present during the term of the lease. Revised Immigration Ordinance §§ 5 and 7.B. These provisions seek to remove "illegal aliens" from Hazleton and deny new "illegal aliens" arriving in Hazleton admission to the city.

In its Motion to Dismiss, Hazleton makes much of the fact that the Ordinance uses the term "illegal alien," which term appears in the federal code. Def. Brief at 29-31. Hazleton fails to recognize, however, that in the one federal law that defines the term, the federal contains a different definition than the Ordinance. *Compare* Revised Immigration Ordinance § 3.D. with 8 U.S.C. § 1365(b) (setting forth a definition relating specifically to aliens convicted of a

felony and involving multiple factors that must be fulfilled "before the date of the commission of the crime").

In fact, Section 5 of the Revised Immigration Ordinance is directly at odds with the federal immigration system because it rests on the fundamentally flawed assumptions that (1) the federal government desires the removal of every alien who lacks 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. Neither of these assumptions can be sustained and, in making them, the Revised Immigration Ordinance seriously conflicts with federal law.

First, Hazleton ignores the fact that the federal government actively permits numerous categories of persons who may technically be "not lawfully present in the United States" to live and work in the United States. *See, e.g.*, 8 C.F.R. § 274a.12(a)(11-13), (c)(8-11, 14, 18-20, 22, 24) (listing categories of persons who can receive federal permission to work, and implicitly to stay, in the United States even though they may be violating immigration laws). These include, for example, persons who have pending applications to adjust to a lawful status pursuant to the Violence Against Women Act, *see* 8 U.S.C. § 1255(m), or under 8 U.S.C. § 1255(i), and persons who are applying for "temporary protected status" under 8 U.S.C. § 1254a. Persons released from detention pursuant to legal mandates and restrictions imposed by the Supreme Court, though subject to an order of removal, are permitted to stay and work in the U.S. *See Clark v. Martinez*, 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001). Federal officials may also

exercise discretion not to deport persons who are otherwise removable. *See* 8 C.F.R. § 212.5(f).

In addition, the federal agency in charge of housing (the Department of Housing and Urban Development) expressly permits persons lacking immigration status to live with persons who are recipients of federal housing subsidies. *See* 24 C.F.R. § 5.508(e) (providing that "[i]f one or more members of a family elect not to contend that they have eligible immigration status, and other members of the family establish their citizenship or eligible immigration status, the family may be eligible for assistance . . . despite the fact that no declaration or documentation of eligible status is submitted for one or more members of the family."); *see also* 24 C.F.R. § 5.520 (providing for prorated subsidies based on the number of persons in the household eligible for benefits). In sum, persons who may not be lawfully present are explicitly permitted to reside in housing partially subsidized by the federal government.

Second, and fundamentally, Hazleton fails to recognize that the federal government only decides whether it wishes to remove someone from the country through the formal procedures set out in the federal Immigration and Nationality Act ("INA"), 8 U.S.C. §§1101 *et seq.*, and associated regulations, which include substantial procedural safeguards, including the availability of administrative appeal and judicial review. *See generally* 8 U.S.C. § 1229a (removal proceedings); 8 U.S.C. Parts 240, 1240 ("Proceedings to Determine Removability of Aliens in the United States"). It is the federal government's burden to prove, in these adversarial proceedings, that the individual is an alien and removable. But that is only the first step of this procedure. Even aliens who lack immigration status at

the outset of a removal proceeding may obtain temporary or permanent permission to remain in the United States during the course of the proceeding; individuals who may obtain relief from removal include spouses and other relatives of U.S. citizens and lawful permanent residents, victims of domestic violence, and individuals seeking protection from persecution or torture. *See, e.g.*, 8 U.S.C. § 1154 (procedure for granting immigrant status to certain relatives of U.S. citizens and lawful permanent residents); 8 U.S.C. § 1229b (cancellation of removal for certain relatives of U.S. citizens and lawful permanent residents); 8 U.S.C. § 1229b(b)(2) (cancellation for certain battered spouses and children); 8 U.S.C. § 1231(b)(3) (restricting removal of individuals subject to persecution); 8 C.F.R. §§ 208.16-18 (deferral of removal under Convention Against Torture).

By denying abode to every individual who is "unlawfully present," the Ordinance runs roughshod over the complex system of federal classification and discretion and the federal government's policy decisions permitting the continued residence of mixed-status families within the United States. *See Plyler v. Doe*, 457 U.S. 202, 236 (1982) (Marshall, J., concurring) ("[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"); *id*. at 241 n.6 (Powell, J., concurring) ("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….").

In an attempt to disguise these clear conflicts with federal law, Hazleton has set forth a procedure in the Revised Immigration Ordinance that makes penalties under that Ordinance contingent on federal "verification" of an individual's status.

Hazleton's description of "the actual mechanism used" to obtain such verification, Def. Brief at 28-29, is entirely unsupported by any declaration or other evidence and must be disregarded by the Court in its determination of the Motion to Dismiss. Indeed, Hazleton has not executed a Memorandum of Understanding with the Federal government, or otherwise been granted authority to use or access, the Systematic Alien Verification for Entitlements ("SAVE") program or any other Federal government immigration verification system for purposes of verifying the immigration status of renters and occupants of dwelling units. (Ex. 9 to Plaintiffs' Statement of Fact in Support of Motion for Summary Judgment, pp. 298:11 – 310:1.).

Even assuming, however, that Hazleton's assertion is true and that it will in fact attempt to use the SAVE database to determine whether individuals are "illegal aliens" as defined under the Immigration Ordinance, that attempt is futile. As its name indicates, SAVE is a database system designed to determine whether an applicant for a government benefit or entitlement is in an immigration status that qualifies him to receive that entitlement. It is not a substitute for the formal determination of status that occurs through a removal proceeding and judicial review. Accordingly, the federal government has instructed its agencies that SAVE does not provide such a determination:

> [A federal] entity will "know" that an alien is not lawfully present in the United States only when the unlawful presence is a finding of fact or conclusion of law that is made by the entity as part of a formal determination that is subject to administrative review on an alien's claim for any of the statutorily specified programs set out above. In addition, that finding or conclusion of unlawful presence must be supported by a

> determination by the Service or the Executive Office of Immigration Review, such as a Final Order of Deportation. *A Systematic Alien Verification for Entitlements (SAVE) response showing no Service record on an individual or an immigration status making the individual ineligible for a benefit is not a finding of fact or conclusion of law that the individual is not lawfully present.*

65 Fed. Reg. 58301 (emphasis added); *see also Plyler*, 457 U.S. at 241 n.6 (Powell, J., concurring) ("[E]ven the [federal immigration authorities] cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course.").

For similar reasons, the Tenant Registration Ordinance also conflicts with federal immigration law. That ordinance requires each individual occupant of any rental unit to obtain an occupancy permit from Hazleton, and requires applicants for occupancy permits to provide "proof of legal citizenship and/or residency." Yet, as explained above, numerous individuals who are not lawfully present in the United States are nonetheless permitted to live and work here by the federal government. The Tenant Registration Ordinance's attempt to exclude from residence in Hazleton all persons unable to tender "proof of legal citizenship and/or residency" thus squarely conflicts with the federal immigration scheme.

In addition, the Tenant Registration Ordinance does not provide any definition of "legal … residency." The closest approximation to such a status in the federal immigration law is lawful permanent resident status. *See* 8 U.S.C. § 1101(a)(20). However, there are numerous "nonimmigrant" visa holders and others who are allowed to live in the United States under the federal immigration system. *See, e.g.*, 8 U.S.C. § 1101(a)(15). Therefore, to the extent the Tenant

Registration Ordinance adopts the federal "lawful permanent resident" status to define whether someone can lawfully reside in Hazleton, it does so in a manner that conflicts with federal immigration law. Furthermore, to the extent the Tenant Registration Ordinance requires Hazleton to create its own definition of "legal … residency" and make its own determinations of who is or is not a legal resident, that too conflicts with the federal scheme. *See, League,* 908 F. Supp. at 770 (Congress has exclusively reserved to federal agencies the power to make independent determinations of immigration status).

Hazleton has offered virtually no argument in support of its contention that the Tenant Registration Ordinance is valid under the Supremacy Clause. *See generally* Def. Brief at 24-51. Indeed, Hazleton's only statement in defense of that ordinance is its bald assertion that the Tenant Registration Ordinance:

> does not involve any verification of status whatsoever. It merely requires tenants to provide *any documents that they wish to submit*, concerning their citizenship or alien status. The Ordinance does not say or imply that Hazleton Officials will verify the tenants' claims or the documents submitted.

Def. Brief at 42 (emphasis added). This assertion flies in the face of the plain language of the Ordinance, which "*specifically require[s]" "[p]roper* identification showing *proof* of legal citizenship and/or residency [of each occupant] *in order*" to issue an occupancy permit. Ordinance 2006-13, § 7.b.1 (emphasis added.) Moreover, it contradicts Hazleton's own publications and the Mayor's own statements clearly stating that Hazleton intends to require proof of status and to verify status. *See, e.g.*, "Hazleton gears up to keep illegals out," The Morning Call, July 15, 2006 (quoting Mayor as stating that "in the beginning, there

will be a lot of work to check all the tenants in Hazleton"); Ex. 10 to Plaintiffs' Statement of Facts in Support of Motion for Summary Judgment. Hazleton cannot save the Tenant Registration Ordinance now by averring that it does not mean what it says.

(2) Employment Provisions

Like its housing provisions and the Tenant Registration Ordinance, the Revised Immigration Ordinance's employment provisions conflict with multiple provisions of federal law. Its provisions mandating enrollment in the federal Basic Pilot Program conflict with Congress' designation of the Basic Pilot Program as a voluntary, experimental program to be implemented by the Secretary of Homeland Security. *See* Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA"), §§ 401, 402(a), Pub. L. No. 104-28, Div. C (Sept. 30, 1996), *codified as amended at* 8 U.S.C. § 1324a note. Congress set forth a limited list of employers required to participate in the Basic Pilot or a related program—a list completely different from Hazleton's. IIRIRA. § 402(e).[2] Congress also specifically provided that the government "*may not require* any person or other entity to participate in a pilot program," IIRIRA § 401(a) (emphasis added). *See also id.* § 404(h) (providing that government may not "utilize any information, data base, or other records assembled under this subtitle for any other purpose other than as provided for under a pilot program").[3] In contrast, the Revised

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[2] IIRIRA § 402(e) requires certain Federal entities to participate in a pilot verification program and provides that a federal administrative law judge may require an employer to participate in a pilot program as part of a cease and desist order issued under 8 U.S.C. § 1324a.

[3] In addition, Congress specifically did not include a provision that would have given state and local governments access to the Basic Pilot program. *See* 149

Immigration Ordinance mandates that businesses enroll in the federal Basic Pilot Program in certain circumstances, §§ 4.B.6(b), 4.D., and even where the Ordinance does not require such enrollment, subjects businesses to the risk of exorbitant penalties if they do not enroll, §§ 4.B.5, 4.E. The Ordinance's attempt to force employers to enroll in Basic Pilot is incompatible with federal law.[4]

The Revised Immigration Ordinance also conflicts with federal law by requiring businesses, individuals, non-profits, and other entities to ensure that any person they "recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct … to perform work in whole or part within Hazleton" is an authorized worker. § 4.A. In contrast, federal law does *not* require that employers verify the immigration status of certain categories of workers, such as independent contractors and casual domestic workers, and does not apply to entities, such as unions, that refer individuals for employment but without a fee or profit motive. *See* 8 U.S.C. § 1242a; 8 C.F.R. § 274a.1(c)-(f); *see also* H.R. Rep. 99-682(I), at 57

Cong. Rec. H 11582-01 (Nov. 19, 2003) (statement of Rep. Jackson-Lee) ("I am pleased to note that the Senate removed a provision that would give State and local governments access to the information collected with this program …. [I]n fact, we have provided safeguard provisions to make this legislation work, to provide the information that is necessary to ensure the protection of the workplace, and also to provide due process rights for all who are involved"); *id.* (Statement of Rep. Berman) (noting support of proposal and that he had opposed previous version "in part because I had concerns about what was in section 3 of the bill allowing data to be shared with State and local governments").

[4] Notably, one aspect of the current debate regarding immigration reform involves whether and to what extent mandatory electronic employment verification will become a feature of the federal law. *See, e.g.,* S. 1033, 109th Cong., § 402 (proposing electronic verification system); S. 1438, 109th Cong., § 321 (alternative verification proposal). Hazleton's effort to force employers to use the Basic Pilot Program is an effort to short-circuit that national debate and impose a conclusion of Hazleton's choosing notwithstanding the national legislative process.

(stating that "[i]t is not the intent of this Committee that sanctions would apply in the case of casual hires" and noting an exception for unions and similar entities).

The provisions in § 7 do nothing to cure these conflicts and actually introduce additional incompatibilities. Specifically, one method of "correcting" a violation of the employment section under Ordinance 2006-40 is for the employer to obtain additional information from the worker and to reverify the workers' status through the Basic Pilot Program. *See* § 7.C.2. Yet federal law prohibits reverification except under limited circumstances. 8 U.S.C. § 1324b(a)(6). Federal law also prohibits using the federal I-9 from "and any information contained in or appended to such form" for purposes other than enforcing the federal employer-sanctions provisions and certain federal criminal laws. 8 U.S.C. §1324a(b)(5). Further, this provision conflicts with 8 U.S.C. § 1324a(a)(3), which provides employers with a safe harbor if the employer complied in good faith with the verification requirements. *See id*. ("A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.").

Plaintiffs' have adequately pled that the Ordinances are preempted and therefore Hazleton's Motion to Dismiss must be denied. Further, because the Ordinances are preempted, Plaintiffs' Motion for Summary Judgment should be granted.

c) Interference With The Federal Government's Regulatory Scheme.

Plaintiffs would be entitled to summary judgment, even if the Ordinances did not explicitly conflict with specific provisions of federal law, because Hazleton's attempts to *supplement* federal immigration law nonetheless undermine the legislative scheme enacted by Congress, and therefore violate the Supremacy Clause.

In *Hines v. Davidowitz*, a case that arose in this District, the Supreme Court ruled that where the federal government had passed an alien registration scheme, Pennsylvania could not enforce its own state alien-registration law. The Court explained that "where 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 or auxiliary regulations." *Hines*, 312 U.S. at 66-67. The Court further noted that the federal system attempted "to steer a middle path," creating a "single integrated and all-embracing system … in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance" while also obtaining the information sought under the statute. *Id*. at 73-74. *Accord Rogers v. Larson*, 563 F.2d at 626 (invalidating Virgin Islands employer sanctions scheme and stating that "[b]ecause of the different emphasis the [Virgin Islands and federal employment] schemes

place on the purposes of job protection and an adequate labor force, we conclude that [the Virgin Islands statute] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the INA").

Similarly here, Congress has created an integrated scheme of regulation that includes provisions directed at both employer sanctions and harboring. These provisions strike careful balances reflecting the federal legislature's view of the national interest. For example, with IRCA, Congress balanced the important goals of reducing employment of individuals who lack work authorization; creating a workable system for employers and employees; and avoiding harassment of or discrimination against employees. *See* H.R. Rep. 99-682(I),at 56-62. Thus, the statute contains safeguards such as a "safe harbor" provision for employers who are presented with facially valid documents; restrictions on reverification of employees after they are hired; extensive antidiscrimination provisions; prohibitions on employers' requesting additional documents once an employee presents minimally adequate documentation; a ten-day cure period for good-faith violations of the document verification requirements; and a graduated series of penalties after adjudication by an administrative law judge. *See* 8 U.S.C. § 1324a.

Additionally, the INA's harboring provision reflects Congress' judgment on what balance should be struck regarding the statute's reach and the penalties that should apply. Congress has amended the statute to alter that balance on numerous occasions. For example, in 1952 Congress amended the statute to provide that normal acts incident to employment would not be considered harboring, only to amend the statute again in 1986 to remove that proviso. *See United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999). The federal system's interpretation of the statute

is not entirely settled, *see United States v. Maali*, No. 6:02-CR-171ORL28KRS, 2005 WL 2204982 (M.D. Fla. Sept. 8, 2005) (noting "uncertainty surrounding the meaning of harboring"), and recent legislative proposals would modify it yet further, *see* H.R. 4437, 109th Cong., § 202.

The effect of Hazleton's Ordinances is clearly to upset the balances struck by Congress in each of these areas and in immigration law generally by implementing Hazleton's own enforcement mechanism, penalties, and interpretations in place of the federal system, and simultaneously to bypass the discretion that system places in federal officials and procedures.

For example, Congress viewed IRCA's provisions prohibiting discrimination by employers as a critical complement to the Act's enforcement provisions. *See, e.g.*, *Roginsky v. Dep't of Defense*, OCAHO Case No. 90200168, 1992 WL 535565 (OCAHO May 5, 1992) ("IRCA demonstrates the congressional intent to treat the antidiscrimination and employer sanctions provisions as unitary"); *accord Mir v. Federal Bureau of Prisons*, OCAHO Case No. 92B00225, 1993 WL 604446, at *5-8 (OCAHO April 20, 1993). Indeed, Congress explicitly linked the employer verification provisions to the antidiscrimination provisions by forcing the latter to expire if the employer sanction provisions were repealed pursuant to 8 U.S.C. § 1324b(k). See 8 U.S.C. § 1324b(k) ("Termination dates. This section shall not apply to discrimination in hiring, recruiting, or referring, or discharging of individuals occurring after the date of any termination of the provisions of section 1324a of this title."). Yet by enacting an enforcement-only scheme that contains no countervailing prohibition on discrimination by employers, Hazleton has undermined the balance Congress sought to achieve. This

seriously interferes with the choices made by Congress in creating that system and threatens the ability of the system to work as an integrated and uniform whole – for if Hazleton can pass its own ordinances in these areas, so can every municipality in the country, each setting forth its own mechanisms, penalties, and interpretations.

In addition, the Ordinances place a significant burden on the federal government, as Hazleton insists the federal government will play a key role in the enforcement of the Ordinances. A federal court analyzing an ordinance similar in all relevant respects to § 5 of Hazleton's Immigration Ordinance recently cited this burden, as well as the serious field preemption concerns, in issuing a Temporary Restraining Order against that ordinance.[5] *Garrett v. City of Escondido*, ___ F.Supp.2d ____, 2006 WL 3613703, a *11 (S.D. Cal.) Nov, 20, 2006). Hazleton's Ordinances – which are more comprehensive than those in the *Escondido* case, would only increase that burden.

Hazleton's Ordinances simply cannot stand. *See Hines; see also Garamendi*, 539 U.S. at 423, 427 (California could not "employ[] 'a different, state system of economic pressure'" to address an issue touching on foreign relations, nor "to use an iron fist where the [federal government] has consistently chosen kid gloves"); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000) (state statute touching on foreign relations not saved by the fact that state and federal statute "share the same goals and … some companies may comply with both sets of restrictions," because "the inconsistency of sanctions … undermines the congressional calibration of force"); *United States v. Locke*, 529 U.S. 89, 115

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[5] The city in that case subsequently stipulated to the entry of a permanent injunction barring enforcement of the ordinance at issue.

(2000) (fact that state requirements were similar to federal not enough to avoid preemption; "[t]he appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation"); *Wis. Dep't of Indus. v. Gould*, 475 U.S. 282, 286, 288-89 (1986) (state statute touching on area governed by a "complex and interrelated federal scheme of law, remedy and administration" preempted because "conflict is imminent whenever two separate remedies are brought to bear on the same activity" and "[e]ach additional [state] statute incrementally diminishes the [agency's] control over enforcement of the [federal law] and thus further detracts from the integrated scheme of regulation created by Congress").

d) Hazleton Fails To Refute Plaintiffs' Claim That The Ordinances Are Conflict Preempted

In its Motion to Dismiss, Hazleton fails to adequately address the specific conflicts with individual provisions of federal immigration law, discussed above. Hazleton instead invokes a number of unrelated statutory provisions as "overwhelming evidence of congressional intent to facilitate state and local efforts to address illegal immigration." Def. Brief at 48, 42-59. For example, Hazleton asserts that "states and localities may require employers to participate in the [Basic Pilot] Program," citing not to a statute, regulation, judicial decision, or even a statement of any governmental official, but rather testimony presented to a state legislative committee by an individual who appears to be associated with a non-governmental group that favors restricting immigration. Def. Brief at 47 & n.4.

More significantly, Hazleton misconstrues the import of the various initiatives and programs referenced in its Motion to Dismiss. Rather than

encouraging unbounded participation in immigration matters by state and local authorities, Congress has carefully authorized certain specific initiatives and programs and defined the limitations of those programs where it has determined that the state or local authorities may play a complimentary role. Congress has made no such determination here.

Because Hazleton's Mayor appears eager to play a trailblazing role in immigration enforcement, it is particularly relevant to note that Congress has created a program to allows states and localities to enter into agreements with the federal government to engage in certain immigration-enforcement functions, pursuant to training and other requirements. *See* 8 U.S.C. § 1357(g), cited in Def. Brief at 61. Significantly, Hazleton has not entered into such an agreement. Instead, Hazleton has chosen to invent a wholly different, unauthorized, and conflicting system of local immigration regulation.

Hazleton's Motion to Dismiss avoids discussion of the controlling Supreme Court precedent of *Hines v. Davidowitz*, 312 U.S. 52 (1941), perhaps hoping that because the *Hines* predates *De Canas* the Court will ignore it entirely. But *Hines* remains a vital precedent and a touchstone of the Supreme Court's preemption jurisprudence.[6] And the teaching of *Hines* is clear: local ordinances that address the same subject area as federal statutes and "conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations" cannot stand. *Hines*, 312 U.S. at 66-67. *See also Rogers v. Larson*, 563 F.2d 617, 626 (3d

[6] In fact, the Court has cited *Hines* far more frequently than *De Canas* in the decades since *De Canas* was decided.

Cir. 1977) (Third Circuit decision overturning Virgin Island employer sanctions scheme on conflict-preemption grounds less than two years after *De Canas*).

De Canas only reinforces the importance of *Hines* and the fact that the Ordinances here are preempted. *De Canas* specifically cited *Hines* in remanding the conflict-preemption issue to the California Supreme Court. 424 U.S. at 363-64. Moreover, *De Canas* emphasized that both *Hines* and *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (addressing the same statute as Hines) turned on the fact that "the federal statutes [at issue in those cases] were in the specific field which the States were attempting to regulate." *See* 424 U.S. at 362. Here, the Immigration Reform and Control Act ("IRCA"), 8 U.S.C. §§ 1324a-b and other federal laws are precisely "in the specific field" which Hazleton is attempting to regulate.

Plaintiffs have sufficiently pled that the Ordinances are conflict preempted both because they conflict with individual provisions of federal law and because they interfere with the federal government's regulatory schemes. Accordingly, Hazleton's Motion to Dismiss must be denied. Indeed, the Ordinances are conflict preempted both because they conflict with individual provisions of federal law and because they interfere with the federal government's regulatory schemes, Plaintiffs' Motion for Summary Judgment as to Count I accordingly should be granted.

2. <u>The Ordinances are Field Preempted</u>

The Ordinances are invalid for the separate and additional reason, in addition to the reasons discussed above, because the federal government has comprehensively legislated both in the field of immigration and specifically with respect to employer sanctions and harboring of undocumented aliens. *See*

generally 8 U.S.C. § 1101 *et seq.; see also* 8 U.S.C. §§ 1324a-1324b (employer sanctions and antidiscrimination scheme), 1324 (harboring provision). Congress has left no room for Hazleton to pass its own versions of such laws.

a) Housing provisions

There can be no doubt that the federal immigration law is a comprehensive, and complex, regulatory scheme. *SeeHines*, 312 At 69 (even in 1940, the immigration code was a "broad and comprehensive plan"). *See also Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) ("[w]ith only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity.") (citation omitted) (alteration in original). Today, the INA, 8 U.S.C. 1101 *et seq*., and its associated regulations in Title 8 of the Code of Federal Regulations, contain a myriad of interrelated provisions establishing, among other things, numerous immigration categories; civil and criminal sanctions for various violations; and extensive procedures for determining status and removability. *See, e.g.*, 8 U.S.C. § 1154 (procedure for granting immigrant status); §§ 1228-1252 (relating to removal proceedings and judicial review of removal decisions); §§ 1255-1259 (relating to adjustment of status); 8 U.S.C. § 1229a (removal proceedings). Thousands of federal officials in numerous federal agencies enforce the statutes and regulations, confer benefits, make discretionary determinations, undertake adjudications, and otherwise administer the immigration laws.

Because the Tenant Registration Ordinance creates independent immigration statuses and an independent system for determining status within that system, it is field preempted by the INA's comprehensive alien classification scheme.

Similarly, the Revised Immigration Ordinance's "harboring" provision is, first and foremost, an attempt to prevent those defined as "illegal aliens" from living or working in Hazleton. The INA's overall legislative scheme is devoted precisely to determining who may and who may not live in the United States, and it admits of no state or local legislation in the same field.

Moreover, federal immigration law has long contained provisions specifically directed at the harboring of immigration violators. Congress has carefully calibrated and modified the reach and penalties of the federal harboring statute over many years. *See United States v. Kim, infra* (analyzing 1986 amendments to harboring statute to determine whether harboring could apply to employment); *United States v. Lopez*, 521 F.2d 437, 440-41 (2d Cir. 1975) (describing legislative history in determining reach of earlier statute). There is no suggestion that Congress has invited or would countenance state laws in this field.

Hazleton's Motion to Dismiss does not dispute that § 5 of the Immigration Ordinance is an attempt to legislate in the same field as federal law. Rather, Hazleton asserts that "[e]nacting such harboring provisions is well within the authority of a municipality under the doctrine of 'concurrent enforcement activity.'" Hazleton derives this "doctrine" from *Gonzales v. City of Peoria*, a case in which the Ninth Circuit specifically "assume[d] that the civil provisions of the [INA] … constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration." 722 F.2d 468, 474-75 (9th Cir. 1983). But *Gonzales* is entirely inapposite. At most, that case authorized state and local participation in criminal immigration enforcement through the use of the arrest power. In contrast, with these Ordinances Hazleton is not merely enforcing

federal laws but creating its *own* immigration laws. Nothing in *Gonzales* authorizes such action.

b) Employment provisions

Congress has created a detailed, comprehensive, and nationwide employment verification and employer sanctions scheme that specifically preempts state and local attempts to create their own sanctions schemes. *See* 8 U.S.C. § 1324a. Hazleton nonetheless argues that the Revised Immigration Ordinance's employment provisions are not field preempted, relying primarily on *De Canas*, a 1976 decision issued a decade before Congress enacted the federal employer sanctions scheme. Hazleton's anachronistic argument fails entirely to grapple with the significant changes that have occurred since *De Canas*.

At the time that *De Canas* was decided, there was no federal employer sanctions scheme and no general prohibition on hiring unauthorized aliens. In addition, the limited federal law relating to employment of aliens actually invited state regulation, stating that it was "intended to *supplement* State action" and explaining that it did not displace obligations under "appropriate State law and regulation." *De Canas*, 424 U.S. at 362 (emphasis added). Accordingly, in *De Canas* the Supreme Court found that California's employer-sanctions statute was not field preempted. 424 U.S. at 352, 352 n.1, 353 n.2. The Court subsequently emphasized that it had "rejected the pre-emption claim" in *De Canas* because "Congress *intended* that the States be allowed" to impose some regulation in this area. *Toll*, 458 U.S. at 13 n.18 (emphasis in original).

In 1986, however, Congress passed IRCA, after lengthy and careful consideration of various legislative options. *See* 8 U.S.C. §§ 1324a-b; H.R. Rep.

99-682(I), at 53-56 (recounting history of legislation). IRCA added employer sanctions and antidiscrimination provisions to the INA for the first time, removing its earlier permission for state regulation of employment and enacting instead an express bar on such regulation.

Hazleton's field preemption argument nonetheless relies on language in *De Canas* explaining that *in 1976* the Congress had not occupied the field of laws restricting the employment of aliens, explaining that employment of aliens was not a "central concern of the INA" and that it did not contain provisions ousting state authority regarding the employment of aliens. Def. Brief at 32-36. But that reasoning clearly does not survive Congress's subsequent addition of specific provisions restricting the employment of aliens and providing a statutory scheme sanctioning employers who violate those provisions.[7]

Hazleton also argues that § 4 of the Immigration Ordinance falls within a parenthetical exception to IRCA's express preemption provision, § 1324a(h)(2), which provides that "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" is preempted. Def. Brief at 36-37. Hazleton argues that because the Ordinance penalizes businesses by denying, suspending, or revoking their licenses and by imposing a novel treble-

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[7] Indeed, *De Canas* specifically concluded that "Congress' failure to enact [] general [employer] sanctions reinforces the inference that may drawn from other congressional action that Congress believes this problem does not *yet* require uniform national rules." 424 U.S. at 361 n.9 (emphasis added). Congress has since enacted precisely what the Court found lacking there: a general scheme of employer sanctions directly addressing the activity with which the local law was concerned.

damages private right of action, it is a "licensing [or] similar law," and therefore not preempted.

Hazleton's argument cannot be sustained. First, the Ordinance's novel treble-damages private right of action could not be considered "similar" to a licensing law, even in the broadest reading of the word "licensing." As to the remainder of § 4, the mere fact that a local employer sanctions scheme imposes penalties by revoking licenses does not make it a "licensing law." That would lead to the absurd conclusion that Congress intended that any civil or criminal sanction scheme, no matter how slight the penalties, would be preempted in favor of the uniform federal scheme, but that a scheme imposing the enormous penalty of entirely shuttering a business would be permitted simply because it does so through the revocation of a license.

Rather, the statute's reference to "licensing" encompasses "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*" — a finding that can only be made after extensive federal proceedings, *see* 8 U.S.C. § 1324a(e) — or "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. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5662 (emphasis added). The Ordinance does not fall within either of these categories.[8]

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[8] Contrary to Hazleton's contention, Def. Brief at 49-51, Plaintiffs do not present a theory that would render § 1324a(h)(2) surplusage. Section 1324a(h)(2) establishes that certain state and local enactments are not preempted, and its scope

In any event, even if some part of § 4 did fall within the exception in § 1324a(h)(2), the section would still be invalid because it stands as an obstacle to federal law and policy, as explained above. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) ("Congress' inclusion of an express pre-emption clause does not bar the ordinary working of conflict pre-emption principles" (punctuation and citation omitted)); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (finding conflict preemption even where state action fell outside express preemption clause).

3. <u>The Ordinances Impermissibly Regulate Immigration.</u>

Finally, Hazleton's Motion to Dismiss should be denied and Plaintiffs are entitled to summary judgment because the Ordinances are invalid for the separate and additional reason that they are impermissible attempts to regulate immigration. The regulation of immigration is constitutionally reserved to the federal government, such that even if Congress had not legislated on the same subject matter, the Ordinances would be invalid. State or local laws that encroach on this exclusive federal power can be described as "constitutionally preempted."

Admittedly, not all laws touching on aliens amount to impermissible attempts to regulate immigration. For example, in *De Canas*, the Supreme Court found that California's law aimed narrowly at "strengthen[ing California's] economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to

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is explained above. The fact that § 1324a(h)(2) does not control *this case* does not make it meaningless.

employment," which had at most "some purely speculative and indirect impact on immigration," was not constitutionally preempted. 424 U.S. at 355-56.

The Ordinances at issue here are very different. Taken together, they set forth a broad and integrated scheme that combines multiple provisions addressing different areas – tenant registration, harboring, and employment – to single out certain individuals on the basis of their immigration status and remove them from Hazleton by making it impossible for them to live or work in the locate, and going so far as to directly regulate who may rent housing within Hazleton based upon the immigration status of the tenants or occupants. *See* Immigration Ordinance § 7.B. The Supreme Court never has allowed states or municipalities to regulate aliens in this manner. Making rules about who may stay and who must depart, and effectuating that departure is the very core of immigration regulation.

Hazleton asserts that the *De Canas* Court's statement that certain earlier cases whose "doctrinal foundations … [have been] undermined … remain authority that, standing alone, the 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 to the country, and the conditions under which a legal entrant may remain," forecloses any finding that Hazleton's Ordinances are constitutionally preempted. *Id*. at 355; Def. Brief at 26, 29.

Hazleton is mistaken. If that *dicta* set forth the entire scope of the exclusive federal immigration power, there would have been no reason for the *De Canas* Court to explain that the state statute focused on a local economic problem and that it had at most some purely speculative and indirect impact on immigration; the fact that the statute did not involve determinations of who was lawfully admitted and

the conditions under which lawful entrants may remain would suffice to make it constitutional. The fallacy of Hazleton's argument is apparent because the Supreme Court has repeatedly invalidated state statutes that amount to an "assertion of the right to deny entrance *and abode*" to aliens (emphasis added), even where the statutes did not expressly address admissions or set conditions on lawful entrance. *See, e.g., Truax*, 239 U.S. at 135; *Graham*, 403 U.S. at 380.

Furthermore, as a logical matter, the power to regulate immigration would be hollow if it did not include the power to expel those who violated admissions or other criteria – that is, if it did not include laws regulating "illegal," as well as "legal entrants."[9] Otherwise, each city and town in the United States could, on its own, detain and actually deport any individual who was not in a lawful immigration status, or subject such an individual to arbitrary criminal penalties invented by the municipality. Such measures clearly are not consistent with the constitutional reservation of immigration power to the federal government. Nor are the Ordinances at issue here.

Hazleton's novel proposed use of federal verification, even if such a system existed and had been approved for use, does not ameliorate the Ordinances'

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[9] *See also In re Alien Children Education Litigation*, 501 F. Supp. 544, 578 (S.D. Texas 1980) ("Measures intended to increase or decrease immigration, whether legal or illegal, are the province of the federal government."), *aff'd sub nom. Plyler v. Doe*, 457 U.S. 202 (1982); Brief for the Secretary of Health and Human Services in Opposition to Petition for Writ of Certiorari, *City of Chicago v. Shalala*, 1999 WL 33632748 (Feb. 2000) at 13 n.7 ("*De Canas* stands only for the proposition that courts will not *automatically* strike down every state statute that adversely affects some group of aliens, if there is no conflict between the state and federal law. De Canas does not suggest that the federal government's extensive power over aliens is limited to the power to make decisions about who should be permitted to immigrate.") (Emphasis added.)

encroachment on federal power. The presence or absence of federal verification does not alter the fact that Hazleton has, independently of the federal government, designed its own system of laws and enforcement that seek to regulate the presence of foreign nationals within Hazleton's borders. This it cannot do.

Moreover, Hazleton has not included any verification procedure in the Tenant Registration Ordinance. The terms of that Ordinance require City officials to determine whether each tenant in Hazleton has presented "proof of legal citizenship and/or residency."[10] As explained above, this Ordinance requires Hazleton to create its own definition of "legal … residency" and empowers its officials to make Hazleton's own determinations of who is or is not a legal resident for the purposes of the Tenant Registration Ordinance. These actions encroach on the federal immigration regulation power. *Plyler*, 457 U.S. at 225 ("The States enjoy no power with respect to the classification of aliens."); *id*. at 236 (Marshall, J., concurring) (any attempt to "determine which aliens are entitled to residence … would involve the State in the administration of the immigration laws"); *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 769-771 (C.D. Cal. 1995) (invalidating state law provisions classifying aliens as unconstitutional regulation of immigration); *accord Chy Lung*, 92 U.S. at 279-81 (rejecting state statute that allowed state commissioner to classify arriving immigrants). In addition, Hazleton officials lack expertise in complicated immigration matters, will

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[10] Section 7 of Ordinance 2006-40 may restrict Hazleton officials from making independent determinations of status in the context of administering *that* Ordinance. It does not, however, purport to enact a general bar on any determination of status by Hazleton officials, and any such bar would conflict with the terms of the Tenant Registration Ordinance.

be unable to identify or understand the many varieties of immigration documentation, and will undoubtedly make mistakes in attempting to enforce the Tenant Registration Ordinance.[11]

Taking the allegation sin the Second Amended Complaint, and all inferences thereform, it is clear that Plaintiffs have raised allegations that the Revised Immigration Ordinance and Tenant Registration Ordinance cannot stand under the Supremacy Clause. Given Hazleton's reliance on cases with inapplicable holdings, the Ordinances' clear conflict an interference with federal laws and intrusion into a field fully occupied by federal laws, the lack of any indication that Congress has granted authority relative to any immigration matter, and ample precedence demonstrating that local laws concerning immigration matters have been

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[11] Federal immigration law is infamously complex. *See Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (describing "the labyrinthine character of modern immigration law" as "a maze of hyper-technical statutes and regulations"); *see also, e.g.*, *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988). Adding to the difficulty of determining status is the fact that many types of documents, such as court decisions, letters from federal immigration agencies, and passport inserts, may constitute valid proof of immigration status but may not be so regarded by untrained persons. And, to make matters still more complex, it cannot be assumed that a person who does not have identification documents clearly describing her immigration status is in the United States in violation of federal law. For example, many nationals of Honduras who have been granted Temporary Protected Status ("TPS") have been issued Employment Authorization Documents ("EADs") with an expiration date of July 5, 2006. The federal government has since extended the designation of Honduras for TPS by another year and has published a Federal Register notice indicating that these EADs are to be considered valid through January 5, 2007. 71 Fed. Reg. 16,333 (Mar. 31, 2006). Yet a person untrained in immigration law is likely to believe that an apparently expired EAD is an indication of "illegal alien" status.

determined to be in violation of the Supremacy Clause under one or more of the three applicable standards, this Court should deny Hazleton's Motion to Dismiss.

Plaintiffs have shown that the Ordinances are preempted because they regulate immigration, which is an area reserved solely to the federal government. Accordingly, this Court should grant summary judgment in Plaintiffs' favor on Count I of the Second Amended Complaint.

B. The Revised Immigration Ordinance Violates Fourteenth Amendment Procedural Due Process Guarantee

Hazleton asserts that Plaintiffs do not have a legally cognizable liberty or property interest in housing or employment that would trigger procedural protections. Def. Brief at 51-56. Hazleton further asserts that, even if protectable interests are implicated, the Revised Immigration Ordinance affords sufficient due process. Def. Brief at 56-63. Thus, Hazleton argues its Motion to Dismiss should be granted. As discussed below, this Court should deny Hazleton's motion on this claim because Hazleton's argument is based on (1) facts outside of the pleadings, (2) facts that contradict allegations in the Second Amended Complaint, which must be accepted as true, (3) facts that are not supported by the evidence developed in discovery, and (4) on a disingenuous interpretation of the law. Because the Second Amended Complaint sufficiently alleges a violation of constitutional due process rights,[12] Hazleton's Motion on this claim should be denied. Moreover, based on the evidence developed during discovery, the Revised Immigration Ordinance is so procedurally deficient that in fact this Court should grant Plaintiffs' summary judgment motion on the Fourteenth Amendment procedural due process claim.

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[12] Plaintiffs' procedural due process allegations are found at paragraphs 56-83 and 132-45 of the Second Amended Complaint.

1. The Law Regarding Procedural Due Process Claims is Well Established.

The Fourteenth Amendment provides that "no person shall be deprived of life, liberty, or property without due process of law." U. S. Const. Amend. XIV. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (emphasis in original; citations omitted). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

The Supreme Court has established a two-step test for examining procedural due process claims: the first asks whether there exists a liberty or property interest that has been interfered with by the State; the second examines whether the procedures that attend the deprivation are constitutionally sufficient. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted); *accord*, *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

The Revised Immigration Ordinance deprives Plaintiffs of both "property" and "liberty" interests. Property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (citations omitted).[13] "Liberty interests that trigger procedural due process

[13] "One alleging a property interest in a benefit protected by due process must go beyond showing an unsubstantiated expectation of the benefit. To have a

may be created by state law or by the federal constitution itself." *E.B. v. Verniero*, 119 F.3d 1077, 1105 (3d Cir. 1997), *cert. denied*, *522 U.S. 1109 (1998)*, citing *Sandin v. Connor*, 515 U.S. 472 (1995).[14]

Once a protected liberty or property interest has been identified, the focus shifts to assessing the quality and timing of the process due. The test, first enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), requires this Court to balance three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*. at 334-35; *accord E.B.*, 119 F.3d at

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property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1256 (3d Cir. 1994) (citations omitted).

[14] Protectable liberty interests extend beyond,

> merely freedom from bodily restraint but also [to] the *right of the individual to contract, to engage in any of the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.

Board of Regents v. Roth, 408 U.S. 564, 572 (1972) (emphasis added).

1106-07. We now apply the procedural due-process analysis to the Revised Immigration Ordinance.

2. Section 4 of the Revised Immigration Ordinance Interferes with Liberty and Property Interests of both Employers and their Employees.

Both employers and employees have protected interests in the employment contract. From the employees' perspective the ability to earn a living is critical: "[T]he 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." *Loudermill*, 470 U.S. at 543. As a result, for nearly a century courts have ruled that, "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the 'liberty' and 'property' concepts of the Fifth and Fourteenth Amendments." *Piecknick*, 36 F.3d at 1259, *quoting Greene v. McElroy*, 360 U.S. 474, 492 (1959).[15] Article I, § 1 of the Pennsylvania Constitution provides an independent state-law ground for this right. *See Nixon v. Commonwealth*, 839 A.2d 277, 288 (Pa. 2003).[16]

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[15] *See also Conn v. Gabbert*, 526 U.S. 286 (1999) ("Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment…."); *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("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").

[16] Plaintiffs recognize that, "It is the liberty to pursue a particular calling or occupation and not the right to a specific job that is protected by the Fourteenth Amendment." *Piecknick*, 36 F.3d at 1262 (citation omitted). But the effect of a Hazleton decision that a person is an unlawful worker is more akin to a situation "in which a person's license to pursue a chosen occupation is revoked or substantially interfered with . . . or where there is harm to an individual's

From the employer's perspective, the right is viewed as an interest in continuing the business and the right to contract with employees. *See, e.g.*, *College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 131 F.3d 353, 361 (3d Cir. 1997) ("Clearly, a business is an established property right entitled to protection under the Fourteenth Amendment"), *aff'd*, 527 U.S. 666, 675 (1999) ("The assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment") (parenthetical in original); *Roth*, 408 U.S. at 572; *Small v. United States*, 333 F.2d 702, 704 (3d Cir. 1964). Section 4 effects deprivations of constitutionally protected liberty and property interests by giving Hazleton the power to suspend the business permit of any entity that has been accused of employing an "unlawful worker." And while it is true that the federal immigration laws prohibit certain non-citizens from working, it cannot be assumed ex ante that Hazleton's determinations about who is an "unlawful worker" are correct; it is precisely that determination that must be subjected to due process before we can know whether it is indeed correct and before sanctions may be imposed.

3. Section 5 of the Revised Immigration Ordinance Implicates Landlords' and Tenants' Property Interests.

Both landlords and tenants have a "property interest" in their homes and apartments because real property is considered a fundamental right under the U. S. and Pennsylvania Constitutions. The U.S. Supreme Court has ruled that the "right

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reputation," both of which implicate a protectable liberty interest. *Id*. at 1261. The decision is not about whether a person should or should not be in a "specific job"; it prohibits the person from any calling, occupation or indeed gainful employment within the City.

to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993).[17] A corresponding right exists under state law: "An owner of property in this Commonwealth has a tremendously prized and fundamental Constitutional right to use his property as he pleases. . . ." *Parker v. Hough*, 215 A.2d 667, 669 (Pa. 1966) (citations omitted). The deprivation of real property need not be total or complete to trigger procedural protections. "[E]ven . . . temporary or partial impairments to property rights . . . 'are subject to the strictures of due process.'" *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (citations omitted).

Both landlords and tenants have protected interests in a government's decision to terminate a tenancy. Procedural due process must attend governmental deprivations of both a landlord's rental income, *James Daniel Good Real Property*, 510 U.S. at 54, and a tenant's continued residence in the rental property, *Greene v. Lindsey*, 456 U.S. 444, 450-51 (1982). Consequently, Section 5 effects a deprivation of both landlords' and tenants' protected property interests.

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[17] *See also*, Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 536 (2002) ("There never has been doubt that the government must provide due process before it deprives a person of real or personal property"); *Dennison v. Pennsylvania Dept. of Corrections*, 28 F.Supp.2d 387, 400 (M.D.Pa. 2003) ("Real property ownership has been historically protected by the Constitution and is considered fundamental to American society"), *quoting Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 229-230 (1985) (Powell, J., concurring).

4. Hazleton's Argument that Plaintiffs have no Protectable Liberty or Property Interest in Employment or Housing Stands Procedural Due Process Law on its Head.

Hazleton argues that Plaintiffs have no cognizable legal interest in employment or housing because if illegal aliens are involved those contractual relationships are illegal and "void ab initio." Def. Brief at 51-56. This argument stands the concept of procedural due process on its head. The allegation that an employee is an "unlawful worker" or that a tenant is an "illegal alien," which if determined to be true would under the Revised Immigration Ordinance deprive a person of his or her employment and housing in Hazleton, is precisely the determination that must be subjected to the crucible of due process. Hazleton's argument assumes that which must be determined by the proceedings.

In addition, the cases on which Hazleton relies to make this argument are inapposite. *See* Def. Brief at 52-56. The cases all involve situations with no disputed facts, i.e., contracts that are illegal on their face, either because the employer was not authorized under state law to include the particular terms, *see, e.g., Cooley v. Pennsylvania Housing Fin. Agency*, 830 F.2d 469 (3d Cir. 1987); *Demko v. Luzerne Co. Comm. College*, 13 F. Supp. 2d 722 (M.D. Pa. 2000), or the agreement violated a zoning ordinance, *see Ruiz v. New Garden Twnshp.*, 376 F.3d 203 (3d Cir. 2004). It was unnecessary to look beyond the terms of the contractual language to know the agreement was illegal and, thus, the documents could not support a property-interest finding. As the Supreme Court held recently, if there are no relevant facts in dispute, there is no due process right. *See Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 5 (2003) ("Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to

establish in that hearing are relevant under the statutory scheme"). That characterization applies to the cases cited by Hazleton.

By contrast, in this case the employment or housing agreements are not *facially* illegal; they might be illegal if an employee is determined to be an "unlawful worker" or a tenant is found to be an "illegal alien" and if the employer or landlord had knowledge of that fact. But whether the person really meets the Revised Immigration Ordinance's definition of "unlawful worker" or "illegal alien" is a determination that is dependent on facts beyond the four corners of the agreement. These are *the* key facts on which everything turns; facts that are likely to be disputed and, thereby, subject to procedural protections. By asserting that illegal immigrants have no rights and, therefore, do not deserve due process, Hazleton is putting the proverbial cart before the horse. Moreover, the argument contravenes black-letter law that even illegal immigrants enjoy due process rights. *See, e.g.*, *Kamara v. Attorney General of U.S.*, 420 F.3d 202, 216 (3d Cir. 2005) ("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") (citations omitted).

Therefore, this Court should reject Hazleton's argument that the Revised Immigration Ordinance does not implicate protectable interests necessitating due process. We turn now to whether Hazleton has provided constitutionally adequate procedural protections in the employment and housing contexts.

5. Hazleton's Purported Procedural Due Process is Deficient Because the so-called Administrative Protections attend an as-yet Undefined and Unapproved Verification Process and the Judicial Protections send Aggrieved Parties to Tribunals with no Legal Authority to Resolve the Dispute.

Having established that the Ordinances will result in depriving Plaintiffs of protected interests in housing and employment, the analysis turns to what procedural protections are due. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *See also, Mathews*, 424 U.S. at 333 (The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."). Except in "extraordinary situations," the due process must *precede* the deprivation. *James Daniel Good Real Property*, 510 U.S. at 53 (citations omitted).

The procedural due process afforded under the Revised Immigration Ordinance is not simply constitutionally deficient; it is illusory. The Revised Immigration Ordinance's enforcement scheme fails to afford any aggrieved party, i.e., employers, employees, landlords or tenants, meaningful and constitutionally adequate due process, either prior to or even after, ordering the deprivation of protected liberty or property interests. The process is essentially the same for both the employment and housing sections. *Compare* Revised Immigration Ordinance, § 4.B. with § 5.B.

Enforcement is initiated by a complaint, lodged with the Hazleton Code Enforcement Officer (hereafter "Code Officer"), which can be filed by virtually anyone, including Hazleton City employees. §§ 4.B.1 and 5.B.1. Within three days the Code Officer is required to "request identity information" from the business entity regarding the complained-about employee(s). *Id*. at § 4.B.3. The Ordinance does not define "identity information" and, as noted above, information collected as part of the federal employment-verification process is confidential under federal law. 8 U.S.C. § 1324a(b)(5). An employer's failure to provide identity information within three days results in the suspension of the business permit, which makes continued operation illegal. *Id*. The Revised Immigration Ordinance's housing section does not provide a corresponding process for obtaining identity information regarding the complained-about tenant, but Hazleton will already have that information through the Registration Ordinance, which requires tenants to provide "[p]roper identification showing proof of legal citizenship and/or residency" as a condition of receiving an occupancy permit. Ordinance 2006-13 § 7.b.1.g.

Upon receipt of the identity information, the Revised Immigration Ordinance directs the Code Officer to submit the documents to the federal government for verification. 2006-18 §§ 4.b.3 and 5.b.3. The Revised Immigration Ordinance is silent on exactly how this verification will work, except to say that it will occur "pursuant to United States Code Title 8, section 1373…." *Id*. That U.S. Code provision does not establish a verification mechanism.

Under the Revised Immigration Ordinance, Hazleton would submit an allegedly illegal employee's or tenant's identity papers (whatever those may be) to

a completely undefined and as-yet-unapproved federal verification process. As of January 31, 2007, Hazleton could not identify to whom in the federal government the identity information would be sent and the details of how the verification would occur. *See* Barletta Jan. 31, 2007, deposition at 122:07 – 124:24. Significantly, as of that date no federal agency had approved a verification method that Hazleton could use to ascertain immigration status of individuals alleged to be illegally working or housed in the City. *Id*. There are no, and can be no, meaningful procedures because there is as yet no approved verification system and no federal agency designated to determine a immigrant's status for the purposes contemplated by the Ordinances. If there is no verification mechanism in place any alleged due process protections are a sham. Hazleton's claim that allowing employers (Def. Brief at 57) and landlords (*id*. at 60-61) to provide identity documents (but not get a hearing or any adversarial proceeding) constitutes "extensive due process" is greatly exaggerated to begin with, but the argument is farcical when viewed in light of the fact that there is no verification process to which procedural protections can be attached.[18]

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[18] Even assuming, *arguendo,* that the federal government eventually authorized Hazleton to use the SAVE system to conduct the verification, the procedural protections are still deficient. As discussed in the pre-emption section, *supra*, a SAVE "response showing no Service record on an individual or an immigration status making the individual ineligible for a benefit is not a finding of fact or conclusion of law that the individual is not lawfully present." 65 Fed. Reg. 58301. Indeed, the determination that a individual is unlawfully present can be made only through formal procedures set forth in the INA and associated regulations, which procedures are subject to appeal and judicial review in the federal courts. Yet the Revised Immigration Ordinance makes a SAVE "verification" that a person is not "lawfully present" a "rebuttable presumption as to that individual's status in any judicial proceedings brought pursuant to this ordinance" and purports to authorize courts to "take judicial notice" of the SAVE verification. 2006-40 § 7.G.

Beyond the as-yet non-existent verification system, the purported judicial protections recently tacked in the Revised Immigration Ordinance are meaningless. Giving people access to local and state courts is an empty gesture because those tribunals have neither the expertise nor, more importantly, the legal authority to adjudicate immigration-status disputes. The venues provided by the Revised Immigration Ordinance for procedural due process are "the Magisterial District Court for the City of Hazleton, subject to the right of appeal to the Luzerne County Court of Common Pleas." Ordinance 2006-40 § 7.F. *See also* Def. Brief at 57-58 and 61-63. But as discussed above, and as conceded by Hazleton, the determination of a person's immigration status is one properly made at the federal level. Neither a local District Magistrate nor a Pennsylvania Common Pleas court judge is competent or legally authorized to determine a person's immigration status. Consequently, the judicial process provided by Hazleton is also illusory.

Since Hazleton provides no meaningful procedural protections, either before or after depriving employers, employees, landlords and tenants of important rights, the *Mathews* factors clearly favor Plaintiffs. The "private interests" affected are important. The loss of livelihood and, even more so housing, creates a tremendous hardship. Since there are no administrative procedures (because there is no verification process to which they can be attached) and the judicial proceedings are effectively meaningless, there is no protection against "erroneous deprivation." The absence of a meaningful process makes it irrelevant whether the law would allow the process to occur pre- or post-deprivation. On the third *Mathews* factor, a

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Hazleton's unapproved but proposed use of SAVE would be contrary to the parameters and guidelines of that system, compounding the pre-emption problems discussed earlier in this memorandum.

"substitute procedural requirement" would be to await federal government action to identify, detain and deport people identified as being here illegally, a process that involves no "fiscal and administrative burdens" on Hazleton.

Taking the allegations in the Second Amended Complaint, and all inferences therefrom, it is clear that Plaintiffs have raised valid allegations that the Revised Immigration Ordinance is unconstitutional under Fourteenth Amendment Due Process standards. Accordingly, Hazleton's Motion to Dismiss should be denied. Further, because it is clear that Hazleton's Revised Immigration Ordinance fails to provide adequate procedural due process and thereby violates the Fourteenth Amendment, Plaintiffs Motion for Summary Judgment on Count II of the Second Amended Complaint should be granted.

C. The Revised Immigration Ordinance Uses Impermissible Classifications In Violation Of The Equal Protection Clause

The Revised Immigration Ordinance expressly allows the consideration of a person's race and ethnicity to determine whether that person is an "unlawful worker" or "illegal alien" under the Ordinance. Specifically, the Ordinance allows Hazleton to consider those classifications as evidence of a violation when determining whether a complaint is valid, as defined by the Ordinance, as long as such evidence is not the primary basis for the complaint. By expressly allowing consideration of these suspect classifications[19] in its enforcement scheme, the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment.

Hazleton argues that Plaintiffs ground their equal protection claim on Hazleton's disparate treatment of Plaintiffs based upon their immigration status.

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[19] *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *United States v. Williams*, 124 F.3d 411, 422 (3d Cir. 1997).

Def. Brief at pp. 64-67. That assertion mischaracterizes Plaintiffs' claim, which in fact targets the Ordinance's reliance on classifications based on race, national origin and ethnicity. In fact, Plaintiffs have not only stated a claim that should not be dismissed under Fed. R.C.P. 12(b)(6) but have stated a claim for which summary judgment should be granted.

1. The Ordinance Expressly Permits Hazleton To Use Racial Classifications As Evidence Of A Violation

The Immigration Ordinance contains two parallel, and almost identical, complaint-based enforcement schemes, one to enforce the prohibitions against the employment of "unlawful workers" in the business permit context (Section 4.B.) and the other to enforce prohibitions against renting to "illegal aliens" section in the housing context (Section 5.B.). The business permits provisions state in part:

> 4.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 solely or primarily 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….

As set forth above, an enforcement action is initiated by means of a written signed complaint. If a complaint alleges the requisite information, it is to be considered a valid complaint, and an investigation is then mandated.[20] Hazleton must make a request for certain identity information and, if the business entity does not respond within three days, Hazleton is directed to suspend its business permit indefinitely. The indefinite suspension can occur even before a finding of a violation of the Revised Immigration Ordinance.[21]

Under this Ordinance, Hazleton has committed itself to acing on complaints based in part upon race, ethnicity and national origin. The relevant text plainly states it is clear that as long as a complaint's allegation of a violation is *not* "solely or primarily on the basis of national origin, ethnicity, or race," the complaint is neither invalid nor unenforceable. Revised Immigration Ordinance, § 5.B.2. Accordingly, a complaint based in part on those suspect characteristics will be considered valid and enforceable. Hazleton's suggestion that City officials will no act to enforce complaints based upon a prohibited characteristic does not solve the problem because the Revised Immigration Ordinance does not leave such matters

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[20] Though the procedures described are those dealing with allegations of business entities employing unlawful workers as set out in § 4.B, the procedures are identical for property owners alleged to have rented to "illegal aliens" under § 5.B.1 and 5b.2. However, the investigatory process under § 5.B.3 differs from that in § 4.B.3.

[21] Under § 5.B.3 the Code Enforcement Office does not require property owners to provide the identity information of a tenant who is allegedly an "illegal alien" as § 4.B.3 does because that information, under Ordinance 2006-13, should already exist in Hazleton's Tenant Registry.

to the City's discretion. That the Ordinance mandates that all valid complaints "shall" be enforced. Revised Immigration Ordinance §5.B.3.

Hazleton's claim that the allowance for complaints partially based on national origin, race, or ethnicity is to allow for use of those characteristics on a purely descriptive basis is undermined by the text itself. Rather, the Revised Immigration Ordinance contemplates a "complaint which alleges a *violation . . . on the basis of* national origin, ethnicity, or race" and requires that the City take enforcement action based on such a complaint. Revised Immigration Ordinance, § 5.B.2 (emphasis added). In short, the provision goes to the core of the decision-making process within the enforcement mechanism, and does not merely restrict, as Hazleton suggests, the information that may be written in a complaint.

Hazleton further attempts to muddy the Court's understanding of how the Revised Immigration Ordinance is to operate by reciting the language from § 4.B.1, which provision sets forth what allegations a complaint must contain for the complaint to be considered valid, including a requirement that a complaint describe "the alleged violator(s) as well as the actions constituting the violation." Hazleton argues that § 4.B.1 somehow negates the plain meaning of § 4.B.2. In fact, § 4.B.1 in no way undercuts or alters the plain meaning of § 4.B.2. Section 4.B.2 is clearly intended to set forth the role that race, ethnicity and national origin are to play in Hazleton's determination whether the allegations in a complaint adequately describe a violation of the Revised Immigration Ordinance. Section 4.B.2 expressly states that those factors – race, ethnicity, and national origin – can serve as evidence of "unlawfulness" so long as they are not the primary or sole evidence of the unlawfulness. Put more concretely, an allegation

that a worker is Latino can serve as evidence of a worker's unlawfulness; it just can not constitute the sole or primary evidence of the worker's unlawfulness. As such, the Ordinance clearly relies on racial, ethic and national origin classifications in determining whether the complaint is valid.

2. The Equal Protection Clause Prohibits the Use of Race as Evidence of a Violation.

In order to be valid, the Revised Immigration Ordinance's reliance on racial classifications must pass muster under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court has made clear that "all racial classifications [imposed by government] . . . must be analyzed by a review court under strict scrutiny." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (subcontractor denied contract as result of contract's incentives for hiring disadvantaged subcontractor had standing to seek forward-looking relief against future use of such clauses on equal protection grounds). "Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests." *Johnson v. California*, 543 U.S. 499, 505 (2005) (citing *Adarand Constructors, supra) (*strict scrutiny, rather than "reasonably related to legitimate penological interest" standard, governed inmate's challenge policy of initially placing new inmates with cellmates of same race)*; see also Lomack v. City of Newark*, 463 F.3d 303, 307 (3d Cir. 2006) (racial balancing policy in fire department violated equal protection as racial classifications receive close scrutiny even if intended to burden or benefit the races equally).

The *Johnson* Court explained why strict scrutiny applies to *any instance* where the government uses racial classifications, even for so-called benign use:

> The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining ••• what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. We therefore apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." (citations omitted; emphasis in the original).

Johnson, 543 U.S. at 505-06.

The use of racial classifications in the administration of justice, as in the instant case, is particularly troublesome.

> Race discrimination is "especially pernicious in the administration of justice." And public respect for our system of justice is undermined when the system discriminates based on race. (citations omitted)

Id. at 511.

As explained above, the Ordinance relies on racial classifications by allowing race to serve as evidence of a worker's or tenant's unlawfulness for purposes of determining whether the allegations in a complaint constitute a valid complaint. Thus, the burden falls upon Hazleton to establish a compelling governmental interest to justify its actions.

Hazleton knows it can not meet that burden and does not attempt to do so. In its Motion to Dismiss, Hazleton acknowledges that strict scrutiny applies where the government classifies according to race or national origin but then goes on to deny that the Revised Immigration Ordinance relies on racial classifications, a

denial that, as shown above, is contrary to the plain language of the Ordinance. *See* Def. Brief at 65-67.

It is difficult to imagine what governmental interest could be so *compelling* so as to justify such an overtly discriminatory scheme. Hazleton cannot escape strict scrutiny by arguing that the Revised Immigration Ordinance is racially neutral and does not use race to either benefit or burden the alleged violator. The Court in *Johnson* resoundingly rejected this argument presented on behalf of the California Department of Corrections (CDC):

> The CDC claims that its policy should be exempt from our categorical rule because it is "neutral"–that is, it "neither benefits nor burdens one group or individual more than any other group or individual." … The CDC's argument ignores our repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." Indeed, we rejected the notion that separate can ever be equal-or "neutral"–50 years ago in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and we refuse to resurrect it today. (citations omitted).

Id. at 507.

The constitutional infirmity is not cured by any claim that, under the Revised Immigration Ordinance, race does not serve as the "sole or primary" basis for establishing the validity of a complaint. Recognizing that is rare to see race as the only factor involved in any challenged practice, the constitutional bar on the use of racial classifications is not evaded, minimized, or undone simply because there are other factors involved in a process challenged as violating equal protection. *See, e.g,. Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 268 (1977) (rarely are legislative or administrative decisions

motivated by a single concern). By allowing selective prosecution or enforcement of laws based on the race of an individual, the Revised Immigration Ordinance violates equal protection standards. *See also Christopher v. Nestlerode*, 373 F.Supp.2d 503, 519 (M.D.Pa. 2005) ("selective enforcement of laws or regulations, based on race or ethnicity of an individual, may give rise to a violation of the Fourteenth Amendment," citing *Bradley v. United States*, 299 F.3d 197, 206-07 (3d Cir. 2002) (in selective enforcement claim, passenger failed to prove that customs inspectors treated her differently than other similarly situated passengers). By making race a relevant consideration in enforcing the Ordinance, Hazleton "threatens to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility . . . [and] to reinforce racial and ethnic divisions." *Johnson v. California*, 543 U.S. 507 (2005). The potential for aggravating racial hostilities is immense if Hazleton residents were permitted to single out other persons for prosecution under the Revised Immigration Ordinance based upon their race or ethnicity.[22] This Court must not allow such a scheme to govern.

Plaintiffs have sufficiently alleged that the Revised Immigration Ordinance violates Equal Protection standards. Accordingly, Hazleton's Motion to Dismiss must be denied. Further, the clearly apparent Equal Protection violations require that Plaintiffs' Motion for Summary Judgment on Count III of the Second Amended Complaint be granted.

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[22] This is not a case like *Brown v. Oneonta*, 221 F3d. 329 (2nd Cir.) involving the use of race to describe a suspect; the Revised Immigration Ordinance permits the use of race as evidence of a violation of the Ordinance, not simply as a means to identify a suspected violator.

D. The Ordinances Violate The Fair Housing Act

In their Motion to Dismiss, Hazleton argues that "illegal aliens" are not within the class of persons protected by the Fair Housing Act ("FHA"), 42 U.S.C. §3601 *et seq.* and denies that the Ordinances have a discriminatory effect.

The FHA prohibits discrimination based, *inter alia*, on race, color or national origin in all housing-related matters. 42 U.S.C. §3604 *et seq*. In particular, the FHA makes it unlawful: (1) "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person *because of race, color*, religion, sex, familial status, or *national origin*" (42 U.S.C. §3604(a) (emphasis added)) and (2) "To discriminate against any person in the *terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color*, religion, sex, familial status, or *national origin*." (42 U.S.C. §3604(b) (emphasis added)). Discrimination under §§ 3604(a)-(b) can be established either on a theory of intentional discrimination (disparate treatment) or discriminatory effect (disparate impact). *See, e.g.*, *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 141-44 (3d Cir. 1977).

There can be no question that the harboring enforcement scheme of the Revised Immigration Ordinance violates the FHA. Hazleton's reliance on race and national origin as a basis upon which a complaint can be made and investigated violates Sections 3604(a)-(c) of the FHA. As explained above, the Ordinance deems valid and enforceable any complaint which alleges a violation *in part* on the basis of national origin, ethnicity, or race. Accordingly, under the text of the Revised Immigration Ordinance, the basis or justification for the allegation itself

may be, in part, one of the characteristics prohibited under the FHA. Such a race, national origin, or ethnicity-based allegation may then trigger enforcement against an individual and lead to eviction or displacement from the residence. Although Hazleton claims that its officials may only consider neutral reasons in determining whether the enforce a complaint, the plain words of § 5(B)(2) are to the contrary.

By the same token, § 5.B.2 makes an express statement that race, ethnicity, and national origin may be used as one factor in identifying persons not entitled to reside in Hazleton, in violation of 42 U.S.C. § 3604(c). *See, e.g.*, *United States v. Hunter*, 459 F.2d 205, 210 (4th Cir. 1972) (emphasizing that § 3604(c) "applies on its face to 'anyone'" making discriminatory statements); *see also Mayers v. Ridley*, 465 F.2d 630, 653 (D.C. Cir. 1972) (Wilkey, J., concurring) (describing the "discouraging psychological effect" discriminatory statements); Robert G. Schwemm, Discriminatory Housing Statements and 3604(c): a New Look at the Fair Housing Act's Most Intriguing Provision, 29 Fordham Urb. L.J. 187, 249-50 (2001) (discussing § 3604(c)'s purpose of protecting minorities from the insult caused by statements of discrimination).

In the same way, the Revised Immigration Ordinance intentionally makes dwellings unavailable on the basis of race, ethnicity, and national origin, in violation of 42 U.S.C. § 3604(a). As the Third Circuit has made clear in the Fair Housing Act context: "Where a regulation or policy facially discriminates on the basis of the protected trait [e.g., race or national origin], in certain circumstances it may constitute per se or explicit . . . discrimination because the protected trait by definition plays a role in the decision-making process." *Community Services, Inc.*

v. Wind Gap Municipal Authority, 421 F.3d 170, 177 (3d Cir. 2005) (internal punctuation omitted).

In addition, as a result of Revised Immigration Ordinance's sanctioned use of the prohibited categories of race, ethnicity, and national origin as the basis for a complaint, the Ordinance will have a disparate impact on the ability of persons of minority races, ethnicities, or national origins, and in particular Latinos, to obtain housing or continue to reside in Hazleton. *See* 42 U.S.C. § 3604(a).

Further, the Revised Immigration Ordinance's reliance on race, ethnicity, or national origin as one factor, and not the "sole or primary" basis for a complaint does not lessen in any way Hazleton's liability under the Fair Housing Act. It is well established that the FHA is violated as long as "some discriminatory purpose was a 'motivating factor' behind the challenged action. *Wind Gap Municipal Authority*, 421 F. 3d at 177. As the Third Circuit has emphasized: "[t]he discriminatory purpose need not be malicious or invidious, nor need it figure in 'solely, primarily, or even predominantly' into the motivation behind the challenged action." *Id*.

Hazleton asserts that City employees "[]may only consider race/ethnicity/origin-neutral factors when deciding whether or not a complaint is a valid one that warrants further investigation." *See Def. Brief* at 70. What Hazleton identifies as "neutral factors" are in fact impermissible factors under the statutory scheme and case law interpreting the Fair Housing Act.

Further, the Tenant Registration Ordinance's requirement that tenants show proof of lawful immigration status, without a concomitant prohibition on discrimination by housing providers, will result in a disparate adverse impact on

the ability of minority housing seekers to obtain housing in Hazleton, in violation of the FHA.

Plaintiffs have sufficiently alleged that the Revised Immigration Ordinance and Tenant Registration Ordinance raise disparate treatment and disparate impact claims under the FHA and that persons of minority races, ethnicities, or national origins, and in particular Latinos, in Hazleton will be subjected to unequal treatment in attaining and maintaining peaceful habitation upon the implementation of these Ordinances, in clear violation of the FHA. Accordingly, Hazleton's Motion to Dismiss must be denied. Further, because the Ordinances plainly contravenes the FHA, Plaintiffs' Motion for Summary Judgment on Count IV of the Second Amended Complaint should be granted.

E. The Ordinances Volate 42 U.S.C.§ 1981 Prohibition Against Alienage Discrimination

Section 1981 protects the right of "all persons" to, inter alia, make and enforce contracts and obtain the "full and equal benefit of all laws" on equal footing with "white citizens." 42 U.S.C. § 1981(a).[23] Section 1981 thus prohibits

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[23] The statute provides in full:

> (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

discrimination based on both race and alienage. Hazleton's Ordinances violate § 1981 in several respects: by making both housing and employment unavailable based on race pursuant to the Revised Immigration Ordinance, as explained above; and by making housing unavailable based on alienage pursuant to both the Revised Immigration Ordinance and the Tenant Registration Ordinance.

Hazleton erroneously assert that Plaintiffs' alienage discrimination claim under 42 U.S.C. § 1981 must be dismissed because § 1981 does not apply to persons lacking lawful immigration status. *Def. Brief* at 69.

First, Hazleton is wholly mistaken in its assertion that the protections of § 1981 do not extend to undocumented persons. The text of § 1981 itself makes clear that it applies to "[a]ll persons within the jurisdiction of the United States." 42 U.S.C. § 1981(a). As the Supreme Court has repeatedly held: "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." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). *See also, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("[The Fourteenth Amendment's] provisions are universal in their application, to *all persons* within

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> 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.

42 U.S.C. § 1981.

the territorial jurisdiction.") (emphasis added). The Supreme Court has expressly noted that the language of § 1981 is based on the Fourteenth Amendment: "[Section 1981] and the Fourteenth Amendment on which it rests in part protect '*all persons*' against state legislation bearing unequally upon them either because of alienage or color." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (emphasis added). Thus, just as an "alien[] whose presence in this country is unlawful" is a "person[]" as that term is used in the text of the Fifth and Fourteenth Amendments to the U.S. Constitution (*Plyler*, 457 U.S. at 210), he or she is likewise a "person" within the meaning of § 1981.[24] Hazleton' argument – that undocumented persons are not "persons" – has been resoundingly rejected by the courts.

Second, Hazleton argues that if undocumented persons were protected by § 1981's prohibition on alienage, then undocumented workers could bring § 1981 claims against employers for failing to hire them when those employers were merely trying to comply with federal immigration law. *Def. Brief* at 70-71. Hazleton misconstrues Plaintiffs' claim. Nowhere do Plaintiffs claim that Hazleton has violated § 1981 by making it unlawful for employers to hire workers who lack authorization to work. *See* Second Amended Complaint at ¶¶176-83.

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[24] *See also, e.g., Anderson v. Conboy*, 156 F.3d 167, 173 (2d Cir. 1988) ("The use of 'persons' rather than 'citizens' [in § 1981] was deliberate. Because [that provision] was at least in part based on the Fourteenth Amendment, the change in language reflects the language of that newly enacted Amendment, which extended the country's guarantee of the equal protection of the laws to 'any person within its jurisdiction.'") (quoting the Fourteenth Amendment). *Cf., e.g., Chellen v. John Pickle Co., Inc.*, 344 F.Supp.2d 1278, 1292 (N.D. Okla. 2004) (undocumented workers are "employees" under FLSA); *EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585, 593-94 (E.D. Cal. 1991) (undocumented workers are "employees" within the meaning of Title VII).

Indeed, an employer who refuses to hire an individual because he lacks work authorization cannot be held liable for alienage discrimination under § 1981, because the employer's action is motivated by the need to comply with federal law rather than by discriminatory animus. Plaintiffs' claim is that Hazleton violates § 1981 and discriminates based on alienage by making it illegal for persons lacking proof of lawful immigration status to obtain housing in Hazleton.

Plaintiffs have sufficiently alleged that the Revised Immigration Ordinance violates § 1981, requiring that Hazleton's Motion to Dismiss must be denied. Further, because the Ordinances violate § 1981, Plaintiffs' Motion for Summary Judgment on Count V of the Second Amended Complaint should be granted.

F. Hazleton Exceeded Its Municipal Powers And Home Rule Charter In Enacting The Revised Immigration Ordinance

In its Motion to Dismiss, Hazleton denies that it the Revised Immigration Ordinance violates its municipal powers or the Home Rule Charter law, or conflicts with Pennsylvania employment law. Def. Brief at 75-77. Hazleton rests its argument in part on its contention that the City has not adopted a home rule charter. *Id.* at 76. However, irrespective of the form of this municipality, Hazleton lacks powers to add new substantive requirements to the employment relationship, to create a private right of action over employers and t allow certain employees to recover treble damages, as is provided in the Revised Immigration Ordinance. Hazleton's Motion to Dismiss must therefore be denied and Plaintiffs are entitled to summary judgment on these claims.

"The general powers of all municipal governments, regardless of the style and plan selected, are limited to those bestowed by the state legislature." *See, e.g., In re Nomination Petition of Joseph Digiorlamo for Mayor*, No. 0501736-31, slip.

op. at 3 (Bucks County, Apr. 6, 2005). Municipalities are not sovereigns and have no original or fundamental power of legislation. *Genkinger v. City of New Castle*, 84 A.2d 303, 304 (Pa. 1951); *see also Kline v. City of Harrisburg*, 68 A.2d 182 (Pa. 1949). Rather, they have only the powers to enact ordinances which are given to them by the General Assembly. *Genkinger*, 84 A.2d at 304.

If Hazleton is in fact a home-rule-charter municipality, it derives its legislative powers from the Constitution of the Commonwealth of Pennsylvania and the Home Rule Charter law. 53 Pa.C.S.A. § 2961; *see also* Pa. Const. art. 9, § 2. Although those powers are broad, the General Assembly has circumscribed the ability of a home-rule-charter municipality, such as Hazleton, to regulate business and employment. According to the Home Rule Charter law:

> [a] municipality which adopts a home rule charter **shall not determine the duties, responsibilities or requirements placed upon businesses, occupations and employers**. . . except as expressly provided by statutes which are applicable in every part of this Commonwealth or which are applicable to all municipalities or to a class or classes of municipalities.

53 Pa.C.S.A. § 2962(f) (emphasis added).

To the extent that Hazleton has not adopted a home rule charter — an alternative factual scenario specifically pled in the Second Amended Complaint — its municipal powers are even more restricted. Municipalities that have not adopted home rule charters have only those powers expressly given to them by the Commonwealth. The Commonwealth has not granted cities of the third class, like Hazleton, the right to create a private California in favor of employees against employers. The powers vested in Hazleton are contained in the Third Class City Code, 53 P.S. § 37403. The Third Class City Code enumerates 68 specific powers

in such specific and diverse areas as payment of debts and expenses, removal of garbage, destruction of dogs, the sale and use of fireworks, regulations of skating rinks, support of National Guard Units, inspection of milk, sprinkling of streets, and placing of electrical wires underground in certain districts. *See* 53 P.S. §37403 (1), (6), (9), (27), (31), (35), (44), (49) & (50). None of the 68 enumerated powers authorizes Hazleton to create private causes of action or alter existing Pennsylvania law governing the employer employee relationships.

Pennsylvania is an employee-at-will state. *See, e.g.*, *McCartney v. Meadow View Manor, Inc*., 508 A.2d 1254, 1255 (Pa. Super. 1986). The Revised Immigration Ordinance imposes duties and responsibilities on employers in direct violation of the Home Rule Charter law and exceed the powers delegated under the Third Class City Code. *See Smaller Manufacturers Council v. Council of City of Pittsburgh*, 485 A.2d 73, 77 (Pa. Commw. Ct. 1984). Sections 4 and 7 of the Revised Immigration Ordinance add a unique set of immigration-related employment regulations neither contemplated nor authorized by state law. For example, Section 4.E. deems it an "unfair business practice" for a business in Hazleton to discharge "an employee who is not an unlawful worker," if the business was not participating in the Basic Pilot Program and was employing an unlawful worker; empowers an "unfairly discharged employee" to sue the employer for the described "unfair business practice" and authorizes the "unfairly discharged employee" to recover actual damages, including three times the employee's lost wages for a 120-day period, and attorneys' fees and costs. Similarly, Section 4.A. add a new certification requirement for employers and a new substantive restriction on who may be employed in Hazleton. Sections 4.B.

and 7.C. add a new enforcement scheme creating additional obligations on employers.

Because the Revised Immigration Ordinance improperly attempts to impose unique local duties and responsibilities upon employers and employees, as described above, it constitutes an *ultra vires* act and must be declared void. Hazleton's motion to dismiss is therefore without merit and must be denied. Because Hazleton lacks authority to enact the Revised Immigration Ordinance, Plaintiffs are entitled to summary judgment on Count VI and IX of the Second Amended Complaint.

G. The Revised Immigration And Tenant Registration Ordinances Violate Pennsylvania's Landlord/Tenant Act

In Count VII of the Second Amended Complaint, Plaintiffs request this Court to declare the Immigration Ordinance and the Registration Ordinance to be unenforceable because they contravene express provisions of Pennsylvania's Landlord Tenant Act of 1951. 68 P.S. §§ 250.101, *et seq*. ("L/T Act"). In its Motion to Dismiss, Hazleton asserts that the L/T Act is inapplicable to contracts and agreements with "illegal aliens."

In addition to prohibiting municipalities from regulating the employer/ employee relationship, the Home Rule Charter law proscribes municipalities from exercising **"powers contrary to, or in limitation or enlargement of, powers granted by statutes which are applicable in every part of this Commonwealth."** 53 Pa.C.S.A. § 2962(c)(2) (emphasis added). These limitations were designed to reserve to the Commonwealth matters that are most appropriately dealt with on a state-wide level. *Hartman v. City of Allentown*, No. 2003-C-1846, slip. op. at 5 (Lehigh County, June 14, 2004). This law is consistent

with state preemption principles, which apply irrespective of the form of Hazleton's municipal government.

The Commonwealth has explicitly claimed authority over landlord-tenant issues by virtue of its enactment of the L/T Act. The legislature clearly expressed its intention that the L/T Act be the **sole** source of rights, remedies and procedures governing the landlord/tenant relationship. *Lenair v. Campbell*, 31 Pa. D. & C.3d 237, 241 (Phila. County 1984). The L/T Act states:

> [A]ll 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 P.S. § 250.602 (emphasis added).[25] *See also*, *Williams v. Guzzardi*, 875 F.2d 46, 53, n.13 (3d Cir. 1989). More specifically, "[t]he Pennsylvania Landlord and Tenant Act of 1951, Pa. Stat. Ann., tit. 68, §§ 250.101-250.602, prescribes the exclusive procedures to be followed to evict a tenant." *Bloomsburg Landlords, Assoc., Inc. v. Town Of Bloomsburg*, 912 F. Supp. 790, 803 (E.D. Pa 1995).

State preemption applies where "there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected." *Hartman v. City of Allentown*, 880 A.2d 737, 747 (Pa. Commw. Ct. 2005)(citing *United Tavern Owners of Philadelphia v. Philadelphia Sch. Dist.*, 272 A.2d 868, 871 (Pa. Commw. Ct. 1971)). Accordingly, municipalities such as Hazleton are prohibited from altering

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[25] Section 250.103 of the L/T Act excludes existing laws under 10 specific situations from repeal or modification, and Section 250.503-A requires tenants to comply with all obligations, including those imposed by, *inter alia*, municipal ordinances.

or supplementing that law. *See, e.g., Council of Middletown Township v. Benham*, 523 A.2d 311 (Pa. 1986) (*citing Western Pennsylvania Restaurant Association v. Pittsburgh*, 77 A.2d 616, 620 (Pa. 1951)).

The landlord/tenant provisions of the Revised Immigration Ordinance and Registration Ordinance directly conflict with the L/T Act. Section 5.A. of the Revised Immigration Ordinance makes it unlawful for any person or business entity that owns a dwelling unit ("landlord") in Hazleton to knowingly, or in reckless disregard of the fact, harbor an illegal alien. Section 5.B.(3) requires the landlord to "correct a violation" within five business days or else have its license denied or suspended and prohibits the landlord from collecting any rent, payment, fee, or other form of compensation from, or on behalf of, any tenant in the dwelling unit during the period of suspension. Because harboring is defined to include permitting the occupancy by an illegal alien, and a separate violation is deemed to have been committed on each day that harboring occurs, the only way a landlord can avoid sanctions and "correct a violation" is within 5 days of written notice from Hazleton.

Similarly, the Registration Ordinance requires landlords to take reasonable steps to remove or register unauthorized occupants that are the guests of current occupants within **ten** days of learning of their unauthorized occupancy. The penalty for non-compliance is a one-time fine of $1,000 for each occupant without a permit, plus $100 per occupant for each day the landlord allows such an unauthorized occupant to occupy the rental unit.[26]

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[26] Occupants are defined to include any person merely residing in the rental unit that is 18 years or older. An occupant cannot obtain an occupancy permit, however, unless he/she can provide proof of legal citizenship and/or residency.

The eviction provisions of the Revised Immigration Ordinance and Registration Ordinance require the landlord to violate the L/T Act. The L/T Act safeguards tenants even when they have done something meriting eviction. Under the L/T Act, removal is initiated by the filing of a complaint. The tenant is not required to appear before the justice of the peace to answer the complaint at a date less than seven days from the date of the summons. 68 P.S. § 250.502. And, even if a judgment is rendered in favor of the landlord, a writ of possession will not issue until the fifth day after the rendition of the judgment, and is not to be executed until the eleventh day following service upon the tenant, which is to occur within 48 hours of issuance. 68 P.S. § 250.503. Under the L/T Act, a tenant cannot be evicted for a minimum of 23 days. (This does not include the provisions for notice, which can add an additional 10 days at a minimum, unless the lease provides for a lesser time, or waives notice entirely. *See* 68 P.S. § 250.501.)

The Registration Ordinance also materially conflicts with the L/T Act. Under Section 10.b. of the Registration Ordinance, occupants who allow additional occupancy in a Rental Unit without first obtaining the written permission of the landlord, and without requiring that any additional occupant obtain his or her own permit, are in violation of the Registration Ordinance and are subject to conviction and fines similar to those the landlord is subject to, i.e., $1,000 per occupant, and $100 per day per occupant for which permission and a permit were not obtained.

Accordingly, landlords may have current tenants that will not meet the stringent citizenship and/or legal residency requirement of the Registration Ordinance. Landlords are, thus, faced with the Hobson's choice of evicting such tenants (and losing rental income, perhaps also subjecting themselves to liability for breaching the lease) or paying exorbitant fines for not doing so.

Under Section 250.504-A of the L/T Act, however, tenants have a right to invite social guests, family, or visitors for a reasonable period of time, as long as their obligations as a tenant under the L/T Act are observed. Although Section 250.503-A of the L/T Act lists Tenant's duties as including complying with all obligations imposed upon tenants by applicable provisions of all municipal ordinances, the duty to obtain authorization for/and registration of guests in the Tenant Registration Ordinance is in direct conflict with a tenant's rights to have visitors for a reasonable period of time under the L/T Act.

The Tenant Registration Ordinance also requires that landlords take reasonable steps to remove or register unauthorized occupants within ten days of learning of their occupancy. As described above, this requirement conflicts with the L/T Act's notice under Section 250.501; the time limits for notice under Section 250.501; the time limits for removal under Sections 250.502 and 250.503; and tenant's rights under Section 250.503-A.

In sum, Hazleton has clearly exceeded the municipal authority granted to it by the Commonwealth of Pennsylvania in enacting Sections 4.E. and 5.B.(3) of the Immigration Ordinance, and in enacting the Registration Ordinance. Accordingly, Hazleton's Motion to Dismiss must be denied and Plaintiffs' Motion for Summary Judgment on Count VII of the Second Amended Complaint should be granted.

H. The Ordinances Violate Guarantees Of Privacy

Hazleton argues that no fundamental privacy right has been alleged by Plaintiffs. However, in determining whether information is entitled to privacy protection, the Third Circuit has looked at whether it is within an individual's reasonable expectations of confidentiality. The more intimate or personal the

information, the more justified is the expectation that it will not be subject to public scrutiny. *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 112 (3d Cir. 1987). As explained in *Sterling v. Borough of Minersville*, 232 F.3d 190, 197 (3d Cir. 2000), "our jurisprudence takes an encompassing view of [the] information entitled to a protected right to privacy." Id. at 197 (citation omitted).

1. The Tenant Registration Ordinance Violates Plaintiffs' Privacy Rights.

The information demanded by Hazleton under the Tenant Registration Ordinance would disclose the residence of every occupant who does not own their home, revealing not only a single home address but the associations that take place in the home.[27] Unlike the telephone book, the disclosures required by the Tenant Registration Ordinance do not involve a single voluntary subscriber at a residence. The system put in place by Hazleton provides for no "unlisted numbers," and is constructed to provide a comprehensive history of every resident of a rented dwelling in Hazleton. If an individual decides to move in with a paramour, she must register with Hazleton, and so too, if she decides to move out. If a married couple decide to establish separate residences, they must register with Hazleton; if an adult child moves back into his parents home, Hazleton demands disclosure.

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[27] *Cf. Fraternal Order of Police, Lodge No. 5 v. City of Phila*., 812 F.2d 105, 119 (3d Cir. 1987) (recognizing privacy of association and invalidating questions about association*); Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), *aff'd,* 532 U.S. 514 (2001) ("As commonly understood, the right to privacy encompasses both the right 'to be free from unreasonable intrusions upon [one's] seclusion' and the right to be free from 'unreasonable publicity concerning [one's] private life.' *Fultz v. Gilliam,* 942 F.2d 396, 401 (6th Cir. 1991)").

These are matters of personal relationships which are shielded from overbearing government inquiry and disclosure by the constitutional right to privacy.[28]

Furthermore, in implementing the Tenant Registration Ordinance as an enforcement mechanism of the Revised Immigration Ordinance, Hazleton requires that applicants provide highly confidential documents such as birth certificates, alien residency cards, passports, naturalization documents and other document issued by the federal government. These documents contain information in which Plaintiffs have a reasonable expectation of privacy such as date of birth, country of birth, country of origin, date of entry into the United States, and whether they are protected by the federal government as a result of domestic violence. Disclosure of such information which could easily be used to usurp an individual's identity and/or endanger the person's safety.

In *Fraternal Order of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 118 (3d Cir. 1987), the court observed that an important element of the privacy inquiry is the degree to which sensitive information is safeguarded from disclosure. Finding "no statute or regulation that penalizes officials with confidential information from disclosing it," the Court in that case held that even with respect to personal information that Philadelphia was entitled to collect from its employees, the absence of such penalties rendered the collection unconstitutional.

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[28] *See Sterling v. Borough of Minersville*, 232 F.3d 190, 197 (3d Cir. 2000) (sexual orientation is intimate and protected against involuntary disclosure by privacy right); *Yeager v. Hackensack Water Co*., 615 F. Supp. 1087, 1092 (D.N.J. 1985) (Water company's collection of names of members of household violates privacy rights. "The right to be free from compelled disclosure of the names of household members is within the right of privacy which has been recognized by the courts").

Here, while § 12 of the Tenant Registration Ordinance announces that information collected will be "confidential," the Ordinance establishes neither a definition of "confidentiality" nor any penalty for disclosure. Indeed the Tenant Registration Ordinance explicitly reserves the right to release the information "to authorized individuals" during the course of "an official City investigation." Further, apparently such personal information may become subject to disclosure under the Pennsylvania Right to Know Act.[29]

Moreover, § 7.D. of Ordinance 2006-40 requires landlords to cure a violation by either initiating an eviction proceeding, giving notice to quit or extracting additional identifying information from the tenant and/or occupant. Hazleton has enacted no confidentiality obligation upon the landlord who receives such personal information. Even worse, the Revised Immigration Ordinance provides no prohibition against tenants being subject to these searches an unlimited number of times with an unlimited number of landlords, agents and business associates who have no disincentive from disclosing the private and personal information.

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[29] Compare *Tribune-Review Publ. Co. v. Allegheny County Hous. Auth.*, 662 A.2d 677 (Pa. Commw. Ct. 1995) (refusing to disclose payroll records, but noting that "careful review of both federal and state law has revealed no statute restricting the release of government employees' home addresses and home telephone numbers") and *PG Publishing Co. v. County of Washington*, 638 A.2d 422 (Pa. Commw. Ct. 1994) (authorizing release of cell phone records) with *Tribune-Review Publ. Co. v. Bodack*, 875 A.2d 402 (Pa. Commw. Ct. 2005) (redacting telephone numbers because "In this era when identify theft is a national problem, release of a person's phone number to the public at large merely because that person called a public official or was called by some public official could cause such public records to operate to the prejudice or impairment of a person's reputation or personal security.").

Against these unprecedented impositions, Hazleton provides as justification only an empirically falsifiable claim that "illegal immigrants" threaten higher crime rates and burdens of public services, and a desire to enforce its federally preempted rules against "harboring" such individuals. Such claims are insufficient to justify the imposition of a "registration" regime on every renter and occupant of rented property in Hazleton.

Hazleton's brief also asserts that the city will only collect the information in the event a complaint is filed. Def. Brief at 81. Hazleton does not assert any other reason for the collection of these documents. In the privacy balancing test mandated by Third Circuit precedent, Hazleton's alleged interests simply do not weigh heavily enough to sustain the intrusion wrought by the Tenant Registration Ordinance.

Plaintiffs have sufficiently pled allegations regarding their privacy rights, requiring that Hazleton's Motion to Dismiss be denied.

2. The Revised Immigration Ordinance Violates Federal Guarantees Of Privacy

The Revised Immigration Ordinance is also violative of Federal guarantees of privacy. However, Hazleton takes a much more reckless approach to gathering private and personal information from tenants under this scheme. While the Tenant Registration Ordinance makes a bald assertion that information collected by Hazleton is to be confidential, Hazleton does not even make such a minimal attempt in the Revised Immigration Ordinance.

Under Ordinance 2006-40, upon receipt of notice of a "harboring" violation, a landlord must either issue a notice to quit, seek additional information from tenant or commence an action of recovery of possession of real property against

the tenant.[30] The landlord must either convince the tenant to hand over personal information or incur the expense of instituting eviction proceedings. The tenant must either hand over personal and private documents to the landlord or risk losing the housing. Hazleton explained the options available to the landlord as follows: The landlord's first opportunity to be heard is in his presentation of identity data to Hazleton." Def. Brief at 57. "The property owner may correct the violation. *Importantly, if an alien tenant maintains that he is lawfully present in the United States, he may provide information to his landlord, which can be forwarded to City of Hazleton for a second verification of status by the federal government.*" (emphasis in original). *Def. Brief* at 57. In sum, the landlord must somehow obtain these documents from the tenant to show to the Code Office or initiate eviction proceedings.

Under Ordinance 2006-40, the onus is on the landlord to obtain highly confidential documents proving lawful status.[31] While Ordinance 2006-40 gives the landlord the authority to seek private and confidential information, however, it does not create any penalties should the landlord distribute this information. The Ordinance does not inform the landlord of which documents it seeks. Thus, a cautious landlord will feel pressured to seek as much information as s/he could possibly obtain not knowing what is actually needed to cure the asserted violation. In fact, should a landlord want to secure personal information from a tenant, there is nothing that prohibits such landlord from being the complainant.

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30 *See* Ordinance 2006-40 Section 7.D.

31 Documents likely to be sought after include Social Security cards, Resident Alien cards, Birth Certificates, and documents containing Visa information, all of which contain highly confidential and private information.

There are no limits to how many times a tenant can be exposed to privacy violations, thus permitting multiple opportunities for the disclosure of private information, and disclosure to various landlords and agents over a lifetime. Under the Ordinances' scheme, a tenant's private information is to be disclosed to a landlord who suffers no penalties for disclosure and distribution of said information and has incentives to force a tenant to disclose the most information possible.[32] Without any protections for tenants' private and personal information, this ordinance should be declared unconstitutional under the U.S. Constitution.

3. The Ordinances Violate State Guarantees Of Privacy

Article 1, § 8 of the Pennsylvania Constitution states that:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

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[32] However, Hazleton is responsible for Privacy Rights violations that occur as a result of compliance with the ordinance. In *Pitt News v. Fisher*, 215 F.3d 354 (3d Cir. 2000), relying on *Bennett v. Spear*, 520 U.S. 154 (U.S. 1997). The Court held that *The Pitt News*, a school newspaper, could bring suit against the Pennsylvania Liquor Control Board (LCB). The Court explained: "In Bennett, the plaintiff sued one government agency, 'Agency A,' which had coerced a second agency, 'Agency B,' into enacting certain regulations that injured the plaintiff. The Court held that the plaintiff had standing to sue 'Agency A,' [][t]he rationale was that the plaintiff's injuries were directly traceable to the actions of 'Agency A,' because 'Agency B' would not have enacted the challenged regulation" *Pitt News*, at 361. Thus, by analogy, Hazleton (Agency A) which is coercing the landlord (Agency B) is still liable to tenant Plaintiffs for violations of privacy executed by the landlord.

In *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), the Pennsylvania Supreme Court explained that although the language of Art 1, Section 8 parallels that of the 4th Amendment of the U.S. Constitution, the Pennsylvania Constitution "embodied a strong notion of privacy, notwithstanding federal cases to the contrary." *Edmunds* at 898. The Court explained: "In *Commonwealth v. Platou* [312 A.2d 29 (Pa. 1973), *cert. den.* 417 U.S. 976 (1974)] and *Commonwealth v. DeJohn* [403 A.2d 1283 (Pa. 1979)], we made explicit that 'the right to be free from unreasonable searches and seizures contained in Article 1, Section 8 of the Pennsylvania Constitution is tied into the implicit right to privacy in this Commonwealth'." *Id.*, *quoting DeJohn*, 403 A.2d at 1291.

From *DeJohn* forward, a steady line of case-law has evolved under the Pennsylvania Constitution, making clear that Article I, Section 8 is unshakably linked to a right of privacy in this Commonwealth. *See Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983); *Commonwealth v. Miller*, 518 A.2d 1187 (Pa. 1987); *Commonwealth v. Blystone*, 549 A.2d 81 (Pa. 1988); and *Commonwealth v. Melilli*, 555 A.2d 1254 (Pa. 1989).

Both Ordinances violate Plaintiffs' Pennsylvania Privacy rights by seeking personal and private information from tenants subjecting them to searches and privacy violations at the behest of the government. The Court in *Commonwealth v Miller*, at pp. 1191-1192, best explained the purpose of securing individual's privacy, the protection: "[] is designed to protect us from unwarranted and even vindictive incursions upon our privacy. It insulates from dictatorial and tyrannical rule by the state, and preserves the concept of democracy that assures the freedom

of its citizens. This concept is second to none in its importance in delineating the dignity of the individual living in a free society."

The Revised Immigration and Tenant Registration Ordinances treat all tenants as individuals who do not have any privacy expectations in their personal and private information in spite of such guarantees by the Pennsylvania Constitution. Hazleton assert that "[t]he City of Hazleton makes use of this information for the purposes of contacting tenants in the instances of blight or property code enforcement, and for locating individuals in instances of emergency," Hazleton does not assert any logical reason as to why having an individual's alien number, birth certificate, visa category and all other private information sought would make it easier to identify individuals in case of emergency.

In the case of an alien, the information would be maintained in the event a complaint is filed. *Def. Brief* at 81. This is not a compelling reason to accumulate so much private, confidential and personal information. Hazleton analogizes providing these documents to providing information to receive a government license, permit, or the receipt of public benefits, or payment of taxes, but these scenarios are not comparable. In each instance, the government has articulated a compelling reason, such as to ensure the proper collection of taxes, that public benefits are issued to those eligible for them, or that voting mechanisms are accurate. When the government is asking for private and personal information, the information must be related to the function at hand. The government cannot collect this kind of information "just in case" as Hazleton seems to argue it can.

Finally, Hazleton asserts that compliance with the Ordinances "do not involve any public disclosure of the information collected by Hazleton." *Def. Brief* at 83. This is incorrect, as Ordinance 2006-40 provides that a landlord may demand additional personal information from a tenant or occupant to comply with the Revised Immigration Ordinance. Whether read together or apart, the Ordinances violate Plaintiffs' Federal and State Privacy rights. Hazleton have not asserted any state interest in obtaining this information other than for use "if a valid complaint is initiated under the IIRA Ordinance." *Def. Brief* at 81. Thus, the Motion to Dismiss must be denied.

I. Plaintiffs Have Stated A Claim For A Violation Of Legitimate Police Powers

Hazleton contends that Plaintiffs incorrectly allege that "the police powers of a state or municipality may only be used to respond to 'nuisances.'" (Motion to Dismiss at 84). To the contrary, paragraphs 215-218 of the Second Amended Complaint make clear that Plaintiffs recognize that "police powers" may be used to "preserv[e] the public health, safety and morals" of Hazleton, as well as to abate public nuisances. Hazleton attempts to conceal the question at issue by focusing solely on whether police powers may be used for purposes other than abating a nuisance.

Despite this attempt to obfuscate the issue, it remains clear that, whether police powers are used to abate a public nuisance or to preserve the public health, safety and morals of Hazleton, the exercise of such powers "must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means . . . employ[ed] must have a real and substantial relation to the objects sought to be attained." (Second Amended Complaint § 216). Hazleton has failed

to address this issue, much less demonstrate that Plaintiffs have failed to plead sufficient facts to state a claim.[33]

The stated purpose of the Revised Immigration Ordinance is to:

> secure to those lawfully present in the United States and this City . . . the right to live in peace free from the threat of crime, to enjoy the public services provided by this city without being burdened by the cost of providing goods, support and services to aliens lawfully present in the United States, and to be free from the debilitating effects on their economic and social well being imposed by the influx of illegal aliens. . .

(Ordinance 2006-18 § 2.F.). The Revised Immigration Ordinance further states that "[i]llegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of case, contributes to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life." (Ordinance 2006-18 § 2.C.). As alleged in the Second Amended Complaint, there is no evidence that "illegal immigration" has increased Hazleton's crime rate, contributed to any burdens on public services, including hospitals and schools, or diminished the quality of life of any of Hazleton's residents. Plaintiffs have alleged sufficient facts to show that there is no "real or substantial relation" between the stated purpose of the Revised Immigration Ordinance and the means

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[33] Ironically, despite Hazleton's latest argument that a nuisance is not required to exercise its police powers, Hazleton relied on its authority to abate public nuisances in enacting the Immigration Ordinance. (*See* Ordinance 2006-18 § 2.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 acts and policies that facilitate immigration in a manner consistent with federal law and the objectives of Congress.").

employed to achieve that purpose. Thus, Plaintiffs have stated a valid claim that the enactment of the ordinance was an abuse of Hazleton's police powers.

It is well-established that "[A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means *which it employs must have a real and substantial relation to the objects sought to be attained.*" *Mahony v. Township of Hampton*, 651 A.2d 525, 527 (Pa. 1995) (quoting *Lutz v. Armour*, 151 A.2d 108, 110 (Pa. 1959)) (emphasis in original); *Gambone v. Commonwealth*, 101 A.2d 634, 637 (Pa. 1954). An ordinance that simply declares that a nuisance or problem exists does not constitute evidence that there is an actual nuisance or problem. *See Commonwealth v. Creighton*, 639 A.2d 1296, 1299 (Pa. Commw. Ct. 1994) (citation omitted). "Rather, the ordinance must be phrased in such a way as to require the municipality to affirmatively establish that that a nuisance [or problem] in fact existed." *Id.* Moreover, the actual means used to achieve the goal of abating an actual nuisance or remedying a problem must be "reasonably necessary and not unduly oppressive." *Id.* at 1300.

Here, Hazleton enacted the Immigration Ordinance for the purported purpose of decreasing crime and relieving the supposed burdens that "illegal immigration" has placed on hospitals and schools. (Ordinance 2006-18 § 2). As alleged in the Complaint and confirmed in discovery, however, Hazleton has conducted absolutely no analysis as to whether illegal immigration has caused any problems or what measures are necessary to solve these purported problems. (Second Amended Complaint ¶ 220). Just because Hazleton claims that there are problems and challenges facing Hazleton does not make it so. Indeed, the violent

crime rate has decreased steadily in Hazleton over the past five years. (*Id.* ¶¶ 221-22). In addition, as alleged in the Complaint, Mayor Barletta has admitted that he has no "statistics or solid evidence to back up his claim that 'illegal aliens' have contributed significantly to any real or perceived problem in Hazleton." (*Id.* ¶ 221).[34]

The Complaint describes, in great detail, many of the deficiencies in Hazleton's conclusion that "illegal immigration" has negatively impacted the public welfare: (1) there is no evidence that illegal immigration has increased the crime rate in Hazleton; in fact, crime has decreased; (2) there are no statistics or analyses indicating that "illegal immigration" has increased medical costs for Hazleton; and (3) there are no statistics or analyses showing that "illegal immigration" has caused an increase in school budgets. (Id. ¶¶ 221-227). The Complaint therefore alleges sufficient facts to demonstrate that the Revised Immigration Ordinance bears no "real and substantial relation" to any demonstrated problem or nuisance in Hazleton.[35]

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[34] Indeed, the Court has recognized that Hazleton "offers only vague generalizations about the crime allegedly caused by illegal immigrants, but has nothing concrete to back up its claims." (Order dated 1/31/06 at 8).

[35] Hazleton cites *DeCanas v. Bica*, 424 U.S. 351 (1976), in support of its argument that municipalities may use their police powers to prohibit the employment of those immigrants deemed "illegal". (Motion to Dismiss at 84). Such a broad contention does not resolve the matter at issue. As *DeCanas* dealt with a California state statute, it had nothing to say about the police powers of municipalities generally or Pennsylvania in particular and the *De Canas* Court recognized that the use of such powers must serve a legitimate purpose. i.e., "to protect workers within the State." *See DeCanas*, 424 U.S. at 356. In the present case, Hazleton has not identified a legitimate or actual goal that bears a "real and substantial relation" to the restrictions contained in the Immigration Ordinance. Hazleton's reliance on *DeCanas* regarding police powers is entirely misplaced.

The Complaint also contains sufficient facts to demonstrate that the measures imposed to resolve the alleged problems in Hazleton are "unreasonable, unduly oppressive and patently beyond the necessities of the case." As Plaintiffs alleged, despite having no immigration experience, the Code Office is expected to implement the Immigration Ordinance, the Tenant Registration Ordinance and the Property Registration Ordinance without any guidance from the Federal Government. (*Id.* ¶¶ 231-235). Nor does the Code Office know how it will enforce such ordinances. (*Id.* ¶ 235). As a result, the Ordinances suppress the freedom of individuals without any evidence that they will resolve any real or perceived problem in Hazleton. Such a result may not be justified as a legitimate exercise of police powers.

J. Plaintiffs Have Standing To Maintain This Action

Contrary to Hazleton's assertions, each of the Plaintiffs has standing based on the harm they have and will suffer through the enactment of the Ordinances. In addition, viewing the Complaint in the light most favorable to the Plaintiffs, each of the Plaintiffs' individual claims against Hazleton must stand.

Hazleton argues that Plaintiffs who are landlords or employers have no standing to challenge the constitutionality of the Ordinances unless such Plaintiffs have harbored "illegal aliens" or hired "unauthorized workers." Furthermore, Hazleton maintains that Plaintiffs who are tenants lack standing because (1) those Plaintiffs with lawful immigration status will not be harmed by the Ordinances and (2) any Plaintiff who has alleged unlawful status, has no legal right to be in Hazleton or the U.S. *See Def. Brief* at 21. Hazleton's arguments are without merit.

Hazleton would substitute a requirement that Plaintiffs actually violate the Ordinances with the well established test for showing standing:

First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly ... trace[able] to the challenged action of Hazleton, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (ellipses in original, citations omitted).

While Plaintiffs bear the burden of establishing these elements, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* (citations omitted). Consequently, at the current state of this litigation, "general factual allegations of injury resulting from Hazleton's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (citation omitted).

Here, the Plaintiffs injuries are neither "conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 180 (2000). Hazleton argues that Plaintiffs must show that they would suffer violations under the Revised Immigration Ordinance in order to show any threat of injury. However, this proposition is unsupported by Third Circuit case law. Plaintiffs may

sue so long as they can demonstrate an "identifiable trifle" constituting actual or threatened injury because such harm is sufficient to guarantee that plaintiffs have a concrete interest in the outcome of the litigation. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n. 14 (1973). The Third Circuit has consistently followed the standard for Article III injury-in-fact based on a Plaintiff showing "an identifiable trifle" of harm. *See Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982) ("The contours of the injury-in-fact requirement, while not precisely defined, are very generous"); *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71 (3d Cir. 1990) ("These injuries need not be large, an "identifiable trifle" will suffice."); *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286 (3d Cir 2005) ("Injury-in-fact is not Mount Everest," reversing grant of motion to dismiss); *Pub. Interest Research Group of N.J.*, 913 F.2d at 71 (same). Certainly, for purposes of a motion to dismiss, Plaintiffs have pled the necessary injuries to satisfy the standing criteria.

1. Plaintiffs Have Standing to Claim that the Ordinances are Preempted by Federal Immigration Laws and Regulations.

Plaintiffs clearly have standing to raise their Supremacy Clause claim. Hazleton argues, however, that even if Plaintiffs meet the standing requirements overall, Plaintiffs lack standing to raise preemption claims because they do not fall within the "zone of interests" of the federal provisions that preempt the challenged Ordinances. *Def. Brief* at 8-10. Hazleton's argument is completely foreclosed by the Third Circuit's decision in *St. Thomas-St. John Hotel & Tourism Assoc. v. Gov't of the United States Virgin Islands*, 218 F.3d 232 (3d Cir. 2000):

We 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. *Id.* at 240-41. *Accord Planned Parenthood of Houston & Southeast Texas v. Sanchez*, 403 F.3d 324, 331 (5th Cir. 2005) (rejecting Hazleton's argument that the district court erred in reaching plaintiffs' preemption claim where plaintiffs "were not seeking to vindicate any right or to enforce any duty running to them"); *Taubman Realty Group Ltd. v. Mineta*, 320 F.3d 475, 481 n.3 (4th Cir. 2003) (holding that the plaintiff "does not have to meet the additional standing requirement involving the zone of interests test with respect to its Supremacy Clause claim against the [Hazleton] County"); *Pharma. Research & Manufs. Of America v. Concannon*, 249 F.3d 66, 73 (1st Cir. 2001) ("As the Third Circuit recently pointed out, an entity does not need prudential standing to invoke the protection of the Supremacy Clause." (citing *St. Thomas*), *aff'd sub nom. Pharma. Research & Manufs. of America v. Walsh*, 538 U.S. 644 (2003).[36]

St. Thomas makes clear that a preemption plaintiff need not show that he is within a statutory "zone of interests" in order to have standing on his Supremacy

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[36] Indeed, as the Third Circuit noted in *St. Thomas*, Hazleton's argument has also been implicitly rejected by the Supreme Court. *See* 218 F.3d at 241 (citing *California Fed. Sav. & Loan Assoc. v. Guerra*, 479 U.S. 272 (1987) (action by employers arguing that state law was preempted by Pregnancy Discrimination Act, which confers rights on pregnant employees), and *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (action by tanker company arguing that state law was preempted by federal statute imposing various operation, safety, and environmental requirements on tanker companies)).

Clause claim. Hazleton ignores this precedent and instead cites to an opinion on a stay application issued by a single justice of the Supreme Court in *INS v. Legalization Assistance Project of the L.A. County Fed'n of Labor*, 510 U.S. 1301 (1993) (O'Connor, Circuit Justice). That suit raised a claim *against the federal government* that particular immigration regulations were contrary to the Immigration and Nationality Act and the Constitution. That claim was not a preemption claim and Justice O'Connor's decision in the stay application in *Legalization Assistance Project* does not in any way contradict the Third Circuit's subsequent and controlling ruling in *St. Thomas*. As such, all of the Plaintiffs clearly have standing to challenge the Revised Immigration Ordinance and Tenant Registration Ordinance based upon their preemption claims.

2. Plaintiff Businesses and Landlords Have Standing.

Plaintiff businesses and landlords have alleged "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997), *quoting Lujan*, 504 U.S. at 560. Specifically, these Plaintiffs would be burdened by the Revised Immigration Ordinance and Registration Ordinance, because these Ordinances would impose costs, time and resources regardless if whether those Plaintiffs were subjects of an enforcement action. *See, e.g,. Salem Inn, Inc. v. Frank*, 522 F.2d 1045, 1048, (2nd Cir. 1975) (holding that tavern operators had an interest in enjoining ordinance because of economic cost of compliance and threat of prosecution upon violation). Here, Plaintiff business owners who are employers must, above and beyond their preexisting duties under federal law (1) check the immigration status of all of their new hires, without recourse to federal safe-harbor

provisions; (2) check the immigration status even of people who are not hired as regular employees, such as independent contractors, day laborers and other persons "dispatched;" and (3) enroll in the otherwise voluntary Basic Pilot in order to avoid liability and potential sanctions. Likewise, the Plaintiff landlords are burdened with (1) checking the immigration status of potential tenants; (2) checking the immigration status of existing tenants; and (3) registering themselves and paying the fee imposed by the Tenant Registration Ordinance. Both landlord and employer Plaintiffs — who are mainly small businesses or individuals — are forced to incur expense, time and resources to comply with the ordinances. Economic injury, both actual loss in the past and prospective loss in the future, plainly satisfy the standing requirement. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 954-55 (1984).

Plaintiff employers and landlords also clearly satisfy the second prong of the test for standing: "there must be a causal connection between the injury and the conduct complained of--the injury has to be 'fairly ... trace[able] to the challenged action of Hazleton, and not ... the result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (citation omitted). Threatened action by a third party is sufficient for the causation prong of standing. *Meese v. Keene*, 481 U.S. 465, 472 (1987). The cause of the injuries here is Hazleton's threat to enforce the Ordinances. By sanctioning anyone who provides shelter to "illegal aliens" or "dispatch[es]" unauthorized workers, and by enforcing the Ordinances against such persons, there is a casual relationship between the

Ordinance (and Hazleton's enforcement of it) and the injuries and economic losses suffered by these Plaintiffs.

The third element of the *Lujan* test also is clearly satisfied. The test requires that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" 504 U.S. at 560. If this Court were to permanently enjoin enforcement of the Ordinances, employers and landlords would not be forced to expand costs, time and resources attempting to comply with the Ordinances and the threat of sanctions would be removed. Simply because the enforcement has not, to date, been directed against the Plaintiffs does not negate the Plaintiffs' standing in this matter. Plaintiffs Lozano and Hernandez are either "Owners" or "Operators" of "Dwellings" as defined in Tenant Registration Ordinance. Plaintiffs Lechuga, Lozano and Hernandez are potential "Employers" as referred in the Immigration Ordinance. As such, pursuant to the plain reading of the Ordinances, they are required to comply with the Ordinances to avoid sanctions thereunder. *See Friendship Medical Ctr, Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141 (7th Cir. 1974), *cert. den.*, 420 U.S. 997 (holding that plaintiffs alleged sufficient threat of prosecution where "continuing restrictive effect placed on the plaintiffs by the regulations which is the basis of their complaint. In this case. . . we are dealing with recently enacted ordinances that have potentially very real criminal sanctions.").

3. <u>Plaintiff Tenants and Employees Have Standing.</u>

Hazleton argues in its brief that Plaintiff tenants do not have standing because they "have no legal interest in remaining anywhere inside the United States." *See Def. Brief* at 19. However, Hazleton's argument, and indeed their

entire motion, is based on two related and erroneous assumptions. First, Hazleton proceeds as if the Ordinances will only affect persons who are in fact undocumented and who in fact have been determined by the federal government to be removable. Yet a key aspect of Plaintiffs' claims is that because of the complexity of federal immigration law, the imprecise and overbroad nature of the Ordinances, and the complete lack of constitutionally mandated procedural protections, the Ordinances unlawfully impact a myriad of persons who are permitted by the federal government to continue to reside in the U.S., whether explicitly or implicitly. *See, e.g.*, Second Amended Complaint ¶¶ 114-115. Further, Plaintiffs assert that the Ordinances impose additional burdens and risks on both landlords and employers, regardless of whether they have any tenants or employees falling within the Ordinances' prohibitions.

Second, Hazleton's argument appears to assume that undocumented persons have no legal rights, constitutional or otherwise. Yet in case after case, the federal courts, including the Supreme Court, have made clear that undocumented persons – even those who have been found removable – continue to have important substantive constitutional and statutory protections. As the Supreme Court emphasized in *Zadvydas v. Davis*, 533 U.S. 678 (2001), for example, "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* at 693 (citing cases). *See also, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 210 (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."); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (citations omitted); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("[The Fourteenth Amendment's] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."). Indeed, over a hundred years ago in *Wong Wing v. United States*, 163 U.S. 228 (1896), the Supreme Court squarely held that persons subject to final orders of deportation are entitled to substantive constitutional protections. As the *Zadvydas* Court reiterated more recently, *Wong Wing* "held that punitive measures could not be imposed upon aliens ordered removed because 'all persons within the territory of the United States are entitled to the protection' of the Constitution." *Zadvydas*, 533 U.S. at 694 (quoting *Wong Wing*, 163 U.S. at 238).

It is likewise well-established that persons without lawful immigration status, including immigrant workers lacking work authorization, are entitled to numerous statutory protections under federal law.[37] Undocumented workers are protected by a range of statutes including the National Labor Relations Act, Title

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[37] We should also be mindful of the fact that the U.S. Senate has under review a bill to legalize the status of certain undocumented foreign nationals. *See* S. 2611, 109th Cong. As such, those who are allegedly "illegal aliens" or "unauthorized workers" today under the Ordinances may very well be lawful residents of this country tomorrow.

VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, and the Migrant and Seasonal Agricultural Worker Protection Act. *See, e.g., Sure-Tan v. NLRB*, 467 U.S. 883 (1984) (holding that employer had violated NLRA by reporting undocumented employees to INS in retaliation for participating in union activities); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1069 (9th Cir. 2004) (concluding that "the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases"), *cert. denied*, 544 U.S. 905 (2005);[38] *Chellen v. John Pickle Co., Inc.*, 344 F.Supp.2d 1278, 2004 WL 2563265 (N.D. Okla. Aug. 26, 2004) (holding that undocumented workers are "employees" under FLSA); *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601, 604-05 (S.D. Fla. 2002) (holding that undocumented workers have standing to sue under the Migrant and Seasonal Agricultural Worker Protection Act). Numerous courts have even denied Hazleton's attempts to seek information regarding a plaintiff's immigration status, holding that such attempts would undermine the ability of immigrant plaintiffs to vindicate their statutory rights in a number of contexts. *See Rivera*, 364 F.3d at 1064-70 (Title VII); *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (FLSA); *Centeno-Bernuy v. Perry*, 219 F.R.D. 59 (W.D.N.Y. 2003) (Migrant and Seasonal Agricultural Worker Protection Act); *Liu v. Donna Karan, Int'l*, 207 F.Supp.2d 191, 192-93 (S.D.N.Y. 2002)

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[38] *See also* Equal Employment Opportunity Comm'n, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*, EEOC DIRECTIVES TRANSMITTAL NO. 915.002, June 27, 2002, *available at* http://www.eeoc.gov/policy/docs/undoc-rescind.html (emphasizing "the settled principle that undocumented workers are covered by the federal employment discrimination statutes and that it is [] illegal for employers to discriminate against them").

(FLSA); *De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237, 237-38 (C.D. Ill. 2002) (Title VII, FLSA, and state minimum wage law); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (Federal Tort Claims Act).

4. Plaintiffs Have Standing to Claims that the Ordinances Violate Equal Protection and the Fair Housing Act.

Plaintiffs also have standing to bring their equal protection claims. The Immigration Ordinance expressly permits factors such as "national origin, ethnicity, or race" to be considered as some evidence that a violation of the ordinance has occurred. The Ordinance therefore creates specific barriers which prevent Plaintiffs from enjoying the same liberties other Hazleton residents, based on prohibited considerations. This discriminatory barrier or classification, which offends the Constitution, is sufficient to create standing. As the noted by the United States Supreme Court,

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group need not allege that he would have obtained the benefit but for the barrier in order to establish standing.

Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993). The "injury in fact" necessary to establish standing is "not the ultimate inability to obtain the benefit," but rather, "the denial of equal treatment resulting from the imposition of the barrier" *Id*. Plaintiffs have clearly alleged and demonstrated, with specific facts, that the Ordinance subjects them to unequal treatment due to their "national origin, ethnicity, or race." (Second Amended Complaint ¶¶ 1-38). Thus, they have pled sufficient facts to establish their standing to pursue an Equal Protection Claim.

Hazleton presumes the standing requirements for Fair Housing Act (FHA) purposes could only be met if a tenant is not able to secure a tenant registration or if they are removed from their home solely as a result of the ordinances. *Def. Brief* at 19. Hazleton's understanding of the purpose of the FHA is erroneous. To ensure that access to housing is not jeopardized in any manner Section 3602(i)(b) of the FHA defines an "aggrieved person" as someone who " believes that such person will be injured by a discriminatory housing practice that *is about to occur*." [Emphasis added]. Any private "aggrieved person" could bring a private right of action where "[] the court finds that a discriminatory *housing practice* has occurred or *is about to occur*[]." 42 U.S.C. § 3613 (c)1(a) ([emphasis added). The language of the Act is "broad and inclusive" and is subject to "generous construction." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). The Act's prohibition "appear [] to be as broad a prohibition as Congress could have made, and *all practices which have the effect of making dwellings unavailable on the basis of race are therefore unlawful*." *United States v. Gilbert*, 813 F. 2d 1523, 1528 (9th Cir. 1987) (quoting 42 U.S.C. §3604) (emphasis added). In *Trafficante*, the U.S. Supreme Court found the Fair Housing Act's language to reflect "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution, *citing Hacket v. McGuire Bros., Inc.*, 445 F. 2d 442 (3d Cir. 1971). The Court explained that the Fair Housing Act was not intended to allow claims only by persons who were the objects of discrimination, but by anyone who was affected by discriminatory practices.[39] There is nothing in the statutory

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[39] To illustrate the scope of standing under the FHA see *Heights Community Congress et al., v. Rosenblatt Realty, Inc.*, 73 F.R.D. 1, 12 (N.D. OH 1975), where the court approved three classes to proceed: "All residents [ ]who have been

language of the Fair Housing Act or its jurisprudence that reflects an intention to limit standing only to cases where Plaintiffs have *already* lost or were *already* denied housing. Thus, Plaintiffs have standing to challenge the Ordinances as a prohibited discriminatory practice.[40]

5. Organizational Plaintiffs Have Standing.

An association, like any other plaintiff, may establish standing in its own right. Here the Plaintiff organizations—Casa Dominicana, Hazleton Hispanic Business Association (HHBA) and Pennsylvania Statewide Latino Coalition (PSLC) —have each suffered injuries by the threatened enforcement of the Ordinances. Casa Dominicana has lost members, which in turn equates to less financial and other support for the organization. HHBA and PSLC have expended time, financial support and resources in order to advocate against enactment and enforcement of the Revised Immigration Ordinance and similar ordinances throughout the Commonwealth of Pennsylvania, as well as in providing assistance to its members impacted by the Revised Immigration Ordinance. See Second Amended Complaint, ¶¶ 25-38. The Plaintiff Organizations thus have alleged sufficient concrete and demonstrable injury with the consequent drain on the

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deprived of the benefits of interracial association as a result of defendant's conduct;" "All whites who have been 'steered' out []from their neighborhood" and all whites deprived of their continued right to interracial associations by the cumulative impact of the selective and racially motivated showing of real estate in segregating certain racially integrated neighborhoods[]"; and "All blacks steered away from predominantly white areas and into racially integrated neighborhoods in Cleveland Heights which deprive their class their continued rights of interracial associations by the cumulative impact of the selective and racially motivated showing of real estate in segregating certain neighborhoods[]."

[40] The anti-harboring scheme is encapsulated by Section 5 of Ordinance 2006-18, Section D of Ordinance 2006-40 and Section 7 of Ordinance 2006-13.

organization's resources. *See Havens Realty Corp v. Coleman*, 455 U.S. 363 (1982) (holding that organization had standing in its own right where it suffered drain of resources by interference of organization's ability to provide counseling and referral services for low-income home seekers and generally suffered impairment in promotion of open housing).

In addition to standing in its own right, the Plaintiff organizations have standing based on the claims of its members. An organization has associational standing where "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). *See also Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 2002 WL 186008, at *3 (3d Cir. 2002). An organization has standing to sue to redress injuries suffered by its members without a showing of injury to the association itself. *Warht v Seldin*, 422 U.S. 490, 511 (1975). According to the Supreme Court, if even one of the members can allege injury as a result of the challenged government action, then the organization has associational standing. *Id.*

As Plaintiffs have alleged, members of each of the organizations include business owners, landlords, tenants or residents of Hazleton who are and will be negatively impacted by the enforcement of the Ordinances. Since each of these types of members have alleged demonstrable and concrete injury as set forth above, the organizations of which they are part also have associational standing. HHBA, for example, has members who are business owners and landlords who

employ or leases to the immigrant (Hispanic) communities. These landlords and businesses will suffer in the same manner as Plaintiff Business Owners and Landlords due to (1) reduction in customer-base and loss of employees or tenants; (2) expenditures of time and resources trying to ascertain any "illegal alien"; (3) exposure to anti-discrimination lawsuits by requesting documentation from such persons; and (4) exposure to fines and penalties under the Ordinances by employing/leasing to alleged "illegal aliens."

K. All Anonymous (John And Jane Doe) Plaintiffs May Proceed Anonymously In This Action

This Court already has held that "Plaintiffs (Does) may legitimately fear removal from the country and separation from their families if they reveal their identities." Memorandum and Order, p. 6, dated Dec. 15, 2006. Plaintiffs 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. This Court granted Plaintiffs a protective order to preserve the confidentiality of Plaintiffs Does' names, identities, and immigration status in order to avoid "the danger of intimidation, the danger of destroying the cause of action" and risk of Plaintiffs' loss in pursuing their constitutional and statutory rights, (citing *Zeng Lui v. Donna Karan Internat'l, Inc.*, 207 F.Supp. 2d 191, 193 (S.D.N.Y. 2002), and *Ansoumana v. Gristede's Oper. Corp.*, No. 00 Civ. 0253 (S.D.N.Y. Nov. 8, 2000)). The Court's reasoning similarly applies to the issue of the use of pseudonyms in the pleadings.

The Third Circuit has not expressly adopted a standard on the issue of the use of pseudonyms by Plaintiffs, *Doe v. Evans*, 202 F.R.D. 173, 175 (E.D. Pa.

2001) fn. 5, nor has it reversed or denied jurisdiction to courts based on their use. The Federal Rules of Civil Procedure do not specifically address the use of a pseudonym by plaintiff parties. A significant number of courts have either explicitly,[41] *see Doe v. State of Alaska*, 122 F.3d 1070 (9th Cir.1997) (unpublished), or implicitly permitted its use, *see Roe v. Wade*, 410 U.S. 113 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982) (where illegal aliens were allowed to proceed anonymously in their successful constitutional challenge to the Texas law denying free public grammar school education to illegal alien children), *John Doe I, et al. v. Village of Mamaroneck*, --- F.Supp.2d ---, 2006 WL 3393247 (S.D.N.Y. 2006); *Doe v. Matthews*, 420 F. Supp. 865 (D.N.J. 1976) (allowing plaintiff to sue under a pseudonym without explanation); *Doe v. Martin*, 404 F. Supp. 753 (D.C. 1975) (allowing plaintiff to proceed anonymously without discussion). Thus, it is clear that a number of courts have allowed pseudonym Plaintiffs to proceed without seeking advance permission of the courts.

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[41] Under special circumstances, courts have allowed parties to use fictitious names, particularly where necessary to "protect[ ] privacy in a very private matter." *Doe v. Smith*, 189 F.R.D. 239 (E.D.N.Y. 1998) , *citing to*, *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D.Mont.1974); factors in determining whether a plaintiff may proceed anonymously, including privacy and security interests, as well as whether the plaintiff would be compelled to admit an intention to engage in illegal conduct, thereby risking criminal prosecution); *Doe v. Bell Atl. Bus. Sys. Serv., Inc.*, 162 F.R.D. 418, 420 (D. Mass. 1995) (recognizing cases that have allowed Plaintiffs to proceed anonymously on grounds of social stigmatization, real danger of physical harm, or where the injury litigated against would occur as a result of the disclosure of the plaintiff's identity); *Doe v. Hodgson*, 344 F. Supp. 964 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 537 (2d Cir. 1973) (challenging legislation that excluded agricultural workers from certain benefits and protections in case filed by migrant agricultural laborers pseudonymously).

Though Rule 10 of the Federal Rules of Civil Procedure provides that a party's name be included in a civil action's caption, rarely has a federal court dismissed a complaint merely because the plaintiff's name was used anonymously. Only one court has used its discretion to interpret Rule 10 to render an anonymous filing generally ineffective to commence an action but only where the complaint failed to identify by true name at least one plaintiff in the filing of the action. *Roe v. New York*, 49 F.R.D. 279, 282 (S.D.N.Y. 1970). In contrast, this action has identified both a set of anonymous Plaintiffs and named Plaintiffs.

Courts have recognized that when Plaintiffs challenge an ordinance, or a governmental policy or law that affects a broad grouping of persons, and, not an individual defendant, Plaintiffs' position should be favored. Hazleton is not disadvantaged by the lack of access to the names and identity data for the Plaintiff Does. Plaintiff Does do not have any "ulterior" motives to advance any fraudulent claims; they do have *bona fide* concerns about the adverse effects of the challenged Hazleton ordinances, their enforcement, and the effects on their basic rights to shelter, education, and, a livelihood. *See, e.g.*, *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981) (in view of threats made against the Plaintiffs and the community hostility, Plaintiffs were entitled to proceed anonymously); *Doe v. Rostker*, 89 F.R.D. 158, 161 (N.D. Cal. 1981) (explaining that "[c]ourts have carved out limited exceptions to Rule 10 where the parties have strong interests in proceeding anonymously…. The common thread running through these cases is the presence of some social stigma or the threat of physical harm to the Plaintiffs attaching to disclosure of their identities to the public record.").

Hazleton's reliance on *Marcano v. Lombardi* is misplaced and can be distinguished. There, the court ruling on defendant's Motion for Summary Judgment held that though Plaintiff Marcano had not petitioned for permission to proceed under a pseudonym, he had "persistently and repeatedly" maintained a "false" alias, was unable to establish the Fed. R. Civ. P. 17(a) real party in interest requirement and had utterly failed to address the pseudonym issue. *Marcano v. Lombardi*, 2005 WL 3500063 at 4 (D.N.J. 2005) (not for publication); *Dotson v. Bravo*, 321 F.3d 663 (7th Cir. 2003) (case dismissed due to Plaintiff's use of false name).

Plaintiffs have not used any false names or aliases. Each of the Doe Plaintiffs have genuine reasons to fear disclosure of their true names and identities, *supra*. The Plaintiffs have not engaged in "hide and seek" nor engaged in a "misleading shell game of interchangeable Plaintiffs" as Hazleton charge. As the Court found, there is "no merit to these contentions." *Id*., Memorandum and Order, at 3. Indeed, as the Court found, Plaintiffs have sufficiently identified each plaintiff and did not engage in "some type of abuse of judicial process" simply by making "changes in an amended complaint which superseded the original complaint." *Id*. at 5. Each of the individually numbered Plaintiffs John and Jane Does described in the Original Complaint (filed August 15, 2006), in the First Amended Complaint and in the Second Amended Complaint are indeed distinguishable and different.[42]

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[42] In the interim period under the Court's temporary restraining order, during which Hazleton was considering the cessation of enforcement or repeal of the prior Ordinance, some Doe Plaintiffs had moved out of Hazleton due to its anti-immigration stand. A few no longer had claims under the amended ordinances.

However, Plaintiffs' allegations and facts as stated in their Second Amended Complaint are neither misleading nor have they unduly restricted Hazleton from assessing the allegations presented. Hazleton can not show that the adding and removal of various Doe Plaintiffs has subverted the ability of this Court or Hazleton from properly evaluating the claims raised by the Plaintiffs' motion for a temporary restraining order and preliminary relief.

VI. CONCLUSION

For the reasons set forth in this Memorandum of Law in Opposition to Hazleton's Motion to Dismiss and in support of Plaintiffs' Motion for Summary Judgment, the Plaintiffs respectfully request this Court to deny Hazleton's Motion

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These parties were effectively withdrawn. After the new Immigration Ordinance was passed in September 2006, additional Doe Plaintiffs were identified and joined to the litigation. After Hazleton City passed yet another set of Ordinances on December 28, 2006, Plaintiffs were required to file a Second Amended Complaint necessitating more changes to the Plaintiffs.

Plaintiffs John Doe 1, 2, 3, and 4, and Jane Does 1 and 3, in the Original Complaint, were removed. In the First Amended Complaint, the *only* original Doe remaining in the case, Jane Doe 2, thereafter became Jane Doe 1. All other John and Jane Does were added as new individual Plaintiffs, including, minor school-age children John Does 5 and 6, and, Jane Does 3 and 4. Subsequent to the December 28, 2006 ordinances, Plaintiffs Brenda Lee Mieles, Jane Does 1 and 2 and John Does 2, 4 and 6 were withdrawn. All minor school age children Jane Does 3 and 4 and John Does 5 and 6 have been withdrawn. In the Second Amended Complaint, Plaintiffs Jane Doe 5 and John 7 were joined.

to Dismiss in its entirety and grant Summary Judgment on each of the claims in their favor.

Respectfully submitted,

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