

Kris W. Kobach
Kobach Law, LLC
4701 N. 130th Street
Kansas City, Kansas 66109
913-638-5567
kkobach@gmail.com

*Attorney for Appellant,
The City of Hazleton, Pennsylvania*

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

Re: *Pedro Lozano, et al. v. City of Hazleton*, 3rd Cir. No. 07-3531, Sup. Ct. No. 10-772—Letter Brief of the Appellant City of Hazleton on Remand, in Light of the Supreme Court’s Decision in *Chamber of Commerce v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968 (2011).

Dear Ms. Waldron:

This letter brief responds to your August 11, 2011, letter calling for a new round of briefing in the case of *Pedro Lozano, et al. v. City of Hazleton*, 3rd Cir. No. 07-3531, Sup. Ct. No. 10-772. On June 6, 2011, the United States Supreme Court granted the Appellant’s (“City’s”) petition for writ of certiorari in this case, vacated the judgment of this Court, and remanded the case back to this Court for

reconsideration in light of *Chamber of Commerce v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968 (2011), a decision that the Supreme Court had rendered eleven days earlier.

In *Whiting*, the Supreme Court affirmed the Ninth Circuit’s decision in *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2009), upholding the Legal Arizona Workers Act against several preemption challenges. The Supreme Court’s determination to vacate this Court’s previous decision in the instant case reflected the fact that the similarities between this case and *Whiting* are numerous and significant. Both cases involve state or local laws intended to discourage illegal immigration—in Arizona by preventing the hiring of illegal aliens, and in Hazleton by preventing both the hiring and the harboring of illegal aliens. Both involve state or local laws that duplicate the terms of federal immigration law.¹ Both involve conflict-preemption challenges based on the notion that preemption might occur if a state or local law disrupted an implicit balancing of congressional objectives in federal law.² Both involve state or local

¹*Compare Whiting*, 131 S. Ct. 1968, 1981 (“And here Arizona went the extra mile in ensuring that its law closely tracks IRCA’s provisions in all material respects.”), with the Hazleton Illegal Immigration Relief Act (“IIRA”) Ordinance §§ 2.E, 3.D, 3.E, 4.B(3), 5.A, 6.A. “IRCA” is the federal Immigration Reform and Control Act of 1986.

²*Compare Whiting*, 131 S. Ct. at 1983 (“According to the Chamber, the harshness of Arizona’s law ... impermissibly upsets that balance.”), with *Lozano, et al. v.*

(footnote continued on next page ...)

laws that expressly rely upon federal verification of an alien’s immigration status pursuant to 8 U.S.C. § 1373(c).³ Both involve laws that include virtually-identical statutory language to ensure local deference to federal determinations of immigration status.⁴ And both involve state or local laws based on the principle of concurrent enforcement—whereby the state or local law prohibits substantially the same activity that is already prohibited by federal law.⁵

Whiting, like the instant case, concerned challenges to a state or local law based on both express preemption and implied conflict preemption. *Whiting*, 131 S. Ct. at 1981. Chief Justice Roberts’s opinion for the Court is a majority opinion with respect to the express preemption challenge and with respect to the Court’s

(... footnote continued from previous page)

City of Hazleton, 620 F.3d 170, 219 (3d. Cir. 2010), *vacated* in *City of Hazleton v. Lozano*, 180 L. Ed. 2d 243 (2011) (describing the IIRA Ordinance as “a local law that skews the federal government’s careful balancing of objectives in the regulation of alien employment”).

³*Compare* Ariz. Rev. Stat. § 23-212(B) *with* Hazleton IIRA Ordinance §§ 3.D, 4.B(3), 4.B(7), 5.B(3), 5.B(4), 5.B(7), 5.B(9), 7.D(2), 7.E, 7.G.

⁴*Compare* Ariz. Rev. Stat. § 23-212(B) (“A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States”) *with* Hazleton IIRA Ordinance § 7.E (“At no point shall any City official attempt to make an independent determination of any alien’s legal status, without verification from the federal government, pursuant to United States Code Title 8, Subsection 1373(c).”).

⁵*Compare* *Whiting*, 131 S. Ct. at 1982 (“From this basic starting point, the Arizona law continues to trace the federal law.”), *with* Hazleton IIRA Ordinance §§ 2.D, 3.D, 3.E.

textual analysis of conflict preemption.⁶ However, Justice Thomas declined to join the rest of the Court in even considering the plaintiffs’ implied conflict preemption argument that the Arizona law conflicted with the “purposes and objectives” of Congress.⁷ Justice Thomas had previously made clear that he regards the judicial analysis required by this type of implied preemption argument to be illegitimate:

I cannot join the majority’s implicit endorsement of far-reaching implied pre-emption doctrines. In particular, I have become increasingly skeptical of this Court’s “purposes and objectives” pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law. ... [I]mplied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution.

Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187, 1205 (2009) (Thomas, J., concurring). Justice Thomas has explained that he “no longer assent[s]” to “purposes and objectives” conflict preemption. *Id.* at 1217. Thus, five Justices of the Supreme Court rejected all of the implied preemption challenges to the Arizona law—all five rejected the implied preemption challenges using a purely textual

⁶ The Roberts opinion is a majority opinion with respect to the judgment of the Court, Part I (the factual and statutory background), Part II-A (express preemption analysis), and Part III-A (implied preemption analysis looking only at the text of the relevant federal statute). *Whiting*, 131 S. Ct. at 1973 n.1, 1985-86.

⁷ Parts II-B and III-B of the opinion, containing the “purposes and objectives” conflict preemption analysis, were joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito. Justice Thomas declined to participate in the analysis in these parts of the opinion. *Whiting*, 131 S. Ct. at 1973.

analysis; four applied the “purposes and objectives” conflict preemption doctrine and found no conflict; and one has rejected the “purposes and objectives” conflict preemption doctrine, *per se*.

In this letter brief, the City will enumerate and explain the ways in which the Supreme Court’s *Whiting* decision affects this Court’s reconsideration of the instant case. All of this Court’s vacated prior holdings on the merits of the preemption challenges are fundamentally altered by the *Whiting* decision. *Whiting* was the first opinion that the Supreme Court had rendered in thirty-five years in a preemption case in the immigration context.⁸ Consequently, the Court covered the waterfront on the issue—describing the high hurdle that applies in immigration preemption cases, identifying factors that should be considered when adjudicating such cases, and rejecting certain lines of preemption analysis entirely, as explained below. In addition, the Court sustained against preemption challenges certain provisions of the Arizona law that are nearly identical to those found in the Hazleton IIRA Ordinance.

This letter brief contains the following sections:

⁸ Prior to *Whiting*, the last decision that the Supreme Court had rendered in a case turning on preemption in the immigration context was *De Canas v. Bica*, 424 U.S. 351 (1976). In *Whiting*, the Court continued to cite *De Canas*. *Whiting*, 131 S. Ct. at 1973-75, 1981.

- I. Factual Background.
- II. *Whiting* Requires this Court to Uphold the Employment Provisions of the IIRA Ordinance.
 - A. The Suspension or Revocation of Business Licenses.
 - B. Requiring the Use of E-Verify.
- III. *Whiting* Requires this Court to Uphold the Housing Provisions of the Hazleton Ordinances.
 - A. *Whiting* Set a High Hurdle for Implied Preemption Challenges in Immigration Cases.
 - B. *Whiting* Reaffirmed the Doctrine of Concurrent Enforcement.
 - C. A State or Local Statute is not Preempted if it Mirrors the Terminology of Federal Law and Defers to Federal Determinations of Immigration Status.
 - D. Reliance upon 8 U.S.C. § 1373(c) Makes Conflict and Field Preemption Unlikely.
 - E. The Presence of a Fail-Safe Mechanism Militates Against Preemption.
 - F. A State Law that Encourages Illegal Aliens to Leave the United States is not a Preempted “Regulation of Immigration.”
- IV. Conclusion.

As this letter brief explains, *Whiting* undercuts *all* of the Plaintiffs’ preemption claims in the instant case. Consequently, the only holding that is consistent with *Whiting* is one that upholds the Hazleton Ordinances in their entirety.

I. Factual Background.

On July 13, 2006, the City of Hazleton enacted Ordinance 2006-10, the “Illegal Immigration Relief Act Ordinance.” On August 15, 2006, the City enacted Ordinance 2006-13, the “Rental Registration Ordinance.” On September 21, 2006, Hazleton enacted Ordinance 2006-18, the “Illegal Immigration Relief Act” (“IIRA”) Ordinance, to replace Ordinance 2006-10. The IIRA Ordinance was subsequently amended by Ordinances 2006-40 and 2007-6.

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

Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-6, (collectively the “IIRA Ordinance”) renders it unlawful for any business entity to employ unauthorized aliens, as that term is defined by federal law. The IIRA Ordinance does not permit any Hazleton official to determine independently whether a person is authorized to work in the United States. Rather, the city relies entirely upon the federal government’s verification of any person’s employment authorization, through the E-Verify program (formerly the “Basic Pilot Program”).

The IIRA Ordinance also renders it unlawful to harbor an illegal alien by knowingly providing rental accommodations to an illegal alien. The IIRA

Ordinance applies federal definitions of unlawful presence in the United States. The IIRA Ordinance does not permit any City official to determine independently whether a person is an alien unlawfully present in the United States. Rather, the City relies entirely upon the federal government's verification of any alien's legal status, pursuant to 8 U.S.C. § 1373(c). The City will use the Systematic Alien Verification for Entitlements (SAVE) internet-based system, to obtain such verifications from the federal government, unless the federal government directs the City to utilize another method of verification. Hazleton has not in any way attempted to define who should or should not be admitted into the country.

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

II. *Whiting* Requires this Court to Uphold the Employment Provisions of the IIRA Ordinance.

If anything is beyond dispute in the wake of *Whiting*, it is that the employment provisions of the IIRA Ordinance are not preempted. The Legal Arizona Workers Act at issue in *Whiting* did essentially the same things that the

employment provisions of the IIRA Ordinance do: (1) it penalized employers who knowingly hire unauthorized aliens by suspending or revoking their business licenses, and (2) it required employers to participate in the E-Verify program. *Whiting*, 131 S. Ct. at 1976-77. The Supreme Court upheld these challenged provisions against both an express preemption challenge under 8 U.S.C. § 1324a(h)(2)(which expressly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ ... unauthorized aliens”), and implied conflict preemption challenges. *Whiting*, 131 S. Ct. at 1973.

A. The Suspension or Revocation of Business Licenses.

Like the Supreme Court in *Whiting*, this Court in its now-vacated opinion correctly held that the Hazleton IIRA Ordinance provisions that suspend or revoke the business licenses of employers who knowingly hire unauthorized aliens are not expressly preempted. *Lozano*, 620 F.3d at 208-09. The Supreme Court concluded that “Arizona’s licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted.” *Whiting*, 131 S. Ct. at 1981. Thus, with respect to express preemption, this Court’s vacated opinion already conformed to what the Supreme Court would later hold in *Whiting*.

However, this Court went on to hold that the same IIRA Ordinance

provisions suspending the business licenses of employers were impliedly preempted through conflict preemption. *Lozano*, 620 F.3d 210-14. That holding was incorrect. The *Whiting* Court rejected all of the conflict preemption theories that were advanced against the Arizona law—the same theories that Plaintiffs set forth in this case. Three aspects of the *Whiting* opinion are especially salient in this respect.

First, the *Whiting* Court rejected the notion that the federal scheme of employer sanctions is exclusive, and that the creation of a state-level system therefore stands in conflicts with it:

At its broadest level, the Chamber’s argument is that Congress ‘intended the federal system to be exclusive,’ and that any state system therefore necessarily conflicts with the federal law. ... But Arizona’s procedure simply implements the sanctions that Congress explicitly allowed Arizona to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.

Whiting, 131 S. Ct. at 1981. On the same question, this Court previously held that “[t]he crux of this conflict ... is rooted in the fact that Hazleton has established an alternative system at all. ... Under the IIRAO, a business in Hazleton must worry about two separate systems of complaints, investigations, prosecutions, and adjudications.” *Lozano*, 620 F.3d at 213. That holding can no longer stand.

Second, the Supreme Court rejected the same disruption-of-an-implicit-congressional-balance argument advanced by Plaintiffs in the instant case. “The

Chamber argues more generally that the law is preempted because it upsets the balance that Congress sought to strike when enacting IRCA.” *Whiting*, 131 S. Ct. at 1983. As in the instant case, the plaintiffs there described IRCA as an implicit balance between deterring unauthorized alien employment, protecting privacy, guarding against discrimination, and avoiding burdens on businesses; and they claimed that the state law placed too much emphasis on deterring the employment of unauthorized aliens. *Id.* The Supreme Court rejected this notion as a basis for conflict preemption:

As with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interest when it enacted IRCA. Part of that balance, however, involved allocating authority between the Federal Government and the States. ... Of course Arizona hopes that its law will result in more effective enforcement of the prohibition on employing unauthorized aliens. But in preserving to the States the authority to impose sanctions through licensing laws, Congress did not intend to preserve only those state laws that would have no effect. The balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban.

Whiting, 131 S. Ct. at 1984-85. Since *every* law embodies a balance between competing interests, the Arizona plaintiffs’ argument proved too much. Any state or local law could be said to be preempted simply because it allegedly afforded more weight to one particular interest than a federal law did. In the wake of

Whiting, the same argument is no longer sustainable in the instant case.⁹

Third, the *Whiting* Court made clear that a state need not create its own anti-discrimination protections within a law designed to prohibit the hiring of unauthorized aliens. The plaintiffs in *Whiting* argued that since the Arizona law did not duplicate IRCA's anti-discrimination provisions, the law was therefore in conflict with federal law.¹⁰ The Court rejected this argument, pointing out that employees facing discrimination had adequate recourse in IRCA's anti-discrimination provisions, as well as in pre-existing provisions of Arizona law: "...IRCA has its own anti-discrimination provisions, see 8 U.S.C. § 1324b(a)(1)...; Arizona law certainly does nothing to displace those. Other federal laws, and Arizona's anti-discrimination laws, provide further protection against employment discrimination—and strong incentive for employers not to discriminate." *Whiting*, 131 S. Ct. at 1984. The same is true in the instant case. There was no need for the City to duplicate the anti-discrimination provisions of 8 U.S.C. § 1324b(a), because every employee in Hazleton was already protected by those federal provisions and by Pennsylvania's state workplace anti-discrimination laws, found

⁹ The disruption-of-an-implicit-congressional-balance argument was accepted and used as a basis for finding conflict preemption in the vacated prior opinion of this court. *Lozano*, 620 F.3d at 210-13.

¹⁰ This Court reached the same conclusion when analyzing the Hazleton IIRA Ordinance in its now-vacated opinion. *Lozano*, 620 F.3d at 217-18.

at 43 P.S. §§ 953-955.

B. Requiring the Use of E-Verify.

The second aspect of the Arizona law that was challenged in *Whiting* was its requirement that all employers in Arizona use the E-Verify system to verify the work authorization of their newly-hired employees. The *Whiting* plaintiffs claimed that Congress intended participation in the system to be voluntary, and that such a requirement was therefore conflict preempted. *Whiting*, 131 S. Ct. at 1985. This Court agreed with the same argument in its now-vacated opinion, stating, “These provisions contradict congressional intent for E-Verify to remain fully voluntary for the vast majority of employers.” *Lozano*, 620 F.3d at 214.¹¹

The Supreme Court in *Whiting* came to the opposite conclusion. Noting that any federal statutory limitations on making E-Verify mandatory applied only to the federal Department of Homeland Security, not to the states, the Court concluded that “Arizona’s use of E-Verify does not conflict with the federal scheme.”

Whiting, 131 S. Ct. at 1985. The Supreme Court further explained that requiring employers to use E-Verify at the state or local level “in no way obstructs” the

¹¹ The Hazleton IIRA Ordinance does not make E-Verify mandatory for private employers, unless an employer has already been found to be in violation of the Ordinance, § 4.B(6)(b), or the employer seeks a City contract with a value exceeding \$10,000. § 4.D. However, the Hazleton IIRA Ordinance creates a strong incentive to use the E-Verify system by giving a safe harbor against the suspension of a business license to any employer that uses E-Verify. § 4.B(5).

achievement of congressional objectives. *Id.* at 1986. Accordingly, conflict preemption had not occurred. The same is true in the instant case. After *Whiting*, this Court's prior holding on the subject is no longer sustainable.

III. *Whiting* Requires this Court to Uphold the Housing Provisions of the Hazleton Ordinances.

Although the *Whiting* case concerned a law governing the employment of aliens, the principles and conclusions of the Supreme Court undeniably extend to *all* immigration preemption cases. As such, they must be applied also to the housing provisions of the Hazleton IIRA Ordinance and to the Registration Ordinance.¹² Plaintiffs rely upon the same theories in attacking these provisions—theories that do not identify any specific federal statute with which the local law might be said to conflict. Instead Plaintiffs rely upon notions of tension with unwritten congressional objectives, as well as other amorphous standards, to make their conflict preemption claims. The *Whiting* Court emphatically rejected such arguments. They are consequently unavailing against *either* portion of the IIRA Ordinance, or against the Registration Ordinance.

It should also be noted that the Supreme Court vacated and remanded the

¹² The Registration Ordinance does not prohibit the harboring of illegal aliens. Rather, it merely requires tenants to provide information to the City. That information is used for a variety of reason, including the investigation of alleged violation of the housing provisions of the IIRA Ordinance.

entirety of this Court’s prior decision in light of *Whiting*—not just the section dealing with the employment provisions of the IIRA Ordinance. This fact, too, indicates that the implications of *Whiting* extend beyond the employment provisions of the IIRA Ordinance. The Supreme Court directed this Court to reconsider *all* of its prior conclusions in the instant case. With that in mind, there are several aspects of *Whiting* that must guide this Court’s reconsideration of Plaintiffs’ implied preemption arguments.

A. *Whiting* Set a High Hurdle for Implied Preemption Challenges in Immigration Cases.

The Supreme Court has long made clear that to succeed in an implied preemption claim, a plaintiff must demonstrate *unmistakable* Congressional intent to preempt state regulation:

[F]ederal regulation ... should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has *unmistakably* so ordained.

De Canas v. Bica, 424 U.S. 351, 356 (1976) (*quoting Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)) (emphasis added).

In *Whiting*, the Court once again made clear how difficult it is to bring an implied preemption challenge in the immigration context: “Our precedents ‘establish that *a high threshold must be met* if a state law is to be pre-empted for conflicting with the purposes of a federal Act.’ That threshold is not met here.”

Whiting, 131 S. Ct. at 1985 (quoting *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring)) (emphasis added).

Plaintiffs in the instant case have failed to identify a single federal statute that demonstrates congressional intent to preempt laws like the Hazleton IIRA Ordinance. Instead, Plaintiffs base their conflict preemption arguments on theoretical *tension* with unstated congressional objectives. The *Whiting* Court emphatically rejected this approach, which invites judicial activism: “Implied preemption analysis does not justify a ‘free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives’; such an endeavor ‘would undercut the principle that it is Congress rather than the courts that preempts state law.’” *Whiting*, 131 S. Ct. at 1985 (quoting *Gade*, 505 U.S. at 111 (Kennedy, J., concurring)). Plaintiffs in the instant case invite this Court to engage in precisely this sort of “freewheeling judicial inquiry” into whether the harboring provisions of the IIRA Ordinance are “in tension with federal objectives.”

In its now-vacated prior decision, this Court accepted Plaintiffs’ invitation. Specifically, this Court accepted Plaintiffs’ s argument that if the enforcement of the IIRA Ordinance led to the eviction of an illegal alien whom the federal government had become aware of, yet had declined to place in removal proceedings (perhaps due to federal resource constraints), then preemption would occur. *Lozano*, 620 F.3d at 221-22. The problems with this argument in light of

Whiting are threefold. First, there is no conflict with any federal statute. The illegal alien in this hypothetical example does not gain lawful presence in the United States through such non-enforcement; federal law still *requires* him to depart the country. Thus, there is no conflict between Hazleton's action and the requirements of federal law. The IIRA Ordinance does no more than supplement federal immigration enforcement by denying rental housing opportunities to aliens who possess no legal authorization to remain in the United States.

Second, and perhaps more importantly, this argument forgets *whose* objectives matter. For preemption purposes, only the objectives of *Congress* count, not the objectives of an Immigration and Customs Enforcement agent who decides not to initiate removal proceedings in a particular case. *See Whiting*, 131 S. Ct. at 1985 (“[I]t is Congress ... that preempts state law.”).

Third, this argument is entirely hypothetical and therefore has no place in a facial challenge. “In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)). This suit is a facial challenge to a law that has never been enforced. Indeed, Plaintiffs lack standing to raise this challenge since none are in the imagined position. If any such plaintiffs emerge when the

Ordinances are implemented, they may bring an as-applied challenge then.

B. *Whiting* Reaffirmed the Doctrine of Concurrent Enforcement.

Perhaps no preemption doctrine more compellingly supports the City's position than the well-established doctrine of concurrent enforcement. "Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized." *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (citing *Paul*, 373 U.S. at 142). "No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws." *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987). As the Arizona Court of Appeals held in a similar challenge to an earlier Arizona law that tracked the smuggling (as opposed to harboring) subsection of 8 U.S.C. § 1324(a)(1)(A):

The same act may offend the laws of both the state and the federal government and may be prosecuted and punished by each. Abbate v. United States, 359 U.S. 187, 194-95 (1959). Thus, Arizona may prosecute and punish a person who knowingly transports illegal aliens within its borders for profit or commercial purpose under its human smuggling law, just as the federal government may prosecute and punish a person who knowingly or recklessly transports such illegal aliens within the United States under its laws.

State v. Flores, 218 Ariz. 407, 412-413 (Ariz. Ct. App. 2008) (emphasis added).

The Supreme Court in *Whiting* reaffirmed that concurrent enforcement by state and local governments is permissible in the immigration arena. "Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all

material respects.” *Whiting*, 131 U.S. at 1981. The Court then noted approvingly that the Legal Arizona Workers Act of 2007 “trace[d]” federal law:

From this basic starting point, the Arizona law continues to trace the federal law. Both the state and federal law prohibit “knowingly” employing an unauthorized alien. ... But the state law does not stop there in guarding against any conflict with federal law. The Arizona law provides that ... the “term shall be interpreted consistently with 8 United States Code § 1324a and any applicable federal rules and regulations.” § 23-211(8).

Whiting, 131 S. Ct. at 1982. The IIRA Ordinance does the same thing: it prohibits knowing harboring of illegal aliens in apartments, mirroring the text of the federal statute criminalizing the harboring of illegal aliens, found at 8 U.S.C.

§ 1324(a)(1)(A)(iii). IIRA Ordinance § 2.A. And, like the Arizona law in *Whiting*, it provides that “[t]he requirements and obligations of this section shall be implemented in a manner fully consistent with federal law regulating immigration....” IIRA Ordinance § 6.A.

The IIRA Ordinance closely replicates the text of the federal law prohibiting harboring. The federal statute imposes criminal penalties on:

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

8 U.S.C. § 1324(a)(1)(A)(iii). The terms of the harboring violation in the IIRA Ordinance match the terms of federal law: it is unlawful “to let, lease or rent a

dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law....”

IIRA, § 5.A(1). In this way, just as the Arizona law in *Whiting* did, the IIRA Ordinance “trace[s] the federal law.” *Whiting*, 131 S. Ct. at 1982.

Finally, it must be remembered that concurrent enforcement is not necessary to avoid conflict preemption. Rather, it is a merely an indicator that the local law and federal law point in the same direction. All that is necessary to avoid conflict preemption is to avoid obstructing the objectives of Congress that are unmistakably spelled out in federal statute. That threshold is clearly met here.

C. A State or Local Statute is Unlikely to be Preempted if it Mirrors the Terminology of Federal Law and Defers to Federal Determinations of Immigration Status.

The *Whiting* Court rested its conflict preemption holding heavily on two aspects of the Arizona law: (1) the Arizona law used the terminology of federal law precisely; and (2) the Arizona law relied upon, and deferred to, federal determinations of an alien’s status:

Arizona went the extra mile in ensuring that its law closely tracks IRCA’s provisions in all material respects. The Arizona law begins by adopting the federal definition of who qualifies as an “unauthorized alien.” ...Not only that, the Arizona law expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and ‘shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.’ § 23-212(B). What is more, a state court ‘shall consider only the federal government’s determination’ when deciding ‘whether an employee is

an unauthorized alien.’ § 23-212(H) (emphasis added). As a result, there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage.

Whiting, 131 S. Ct. at 1981.

The same two factors are present here. The IIRA Ordinance uses the precise terms and classifications of federal immigration law. *See, e.g.*, §§ 3.D (“‘Illegal Alien’ means an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq.”); 3.E (“‘Unlawful worker’ means ... an unauthorized alien as defined by United States Code Title 8, subsection 1324a(h)(3)”); 6.A (“The requirements and obligations of this section shall be implemented in a manner fully consistent with federal law regulating immigration and protecting the civil rights of all citizens and aliens.”).

In addition, the IIRA Ordinance contains language nearly identical to that in Arizona’s law requiring local officials to rely solely on federal determinations of immigration status. Compare Ariz. Rev. Stat. Ann. § 23-212(B) (state officials “shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.”) with IIRA Ordinance § 7.E (“At no point shall any City official attempt to make an independent determination of any alien’s legal status, without verification from the federal government, pursuant to United States Code Title 8, Subsection 1373(c).”). It was this exact language that the *Whiting* Court highlighted and expressly approved. *Whiting*, 131 S. Ct. at

1981. The presence of nearly-identical language in the two laws is not accidental: Hazleton's IIRA Ordinance and the Arizona statute were drafted in parallel and in part by the same author.

Finally, a court enforcing the IIRA Ordinance is required to defer to the federal government's determination of immigration status:

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

IIRA Ordinance § 7.G. This section, too, uses virtually the same language that the Supreme Court approved in *Whiting*. The Arizona law similarly directed state courts to defer to the federal government's determination of any alien's immigration status, and similarly provided that the federal determination creates "a rebuttable presumption of the employee's lawful status." Ariz. Rev. Stat. Ann. § 23-212(H); *Whiting*, 131 S. Ct. 1981 n.7.

Thus, the IIRA Ordinance, like the Arizona law in *Whiting*, requires local officials to defer to federal determinations of immigration status at every stage. This fact was of significant importance in the Court's rejecting the plaintiffs' conflict preemption arguments. "As a result, there can by definition be no conflict

between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage.” *Whiting*, 131 S. Ct. at 1981. The same holding is appropriate in the instant case. Hazleton uses virtually the same language to ensure that there is no conflict with federal law, either at the investigatory or adjudicatory stage.

D. Reliance Upon 8 U.S.C. § 1373(c) Makes Conflict and Field Preemption Unlikely.

Another issue that figured prominently in *Whiting* was Arizona’s reliance on 8 U.S.C. § 1373(c), a statutory provision that Congress enacted in 1996 to ensure that state and local jurisdictions could obtain from the federal government verification of any alien’s immigration status:

Obligation to respond to inquiries

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

8 U.S.C. § 1373(c) (emphasis added). The *Whiting* Court noted the significance of this federal statutory provision to the Arizona law. “The federal determination on which the State must rely is provided under 8 U.S.C. § 1373(c).” *Whiting*, 131 S. Ct. at 1982; *see also id.* at 1976. Congress had ordered the federal executive branch to comply with such state or local requests, leaving no room for executive discretion in whether to respond. “This provision *requires* the Federal

Government to ‘verify or ascertain’ an individual’s ‘citizenship or immigration status’ in response to a state request.” *Id.* (emphasis added).

Hazleton’s IIRA Ordinance also relies upon the federal verifications of aliens’ immigration statuses compelled by 8 U.S.C. § 1373(c). Indeed, it is fair to say that the IIRA Ordinance is built upon the foundation laid by 8 U.S.C. § 1373(c)—requiring that every determination of an alien’s immigration status be obtained pursuant to it, and referring to the federal statute ten times. IIRA Ordinance §§ 3.D, 4.B(3), 4.B(7), 5.B(3), 5.B(4), 5.B(7), 5.B(9), 7.D(2), 7.E, 7.G.

Such reliance upon the vehicle that Congress created for this purpose militates strongly against any finding of conflict preemption, as well as against any finding of field preemption, since 8 U.S.C. § 1373(c) indicates that Congress contemplated state activity on the field.¹³

In the same statutory section, Congress also recognized the interest of cities in “[s]ending” and “[m]aintaining” such “information regarding the immigration status, lawful or unlawful, of any individual.” 8 U.S.C. § 1373(b)(1)-(2).

Importantly, Congress wanted cities to be able to *send* and *maintain* information—not just receive it—about an alien’s immigration status. This indicates that Congress expected state and local governments to implement programs under

¹³ This Court held in its now-vacated prior holding that the IIRA Ordinance was field preempted. *Lozano*, 620 F.3d at 220-21.

which they would make inquiries about the immigration statuses of aliens and take action based on those inquiries. For this reason, the Registration Ordinance cannot plausibly be said to be preempted, since it merely involves the collection and maintaining of information—something expressly contemplated by 8 U.S.C. § 1373(b)(1)-(2).

It should also be noted that Congress specifically *invited* state and local governments onto the field with respect to harboring. Federal law at 8 U.S.C. § 1324(c) authorizes all state and local officers “whose duty it is to enforce criminal laws” to arrest individuals who are guilty of harboring under 8 U.S.C. § 1324(a)(1)(A)(iii). Together with 8 U.S.C. § 1373, these federal statutes defy any argument that the housing sections of the IIRA Ordinance are field preempted.

Finally, the *Whiting* Court’s approval of state reliance upon immigration status verifications through 8 U.S.C. § 1373(c) undermines one other aspect of this Court’s now-vacated holding. This Court incorrectly held that the Hazleton IIRA Ordinance’s reliance upon a verification under 8 U.S.C. § 1373(c) was improper because a verification under that federal statute is only a “snapshot” of an alien’s immigration status. *Lozano*, 620 F.3d at 221. This Court reasoned that an alien found to be unlawfully present through an 8 U.S.C. § 1373(c) verification might never be removed from the country. *Id.* at 221-22. While that is certainly true, the *Whiting* Court held that a verification under 8 U.S.C. § 1373(c) is an accurate

assessment of an alien's immigration status and a sufficient basis for state or local action with respect to that alien. *Whiting*, 131 S. Ct. at 1982. To hold that a state or locality cannot act with respect to an 8 U.S.C. § 1373(c) verification of an alien's status because the alien might never be removed is to render that federal statute a virtual dead letter. Such a holding would defeat, not further, the objectives of Congress.

E. The Presence of a Fail-Safe Mechanism Militates Against Preemption.

Another area in which the *Whiting* decision controls the instant case concerns the fail-safe mechanism of the IIRA Ordinance. The petitioners in *Whiting*, like the Plaintiffs in the instant case, asserted that the federal government might not be able to provide the specific answer that the state or local government needed when making an inquiry about an alien's status under 8 U.S.C. § 1373(c). In *Whiting*, the issue was whether an 8 U.S.C. § 1373(c) inquiry could "answer[] the question whether that individual was authorized to work." *Whiting*, 131 S. Ct. at 1982. In the instant case, Plaintiffs make a more extreme and speculative argument, claiming that the federal government will be not even be able to report whether an alien is lawfully present in the United States.

The Supreme Court rejected the notion that the federal government would be unable to provide the information that a state needed. *Id.* But the Court also noted that in the unlikely event that the federal government could not provide the

requested information, *enforcement could not occur*: “In any event, if the information provided under § 1373(c) does not confirm that an employee is an unauthorized alien, then the state cannot prove its case.” *Id.* The IIRA Ordinance operates in the same way: the fail-safe mechanism in the Ordinance prevents any enforcement action if the information provided under 8 U.S.C. § 1373(c) does not conclusively confirm the alien’s unlawful status. “If the federal government notifies the City of Hazleton that it is unable to verify whether a tenant is lawfully present in the United States ... the City of Hazleton shall take no further action on the complaint until a verification from the federal government concerning the status of the individual is received.” IIRA Ordinance § 7.E. This provision renders Plaintiffs’ conflict preemption claim impossible to sustain, for the same reasons stated in *Whiting*. *See Whiting*, 131 S. Ct. at 1982.

F. A State Law that Encourages Illegal Aliens to Leave the United States is not a Preempted “Regulation of Immigration.”

A final aspect of *Whiting* that must guide this Court’s reconsideration of the instant case concerns this Court’s previous conclusion that an ordinance that makes it difficult for illegal aliens to continue their unlawful presence in a particular part of the country amounts to a preempted “regulation of immigration.” *See Lozano*, 620 F.3d at 220-21. In *De Canas*, the Supreme Court explained that a “regulation of immigration” for preemption purposes has a very specific, and narrow, meaning: “[T]he fact that aliens are the subject of a state statute does not render it a

regulation of immigration, which is essentially *a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.*” *De Canas*, 424 U.S. at 355 (emphasis added). *See also Whiting*, 131 S. Ct. at 1981.

The IIRA Ordinance in no way determines who should or should not be admitted into the country. On the contrary, the Ordinance defers to federal categories of immigration status and to the federal government’s determination of any particular alien’s immigration status. Hazleton IIRA Ordinance §§ 3.D, 4.B(3), 4.B(7), 5.B(3), 5.B(4), 5.B(7), 5.B(9), 7.D(2), 7.E, 7.G. Nothing in the Ordinance can plausibly be construed as an attempt to define which aliens may lawfully enter the United States. Nor does it determine “the conditions under which a legal entrant may remain” in the United States.

This Court admitted as much in its now-vacated opinion, but then theorized that the City was somehow attempting to achieve the equivalent of a preempted regulation of immigration. *Lozano*, 620 F.3d at 220-21. In support, this Court cited *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989). *Lozano*, 620 F.3d at 220-21. Such a conclusion can no longer stand in the wake of *Whiting*, for two reasons. First, the Supreme Court specifically rejected a similar citation of *Bonito Boats*, pointing out that *Bonito Boats* “concern[ed] state actions that directly interfered with the operation of a federal program.” *Whiting*, 131 S.

Ct. at 1983. The IIRA cannot plausibly be said to interfere with the federal admission of aliens into the United States or with the removal of aliens.

Second, the Supreme Court sustained the Arizona law even though the state sought to make it more difficult for illegal aliens to continue their unlawful presence in Arizona. Indeed, as the Supreme Court has noted before, denying an alien a job is just as effective as denying him abode in encouraging him to return to his country of origin. “[I]n ordinary cases [aliens] cannot live where they cannot work.” *Truax v. Raich*, 239 U.S. 33, 42 (1915). The mere fact that a state or local law makes it more difficult to remain unlawfully present in the United States does not transform that law into a “regulation of immigration,” as that phrase was defined in *De Canas*.

IV. Conclusion.

In summary, the Supreme Court has spoken with clarity on the subject of preemption in the immigration context and has remanded the instant case because this Court’s now-vacated opinion was unsustainable in light of the Supreme Court’s holding. “[A] high threshold must be met” if an implied conflict preemption claim is to succeed, *Whiting*, 131 S. Ct. at 1985 (*quoting Gade*, 505 U.S. at 110 (Kennedy, J., concurring)); and that threshold has not been met in this case. Nor may a court engage in “a ‘free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives’” as Plaintiffs have encouraged

this Court to do. *Id.* (quoting *Gade*, 505 U.S. at 111 (Kennedy, J., concurring)).

For the reasons explained above, the City respectfully prays that this Court follow *Whiting* and reject all of the district court's preemption holdings.

Additionally, several issues on the merits of this case were not addressed by this Court in its now-vacated prior holding, because a finding of preemption was sufficient to affirm the district court's holding. Specifically, the City had appealed the district court's holdings regarding Plaintiffs' procedural due process claim, 42 U.S.C. § 1981 claim, and state police powers claim.¹⁴ The City prays that this Court reverse the district court's holdings on those issues as well, for the reasons stated in the City's earlier briefs. ORAL ARGUMENT REQUESTED.

Respectfully submitted,

s/ Kris W. Kobach
KRIS W. KOBACH

Kansas State Bar No. 17280, admitted *pro hac vice*
Kobach Law, LLC
4701 N. 130th Street
Kansas City, Kansas 66109
(913) 638-5567
kkobach@gmail.com

¹⁴ The district court also held that the IIRA Ordinance's private right of action section (§ 4.E) conflicted with Pennsylvania law; however, that claim need not be addressed in light of this Court's prior holding that no Plaintiff possesses standing to challenge the private right of action section. *See Lozano*, 620 F.3d at 187-88.

CERTIFICATE OF SERVICE

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

Thomas G. Wilkinson, Esq.
Thomas B. Fiddler, Esq.
Cozen & O'Connor
1900 Market St., 3rd Floor
Philadelphia, PA 19103

Lee Gelernt, Esq.
Omar Judwat, Esq.
ACLU
125 Broad St, 18th Floor
New York, NY 10004-2400

Foster Maer, Esq.
Ghita Schwartz, Esq.
Jackson Chin, Esq.
Puerto Rican Legal Defense Fund
99 Hudson St, 14th Floor
New York, NY 10013

Witold J. Walczak, Esq.
ACLU
313 Atwood St.
Pittsburgh, PA 15213

Lucas Guttentag, Esq.
ACLU
405 14th Street, Suite 300
Oakland, CA 94612

Jennifer Chang, Esq.
ACLU
39 Drumm St.
San Francisco, CA 94111

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

s/ Kris W. Kobach

KRIS W. KOBACH

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