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August 2, 2012

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*, No. 07-3531
**Appellees' Letter Brief Addressing *Arizona v. United States*, 132 S. Ct. 2492 (2012).**

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Dear Ms. Waldron,

Pursuant to the Court's June 26, 2012 Order, Plaintiffs respectfully submit this letter brief addressing the impact on this case of the Supreme Court's decision in *Arizona v. United States*, No. 11-182, 132 S. Ct. 2492 (June 25, 2012).

In *Arizona*, the Supreme Court considered field and conflict preemption challenges to four provisions of Arizona SB 1070: § 3, which made it a state crime to violate the criminal provisions of the federal alien registration laws; § 5(C), which made it a state crime to work or seek work without federal work authorization; § 6, which authorized state and local police to arrest individuals who police had probable cause to believe were removable on certain grounds; and § 2(B), which requires state and local police to ask

the federal government about the immigration status of persons who are lawfully stopped or detained on other grounds, if the police reasonably suspect them of being unlawfully present in the United States.

The Court struck down three of the four provisions, §§ 3, 5(C), and 6, on preemption grounds. *Arizona*, 132 S. Ct. at 2510. The Court declined to strike down § 2(B) because the case before it still presented a "basic uncertainty" about how the statute would be interpreted. However, the Court found that § 2(B) *would* be preempted if it allowed the police to extend detentions for immigration verification purposes, or if other indications of interference with federal immigration law manifest. *Id*.

As a whole, *Arizona* teaches that states and municipalities have no authority to enact laws that seek to punish or harass individuals who violate federal immigration laws, except as specifically authorized by federal statute. It applies exacting preemption analysis to all of the Arizona provisions, including § 2(B), and demonstrates that any state or local involvement in immigration enforcement is confined to the narrowest limits. Thus, as elaborated below, *Arizona* confirms this Court's previous opinion in myriad respects and further strengthens Plaintiffs' claims against the Hazleton Ordinances. Further, the City's letter brief misconstrues *Arizona* and the Hazleton Ordinances themselves. This letter brief contains the following sections:

## I. The City's Description Of The Ordinances Is Inaccurate Or Misleading.

Plaintiffs rely on the findings of the trial court, this Court's prior decision in this case, and Plaintiffs' prior briefing for a full description of the provisions and operation of the Hazleton Ordinances at issue. Plaintiffs note briefly, however, that the City's description of the Ordinances in its letter brief is inaccurate and otherwise problematic for reasons including the following:

First, the City states that the purpose of Ordinance 2006-13 (the "Registration Ordinance" or "RO") was "to address increasing problems with absentee landlords and overcrowded apartments." Def. July 23, 2012 Letter Br. (hereinafter "Def. Br.") at 4. But the district court, after a two-week trial, found as a factual matter that both the RO and Ordinance 2006-18, as amended ("IIRAO") are "aimed at combating what the City viewed as the problems created by the presence of 'illegal aliens.'" 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007).[1] The purpose of the Ordinances is "to regulate the employment of unauthorized aliens, and the provision of rental housing to aliens lacking lawful immigration status," not to regulate employment or rental housing *generally*. *See Lozano v. City of Hazleton*, 620 F.3d 170, 177 (3d Cir. 2010); *see also id.* at 209 n.31 (collecting record evidence showing that "the Hazleton City Council was trying to use every tool at its disposal . . . to alter to the best of its ability the landscape of federal immigration regulation as well").

Second, the City suggests that the RO merely envisions the collection of "basic identity and contact information." Def. Br. at 4. But in fact the RO

[1] *Accord Lozano v. City of Hazleton*, 620 F.3d 170, 176-77 (3d Cir. 2010) (Hazleton officials "concluded that aliens lacking lawful status were to blame for certain social problems in the City" and decided "to take independent action to regulate the local effects of unlawful immigration"); *see also* A1484-87, 1713 (Hazleton mayor stating that the RO was a necessary response to unauthorized immigration and that the IIRAO was meant to "deter and punish illegal immigrants").

"specifically require[s] . . . *proof of legal citizenship and/or residency*" in order to apply for an occupancy permit. RO § 7(b)(1) (emphasis added). Thus, the RO "makes possession of documentation of lawful immigration status a requirement for receiving [a] permit." *Lozano*, 620 F.3d at 188; *see also* 496 F. Supp. 2d at 533 ("RO . . . calls upon the employees of the Hazleton Code Enforcement Office to . . . determine if [applicants] are properly in the country."). If the City is now claiming otherwise, that is contrary to the plain language of the Ordinance, the district court's findings, and the evidence in the case. *See, e.g.*, A3433 (City notice explaining citizenship and immigration documentation requirement under § 7(b)); A3446 (City registration form requiring residents to provide either proof of U.S. citizenship or proof of nationality and "legal residency").[2] In addition, the City neglects to mention that any person over the age of 18 who resides in rental housing and fails to obtain an occupancy permit is subject to fines and imprisonment, *see* RO §§ 1(m), 7(b) & 10(a); that landlords are subject to fines of *at least* $1,000 per occupant if they allow occupants without permits, *see id.* § 10(b); and that applicants must "swear that all information provided is true and

[2] The City claims that "[a]ll occupancy permits are issued to all applicants," Def. Br. at 4, but that is not what its cited testimony indicates. What the City's employee actually said on the stand is that "[n]obody will be refused a tenant registration license, as long as they provide documentation *that they indicate meets the requirements*." A1852 (emphasis added). The requirement to show "proof of legal citizenship and/or residency" remains intact. *See* A1484 (Hazleton mayor testifying that tenants must provide such proof).

falsification of documents is punishable by law," A3446 (registration form).

Third, the City states that in determining whether an individual lacks work authorization, "the city relies entirely upon the federal government's verification . . . through the E-Verify program." Def. Br. at 5. Although consistent with the City's opening brief, *see* Blue Br. at 6; *but cf.* Gray Br. at 36 n.6 (describing opening brief's description of the Ordinance, reiterated here, as an "error"), the City's position is inconsistent with federal law: the City can only lawfully use E-Verify to check its *own* workers. *See* Red Br. at 55 n.25.

## II. *Arizona* Confirms This Court's Analysis In Several Key Respects.

*Arizona* firmly puts to rest the notion, advanced by the City, that states and localities are free to enforce the immigration laws, so long as federal law does not explicitly prevent the specific "assistance" they seek to provide. *See, e.g.*, Def. Br. at 17 (contending that "[m]unicipalities retain[] unpreempted authority to otherwise assist in immigration enforcement"). *Arizona* stands for just the opposite: absent explicit congressional authorization, states and localities do not have authority to enforce the immigration laws. *See Arizona*, 132 S. Ct. at 2506 ("Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer."). The following aspects of *Arizona* are particularly salient here:

### A. *Arizona* Confirms That Defendant's Profferred "Mirroring" And "Concurrent Enforcement" Theories Are Wrong.

Before *Arizona*, the City argued repeatedly that its Ordinances were justified under the "doctrine of concurrent enforcement": the theory that "[s]tates and localities are not preempted in the immigration arena when they prohibit the same activity that is already prohibited under federal law." Blue Br. at 56-60; *see also, e.g.*, *id.* at 12; Gray Br. at 36-37; Def. Mar. 18, 2009 Letter Br. at 1; Def. Sept. 26, 2011 Letter Br. at 18-20. Defendant portrayed the Ordinances as "mirror[ing]" provisions of federal law, and thus constituting lawful concurrent enforcement. *See, e.g.*, Gray Br. at 27-28, 31, 37; Blue Br. at 70-71; Def. Sept. 26, 2011 Letter Br. at 19. Plaintiffs have previously explained that, even if the Ordinances did mirror federal law, which they do not, no "doctrine of concurrent enforcement" exists and the City cannot layer its own penalties and procedures on top of the federal immigration laws. *See* Red Br. at 47-48 (citing *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282 (1986)) & n.22; Pl. Oct. 31, 2011 Letter Br. at 20-21.

*Arizona* now makes it absolutely clear that the City's concurrent enforcement doctrine is a chimera. In its analysis of SB 1070 § 3, the Supreme Court flatly rejected Arizona's attempt to defend the statute on the ground that "the provision has the same aim as federal law and adopts its substantive standards," calling that argument "unpersuasive on its own terms." 132 S. Ct. at 2502. The

Court explained that the concurrent enforcement argument is incompatible with *both* field and conflict preemption principles. With respect to field preemption, the argument simply "ignores the basic premise . . . that States may not enter, in any respect, an area the Federal Government has reserved for itself." *Id*. And, separately, implementation of a parallel state system "would *conflict* with the careful framework Congress adopted" in multiple ways. *Id*. (emphasis added). *See also id.* at 2503; *accord id.* at 2505 ("Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement. … [A] conflict in technique can be fully as disruptive to the system Congress enacted as a conflict in overt policy." (punctuation and citation omitted)).

It is therefore unsurprising that neither the "mirroring" nor "concurrent enforcement" theories make an appearance in Hazleton's most recent letter brief. More importantly, the Supreme Court's decisive rejection of one of the central pillars of Hazleton's defense strongly supports affirmance in this case. *Accord Lozano*, 620 F.3d at 223 (rejecting concurrent enforcement defense of the housing provisions).

### B. *Arizona* Confirms That The Housing Provisions Fatally Conflict With Federal Removal Processes And Discretion.

*Arizona* confirms that federal removal processes and discretion are of

paramount importance in the immigration scheme enacted by Congress, and that state or local laws targeting unauthorized immigrants can impermissibly interfere with these critical aspects of Congress's scheme even when they do not physically remove individuals from the United States. The Court emphasized that "[a] principal feature of the [INA's] removal system is the broad discretion exercised by immigration officials," and that it is "[f]ederal officials [who] must decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499.[3] Thus, "[a] decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States," a decision which "touch[es] on foreign relations and must be made with one voice." *Id.* at 2506-07. *Accord Lozano*, 620 F.3d at 197, 204 (noting Executive Branch discretion in immigration enforcement and emphasizing that federal interests are paramount in the field of immigration because of its relationship to foreign affairs).

Interference with the federal removal process and the discretion entrusted to the Executive Branch in the INA are key reasons that the Court found SB 1070 §§

[3] *Arizona* further explains that "[f]ederal governance of immigration and alien status is extensive and complex," that "Congress has specified which aliens may be removed . . . and the procedures for doing so," that the law provides avenues for some removable individuals to "remain in the country," and that "[d]iscretion in the enforcement of immigration law embraces immediate human concerns." *Id.* And it underlines that foreign relations considerations "require[] the Executive branch to ensure that [immigration] enforcement policies are consistent with this Nation's foreign policy." *Id.*

6 and 3 preempted, even though neither section purports to remove any non-citizen from Arizona.[4] In striking down § 6, which would have allowed Arizona police to arrest individuals based on probable cause that they were removable on certain grounds, the Court found that the provision "would allow the State to achieve its own immigration policy," in part by engaging in "harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed." 132 S. Ct. at 2506. Section 6 therefore "violates the principle that the removal process is entrusted to the discretion of the Federal Government." *Id*. Similarly, one "specific conflict[] between [§ 3] and federal law" is that § 3 would give Arizona the power to prosecute "even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Id.* at 2503.

The City's letter brief asserts precisely the authority that the Supreme Court has made clear the City does not have—the power to determine, outside of the federal removal process, "whether it is appropriate to allow a foreign national to live in the United States." *Id.* at 2506. Indeed, the core premise of the housing provisions is that the City can remove any person lacking current immigration

[4] *See id.* at 2533 (Alito, J., concurring and dissenting) (explaining that "[t]he Executive retains complete discretion over whether [individuals arrested under § 6] are ultimately removed.").

status because he "*has no legal right to reside anywhere in the United States*," even absent any indication that the federal government would find him removable or initiate removal proceedings against him. Def. Br. at 20 (emphasis in original). Relatedly, the City asserts the power to disregard federal enforcement priorities, *see id.* at 18-19 ("Federal Enforcement Priorities Have No Preemptive Effect."), even though the Court specifically relied on interference with those priorities as one reason that § 6 is preempted, *see Arizona*, 132 S. Ct. at 2505-06.

Exacerbating the conflict further, the housing provisions threaten more than "*harassment* of some aliens . . . whom federal officials determine should not be removed," a possibility that led to the invalidation of SB 1070 § 6. 132 S. Ct. at 2506 (emphasis added). Instead, the Hazleton provisions promise to *expel* such individuals from the City in pursuit of the City's own immigration policy. Thus they conflict even more directly with the federal immigration system than did the invalidated provisions of SB 1070. *Accord Lozano*, 620 F.3d at 221 (finding the housing provisions "effectively 'remove' persons from Hazleton" and thus conflict with the removal scheme of the INA).

Rather than acknowledging or engaging with any of this reasoning, the City instead seizes on a passage in *Arizona* addressing the United States' argument that § 2(B) is unlawful because, although the federal government believes that police

can voluntarily inquire about the status of detained individuals, in its view a state cannot *require* its police to make such inquiries. 132 S. Ct. at 2508. The Court disagreed, observing that although § 2(B) could require officers to "contact ICE about someone they have detained . . . even in cases where it seems unlikely that the Attorney General would have the alien removed," Congress had not "suggest[ed] it is inappropriate to communicate with ICE in these situations." *Id.*

On that reed, Hazleton hangs the proposition that "[t]he fact that the federal government has not yet devoted the resources to removing a particular illegal alien from the United States (or may never devote the resources to doing so) … does not prohibit the City from enforcing the housing provisions of the IIRA Ordinance after the federal government has confirmed that the alien in question is unlawfully present." Def. Br. at 19-20. That assertion, although necessary to the housing provisions' survival, distorts the Court's reasoning on § 2(B) and is unsustainable in light of the *Arizona* decision as a whole.[5] Communicating with ICE during an otherwise lawful stop under § 2(B) is entirely unlike "enforcing the housing provisions of the IIRA Ordinance," and the Supreme Court has made clear that a

[5] Indeed, the City's position is essentially that of Justice Scalia's single-Justice *dissent*. *See Arizona*, 132 S. Ct. at 2517 (Scalia, J., concurring and dissenting) ("[Federal officials] may well determine not to remove from the United States aliens who have no right to be here; but unless and until these aliens have been given the right to remain, Arizona is entitled to arrest them and *at least* bring them to federal officials' attention.") (emphasis in original).

lack of current immigration status is not enough to target an individual for harassment, much less denial of residence.

### C. *Arizona* Confirms That The Housing Provisions Are Also Conflict Preempted Because Of Other Inconsistencies With Federal Law.

*Arizona* also confirms that, notwithstanding any background presumptions, even small inconsistencies between federal and state law relating to immigration and immigrants will not be tolerated; and that where Congress has decided to go only so far, states and municipalities may not unilaterally go further. Thus, in its § 3 analysis, the Supreme Court found a "conflict with the plan Congress put in place" because even though the penalties for Arizona's state registration crimes generally tracked federal criminal penalties, they "rule[d] out probation as a possible sentence (and also eliminate[d] the possibility of a pardon.)." 132 S. Ct. at 2503. In its § 5(C) analysis, the Court explained that because Congress made it a crime to *hire* unauthorized workers in certain circumstances, but did not criminalize unauthorized workers themselves, Arizona's attempt to make it a state crime to work without authorization "would interfere with the careful balance struck by Congress." *Id.* at 2505. In its § 6 analysis, the Court similarly found that Congress's specific, limited grants of authority for state and local officers to engage in specific aspects of immigration enforcement establish that there is no general authorization for such activities—and it made clear that by the same logic,

some interpretations of § 2(B) would also be preempted. *See id.* at 2506-07, 2509.

The Hazleton housing provisions cannot survive under these principles. The conflicts between the housing provisions and federal law are, if anything, more severe than those presented by SB 1070 §§ 3, 5(C), and 6. The housing provisions improperly use current immigration status as a proxy for removability, conflicting with the basic structure and operation of the immigration system. *See* Red. Br. at 45-47; *Lozano*, 496 F. Supp. 2d at 530-33. They create requirements and enforcement mechanisms wholly unlike those of the federal harboring law that they supposedly "mirror." *See id*. And, by targeting simple landlord-tenant relationships as "harboring," they go well beyond the limits Congress set when it defined the federal offenses. Red Br. at 47 n.21; *DelRio-Mocci v. Connolly Props. Inc*., 672 F.3d 241, 246-48 (3d Cir. 2012) (simply renting to an unlawfully present individual does not constitute harboring). Each of these conflicts is fatal to the housing scheme that Hazleton attempts to pursue. *Accord Lozano,* 620 F.3d at 221-24 (finding the housing provisions conflict-preempted).

### D. *Arizona* Confirms The Housing Provisions Are Field-Preempted.

*Arizona* confirms that field preemption applies where, as in the case of alien registration, the federal scheme was "designed as a 'harmonious whole,'" strikes "a careful balance" and "provide[s] a full set of standards." *Arizona*, 132 S. Ct. at

2501-02 (citing *Hines v. Davidowitz*, 312 U.S. 52, 72 (1941)). Such a "framework enacted by Congress leads to the conclusion . . . that the Federal Government has occupied the field," thereby "foreclos[ing] any state regulation in the area." *Arizona*, 132 U.S. at 2502. Applying these standards, Hazleton's housing provisions intrude on at least three exclusive federal fields: regulating non-citizens' presence, regulating the provision of assistance to unauthorized immigrants through "harboring" and similar laws, and regulating the tracking of non-citizens' presence and mandated reporting of alien information.

*1. The housing provisions are field preempted by the INA's provisions regulating non-citizens' presence.*

It is self-evident that federal immigration law occupies the field of regulating non-citizens' presence based on immigration status. *See, e.g., Arizona*, 132 S. Ct. at 2499 ("Federal governance of immigration and alien status is extensive and complex"); *see also supra* Part II.B & n.3 (collecting *Arizona* statements describing paramount role of federal executive discretion). The provisions of the INA regulating presence are "designed as a 'harmonious whole'" that encompasses standards for entry, removal, and relief, among other things; and creates an extensive federal apparatus to enforce standards, adjudicate claims, and exercise discretion in every aspect of implementation. *See* Red Br. at 49; *accord Lozano*, 620 F.3d at 196-98 (describing "carefully designed system" of the INA and its

enforcement). The Hazleton housing provisions tread on this field. *See* Red Br. at 48-49; *accord Lozano*, 620 F.3d at 220-21 (noting the housing provisions regulate presence); *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 855-56 (N.D. Tex. 2010).

*2. The housing provisions are field preempted by the federal harboring laws.*

The federal government has also occupied the field of regulating the provision of assistance to unlawfully present immigrants. The federal harboring statute, 8 U.S.C. § 1324, reflects Congress' considered judgment of what conduct to prohibit with respect to immigration, and what provisions are necessary to achieve federal policies. *See United States v. South Carolina*, 840 F. Supp. 2d 898, 916-17 (D.S.C. 2011) ("It is clear to the Court . . . that Congress adopted a scheme of federal regulation regarding the harboring and transporting of unlawfully present persons so pervasive that it left no room in this area for the state to supplement it."); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1056 (S.D. Cal. 2006) (concluding that law resembling Hazleton housing provisions is likely field-preempted in view of federal occupation of field of harboring). Even leaving aside the obvious conflicts between the housing provisions and federal law, the provisions unquestionably seek to "complement" this federal scheme, and are

field-preempted for this reason as well. *See Arizona*, 132 S. Ct. at 2502 (field preemption precludes "even complementary state regulation").

3. *The housing provisions are field preempted by the federal alien registration laws.*

The Supreme Court found SB 1070 § 3 field preempted by the federal alien registration laws because the federal scheme to regulate the circumstances under which non-citizens must report their presence to government authorities and provide alien information—its alien registration system—leaves no room for additional state legislation. *Arizona*, 132 S. Ct at 2501-03. Perhaps recognizing that Hazleton's housing provisions—which attempt to track non-citizens' presence in the City by requiring them to report to local authorities and disclose their immigration information—are vulnerable for this additional reason, the City argues that Hazleton's provisions are not actually an alien registration law. Def. Br. at 24-26. That argument misses the point: the question is not whether the challenged law is an alien registration law *per se* (indeed, under § 3, Arizona would not have registered anyone itself), but whether it intrudes on the field occupied by the federal registration laws. The housing provisions do exactly that.

As *Arizona* explained, the federal alien registration laws created "a comprehensive and unified system *to keep track of aliens* within the Nation's borders." 132 S. Ct. at 2502 (emphasis added). The federal alien registration

system governs everything from which noncitizens must register and when, *see* 8 U.S.C. §§ 1201(b), 1302-03; 8 C.F.R. § 264.1, to the content of those registration forms, *see* 8 U.S.C. § 1304, to when registrants must report changes of address, *see* § 1305, penalties for failing to register, *see* § 1306, penalties for failing to carry registration documents, *see* § 1304(e), and penalties for fraudulent statements and counterfeiting, *see* §§ 1306(c)-(d). *See also Arizona*, 132 S. Ct. at 2501-02.

Like the federal law, the housing provisions endeavor to "keep track of aliens" within the City's borders. The RO dictates who must register and when, RO § 7(b), what information must be provided, *id*., and the content of the registration forms, *id.*, requires noncitizens to notify the authorities of changes of address, *id*. ("[a]ny relocation to a different Rental Unit requires a new occupancy permit.), and imposes penalties for failure to comply with registration requirements, RO § 10(a), and for false statements and documents, *see* A3446 (registration form).

The fact that the City nominally requires citizens as well as noncitizens to register does not change its intrinsic character as an immigration control measure. The RO is indisputably directed at noncitizens, as this Court found. *Lozano*, 620 F.3d at 176-77. Further, the registration scheme serves to obtain alien information, only noncitizens are required to provide information purporting to indicate their

lawful presence in the United States, and only noncitizens will have their information sent to the federal government. The housing provisions therefore tread on the field occupied by federal alien registration law.[6]

### E. *Arizona* Confirms That The Hazleton Ordinances' Judicial Challenge Provisions Are Either Preempted Or Inconsistent With Due Process.

*Arizona* confirms that only the federal government has the authority to determine status under the immigration laws. *See* 132 S. Ct. at 2498-99, 2505-07; *accord Plyler v. Doe*, 457 U.S. 202, 225 (1982). Yet, the Ordinances' only nod to due process is to allow an affected individual to affirmatively challenge an application of the Ordinances in a *state* court—a local magisterial district court normally charged with traffic offenses. IIRAO § 7(F).

Immigration or employment-authorization status is plainly a central element in any § 7(F) challenge. But that leaves the City on the horns of a dilemma. If the state courts may determine immigration status on their own as part of such proceedings, as Hazleton previously claimed, *see* Blue Br. at 81, that would plainly

[6] The City's suggestion that if federal alien registration law preempts Hazleton's housing provisions, it also preempts state drivers' license laws, is incorrect. Federal law expressly allows states to condition eligibility for drivers' licenses on immigration status. See REAL ID Act of 2005, Div. B, Tit. II. § 202(c), 42 U.S.C. § 30301 (2006) (establishing qualifying immigration status as a minimum requirement for issuance of conforming drivers licenses). Thus, states may require noncitizens to demonstrate that they meet that eligibility condition without raising preemption concerns.

be preempted.[7] If, instead, state courts may not make such determinations, they will be unable to address a central element of the claim, rendering the procedure even more worthless as a due process matter. *See* 496 F. Supp. 2d at 536-37. Either way, the Ordinances are invalid.

### F. *Arizona* Confirms That *Whiting* Must Be Read Narrowly And That Plaintiffs' Preemption Challenges To The Employment Provisions Survive.

Contrary to the City's previous assertions that "[*Chamber of Commerce v.*] *Whiting* undercuts *all* of the Plaintiffs' preemption claims," Def. Sept. 26, 2011 Letter Br. at 6, and that it necessarily forecloses all preemption claims against the Hazleton employment provisions, Def. Nov. 10, 2011 Letter Br. at 4-13, *Arizona* confirms that *Whiting* should not be viewed as a broad endorsement of state immigration authority in any area, including employment. Indeed, the majority and dissenting opinions in *Arizona* are striking for how little they cite *Whiting*, especially considering that SB 1070 § 5(C) presents a conflict with the same federal law, the Immigration Reform and Control Act of 1986, § 101, 8 U.S.C. §

[7] *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011), found the state employer sanctions procedures at issue not preempted because they required state courts to "consider only the federal government's determination." (*Whiting* did not address any due process claims.) The Hazleton Ordinances have no similar limitation on state court authority.

The City argues that IIRAO § 7(E) is functionally equivalent, see Def.'s Nov. 11, 2011 Letter Br. at 11-12, but § 7(E) addresses "City official[s]," and magisterial district judges are not city officials. *See Hardy v. Kirchner*, 232 F. Supp. 751, 753 (E.D. Pa. 1964); Pa. Const. Art. 5, § 7.

1324a (2006), addressed in that case. Moreover, *Arizona*'s exacting conflict-preemption analysis of SB 1070, *see supra* Part II.C, underscores that even small inconsistencies between Hazleton's employment provisions and federal law can invalidate the employment provisions.

Thus, *Arizona* cautions against reading more into *Whiting,* and in particular the *Whiting* plurality's analysis of the Arizona employer sanctions law, than the case itself warrants. Plaintiffs have previously explained that *Whiting* does not call into doubt any aspect of the Court's analysis of the Hazleton housing provisions, and actually confirms it in key respects. Pl. Oct. 31, 2011 Letter Br. at 6-22. Plaintiffs have also explained that the Hazleton employment provisions are sufficiently different from the Arizona law that they are still conflict-preempted after *Whiting*. *Id.* at 22-30. These arguments have only gained force in light of *Arizona*, and the City's acknowledgment that Hazleton's employment provisions operate in a very different manner than the law in *Whiting*. *See* Def. Nov. 10, 2011 Letter Br. at 5-6.

## III. Hazleton's Letter Brief Misconstrues *Arizona* And The Hazleton Ordinances Themselves.

Below, Plaintiffs respond briefly to those assertions in Hazleton's letter brief that are not already addressed in our explanation of *Arizona* above. As we explain, Hazleton's attempt to argue that Hazleton's entire comprehensive scheme to

regulate noncitizens' presence and residency should be viewed as a "status check" provision like SB 1070 § 2(B) is wholly without merit. Defendant's remaining arguments are even less substantial and should likewise be rejected.

### A. Defendant's New Characterization Of The Housing Provisions As An Information-Sharing Scheme Cannot Save Them From Preemption.

In *Arizona*, the Supreme Court stated that "if § 2(B) only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives." 131 S. Ct. at 2509. Accordingly, the City now tries to recast the housing provisions of the Hazleton Ordinances as a benign "status check" in an effort to save them from preemption.[8] Hazleton's housing provisions, however, are entirely unlike § 2(B), and nothing in the Supreme Court's analysis alters this Court's correct conclusion that the housing provisions are wholly preempted.

[8] As Plaintiffs explain here, the housing ordinances cannot be fairly described as a "status check" scheme. Thus, Plaintiffs do not address the general validity of "status check" laws in light of *Arizona*. Plaintiffs note, however, that even with respect to laws that involve only status verification, the Supreme Court's decision cannot be read to broadly endorse every law that requires or involves verification of immigration status with the federal government.

*1. Hazleton's comprehensive, integrated housing provisions go far beyond merely sharing information.*

The Hazleton Ordinances' detailed and integrated housing provisions work in combination to "regulate residence based solely on immigration status." *Lozano*, 620 F.3d at 220; *see also id.* ("Hazleton's housing provisions regulate which aliens may live there."); *id.* at 224 ("[T]he purpose of these housing provisions is to ensure that aliens lacking legal immigration status reside somewhere other than Hazleton."). The housing provisions:

> prohibit the knowing or reckless harboring of "illegal aliens" (defined to include the knowing or reckless provision of rental housing); subject landlords who violate this prohibition to significant monetary sanctions; . . . invalidate any lease entered into by persons lacking lawful immigration status[;] . . . . require[] all persons over the age of eighteen who seek to live in rented property to obtain an occupancy permit; make[] possession of documentation of lawful immigration status a requirement for receiving that permit; prohibit[] landlords from renting to persons who lack a permit; and subject[] landlords who do so to suspension of their rental license and a concomitant prohibition on collecting rent from the dwelling units involved.

*Id.* at 188; *see also id.* at 179-80 (summarizing Hazleton's housing provisions).

Thus, the City's attempt to now characterize the housing provisions as a mere verification law is contrary to the text and operation of the housing provisions themselves. Moreover, unlike the potentially non-preempted interpretation of SB 1070 § 2(B) outlined by the Supreme Court, Hazleton's status inquiry and

verification procedures do not simply add a query to the federal government to an otherwise immigration-neutral transaction. Nor do they leave any follow-up based on immigration status to the federal government, as § 2(B) must do to survive. Instead, when Hazleton gathers, reports, or verifies immigration status information, it does so in support of its own unlawful ends.

*2. Localities have no authority to require noncitizens to provide immigration status information in order to obtain housing.*

The RO requires all occupants of rental housing in the City to provide "[p]roper identification showing *proof of legal citizenship and/or residency*." RO § 7(b) (emphasis added). The City argues that it is entitled to demand immigration and citizenship documentation on a broad and systematic basis under 8 U.S.C. § 1373 and other statutes. The City contends these provisions authorize Hazleton's scheme because they not only indicate that Congress expected state and local governments to *share* information with the federal government, but they also indicate that "Congress expected state and local governments to implement programs under which they would *acquire* information about the legal status of aliens." Def. Br. at 15-16 (emphasis added). That argument has at least four glaring flaws.

First, as explained in Part I *supra*, the City's argument ignores that the RO does not simply mandate the provision of information, but makes it impossible for

anyone lacking "legal citizenship and/or residency" to reside in rental housing in Hazleton.

Second, as explained in Part II.D.3 *supra*, states and localities lack power to establish schemes "to keep track of aliens," *Arizona*, 132 S.Ct. at 2502, by requiring that noncitizens report their immigration information to state or local authorities.

Third, the City's position is in tension with the Supreme Court's analysis of SB 1070 § 2(B). Unlike the Hazleton Ordinances, § 2(B) imposes no requirement that the noncitizen provide any immigration status information to a state officer. Thus, the Supreme Court's reference to "the sharing of information about possible immigration violations" with federal immigration authorities, *id.* at 2508, in no way endorses local laws like Hazleton's that *require* noncitizens to provide information regarding their immigration status. Indeed, the Court held that "[d]etaining individuals solely to verify their immigration status would . . . disrupt the federal framework," 132 S. Ct. at 2509, indicating that introducing a coercive element into § 2(B) would render it preempted. *Cf.* RO § 10 (providing for fines and imprisonment for occupants who fail to register); A3433 (City notice listing registration requirements and threatening to penalize persons who do not register).

Fourth, none of the federal statutes the City relies on—8 U.S.C. §§ 1373,

1644, and 1357(g)(10)— addresses the *collection* of immigration status information by state or local authorities, and none remotely purports to provide states or localities with power to mandate that noncitizens report immigration status information. For example, although Defendants state that § 1373 "recognized the interest of cities in 'sending' and '[m]aintaining'" immigration status information, Def. Br. at 15 (citing § 1373(b)(1)-(2)), nowhere in the statute does Congress mention *collecting* such information. *Cf. United States v. Grier*, 585 F.3d 138, 142-43 (3d Cir. 2009) (where Congress has specifically included certain terms in a statute, and excluded others, it does so purposefully).

### B. *Arizona* Does Not Undermine This Court's Regulation-Of-Immigration Analysis.

The City argues that *Arizona* "undermines the theory that the [Hazleton] Ordinances constitute a . . . 'regulation of immigration," because the Supreme Court did not find that SB 1070 § 2(B) is a regulation of immigration. Def. July 23, 2012 Letter Br. at 20-22. *Arizona* does no such thing. The United States did not assert in the Supreme Court that Arizona's law constituted a regulation of immigration, and, unsurprisingly, Arizona did not raise the issue either. *See* Briefs of Petitioners and Respondent in *Arizona*, 132 S. Ct. 2492. The Supreme Court did not address whether any part of SB 1070 is a regulation of immigration because that question was not before the Court.

Even if the Court had implied that § 2(B) is not a regulation of immigration (which it did not), it is a vast and unsustainable leap from there to the City's assertion that the Hazleton housing provisions therefore are not a regulation of immigration. As this Court carefully explained in its previous opinion, the housing provisions "regulate residence based solely on immigration status"; "[i]t is difficult to conceive of a more effective method of ensuring that persons do not enter or remain in a locality than by precluding their ability to live in it." *Lozano,* 620 F.3d. at 220-21; *accord Farmers Branch*, 701 F. Supp. 2d at 853-59. In contrast, as construed by the Supreme Court, § 2(B) merely provides for a "status check" to be initiated during otherwise-lawful stops and arrests. *See Arizona*, 132 S. Ct. at 2509. That is much further from the core of immigration regulation than the Hazleton scheme.

Finally, even though the *Arizona* decision does not specifically address regulation of immigration, it by no means suggests that the doctrine lacks power. Indeed, *Arizona* reminds us that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens," and that "[t]he federal power to determine immigration policy is well settled." *Id*. at 2498. It invokes the exclusive federal power to "establish an uniform Rule of Naturalization" and to conduct foreign relations, and explains that "[i]t is

fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States." *Id.* Far from undermining the regulation of immigration analysis in this case, *Arizona* bolsters it by reaffirming the fundamental reasons that the federal government's power to regulate immigration must remain exclusive.

### C. *Salerno* Is No Obstacle To Consideration Of Plaintiffs' Claims.

The City claims that *Arizona* "reiterat[es] the *Salerno* standard for facial challenges" and thus Plaintiffs' claims cannot prevail here. Def. Br. at 9, 6-10. The City is mistaken. In fact, the majority opinion did not cite *Salerno* at all; nor did it allude to *Salerno*'s "no set of circumstances" language, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), or the notion that a law must be "unconstitutional in all of its applications," or any discomfort with the fact that the plaintiff had brought a facial challenge to SB 1070. And, even more tellingly, the majority did *not* adopt the approach that the City insists this Court should adopt in this case: to uphold the law if it is possible to invent a single hypothetical fact pattern under which the state law could be implemented without directly interfering with federal law.[9]

[9] Again, it is a single-Justice *dissent*, not the majority, that takes Defendant's approach. *Arizona*, 132 S. Ct. at 2534 (Alito, J., concurring and dissenting)

Rather, the Supreme Court considered the Arizona provisions' *potential* to interfere with the federal system, including the fact that § 6 could lead to harassment of individuals the federal government would not seek to remove. *See* 132 S. Ct at 2506. The fact that some individuals arrested under § 6 might in fact be individuals the federal government would seek to remove, or that an officer might suspect someone of being removable but later decide that the individual was actually lawfully present, Def. Br. at 8-9, still could not save the provision.

*Arizona*'s § 2(B) analysis, which the City reads as an endorsement of its approach to *Salerno*, is nothing of the sort. It would be one thing if the Supreme Court had found that § 2(B) would produce some lawful stops in addition to some preempted detentions, and that because § 2(B) did not produce a preempted detention every single time it was applied, the federal government's facial challenge fails the *Salerno* test. But that is not what the Court found. Rather, the Court declined to strike down § 2(B) because it was still possible for Arizona courts to construe § 2(B) in a way that would preclude any preempted applications of the provision. *See* 132 S. Ct. at 2509. And the Court explicitly preserved the possibility of future challenges once the meaning of the law is clearer. *Id.* at 2509-10. Nothing in that reasoning supports the City's view of what *Salerno* requires

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(arguing that because "there are plenty of permissible applications of § 6," *Salerno* requires that the statute be upheld).

here.

### D. No Presumption Against Preemption Applies To The Housing Provisions, And It Would Not Save Them If It Did.

The City again insists that this Court must apply a "presumption against preemption," because *Arizona* states that "courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." 132 S. Ct at 2501. Nothing in *Arizona* suggests that the presumption extends to Hazleton's housing provisions, which attempt to regulate the presence of non-citizens within the City. *See Lozano*, 620 F.3d at 219-20; *Farmers Branch*, 701 F. Supp. 2d at 855. But even assuming that *Arizona* requires this Court to apply a presumption against preemption, the real lesson from that case is how inconsequential the presumption is: applying the presumption, the Supreme Court found two provisions conflict preempted, one provision field preempted, and a fourth provision at serious risk of conflict preemption unless the state courts could narrowly confine it. No presumption can save the Hazleton Ordinances, because they are clearly preempted by federal law.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one participant in this case is not a registered CM/ECF user. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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Dated: August 2, 2012

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