No. 07-3531

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PEDRO LOZANO; HUMBERTO HERNANDEZ; ROSA LECHUGA; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3, a minor, by his parents; JANE DOE 1; JANE DOE 2; JANE DOE 3; JOHN DOE 4, a minor, by his parents; BRENDA LEE MIELES; CASA DOMINICA OF HAZLETON, INC.; HAZLETON HISPANIC BUSINESS ASSOCIATION; PENNSYLVANIA STATEWIDE LATINO COALITION; JANE DOE 5; JOHN DOE 7; JOSE LUIS LECHUGA,
Plaintiffs and Appellees,

v.

CITY OF HAZLETON,
Defendant and Appellant.

On Appeal from the United States District Court
for the Middle District of Pennsylvania (No. 3:06-cv-01586)

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. Neither WLF nor AEF has a parent corporation, nor any stock owned by a publicly held company.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters in all 50 States, including many in Pennsylvania. WLF has appeared in courts across the country to ensure that governments at all levels possess the resources to combat illegal immigration and to prevent aliens from seeking to vote illegally. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371 (2005); *Gonzalez v. State of Arizona*, 485 F.3d 1041 (9th Cir. 2007).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici agree with Defendant-Appellant that the district court judgment should be reversed in its entirety. *Amici* are writing separately to focus on the district court's decision striking down the housing-related portion of the challenged ordinances. *Amici* do not believe that Plaintiffs have come close to establishing their standing to challenge that portion of the ordinances. Moreover, Plaintiffs have failed to demonstrate that Congress intended to prohibit State and local governments from regulating the rental of housing units

to those who are in this country illegally, or that the ordinances violate their due process rights.

Amici are filing this brief with the consent of all parties.

STATEMENT OF THE CASE

Amici briefly summarize the facts of the case as they relate to regulation of rental housing within the City of Hazleton.

Both of the ordinances that are the subject to this appeal include provisions that regulate rental housing. The Rental Registration Ordinance ("RO"), Ordinance 2006-13, prohibits occupancy of a rental unit within Defendant Hazleton unless the owner has obtained a license from the City. RO §§ 6, 7.a. It further requires all adult occupants of such rental units to obtain an "occupancy permit" at the time they move into the unit. RO § 7.b. *Those who occupied their units on or before November 1, 2006 are exempt from the permit requirement for the duration of their lease. Id.* In order to obtain an occupancy permit, occupants must provide certain information to the City, including "proper identification showing proof of legal citizenship and/or residency." RO § 7.b.1(g). Hazleton is empowered to enforce the RO by bringing an action before the local Magisterial District Judge. RO §§ 9, 10.

Section 5 of the Illegal Immigration Relief Act Ordinance ("IIRA"), most

recently amended by Ordinance 2007-7, also addresses housing issues. Section 5 imposes burdens on landlords only, not tenants. It prohibits a landlord from renting a dwelling unit in Hazleton to an illegal alien, "knowing or in reckless disregard of the fact that [the] alien has come to, entered, or remains in the United States in violation of law." IIRA § 5.A.[1] If the City receives a "valid" complaint alleging a violation of IIRA § 5.A, it is directed to obtain "identity data" from the landlord and forward it to the federal government for verification. IIRA § 5.B(3).[2] If after completing the verification process, the City determines that the landlord has violated § 5.A – a determination that requires *both* a finding that the tenant is an illegal alien *and* a finding that the landlord has acted knowingly or recklessly – and the landlord fails to correct the violation within the allotted time period, the City is entitled to suspend the landlord's rental

[1] The prohibition is prospective only; it does not apply to leases in existence at the time that "any judicial injunction prohibiting [the IIRA's] implementation is removed, IIRA § 7.A, an event that has not yet occurred.

[2] The IIRA does not specify how Hazleton is to undertake such verification. Nonetheless, City officials have made clear that they intend to utilize the SAVE Program, a federal program that allows State and local governments to verify electronically whether an alien is lawfully present in the United States. *See* Appellant Br. 62-63. The SAVE Program is an essential component of numerous federal programs administered by State and local governments; for example, it provides them with a means of determining whether applicants for public benefits qualify for such benefits.

license until he/she takes steps to correct the violation. IIRA § 5.B(4) & (6). An adequate "correction of a violation" includes serving the tenant with a notice to quit. IIRA § 7.D(1). The ordinance contemplates that the tenant would remain in the unit while contesting his/her eviction in state court. IIRA § 7.D.

Plaintiffs-Appellees have mounted a facial challenge to the RO and the IIRA. The Second Amended Complaint filed in January 2007 lists eight Plaintiffs who are parties to this appeal;[3] all eight assert that they are adversely affected by the housing provisions of the RO and the IIRA. The Plaintiffs-Appellees include one individual who owns rental property (Pedro Lozano), four individuals who live in rental units in Hazleton (John Does 1, 3, and 7 and Jane Doe 5), two organizations whose members include landlords, and one organization whose members include tenants living in Hazleton. The Second Amended Complaint raises a variety of claims under state and federal law, but this brief addresses only two of those claims: (1) the housing provisions of the RO and the IIRA are preempted by federal immigration law; and (2) the housing provisions of the ordinances violate their rights to procedural due process under

[3] The district court ruled that two other plaintiffs, Rosa and Jose Luis Lechuga, lacked standing. The claims of an eleventh plaintiff, Humberto Hernandez, were dismissed after trial for lack of evidence. Those three have not appealed.

the Fourteenth Amendment.

After trial, the district court issued a judgment on July 26, 2007 that declared the RO and IIRA unconstitutional, and permanently enjoined their enforcement. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007). It determined that eight of the Plaintiffs had standing to challenge the two ordinances. *Id.* at 487-505. It determined that all of the housing provisions of the two ordinances conflicted with federal immigration law and thus, based on application of implied conflict preemption principles, were preempted by federal law. *Id.* at 529-533. The court stated that even when the federal government determines (through its SAVE Program) that an alien is not lawfully present in the United States, the federal government has not necessarily determined that the alien should be required to leave the country. *Id.* at 531-32. It stated that the federal government may ultimately decide to grant such aliens permanent resident status, or may decide to temporarily stay removal proceedings. *Id.* It held that the housing provisions of the RO and IIRA, by attempting to prevent such aliens from renting housing in Hazleton, conflicts with the federal determination that some such aliens may be permitted to stay in this country. *Id.* The court held that the housing provisions also conflict with federal immigration law because they requires City officials to determine whether individuals are

properly in the country, a function (according to the district court) assigned exclusively under federal law to federal immigration judges. *Id.* at 532-33.

The district court also held that the IIRA was facially invalid because it violated each of the eight Plaintiffs' rights to procedural due process. *Id.* at 537-38. The court determined that the process provided by the housing provisions of the IIRA is constitutionally inadequate because: (1) the IIRA does not *require* Hazleton to provide a tenant with notice that it is investigating his/her immigration status; (2) in the event of an investigation pursuant to a valid complaint, § 5.B(3) of the IIRA does not specify what "identity data" landlords are to provide to Hazleton regarding the tenant who is the subject of the complaint, *id.* at 538; (3) if the City initially finds a violation of § 5.A,[4] the landlord may stay proceedings by acquiring additional information from the tenant and requesting a second verification through the SAVE Program, IIRA § 7.D(2), but the tenant is not provided with a similar right, *id.* at 538; and (4)

[4] Such a finding could, of course, be made only *after* the federal government's SAVE Program has determined that the tenant is not lawfully present in the United States *and* after a determination that the landlord permitted the tenant to remain in the rental unit despite knowledge of the unlawful presence (or reckless disregard thereof). *See* IIRA §§ 5.A and 7.E (Hazleton may not proceed with a complaint until the federal government verifies unlawful presence; if the federal government "is unable to verify" one way or the other whether the tenant is lawfully present, Hazleton "shall take no further action on the complaint.").

the IIRA provides both the landlord and tenant with the right to contest a finding of violation in the Pennsylvania court system, but such a right provides them with no procedural protection because (the district court determined) Pennsylvania courts lack "authority to determine an alien's immigration status." *Id*. The district court did not specifically address whether the RO violated procedural due process rights.

SUMMARY OF ARGUMENT

The judgment of the district court should be reversed because it lacked jurisdiction to hear the case. None of eight Appellees has suffered injury-in-fact directly traceable to the challenged ordinances and redressable by this lawsuit, and thus each lacks Article III standing to challenge either the RO or the IIRA. The four Appellees who are tenants in Hazleton, as well as the tenant members of Casa, have not been threatened with eviction as a result of the RO. Nor is such a threat likely: the RO's "occupancy permit" requirement applies only to tenants who move into a unit after November 1, 2006, and there is no indication that the tenant Appellees moved into their units after that date. Although the RO imposes a one-time $10 "occupancy fee" on all tenants, the district court never seriously suggested that cities are prohibited from collecting such a fee in the exercise of their police powers over housing. Nor do the tenant Appellees have

standing to challenge the IIRA. Indeed, the IIRA imposes no obligations whatsoever on tenants, and to the extent that the IIRA induces their landlords to initiate eviction proceedings against them, they will have the full range of federal and state law defenses available to them in any such proceedings.

Nor do the three Appellees who are landlords (Pedro Lozano and two organizations) possess Article III standing.[5] The RO prohibits landlords from leasing to post-11/1/06 tenants who lack an occupancy permit, but none of the three landlord Appellees alleges that a specific prospective tenant backed out of a lease because he/she was unable to obtain a permit. They allege that they have had more difficulty attracting tenants in the months following adoption of the RO and IIRA, but particularly because those ordinances have never actually been in force, Appellees have not demonstrated that the alleged shrinkage in the tenant pool is directly traceable to allegedly illegal portions of the RO and the IIRA. Nor have the three demonstrated a likelihood that they will be prosecuted for violation of the IIRA. For example, the IIRA provides that no landlord can be deemed to have violated the ordinance in the absence of evidence that (s)he allowed the tenant to occupy a rental unit despite "knowing" that the tenant was

[5] Two organizations, HHBA and PSLC, assert standing to challenge the ordinances' housing provisions based solely on their claims that they represent the interests of individual members who are landlords Hazleton.

present violation of immigration laws (or in reckless disregard of that fact), IIRA § 5.A; yet none of the landlord Appellees alleged that any of their tenants were illegal aliens. Indeed, because Section 5 of the IIRA is not yet in force – per § 7.A, it does not and will not apply to existing leases and to any lease entered into before the district court injunction is lifted – there is absolutely no prospect that any of the landlord Appellees will be prosecuted in the foreseeable future. If, after the IIRA actually begins applying to any of the landlord Appellees, they can demonstrate that the IIRA is causing them injury-in-fact, they will have ample opportunity to raise an *as-applied* challenge to the IIRA.

On the merits, the district court erred by finding in favor of Appellees on their preemption and due process claims. The district court held that the housing portions of the RO and the IIRA were preempted by federal law, on the basis of implied conflict preemption. Yet the district court failed to demonstrate any conflict between federal immigration law and the Hazleton ordinances. Congress has made clear repeatedly in recent years that it welcomes assistance from state and local governments in preventing illegal aliens from remaining in this country. For example, it actively encourages state and local governments to deny public assistance to illegal aliens as a means of discouraging aliens from entering and remaining in the United States in violation of federal immigration

laws. While Congress has made clear that State and local governments may not determine which aliens may enter and remain in this country, the RO and IIRA cannot plausibly be deemed an effort by Hazleton to make such a determination. Moreover, in the absence of any indication that Congress has ever intended to regulate the provision of rental housing for illegal aliens, there is no basis for asserting that Hazleton's ordinances stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress regarding that subject matter.

The district court also erred in finding that the housing provisions of the IIRA are *facially* invalid on due process grounds. The IIRA does not even apply to tenants and does not empower City officials to terminate tenants' property rights in their leases, so the IIRA simply does not raise due process concerns with respect to the tenant Appellees. If, as a result of IIRA proceedings, their landlords initiate eviction proceedings, the ordinances do not purport to interfere with the rights of tenants to raise the full range of federal and state defenses in connection with those proceedings.

ARGUMENT

I. APPELLEES LACK STANDING TO CHALLENGE THE HOUSING PROVISIONS OF THE RO AND THE IIRA

Article III of the Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies," a limitation that the Supreme Court has interpreted to require plaintiffs, before invoking federal court jurisdiction, to demonstrate that they have a particularized interest in the outcome of *each* of the causes of action they raise. Appellees failed to carry their burden with respect to any one of their causes of action.

The Supreme Court has set forth the following minimum threshold to obtain standing to sue in federal court:

> [T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, . . . [and which is] actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted). As set forth below, Appellees have failed to establish those three elements with respect to their challenge to either ordinance.

A. The Four Tenant Appellees Have Failed To Demonstrate That the Hazleton Ordinances Have Caused Them Any Harm

Four of the Appellees (John Does 1, 3, and 7 and Jane Doe 5) live in rental

units within the City of Hazleton. Each asserts that the adoption of the RO and the IIRA has caused them actual or imminent injury because it has threatened them with the loss of their rental units.[6] The district court deemed those assertions sufficient to establish standing: "The loss (or imminent loss) of one's apartment and the inability to rent a new one is certainly an actual and concrete injury." 496 F. Supp. 2d at 497-98.

The trial record does not support that finding. John Does 3 and 7 and Jane Doe 5 admit that they are illegal aliens. They fear that they will be unable to obtain an "occupancy permit" required by the RO,[7] and thus will be forced to vacate their apartments. That fear is unfounded; § 7.b of the RO makes clear that they are not subject to the occupancy permit requirement. Section 7.b provides that those who occupied their units on or before November 1, 2006 are exempt from the permit requirement for the duration of their leases. The trial record indicates that John Does 3 and 7 and Jane Doe 5 began living in their

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[6] Appellee Casa also asserts that some of its members are tenants living in Hazleton who have been similarly injured. Casa does not assert, however, that its members suffered injuries distinct from those alleged by the four tenant Appellees. Accordingly, Casa's presence in this case adds nothing to Appellees' standing claims.

[7] The RO requires applicants for an occupancy permit to produce "proper identification showing proof of legal citizenship and/or residency," a requirement that would make it very difficult for an illegal alien to obtain such a permit.

apartments before November 1, 2006 and thus need not obtain permits. While the RO's occupancy permit requirement might inhibit the ability of those three individuals to move to new rental units within Hazleton, any such injury is merely conjectural or hypothetical in the absence of an indication that any of the three has concrete plans for such a move.

John Doe 1 does not even face that hypothetical injury: he is now a legal permanent resident who, upon presentation of documents demonstrating that status, could obtain an occupancy permit should the need arise (*i.e.*, should he decide to move to a new rental unit within Hazleton). John Doe 1 claims that he suffered injury-in-fact immediately after initial adoption of the RO, when his landlord asked him to vacate his apartment because the landlord was not sure that John Doe 1 could get an occupancy permit and "didn't want to take the risk" of paying a fine under the IIRA. *Id.* at 497. But any such injury cannot be deemed causally connected to the RO's occupancy permit requirement. Rather, because the RO quite clearly did not require John Doe 1 to obtain an occupancy permit (and his landlord faced no risk of a fine for renting to John Doe 1 in the absence of a permit), any injury can only be attributed to his landlord's misunderstanding of the ordinances and John Doe 1's voluntary acquiescence in his landlord's request that he vacate the apartment. Moreover, that past injury is

unlikely to recur and thus could not in any event provide John Doe 1 with standing to seek prospective relief against the RO.

Although the RO imposes a one-time $10 occupancy fee on all tenants, that fee does not constitute the necessary injury-in-fact. Appellees do not challenge Hazleton's right to regulate rental housing and to impose reasonable fees on all those residing in the City, quite apart from any effort to prevent illegal aliens from obtaining rental housing. Accordingly, the modest fee on all of Hazleton's inhabitants – citizens and aliens alike – cannot support a standing claim because it cannot be deemed to invade a legally protected interest.

Nor do the tenant Appellees have standing to challenge the IIRA. Indeed, that ordinance imposes no obligations on them whatsoever; only landlords are burdened by the IIRA. Moreover, the Appellees' leases are not even subject to investigation under § 5 of the IIRA, because that provision is inapplicable to all current leases. *See* IIRA § 7.A. If, hypothetically, their landlords were nonetheless required by the terms of the IIRA to initiate eviction proceedings against them, no provision of the ordinance would hinder the four tenant Appellees from exercising the procedural rights available to every Pennsylvania tenant facing eviction – including the right to assert that the eviction was proceeding in violation of federal or state law. Only a landlord can face sanction

under the IIRA for harboring an illegal alien tenant; IIRA § 7.D(3) explicitly contemplates that any subsequent effort to evict an illegal alien tenant deemed to have been improperly harbored must follow procedures governing all landlord-tenant disputes and does not sanction any efforts by Hazleton itself to evict such tenants.

John Does 3 and 7 and Jane Doe 5 also claim to live in fear that their illegal alien status will be uncovered and they will lose their housing. Nonetheless, present-day fears of a future, hypothetical injury have never been deemed sufficient to establish injury-in-fact. *See, e.g.*, *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present harm or a threat of specific future harm.").

B. The Three Landlord Appellees Have Failed To Demonstrate That the Hazleton Ordinances Have Caused Them Cognizable Harm, Nor Are They Within the Zone of Interest of Some of the Rights They Assert

The three landlord Appellees – Pedro Lozano, HHBA, and PSLC – have similarly failed to establish standing to challenge the housing provisions of the Hazleton ordinances. The principal injury-in-fact to which they point is an alleged shrinkage in the Hazleton tenant pool in the months following the initial adoption of the RO and the IIRA, with the result that it has become more

difficult for them to lease their rental units.[8] But given the innumerable factors that go into determining demand for rental housing in a given locale, Appellees' evidence was woefully deficient in pinpointing adoption of the Hazleton ordinances as the cause of the alleged shrinkage of the Hazleton tenant pool. More importantly, the provisions of the ordinances to which Appellees object cannot plausibly be deemed the cause of the landlord Appellees' injuries because (due to the district court's injunction) *those provisions never took effect.* Appellees apparently contend that the threat that the Ordinances might someday be enforced created a climate of fear that discouraged some aliens from seeking rental housing in Hazleton. But if so, the resulting injury cannot be deemed "fairly traceable to the challenged action of the defendant" – action which was never in fact undertaken – but rather was "the result of the independent action of some third part[ies] not before the court." *Lujan*, 504 U.S. at 561.

Nor have the three demonstrated a likelihood that they will be prosecuted for violation of the IIRA. We note initially that in seeking a federal court injunction against enforcement of state or local statutes exercising the police power, Appellees are seeking a remedy highly disfavored by the law. The U.S.

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[8] The district court found that one of HHBA's landlord members, Rudolfo Espinal, faced such difficulties, as did Lozano. It made no findings with respect to members of PSLC who own rental units.

Supreme Court "has often emphasized that, in our federal system, it is preferable that constitutional attacks on state statutes be raised defensively in state-court proceedings rather than in proceedings initiated in federal court." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 n.8 (1985). A litigant lacks Article III standing to challenge such a statute in federal court unless there is a "genuine threat" that state/local officials will enforce the statute against the litigant. *City of Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987).

Neither Lozano nor Espinal has come anywhere near demonstrating a "genuine threat" that he will be subject to an IIRA § 5 enforcement action. For example, the IIRA provides that no landlord can be deemed to have violated the ordinance in the absence of evidence that (s)he allowed the tenant to occupy a rental unit despite "knowing" that the tenant was in the United States in violation of immigration laws (or in reckless disregard of that fact), IIRA § 5.A; yet neither Lozano nor Espinal alleges that any of his tenants is an illegal alien. Indeed, because Section 5 of the IIRA is not yet in force – per § 7.A, it does not and will not apply to existing leases and to any lease entered into before the district court injunction is lifted – there is absolutely no prospect that any Hazleton landlord will be prosecuted in the foreseeable future. If, after the IIRA actually begins applying to any of the landlord Appellees, they receive a rental

application from an individual they know to be an illegal alien, they could have a plausible standing argument. If they are able to demonstrate at that point that the IIRA is causing them injury-in-fact because they face a "grave threat" of prosecution, they will have ample opportunity to raise an *as-applied* challenge to the ordinances.

The only other alleged injury to which the landlords can point is the cost of complying with the RO – but for the preliminary injunction, they would have been required to pay a $5 annual license per rental unit, RO § 7.a, and to notify all their tenants whose leases began after November 1, 2006 of the need to obtain a occupancy permit before occupying a rental unit. RO § 7.b. But that fee cannot constitute the required injury-in-fact in the absence of a credible claim that Hazleton's right to regulate rental housing does not include the right to license rental units and to collect a modest fee to defray the cost of such regulation. The regulation of rental units encompasses much more than policing the immigration status of tenants; for example, the RO requires landlords to maintain their rental units "in good repair" and in "clean and sanitary condition." RO § 3.a The modest $5 annual license fee imposed by the RO on all of Hazleton's landlords cannot support a standing claim because it cannot be deemed to invade a legally protected interest. It is not directly traceable to the

alleged constitutional violations because it is severable from the remainder of the RO and can be justified on grounds quite apart from Hazleton's desire to discourage illegal immigrants from living in the City.

To the extent that the landlord Appellees assert that the ordinances conflict with federal immigration law, they lack standing for the additional reason that they fall outside the zone of interest protected by federal immigration law.[9] They assert that the RO and the IIRA interfere with federal efforts to regulate the entry and presence of aliens within the country. But the landlord Appellees are not asserting that the immigration laws grant them any rights or impose obligations on them, let alone that any such obligations conflict with obligations imposed on them by the RO and the IIRA. Rather, at most they are asserting that the RO and the IIRA violate rights bestowed on others by federal immigration law. Under those circumstances. the landlord Appellees lack prudential standing – their claims do not fall within "the zone of interests to be protected . . . by the statute." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474-75 (1982).

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[9] A plaintiffs' standing must be evaluated separately for each of the claims (s)he raises. Plaintiffs must establish "proper jurisdictional bases for each and every claim – particularly when courts are called upon to review a state or local legislative enactment." *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 300 (3d Cir. 2003).

C. Standing Requirements Are Not Relaxed Simply Because Appellees Have Mounted a Facial Challenge to the Ordinances

The district court justified its decision to grant standing to Appellees in part on the ground that Appellees are mounting a facial challenge to the ordinances rather than challenging the ordinances as applied to them. *See, e.g.*, 496 F. Supp. 2d at 493 (a facial challenge "does not require the factual specificity or individual experience required of a lawsuit over a specific event"); *id.* at 535 n.59 (in a facial challenge to the ordinances, courts look only to the language of the ordinances in evaluating due process claims and thus should ignore Hazleton's announced intention to provide tenants an opportunity to participate in proceedings under IIRA § 5); *id*. at 545 n.72 (in a facial challenge to the ordinances, a reviewing court "cannot accept defendant's version of the meaning of" the ordinances, even though it was Hazleton that adopted them). The district court's conclusion that it is afforded broader jurisdiction to review facial challenges to a statute than when reviewing as-applied challenges finds no support in case law; indeed, if anything federal courts are directed to proceed *more* cautiously when hearing facial challenges.

This Court very recently rejected an assertion that "standing requirements should be relaxed" when a plaintiff raises a facial challenge to a statute. *Penn-*

sylvania Prison Society v. Cortes, 508 F.3d 156, 168-69 (3d Cir. 2007) ("None of the cases cited by plaintiffs support a general proposition that facial challenges to the validity of a statute need not satisfy the Article III requirements for standing."). Outside of First Amendment case law (where special rules governing overbreadth apply) the Supreme Court has never recognized the existence of Article III jurisdiction over a facial challenge in the absence of evidence that the plaintiff also had standing to raise an as-applied challenge. *See, e.g., Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) ("As-applied challenges are the basic building blocks of constitutional adjudication.").

Because facial challenges can be so much more disruptive of government functions than are as-applied challenges, courts should if anything be more vigilant in enforcing standing requirements in cases raising facial challenges. As the Supreme Court has explained, "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). By declining to require "factual specificity" from Appellees in meeting their burden to establish standing, the district court inappropriately failed to enforce jurisdictional prerequisites in a case in which such enforcement is particularly important.

II. THE HOUSING PROVISIONS OF THE RO AND THE IIRA DO NOT CONFLICT WITH FEDERAL IMMIGRATION LAW

Amici fully agree with Hazleton's analysis of federal preemption doctrine and thus write only briefly to highlight several points. First, Appellees do not contend that Congress has adopted an express preemption provision addressing the regulation of housing rental by illegal aliens. Accordingly, if Appellees are to prevail on their claim that the housing provisions of the RO and the IIRA are preempted, it can only be on the basis of implied conflict preemption.

Second, there can be little doubt that the regulation of housing is a traditional police power function of state and local governments. Accordingly, there is little to recommend the district court's conclusion that the normal presumption against preemption is inapplicable here simply because the ordinances touch on an issue with "a history of significant federal presence." 496 F. Supp. 2d at 518 n.41. The Supreme Court has stated unequivocally, "In *all* pre-emption cases," the courts "start with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was *the clear and manifest purpose* of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasis added).

Third, the decision below squarely conflicts with the Supreme Court's

decision in *DeCanas v. Bica*, 424 U.S. 351 (1976). *DeCanas* upheld the constitutionality of a California statute that made it a crime to knowingly employ an illegal alien; it rejected a claim that the statute was impliedly preempted by federal immigration statutes. *Id.* at 356-363. The Court explained that while the "[p]ower to regulate immigration is unquestionably exclusively a federal power," the phrase "the regulation of immigration" has a narrow meaning – confined to "essentially a determination of who should or should not be admitted into the country." *Id.* at 354-55. The Court said that State statutes do not constitute the preempted "regulation of immigration" merely because they have an indirect impact on immigration, so long as they do not seek to enlist State power to deport aliens living within the State. *Id.* Because the California employment statute did not seek to deport anyone, the Court held that the statute did not conflict with federal law and thus was not impliedly preempted – even though the statute, by preventing illegal aliens from working, undoubtedly made it very difficult for them to remain within California. Similarly, the housing provisions of the RO and the IIRA may make it difficult for illegal aliens to lease rental housing and thus make it very difficult for them to remain in Hazleton, but *DeCanas* teaches that the ordinances are not impliedly preempted so long as they do not seek to regulate who may and may not remain in the country.

The district court sought to call *DeCanas* into question by noting that in 1986, a decade after the Court handed down its decision, Congress amended the immigration laws to expand considerably federal regulation of the employment of illegal aliens. 496 F. Supp. 2d at 524. *Amici* agree with Hazleton that the 1986 legislation was not intended to overrule *DeCanas*'s holding with respect to State regulation of the employment of illegal aliens. But the district court's reliance on the 1986 legislation serves to highlight the point we are making here: in the 30 years since *DeCanas*, Congress has not adopted *any* legislation attempting to regulate housing for illegal aliens. Accordingly, the district court had no basis for ignoring *DeCanas*'s clear mandate that state and local governments are free to legislate in the area so long as that legislation does not amount to the regulation of immigration.

The district court stated that even when the federal government determines (through its SAVE Program) that an alien is not lawfully present in the U.S., the federal government has not necessarily determined that the alien should be required to leave the country. 496 F. Supp. 2d at 531-32. It held that the housing provisions of the RO and IIRA, by attempting to prevent all illegal aliens from renting in Hazleton, conflict with the federal determination that at least some illegal aliens might be permitted to stay in the country – and thus are

impliedly preempted. *Id.*

Amici note initially that none of the three Appellees who are illegal aliens – John Does 3 and 7 and Jane Doe 5 – claim to fall into this allegedly gray area between legal status and an illegal alien subject to immediate deportation. Any adjudication regarding whether such a gray area really exists should await an as-applied challenge brought by an alien who claims such gray-area status. Also, it simply is not true that Hazleton is deciding for itself which aliens are unlawfully present and thus barred from rental housing in the City. Rather, it proceeds with an enforcement action only after being informed by the federal government, by means of the SAVE Program, that an alien is unlawfully present. If the federal government really believes that an alien has a status superior to that of illegal aliens subject to immediate deportation and thus merits protection from state and local enforcement measures, it is capable of reflecting that belief through the answers it provides in response to SAVE Program inquiries. Under the IIRA, any response other than that the alien is unlawfully present will cause Hazleton to cease all enforcement efforts.

Most importantly, the district court's conclusion that Hazleton is infringing on the role of immigration judges to make admission and removal decisions, *id.* at 533, cannot be squared with the numerous federal immigration

laws that *encourage* assistance from state and local governments in preventing illegal aliens from remaining in this country. For example, Congress adopted immigration reform legislation in 1996 that, among other things: (1) declared illegal aliens ineligible to receive non-emergency public benefits for which at least a portion of the funding comes from the federal government, 8 U.S.C. § 1611; and (2) declared that in most instances States are *prohibited* from providing public benefits to illegal aliens, even if the funding comes solely from the State's own resources. 8 U.S.C. § 1621.[10] A principal goal of the 1996 legislation was "to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). The 1996 legislation – which actively encourages (and in some cases *requires*) state and local governments to take steps designed to discourage aliens from coming to, and remaining in, this country – renders untenable the district court's claim that Congress viewed any such efforts as an unwarranted interference with the

[10] The statutes prohibit providing benefits to aliens that are not "qualified." In general, those not lawfully present in the United States are deemed not "qualified." The federal government established the SAVE Program in part to ensure that state and local governments would have the means to determine whether an alien is not "qualified" and thus ineligible for most public benefits. Providing state and local governments with that capability was particularly important because most federal public welfare programs (*e.g.*, TANF, Food Stamps, Medicaid) are administered at the local level.

authority of immigration judges to make admission and removal decisions.

III. THE HOUSING PROVISIONS OF THE RO AND THE IIRA DO NOT VIOLATE APPELLEES' DUE PROCESS RIGHTS

Amici fully agree with Hazleton's analysis of due process issues and thus, as before, write only briefly to highlight several points.

The "fundamental requirement" of due process is that, if the government seeks to deprive an individual of life, liberty, or property, it must provide the individual "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Of course, in the absence of evidence that the government threatens to deprive an individual of a protected property or liberty interest, there is no obligation to provide the individual with a hearing. The district court held that the IIRA violates the due process rights of tenants "[f]irst and foremost" because it does not require that they be heard in connection with enforcement actions taken against the landlord under IIRA § 5. 496 F. Supp. 2d at 538. As Hazleton points out, that contention is factually incorrect: Hazleton has every intention of notifying tenants of § 5 enforcement actions against their landlords. In any event, the absence of a hearing right would not be constitutionally problematic because § 5 proceedings cannot result in tenants being deprived of any rights. If the result of those

proceedings is that the landlord is directed to seek to evict the tenant, the tenant will still have a fully adequate opportunity in landlord-tenant court to contest the grounds for eviction. *See* IIRA § 7(D)(3).

Second, the district court faulted the IIRA for failing to specify for landlords the types of "identity data" they are to provide to Hazleton regarding a tenant who is the subject of a IIRA § 5 complaint. *Id.* But the court failed to explain how that lack of specificity (which, presumably, Hazleton will supply by means of implementing regulations, if given the opportunity) could deprive a landlord of a meaningful opportunity to be heard. If the "identity data" provided by the landlord and submitted to the federal government by Hazleton is insufficient to permit the SAVE Program to determine whether the tenant is illegally present in the U.S., the deficiency could only inure to the benefit of the landlord – because the IIRA provides that Hazleton is to "take no further action" if the SAVE Program "is unable to verify lawful presence" one way or the other. IIRA § 7.E.

Finally, the district court concluded that proceedings in the Pennsylvania courts would not provide landlords and tenants with a constitutionally adequate hearing, because "the Pennsylvania courts do not have the authority to determine an alien's immigration status"; it held that only an immigration judge has that

authority. *Id.* at 538. The court's holding – made without citation to any authority – is belied by the federal statutes (cited above) that make clear that Congress expects numerous individuals besides immigration judges to make those types of determinations on a daily basis. The only limitation on that authority is that such individuals may not engage in "the regulation of immigration" by deciding who should be admitted into the country and who should be deported. *DeCanas*, 424 U.S. at 354-55. Moreover, the IIRA does not contemplate that City officials and state court judges could second-guess the determination of federal officials that an alien *is* legally present in the U.S. *See, e.g.*, IIRA § 7(G). The district court provided no rationale for assuming that local state courts – as courts of general jurisdiction – would not be authorized to hear the claims of a landlord/tenant that Hazleton had misconstrued communications from federal immigration authorities and that those authorities do not really deem the tenant to be unlawfully present in this country

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment of the district court and direct the dismissal of all claims.

Respectfully submitted,

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Dated: February 19, 2008

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation (WLF), *et al*. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 6,860, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, certificate of bar membership, and this certificate of compliance. The hard copy and the electronic copy of this brief are identical. The electronic copy has been virus scanned using etrust antivirus software, version 7.1.192.

/s/ Richard A. Samp
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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

/s/ Richard A. Samp
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2008, 10 copies of the brief of *amicus curiae* WLF in support of Appellants were deposited in the U.S. Mail, addressed to the Court, and additional copies were deposited in the U.S. mail, addressed as follows:

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