No. 13-531

IN THE

Supreme Court of the United States

THE CITY OF HAZLETON, PENNSYLVANIA,
Petitioner,

—v.—

PEDRO LOZANO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals correctly hold, consistent with *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492 (2012), and decisions of the Fourth, Fifth, Ninth, and Eleventh circuits, that federal law preempts local immigrant harboring ordinances penalizing both owners and occupants of rental housing?

2. Did the court of appeals correctly hold, consistent with *Arizona v. United States* and *Chamber of Commerce v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968 (2011), that federal law preempts a local ordinance regulating on the basis of immigration status virtually every agreement to provide goods or services?

CORPORATE DISCLOSURE STATEMENT

None of the respondents is a corporation that has issued shares to the public, nor is any a parent corporation, a subsidiary, or affiliate of corporations that have done so.

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In addition to the statutes and ordinances listed in the Petition, Section 2005 of the Pennsylvania Third Class City Code, as amended (53 Pa. Stat. Ann. § 37005) provides:

Powers of policemen to arrest

Policemen shall be ex-officio constables of the city, and shall and may, within the city or upon property owned or controlled by the city or by a municipality authority of the city within the Commonwealth, without warrant and upon view, arrest and commit for hearing any and all persons guilty of breach of the peace, vagrancy, riotous or disorderly conduct or drunkenness, or who may be engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of the citizens, or violating any of the ordinances of said city for the violation of which a fine or penalty is imposed.

STATEMENT OF THE CASE

1. In 2006 and 2007, the city council of Hazleton, Pennsylvania enacted a series of ordinances seeking to regulate the presence and activities of the city's residents on the basis of immigration status. Initially, Hazleton enacted an ordinance that prohibited virtually any interaction with "illegal aliens"—including the provision of any goods and services beyond emergency medical care, emergency assistance, and legal assistance—and that required "all official city business, forms, documents,

signage will be written in English only." A3103–06[1] (Hazleton, Pennsylvania Illegal Immigration Relief Act Ordinance, (Ordinance 2006–10)). After plaintiffs filed this suit, Hazleton's city council withdrew that ordinance and enacted new ordinances to replace it. Hazleton amended the ordinances repeatedly throughout this litigation, including during trial in the district court. Pet. App. ("App.") 176. Ultimately, the result was the Illegal Immigration Relief Act Ordinance ("IIRAO"), (Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-7), *id.* at 58–75, and Rental Registration Ordinance ("RO") (Ordinance 2006-13), *id.* at 75–93, (collectively, the "Ordinances"), that are at issue here.

Hazleton's then-Mayor, who was a driving force behind the Ordinances, testified at trial that he and the city council president believed the federal government was not adequately addressing immigration. App. 195 n.44; *see also* A1713 (Mayor Barletta testifying at trial that the city sought to "deter and punish illegal immigrants").[2] Trial testimony established that the city council did not commission or review a single study about the effects of undocumented aliens on crime, the tax base, healthcare, or education in Hazleton, or about the projected impact of the Ordinances on any of these

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[1] References to the Appendix filed by the City in the Third Circuit on February 7, 2008 are given as "A___."

[2] There is no evidence to support Hazleton's claim that the RO was "enacted primarily to address increasing problems with overcrowded apartments." Pet. at 7. Instead, as the Third Circuit explained, the harboring provisions are "a thinly veiled attempt to regulate residency under the guise of a regulation of rental housing," App. 40.

issues. A1436 (trial testimony of Mayor Barletta). But, as the district court found, the Ordinances apparently did have "the effect of increasing racial tension in the City," App. 162 n.31, and discussion of them took place in a "climate of fear and hostility." *Id*. at 165. Latino residents of Hazleton who opposed the Ordinances were subjected to intimidation, harassment, threats, and racist hate mail, and the police had to intervene several times to ensure their safety. *Id.* at 160–65 & nn. 31, 34.

2. On the premise that "[t]he provision of housing to illegal aliens is a fundamental component of harboring," IIRAO § 2(E), the Ordinances work together to create a comprehensive set of prohibitions, penalties, and procedures that eliminate persons who the City regards as "illegal" from rental housing.

Under the Ordinances' harboring provisions, landlords are prohibited from, and penalized for, allowing any adult "illegal alien" to reside in rental housing. IIRAO § 5(A)(1); RO §§ 10.b, 6.a. The City will order landlords to evict such individuals from their rental units, and may request an order closing a rental unit if a landlord fails to comply. IIRAO §§ 5(B)(4), RO § 9. Tenants are similarly prohibited from, and penalized for, allowing unauthorized persons, including family members, to reside with them in their homes. RO § 10.c.

The Ordinances also impose prohibitions and penalties on unauthorized immigrants themselves. Non-citizens the City classifies as "illegal" cannot lawfully enter into leases. IIRAO § 7(B). They cannot lawfully obtain the "occupancy permits" the Ordinances require from all residents of rental

housing. RO § 7.b.1 (individuals must submit "[p]roper identification showing proof of legal citizenship and/or residency"). Lacking occupancy permits, they violate the Ordinances by moving into a rental unit, or even staying with friends or family who live in rental housing. RO §§ 7.b, 10.a. And if they nonetheless manage to obtain rental housing, the City may at any time commence an enforcement action rendering their continued residence a violation of the Ordinances.[3] IIRAO § 5(B)(4); RO § 6.a. *See also* RO § 4.g (City may "pursue[] an enforcement action against any Occupant or Tenant who is deemed to be in violation").

Landlords, tenants, and other occupants who violate the Ordinances are subject to arrest, fines, and potential imprisonment. RO §§ 4.g, 10; IIRAO § 5(B); 53 Pa. Stat. Ann. § 37005 (authorizing arrest for ordinance violations); RO §§ 8.a.1–2 (authorizing police to enforce the RO).

3. Hazleton's employment provisions are written broadly to prohibit any "business entity" from knowingly engaging, directing, or permitting a person who lacks federal work authorization to "perform work" within the city. IIRAO § 4(A). The IIRAO defines "business entity" so expansively that

[3] The Ordinances achieve this result through their licensing scheme for rental units, which is distinct from their occupancy permit scheme for residents. Under the rental unit licensing scheme, landlords must obtain a license for each rental unit. RO § 6.a. If the City determines that an "illegal alien" is residing in a rental unit, it may "deny or suspend" the unit's license. IIRAO § 5(B)(4). Once the license is suspended, any person who "occup[ies], allow[s] to be occupied, advertise[s] …, solicit[s] occupants for, or let[s] to another person" that rental unit violates the RO. RO § 6.a.

it includes, but is not limited to, all "self[-]employed individuals, partnerships, corporations, contractors, and subcontractors." IIRAO § 3(A)(1). The IIRAO provides an equally expansive definition of "work," encompassing every single "activity for which compensation is provided, expected, or due, including but not limited to all activities conducted by business entities." *Id.* § 3(F). Covered "activities" are not limited to the provision of services or labor; included within the Ordinance's sweep is every "agreement to . . . provide a certain product in exchange for valuable consideration." *Id.* § 3(C).

Enforcement of the employment provisions is triggered by a complaint from any resident or municipal employee.[4] *Id.* § 4(B)(1). After a complaint is made, the Hazleton Code Enforcement Office must demand that the employer produce identification documents for the worker. IIRAO § 4(B)(3). If the employer fails to produce the documents within three days or the Code Enforcement Office confirms that a worker lacks authorization to work in the United States, and the employer fails to terminate the employee within three days, Hazleton suspends the business entity's business license. *Id.* § 4(B)(3)–(4).

The IIRAO provides a safe harbor from its penalties for employers who use the E-Verify system, *id.* § 4(B)(5), but affords no affirmative defense to employers who use the I–9 process for employment

[4] The ordinance originally authorized complaints based in part on the worker's perceived ethnicity or race. App. 176. During the trial below, however, Hazleton amended the ordinance to disallow complaints on these bases "'in an effort to . . . remove the equal protection challenge' from the case." *Id.* at 236–37 (quoting Hazleton's trial counsel).

verification.[5] Nor does the IIRAO afford an employer any opportunity for judicial review before sanctions are imposed. *Id.* §§ 4(B)(3)–(4); *see also* IIRAO §§ 7(C)(2)–(3) (tolling three-day period only for further federal administrative inquiry, or if business entity "pursues . . . termination" and worker challenges termination in a state court).

4. A group of business entities, landlords, tenants, and nonprofit organizations filed this suit claiming that the Ordinances violate the Supremacy Clause and other federal constitutional and statutory provisions, as well as Pennsylvania state law. App. 105–108. The district court granted a temporary restraining order enjoining the Ordinances' enforcement, which was extended through final judgment by stipulation of the parties. *Id.* at 105. After a four month discovery period, *id.,* the district court conducted a nine day bench trial, *id.* at 109, that included live testimony from the plaintiffs, various Hazleton officials and a half-dozen expert witnesses.

In July 2007, the district court issued a lengthy decision permanently enjoining the IIRAO and RO on multiple grounds. *Id.* at 94–290. The court found that both the housing and employment provisions were preempted by federal law. The court also found that both provisions violated the Fourteenth Amendment by failing to provide procedural due process guarantees in several ways,

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[5] The federal employment verification procedure commonly known as the "I–9 process" is set forth in the Immigration Reform and Control Act of 1986 ("IRCA"), as codified at 8 U.S.C. §§ 1324a(b)(1)(A–D). *See also* Pet. App. 26 n. 16.

including failing "to provide any notice whatsoever" to tenants and employees. *Id.* at 232, 227–228.

In September 2010, a unanimous Third Circuit panel affirmed the district court's judgment. *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010), *vacated and remanded*, 563 U.S. ___, 131 S. Ct. 2958 (2011). The court of appeals found the housing provisions conflict and field preempted, and the employment provisions conflict preempted. The court of appeals did not reach plaintiffs' other claims, including due process.

Hazleton petitioned for *certiorari*. While that petition was pending, this Court decided *Chamber of Commerce v. Whiting*, 563 U.S. ___, 131 S. Ct. 1968 (2011). The Court granted Hazleton's petition and remanded to the court of appeals to reconsider its conclusions in light of the Court's decision in *Whiting*. App. 3.

On remand, the Third Circuit ordered several rounds of supplemental briefing and held a second oral argument to assess the effects of this Court's intervening decisions in *Whiting* and *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492 (2012).[6] The court of appeals again ruled only on the preemption claims, unanimously "conclud[ing] that both the employment and housing provisions of the Hazleton ordinances are pre-empted by federal immigration law." App. 4.

[6] *Arizona* was issued while this case was pending in the Third Circuit on remand.

REASONS FOR DENYING THE WRIT

Neither of the questions presented warrants the Court's attention.

Five circuits out of six have held state and local harboring laws preempted, and the circuits have *unanimously* rejected laws, like Hazleton's, that directly penalize immigrants themselves for violating anti-harboring provisions. Therefore, any disagreements on the broader question between the five circuits that have held harboring laws preempted and the one outlier circuit are not dispositive here. Moreover, they are not relevant to any ongoing legislative activity in the states and their subdivisions. In addition, the Third Circuit's ruling in this case is a straightforward application of this Court's immigration preemption decisions. The court of appeals correctly concluded that Hazleton may not establish a legal regime that conflicts with federal law by punishing immigrants and landlords without federal direction or supervision for conduct that Congress has decided not to prohibit.

The Third Circuit's ruling on the employment provisions also does not warrant review. Petitioner does not (and could not) suggest that a single other circuit is in conflict with the Third Circuit's decision, or that the employment question is one of national importance. Rather, petitioner simply argues that the Third Circuit misapplied the principles set forth in *Whiting* and *Arizona* to the facts of this case. Petitioner is incorrect; the court of appeals carefully applied this Court's precedent in finding the employment provisions conflict-preempted. And a claimed error in the application of settled law is not a reason to grant the writ.

I. The Third Circuit's Harboring Ruling Does Not Merit Review

A. There Is No Meaningful Circuit Conflict For This Court To Resolve.

The circuit courts are not in "disarray," Pet. at 33, as to whether states and cities are free to create their own schemes to regulate the residence and harboring of noncitizens. In fact, they are in broad consensus on state and local harboring laws overall, and unanimous as to laws that authorize the punishment of the harbored immigrants themselves.

Five courts of appeals—the Third, Fourth, Fifth, Ninth, and Eleventh—have sustained preemption challenges to sub-federal harboring laws. App. 35–57; *United States v. South Carolina*, 720 F.3d 518, 528–32 (4th Cir. 2013); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524 (5th Cir. 2013) (en banc); *Valle del Sol v. Whiting*, 732 F.3d 1006, 1022–29 (9th Cir. 2013); *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1262–67 (11th Cir. 2012) ("*GLAHR*"); *United States v. Alabama*, 691 F.3d 1269, 1285–88 (11th Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 2022 (2013). Only one circuit court—the Eighth—has gone the other way. *Keller v. City of Fremont*, 719 F.3d 931, 939–45 (8th Cir. 2013).

Unlike this case, however, the Eighth Circuit's decision in *Fremont* did not involve a law penalizing unauthorized immigrants themselves. *Every* circuit court that has addressed a law that raises that narrow question—whether a state or locality may use a harboring law to directly penalize unauthorized

immigrants—has held the law preempted. Because this Court could affirm on that narrow ground without addressing any broader conflicts between the Eighth Circuit and its five sister circuits, this case is not a vehicle to resolve those conflicts.

1. Six circuits have addressed state and local harboring laws. Three have addressed state harboring statutes, and three have addressed local ordinances that focus on harboring in rental housing.

The state statutes have all been held preempted. In unanimous rulings in August 2012, the Eleventh Circuit, drawing primarily on this Court's decisions in *Arizona* and *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), determined that Georgia's and Alabama's harboring statutes are field and conflict preempted. *GLAHR*, 691 F.3d at 1262–67; *Alabama*, 691 F.3d at 1285–88. In the *Alabama* case, the Eleventh Circuit specifically addressed—and held preempted—a provision of Alabama's law that defined "entering into a rental agreement . . . to provide accommodations" as harboring.[7] 691 F.3d at 1288. In July 2013, the Fourth Circuit unanimously held the South Carolina harboring statute preempted on field and conflict preemption grounds similar to the Eleventh Circuit's. *South Carolina*, 720 F.3d at 528–32. In October 2013, the Ninth Circuit followed suit, holding the Arizona harboring statute both field

[7] In Alabama's subsequent *certiorari* petition, the state declined to seek review of that aspect of the Eleventh Circuit's decision. Petition for Writ of Certiorari, *Alabama v. United States*, No. 12-884, at 10 n.*.

and conflict preempted.[8] *Valle del Sol*, 732 F.3d at 1022–29.

Two of the three local ordinances have also been struck down on preemption grounds. In June 2013, a divided panel of the Eighth Circuit issued the only circuit court decision holding a state or local harboring law not preempted. *Fremont*, 719 F.3d at 939–45. That decision, however, was followed in July 2013 by the *en banc* decision of the Fifth Circuit holding the Farmers Branch ordinance preempted, *Farmers Branch*, 726 F.3d at 526–39, and the unanimous decision of the Third Circuit in this case.

Petitioner relies on two techniques to try to conjure greater confusion among the circuit courts than exists in reality. First, petitioner ignores the cases involving state harboring statutes almost entirely, confining any mention of them to a footnote and a single sentence near the end of the brief. Pet. at 15 n.4, 37–38. But even these passing references recognize that the state and local rulings are intertwined and in agreement.[9] *See id.* at 15 n.4 (asserting that this case is "an ideal vehicle for addressing the preemption arguments in both [state and local] contexts"); 37–38 (acknowledging that the Eleventh, Fourth, and Ninth Circuits all agree with the decision in this case). That agreement is

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[8] In *Valle del Sol*, Judge Bea did not express a view as to the merits of the preemption claim, explaining that "[b]ecause this case is resolved on other grounds . . . I believe the court should not reach the preemption issue." 732 F.3d at 1029 (Bea, J., concurring and dissenting)

[9] Petitioner nonetheless fails to acknowledge that the provisions addressed and invalidated in *Alabama* included one specifically directed at rental housing.

highlighted in the decision below, where the court of appeals approvingly cited the Eleventh and Fourth Circuits' decisions addressing state statutes. App. 40–45. Similarly, Judge Bright, dissenting in *Fremont*, did so in part because the majority opinion conflicts with the Eleventh Circuit's state statute decisions. *Fremont*, 719 F.3d at 957, 959 (Bright, J., dissenting). The agreement among the circuits is much more widespread and robust than the petition suggests.

Second, petitioner attempts to manufacture conflicts among cases that reach the same result by devising a sort of box score for the three circuits that it does focus on, and assigning each judge on each case an up-or-down vote on each of type of implied preemption. But that attempt rests on the misguided premise that every time a judge decides not to address a potential ground for a ruling, the judge has "rejected" that ground.[10] And it incorrectly elevates differences among individual judges to the same level of importance as conflicts between the federal circuits.

In fact, all five circuit courts that have found preemption agree that the laws are conflict preempted. App. 47 ("the housing provisions conflict with federal law"); *Farmers Branch*, 726 F.3d at 526 ("the Ordinance's criminal offense and penalty

[10] For example, petitioner counts all of the judges in the *Farmers Branch* plurality as having rejected field preemption, Pet. at 27–28, even though the plurality opinion explicitly states that "we need not reach" that issue, 726 F.3d at 537 n.17, and four of the five judges in the plurality did not join a separate concurrence, *id.* at 560–61 (Higginson, J., concurring), that actually does reject a field preemption claim.

provisions and its state judicial review process conflict with federal law"); *South Carolina*, 720 F.3d at 530 ("Sections 4(A) and (C) are . . . conflict preempted"); *id.* at 531 (Sections 4(B) and (D) "are conflict preempted"); *Valle del Sol*, 732 F.3d at 1026 ("Section 13–2929 is Conflict Preempted"); *Alabama*, 691 F.3d at 1288 (harboring provisions "are conflict preempted"); *GLAHR*, 691 F.3d at 1265 ("section 7 presents an obstacle to the execution of the federal statutory scheme"). And, although the controlling opinions of the five circuits are not identical, none of them disagrees with any of the principles stated by any of the others. Only the Eighth Circuit has ruled otherwise.

2. Hazleton's harboring law authorizes penalties not only against purported "harborers" but also against the "harbored" immigrants themselves. No circuit has upheld such a law in the face of a preemption challenge. Therefore, the broader conflict among the circuits that petitioner asserts is both overstated and not a reason to take up this case.

As described above, Hazleton's Ordinances unambiguously prohibit those the City regards as unauthorized immigrants from occupying rental units. Individuals who do either of those things violate the Ordinances (primarily the RO). IIRAO § 5(B); RO §§ 6.a, 7.b. That triggers the penalty provisions, and subjects the immigrants to potential arrest and detention. RO § 10.a (setting penalties); 53 Pa. Stat. Ann. § 37005 (authorizing arrest for violations of local ordinances).

Although the court of appeals did not focus on this specific ground in its decision below, the Fourth, Fifth and Eleventh Circuits have all recognized that

laws penalizing harbored immigrants raise unique preemption problems that distinguish them from laws penalizing only harborers. *See South Carolina*, 720 F.3d at 530 (South Carolina's provisions punishing unauthorized immigrants for allowing themselves to be transported, sheltered or harbored within the state "stand as an obstacle to the execution of the federal removal system and interfere with the discretion entrusted to federal immigration officials" by "[i]n essence . . . criminaliz[ing] unlawful presence"); *Alabama*, 691 F.3d at 1288 (Alabama provision prohibiting "conspiracy to be transported" conflicts with federal harboring law, which does not reach such activity); *Farmers Branch*, 726 F.3d at 532 (ordinance that "reaches non-citizens who may not have lawful status but face no federal exclusion from rental housing, and exposes [them] to arrests, detentions, and prosecutions based on Farmers Branch's assessment of 'unlawful presence'" is preempted).

Petitioner's attempt to manufacture a conflict rests entirely on the Eighth Circuit's decision in *Fremont*, but the ordinance at issue in that case does *not* include provisions that penalize unauthorized immigrants for remaining in rental housing in the city. *Compare* Fremont Municipal Code § 6-428 (3)(H)–(L) (violations apply only to landlords, agents, and lessors) *with* RO §§ 6.a, 10.a (prohibiting the actions of those who "occupy" rental units and applying penalties to "any Person") *and* Farmers Branch Ordinance 2952 §§ 1(C)(1–3); 3(C)(1–3) (provisions penalizing residents). And nothing in *Fremont* forecloses the argument that an ordinance penalizing harbored immigrants would impermissibly conflict with federal law. The Eighth

Circuit's decision simply does not address, even implicitly, whether an ordinance allowing for *arrest and prosecution* of purportedly unauthorized immigrants based on their immigration status and without federal direction or supervision would conflict with federal law. *Cf. Farmers Branch*, 726 F.3d at 534–36. *Fremont* also does not address whether such a provision would conflict with Congress's decision not to criminalize unauthorized presence, or its decision not to penalize the individuals being harbored, together with their harborers, in the federal statute. *Cf. South Carolina*, 720 F.3d at 529–30; *Alabama*, 691 F.3d at 1288.

In sum, there is no disagreement between the circuits on whether a law that penalizes harbored immigrants, like the one at issue here, is preempted. Hazleton's ordinance may be invalidated on the narrow ground that it subjects unauthorized immigrants to arrest and other penalties based on their immigration status, and the Court's affirmance on this ground would leave unresolved the Eighth Circuit's erroneous holding. Thus, even if the Court were inclined to address the separate disagreement between five circuits and the outlier Eighth Circuit, this case does not present a good vehicle for doing so.

B. The Harboring Ruling Does Not Present An Issue of National Importance.

In addition to the fact that any conflicts or tensions between the Eighth Circuit and its five sister circuits are not determinative of the result here, the future of the Fremont ordinance is itself uncertain. After the Eighth Circuit ruled, the Fremont city council further postponed the effective

date of the ordinance and set a special election for February 11, 2014, at which time the voters will decide whether to repeal its harboring provisions.[11] We are aware of no other law in the Eighth Circuit raising the same or similar issues.

More generally, nothing suggests that legislatures, government officials, or courts need further guidance on this matter at all—much less on a nationwide basis. To respondents' knowledge, no state harboring statutes have been enacted since 2011, when a small number of Arizona SB 1070 copycat laws were passed. After that single year of activity, no similar laws have emerged—indeed, no state has even enacted a new statute modeled on Section 2(B) of the Arizona law, despite this Court having declined to enjoin that provision. All of the harboring statutes passed as part of the SB 1070 wave and subsequently challenged are now enjoined, and several of the states have agreed to permanent injunctions after losing in the circuit courts. *See Georgia Latino Alliance for Hum. Rights v. Deal*, No. 1:1cv1804 (N.D. Ga. Mar. 20, 2013) (Doc. No. 143); *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11cv2484 (N.D. Ala. Nov. 25, 2013) (Doc. No. 180).

At the local level, similarly, a brief spell of legislative activity has been followed by years of disinterest. In 2006, Hazleton enacted the first version of its harboring ordinance, and a few copycat ordinances (including Farmers Branch's original ordinance) followed in the same year. Several of

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[11] *See* Joe Duggan and Alissa Skelton, Fremont Voters to Decide on Repeal of Immigrant Housing Ordinance, Omaha World-Herald, Nov. 13, 2013, http://www.omaha.com/article/20131112/NEWS/131119584

those ordinances have since been repealed or permanently enjoined. Some or all of the remaining ordinances are formally suspended, and all are invalid under the established law of their circuits.[12] Since 2006, it appears, all that municipal legislatures have done in this area (other than repeal existing ordinances) is to amend or replace the existing Farmers Branch and Hazleton ordinances and to enact a single new ordinance in Fremont in 2010.

Notably, no municipality, state, or legislator has filed an amicus brief in support of the petition. As matters percolate further, consequential areas of disagreement on this or related immigration preemption issues may emerge among the circuits.

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[12] Apart from Hazleton, Farmers Branch, and Fremont, respondents are aware of nine similar laws enacted in Escondido, California (city stipulated to permanent injunction in 2006); Cherokee County, Georgia (suspended, and invalid under *Alabama*); Valley Park, Missouri (repealed without ever being enforced); Riverside, New Jersey (same); Altoona, Pennsylvania (same); Bridgeport, Pennsylvania (invalid under *Hazleton*); Hazle Township, Pennsylvania (same); Mahanoy City, Pennsylvania (same); and West Hazleton, Pennsylvania (same). *Accord* Justin Peter Steil, "Movement Success, Countermovement Failure," Dec. 18, 2013, at 1–2, *available at* http://ssrn.com/abstract=2369505.

A web post cited in the petition, Pet. at 12 n.2, suggests that five other municipalities may have enacted "laws intended to prevent unauthorized immigrants from obtaining housing," but does not specify which municipalities, or describe the laws any further. In any event, that source also states that "there are no reported cases of [any of the laws] being implemented on a sustained basis." Kevin O'Neil, "Hazleton and Beyond: Why Communities Try to Restrict Immigration," Migration Policy Institute Study (Nov. 2010), *available at* http://www.migrationinformation.org/Feature/display.cfm?ID=805.

Given the situation in the circuits and on the ground, however, this simply is not an issue of national importance at this time.

C. The Third Circuit Correctly Applied Established Rules When It Held the Harboring Provisions Preempted

The decision below rests on straightforward applications of this Court's ruling in *Arizona v. United States*. Under that decision, and this Court's earlier precedents, Hazleton's harboring provisions create precisely the sort of interference with federal law that the Supremacy Clause prohibits.

First, this Court emphasized in *Arizona* that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials," and that both Section 6 and Section 3 of S.B. 1070 impermissibly circumvent federal discretion by allowing state officials to take action against immigrants without the federal government deciding that such action is appropriate. 132 S. Ct. at 2499; *see id.* at 2506 (under Section 6, "[t]he result could be unnecessary 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."); *id.* at 2503 (under Section 3, "the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.").

Applying *Arizona*, the court of appeals concluded that Hazleton's housing provisions

likewise undercut federal discretion, leaving local authorities to make their own decisions as to which non-citizens it is appropriate to target and penalize. App. 46. ("[T]he housing provisions constitute an attempt to unilaterally attach additional consequences to a person's immigration status with no regard for the federal scheme, federal enforcement priorities, or the discretion Congress vested in the Attorney General."). The court of appeals found that—just as Arizona attempted to do by enacting the preempted provisions of S.B. 1070—"[t]hrough the housing provisions, Hazleton is seeking to achieve 'its own immigration policy,' one which will certainly result in 'unnecessary harassment of some aliens . . . whom federal officials determine should not be removed.'" *Id.* at 47 (quoting *Arizona*, 132 S. Ct. at 2506). Accordingly, the housing provisions conflict with federal law by impermissibly "undermining the comprehensive procedures under which federal officials determine whether an alien may remain in this country. . . ." *Id.*

Second, in *Arizona*, the Court underlined that even a "provision [that] has the same aim as federal law and adopts its substantive standards" can conflict with federal law. 132 S. Ct. at 2502. The Court described as "unpersuasive on its own terms" Arizona's argument that the state law escaped conflict preemption because it mirrored federal law's aims and substantive standards. *Id.* And it struck down provisions that would have created "an inconsistency between [state] and federal law with respect to penalties," *id.* at 2503, or "a conflict in the method of enforcement" between state and federal laws, *id.* at 2505, or otherwise "stand[] as an obstacle

to the accomplishment and execution of the full purposes and objectives of Congress," *id*.

Applying *Arizona*, the Third Circuit thus rejected Hazleton's "insist[ence that] there is no conflict pre-emption because it is merely engaging in 'concurrent enforcement' of federal immigration laws," explaining that this argument "simply cannot be reconciled with the Supreme Court's holding in *Arizona*." App. 50. And it concluded that, like S.B. 1070's preempted sections, the Hazleton harboring scheme directly undermines federal law. In particular, the Hazleton Ordinances define as "harboring" numerous activities that are not prohibited by 8 U.S.C. § 1324, including simple rental and occupancy of housing. *Id*. at 51–52.

Third, *Arizona* made clear that the decisions about whether noncitizens should be removed "touch on foreign relations and must be made with one voice.'" 132 S. Ct. at 2506–07. Affirming longstanding precedent, the Court explained 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*. at 2498. It is thus the federal government's sole prerogative "to determine immigration policy," including which aliens may reside in the United States. *Id.*

In accordance with *Arizona*, the court of appeals found that Hazleton's attempt to "unilaterally prohibit those lacking lawful status from living within its boundaries" constituted an "obvious trespass into matters that must be left to the national sovereign." App. 47, 50. This trespass

both conflicts with federal law, *id.* at 47, and is field preempted because it "go[es] to the core of an alien's residency"—something which can only be decided by the federal government, *id.* at 40.

Finally, *Arizona* reiterated that Congress "has occupied the field of alien registration," rendering "even complementary state regulation . . . impermissible." 132 S. Ct. at 2502. Applying this well-established principle, the court of appeals concluded that because "[t]he RO's rental registration scheme serves no discernible purpose other than to register the immigration status of a subset of the City's population," the RO's scheme "can only be viewed as an impermissible alien registration requirement." App. 57. The court of appeals also applied *Arizona's* field-preemption analysis to conclude, in accord with the Fourth, Ninth, and Eleventh Circuits, that the harboring provisions are field-preempted by federal harboring law. App. 40–43.

The Court's precedent was carefully and correctly applied by the Third Circuit, and there is no need for further review.

II. The Third Circuit's Employment Ruling Does Not Merit Review

Petitioner does not argue that even a single other circuit is in conflict with the unanimous decision of the Third Circuit as to the employment provisions—nor could it, because no other circuit has considered an employer sanctions law since *Whiting*. Nor does it argue that the Third Circuit's decision enjoining provisions of a single municipal law has any national importance for any other reason.

Instead, petitioner asserts that the writ should be granted simply because it disagrees with the court of appeals' conclusion, after careful consideration of this Court's decisions in *Whiting* and *Arizona*, that Hazleton's extraordinarily broad employment provisions are preempted by federal law.

Petitioner's objection boils down to this: the Third Circuit "reached the same decision again" after this Court decided *Whiting*; therefore it could not have "attempt[ed] to conform its decision to *Whiting*." Pet. 16. The court's thorough decision easily refutes petitioner's claim.

Indeed, the court of appeals understood that its pre-*Whiting* conclusions had to be thoroughly reconsidered, and forthrightly found that *Whiting* "rejected or otherwise undermined" certain rulings in its earlier decision. App. 15–17. However, after applying *Whiting*'s principles to the ordinance at issue in this case, the court of appeals again concluded that there are irreconcilable conflicts between IRCA and Hazleton's law. *Id.* at 34. Although petitioner characterizes these conflicts variously as "minor," Pet. 17, and "picayune," *id.* at 16, they go the heart of Congress's carefully-drawn scheme of employer sanctions.

The court of appeals followed *Whiting* by undertaking a conflict preemption analysis of Hazleton's employment provisions. App. 17–34. That analysis led to a different conclusion as to Hazleton's scheme than the Court reached in analyzing Arizona's law in *Whiting*, but that is because the laws themselves are significantly different.

First, in contrast to the law upheld in *Whiting*, the "extraordinarily broad" definitions of the persons, entities, and activities covered by the IIRAO reach virtually "any activity that is even remotely economic in nature, conducted by any person or entity in Hazleton." App. 21–22. That contradicts Congress's limitation of "the scope of IRCA's coverage to exclude independent contractors" by "purposely stretch[ing] the IIRAO to include them." App. 25. And, more generally, "prohibiting such a broad array of commercial interactions, based solely on immigration status . . . is untenable in light of Congress's deliberate decision to limit IRCA's reach to the employer-employee relationship." *Id*. at 22.

The direct and severe conflict here is unlike anything the Court considered in *Whiting*, which involved a state employment statute that "closely tracks IRCA's provisions in all material respects" and "trace[s] the federal law." 131 S. Ct. at 1981–82. The Third Circuit's holding that the vast reach of Hazleton's law conflicts with the federal scheme is in complete accord with the principles set forth in *Whiting*. *See* App. 22. This conclusion finds further support in this Court's decision in *Arizona* that Section 5(C) of Arizona's S.B. 1070 impermissibly conflicted with federal law by imposing liability on actors outside of the express limitations of IRCA. *Id.* at 24–25.

Second, the IIRAO imposes "sanctions on employers who have complied with, and relied upon, the I–9 process." *Id.* at 30. In contrast, this Court emphasized that the law in *Whiting* "provides employers with the same affirmative defense for good-faith compliance with the I–9 process as does

the federal law." 131 S. Ct. at 1982. The court of appeals' conclusion that "[t]he IIRAO's employment provisions . . . contravene congressional intent" by eliminating the I–9 affirmative defense, App. 27, is entirely compatible with *Whiting*.

Third, unlike the Arizona law upheld in *Whiting*, which "substantially track[ed]" the procedural protections for employers provided by federal law, the "IIRAO provides substantially fewer procedural protections," including the imposition of sanctions without any judicial review. *Id*. at 31–33. The court of appeals found this, too, to be a significant conflict between federal law and the Hazleton ordinance.

In light of the serious conflicts between the local ordinance and IRCA, and the substantial differences between Hazleton's ordinance and the Arizona law upheld in *Whiting,* the court of appeals reached the sensible conclusion that *Whiting* did not render IIRAO a lawful business licensing ordinance. Petitioner's disagreement with this outcome is insufficient reason to grant the writ.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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