No. 13-531

In The Supreme Court of the United States

THE CITY OF HAZLETON, PENNSYLVANIA,

Petitioner,

v.

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 DOMINICANA OF HAZLETON, INC.; HAZLETON HISPANIC BUSINESS ASSOCIATION; PENNSYLVANIA STATEWIDE LATINO COALITION; JANE DOE 5; JOHN DOE 7; AND JOSE LUIS LECHUGA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

KRIS W. KOBACH
Counsel of Record
KOBACH LAW, LLC
4701 N. 130th St.
Kansas City, KS 66109
(913) 638-5567
kkobach@gmail.com

GARRETT R. ROE
MICHAEL M. HETHMON
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW
Suite 335
Washington, D.C. 20001
(202) 232-5590

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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PETITIONER'S REPLY

I. The Respondents Cannot Mitigate the Circuit Split.

A. The Question of Whether the Harbored Illegal Alien Faces a Penalty is Immaterial.

The Respondents argue that because a similar ordinance reviewed by the Eighth Circuit in *Keller v. Fremont*, 719 F.3d 931 (8th Cir. 2013), *reh'g en banc denied*, ___ F.3d ___ (Oct. 17, 2013), did not impose any penalty on harbored aliens, but the Hazleton ordinances do, the yawning circuit split should be ignored. Resp. Br. 14-15. There are three problems with their argument.

First, they misrepresent the Hazleton ordinances. The rental provisions of the Illegal Immigration Relief Act Ordinance ("IIRAO") impose no penalty whatsoever on unlawfully present alien tenants who occupy apartments in the City. *See* App. 67-70. Penalties are imposed only on the owner of the dwelling unit. IIRAO §§5.B(5)-(8). App. 69-70. The Rental Registration Ordinance ("RO") merely establishes a licensing system for apartment owners and a requirement that tenants obtain an occupancy permit. RO §§6-7. App. 85-88. Its focus is not illegal immigration. Rather, it imposes duties upon landlords concerning inspections, code compliance, cleaning, repair, pest control, and snow removal. RO §§3.a-3.d. App. 80-81. Occupants are only obligated to obtain a permit prior to occupancy and to refrain from allowing unpermitted individuals to occupy the apartment with them.

RO §§7.b., 10.c. App. 87-88, 91. The City "shall issue an Occupancy Permit to the Occupant immediately" upon completion of the permit application form. RO §7.b.2. App. 88. The City does not attempt to verify any of the information provided on the form, either before or after its issuance. The RO merely provides the City with a current list of apartment owners and occupants, in the event that the City investigates a complaint filed under the IIRAO. ROA Appx. A1852 (Trans. vol. 5, p. 119). In short, the Respondents have attempted to fabricate a distinction between the Hazleton and Fremont ordinances where none exists.

Second, the Eighth Circuit did not suggest that this aspect of the Fremont ordinance was dispositive, or even important, to its conclusion that the ordinance was not preempted. If this were such an important distinction, the court would have at least mentioned it, but the court did not. *See Fremont*, 719 F.3d at 937-45. Instead, the Eighth Circuit considered and rejected the preemption analysis of the panels in the Third and Fifth Circuit without even mentioning this distinction: "On this issue, we disagree with a pair of now-vacated panel decisions of our sister circuits. . . ." *Id.* at 942.

Third, the Respondents are also misleading when they refer to the state laws prohibiting harboring that have been litigated in the Fourth, Ninth, and Eleventh Circuits. They claim that "[e]very circuit court that has addressed . . . whether a state or locality may use a harboring law to directly penalize unauthorized immigrants – has held the law preempted."

Resp. Br. 9-10. However, neither the Arizona statute nor the Georgia statute imposed any penalty on the harbored alien. *See* Ariz. Rev. Stat. §13-2929; Ga. Code Ann. §16-11-201. Only the South Carolina and Alabama statutes did. *See* Act 69, 2011 S.C. Acts (S.B. 20) §4; Ala. Code §31-13-13. Thus, according to the Respondents' mistaken logic, the Arizona and Georgia cases should have been analyzed differently. In short, the Respondents' purported distinction cannot mask the disarray among the circuits.

B. The Split Among the Circuits Regarding Field Preemption Must be Addressed.

The Respondents admit that there is a circuit split between the Third, Fifth, and Eighth Circuits regarding ordinances that prevent the harboring of illegal aliens in rented apartments. Resp. Br. 8. However, they attempt to make the split seem more lopsided by including in their analysis the recent decisions of the Fourth, Ninth, and Eleventh Circuits finding state criminal laws against harboring to be preempted. Resp. Br. 10-13. Although those cases involved numerous inapposite claims and statutory provisions, there is one argument common to both the state law cases and the cases regarding local ordinances. All reviewed the field preemption argument that, by enacting 8 U.S.C. §1324(a)(1), Congress occupied the field of alien harboring and thereby displaced even consistent state and local laws.

The argument is that Congress somehow created a *comprehensive* regulatory scheme that occupies the field by merely enacting a few sentences criminalizing harboring. The Eighth Circuit strongly rejected that argument: "We find nothing in an anti-harboring prohibition contained in one sub-part of one subsection of 8 U.S.C. §1324 that establishes a 'framework of regulation so pervasive . . . that Congress left no room for the States to supplement it. . . .'" *Fremont*, 719 F.3d at 943 (*quoting Arizona v. United States*, 132 S.Ct. 2492, 2501 (2012)).

More importantly, the argument also directly conflicts with this Court's holding in *De Canas v. Bica*, 424 U.S. at 351 (1976). As Judge Owen explained in her Fifth Circuit dissent, "the Supreme Court unequivocally held in *De Canas* that the federal harboring laws do not give rise to field preemption." *Villas at Parkside Partners v. Farmers Branch*, 726 F.3d 524, 555 (2013), *cert. pending* (*quoting De Canas*, 424 U.S. at 361). Even Judge Higginson, who authored the principal plurality opinion in *Farmers Branch*, concurred specially to point out that this field preemption argument is meritless: "In my view, the Supreme Court's unanimous decision authored by Justice Brennan in *De Canas v. Bica* . . . forecloses this argument." *Id.* at 560.

Nevertheless, the Third Circuit embraced the argument. App. 42-43. So too did the Ninth Circuit in *Valle del Sol v. Whiting*, 732 F.3d 1006, 1023-26 (9th Cir. 2013), *cert. pending* at Docket No. 13-806 (filed Jan. 6, 2014). Neither the Third Circuit nor the Ninth

Circuit even attempted to explain how this holding could be reconciled with *De Canas*.

On January 6, 2014, the State of Arizona filed a petition for writ of certiorari with this Court in *Valle del Sol*. Although that petition raises various standing questions not relevant to the instant case, it also seeks review of the field preemption holding of the Ninth Circuit. *See Valle del Sol* Cert. Pet. 27-28.

Once this Court has given a definitive interpretation of a statute such as 8 U.S.C. §1324(a)(1), it is an authoritative statement as to the meaning of the statute. *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312-13 (1944). The fact that multiple circuits have ignored this Court's *De Canas* holding with respect to the federal harboring statute is generating confusion in state legislatures and city councils. It also raises a number of perplexing questions. How can a circuit simply disregard this Court's holding without explanation? Is the *De Canas* holding no longer valid in those circuits? What should a city attorney in one of those circuits advise his client when asked whether there is field preemption in the harboring field? Granting the writ is therefore necessary to correct the errant circuits and clarify that *De Canas* remains good law.

II. The Third Circuit's Decision Cannot be Reconciled with *Arizona*.

Presented with six specific conflicts between the decision below and *Arizona*, Cert. Pet. 33-47, the

Respondents do not dispute the existence of five of those conflicts. *See* Resp. Br. 18-20. Instead, they attempt to show ways in which the decision below might appear to reflect other portions of the *Arizona* opinion. Even this response falls short.

A. The Third Circuit's Inconsistency with *Arizona* Cannot be Justified By Calling the Ordinances an Alien Registration System.

The Respondents claim that the opinion below reflects the field preemption holding of *Arizona*, where this Court held that Arizona's imposition of State penalties for violations of the federal alien registration law were field preempted. Resp. Br. 21. Alien registration is the *only* immigration-related field in which this Court has ever found field preemption. *Arizona*, 132 S.Ct. at 2501-03; *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941).

However, the Eighth Circuit thoroughly examined the similar Fremont ordinance and concluded it was nothing like an alien registration system. Like the Hazleton ordinances, the Fremont ordinance "requires *all* renters, including U.S. citizens and nationals, to obtain an occupancy license . . . It does not apply to all aliens – it excludes non-renters." *Fremont*, 719 F.3d at 943 (emphasis in original); *see also* RO §§6-7, App. 85-88. Indeed, more citizen tenancies than alien tenancies are covered by the ordinances. Thus, "[t]he occupancy license scheme at

issue is nothing like the state registration laws invalidated in *Hines* and in *Arizona*." *Fremont*, 719 F.3d at 943.

As the Eighth Circuit correctly pointed out, accepting this field preemption argument "would mean that any time a State collects basic information from its residents, including aliens – such as before issuing driver's licenses – it impermissibly intrudes into the field of alien registration and must be preempted. *It defies common sense to think that Congress intended such a result.*" *Fremont*, 719 F.3d at 943 (emphasis supplied). Nevertheless, the court below agreed with the argument. App. 56.

This is not a minor difference of interpretation between the circuits. This is a 180-degree divergence, with the Eighth Circuit stating that the *Arizona* field-preemption holding is irrelevant to this kind of ordinance, versus the Third Circuit taking the opposite position which the Eighth Circuit says "defies common sense." Granting the writ is necessary to correct the plainly erroneous holding of the court below.

B. The Ordinances Do Not Regulate the Presence of Aliens.

The Respondents also liken the ordinances to Section 6 of the law in *Arizona*, which attempted to give state police the authority to independently determine if aliens were removable, without input from the federal government. *See Arizona*, 132 S.Ct. 2506-07. In so doing, they repeatedly mischaracterize

the ordinances in order to create the impression that the City seeks to independently remove illegal aliens. They claim that the City enacted its ordinances "to regulate the presence" of illegal aliens. Resp. Br. 1. And, they suggest that the ordinances "criminalize [the] unlawful presence" of illegal aliens, effectively removing them from the United States. Resp. Br. 15.

But the ordinances do neither. They prohibit only the employment of unauthorized aliens and the knowing harboring of illegal aliens in rented apartments. These are actions of a more limited scope – actions that fall squarely within the police powers of the states. "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state," including protecting the "lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens." *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976). Similarly, cities may exercise their police powers to regulate, among other things, apartment buildings themselves, and the occupants permitted therein. *Pennell v. City of San Jose*, 485 U.S. 1, 12-14 (1988) (rent control is within police power); *Block v. Hirsh*, 256 U.S. 135 (1921) (compelling landlords to allow tenants to stay beyond their lease period is within police power). The Hazleton ordinances exercise only those limited police powers. The *presence* of illegal aliens in the City is not regulated in any manner. Illegal aliens may reside in the City in owned accommodations, shop in the City, and be present in the City.

The Eighth Circuit was presented with the same argument against the Fremont ordinance, and the court rejected it forcefully:

> As the Ordinance's rental provision would only indirectly effect the "removal" of any alien from the City, this reasoning is far too broad. It would apply equally to the California law upheld in *De Canas* and the Arizona law upheld in *Whiting*, because denying aliens employment inevitably has the effect of "removing" some of them from the State. . . . Conflict preemption requires far greater specificity.

Fremont, 719 F.3d at 944; *Farmers Branch*, 726 F.3d at 580 (Jones and Elrod, J.J., dissenting). The same analysis applies here. The Third Circuit's overbroad definition of "removal" must be corrected to avoid further misapplication of *Arizona*.

III. The Third Circuit's Dodge of *Whiting* Cannot be Justified.

The City has pointed out that the Third Circuit invalidated the employment sections of the IIRAO by offering precisely the same arguments made by Justice Breyer in his *Whiting* dissent. Cert. Pet. 17-20. Specifically, Justice Breyer would have held the Legal Arizona Workers Act ("LAWA") to be preempted because of three differences between that law and the Immigration Reform and Control Act of 1986 ("IRCA"). *See id.*; *Whiting*, 131 S.Ct. at 1990-92. The court below relied on the same three differences to come to

the conclusion that the employment provisions of the IIRAO were still preempted after this Court's post-*Whiting* GVR. It cannot be correct for a circuit court receiving a GVR to respond by relying on the position advanced by the dissent.

Tellingly, the Respondents offer no answer to this flaw in the holding of the court below. *See* Resp. Br. 21-24. Instead, the Respondents dodge the issue and incorrectly claim that the Petitioner "simply ... disagrees with the court of appeals' conclusion." *Id.* at 22. While the City obviously disagrees with the court's conclusion, that is not the point. The point is that the Third Circuit's preemption analysis was considered and rejected by the *Whiting* majority.

Rather than reconsidering its opinion in light of the majority holding of *Whiting*, the Third Circuit offered a perfunctory review of *Whiting* that suggested it was reconsidering its prior ruling. But the court then reissued its ruling by following the reasoning of Justice Breyer's dissent. The same minor differences existed between the LAWA and IRCA as exist between the IIRAO and IRCA. Yet this Court found no conflict preemption in the former instance. That is because "'[t]he proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.'" *De Canas*, 424 U.S. at 357 n.5 (*quoting Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973)) (internal quotation omitted).

The Respondents also argue that this Court should not grant the writ because the Petitioner "does not argue that even a single circuit is in conflict with" the court below regarding the IIRAO employment provisions. Resp. Br. 21. Of course there is no circuit split on the matter. That is because *Whiting* settled the question prior to the Third Circuit's ruling. State laws that stripped business licenses from employers who employed unauthorized aliens, such as Missouri's statute with language identical to that in the IIRAO, were *never even challenged* in the wake of *Whiting*.[1] In *United States v. Alabama*, 691 F.3d 1250 (11th Cir. 2012), *cert. denied*, ___ U.S. ___, 133 S.Ct. 2022 (2013), the plaintiffs challenged a wide variety of provisions in Alabama's omnibus illegal immigration law. But they left the business license section untouched because *Whiting* had foreclosed that challenge. *See* Ala. Code §31-13-15. The employment sections of both the Missouri law and the Alabama law were based in part on the Hazleton IIRA model. But *Whiting* made clear to all would-be plaintiffs that those provisions are not preempted.

Only in the Third Circuit is the *Whiting* holding disregarded. The court below had an opportunity to correct its erroneous decision after the GVR, but

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[1] *See, e.g.*, Mo. Rev. Stat. §285.535: "The correction of a violation with respect to the employment of an unauthorized alien shall include the following actions: (1)(a) The business entity terminates the unauthorized alien's employment. . . ." Mo. Rev. Stat. §285.535. That is virtually identical to IIRAO §7.C, App. 72.

declined to do so. Granting the writ is necessary to enforce this court's unequivocal holding.

IV. The Circuit Split and the Third Circuit's Divergence from *Whiting* Have Created Confusion in an Area of Intense National Interest.

Finally, the Respondents urge this Court to ignore the circuit split and the Third Circuit's deviation from *Whiting* because, they declare, cities and states have not recently enacted measures addressing illegal immigration.[2] Resp. Br. 16-17. The Respondents ignore the more than 500 immigration-related bills that were considered in state legislatures in 2013 alone.[3]

However, the volume of state and local immigration measures does not express the real concern this case presents. After the Third Circuit's holding, state

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[2] The Respondents also argue that the ordinances were not based on appropriate consideration of "the effects of undocumented aliens on crime [or] the tax base" and suggest that they reflected racial animus. Resp. Br. 2-3. However, these allegations were rejected by the district court: "Plaintiffs cannot demonstrate discriminatory intent in passing the amended IIRA." App. 239. The court found that the ordinances were "rationally related to the aim of limiting the social and public safety problems" caused by illegal immigration. App. 243.

[3] Federation for American Immigration Reform, *2013: Trends in State Immigration-Related Legislation* (available at http://www.scribd.com/doc/194574019/2013-Trends-in-State-Immigration-related-Legislation).

legislatures will be confused as to what bills they can or cannot enact in 2014. The states of the Third Circuit may not consider measures like the IIRAO to stop the employment of unauthorized aliens or the harboring of illegal aliens in apartments. Yet the Missouri statute remains on solid ground in the Eighth Circuit, as do other state and local laws throughout the country. This is an untenable situation; federal preemption has either occurred or it has not. One state in the Republic cannot be barred from enacting a statute that another state is permitted to enact.

The Respondents argue at length that the nation must speak with one voice with respect to immigration matters. Resp. Br. 20. Therefore, they claim, cities and states may not enact different laws to discourage illegal immigration within their particular jurisdictions. Yet, the Respondents are perfectly content to have the various *circuits* speaking with multitudinous and discordant voices on the matter. The circuits' differing preemption doctrines now span a huge spectrum – from the Eighth Circuit's federalist approach that guards the sovereign prerogatives of the states, to the Third Circuit's centralist approach that infers preemption at the slightest hint. Granting the writ is essential to bringing national uniformity to the variable application of preemption doctrine in this area.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KRIS W. KOBACH
Counsel of Record
KOBACH LAW, LLC
4701 N. 130th St.
Kansas City, KS 66109
(913) 638-5567
kkobach@gmail.com

GARRETT R. ROE
MICHAEL M. HETHMON
IMMIGRATION REFORM
LAW INSTITUTE
25 Massachusetts Ave., NW
Suite 335
Washington, D.C. 20001
(202) 232-5590

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