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 *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is a local ordinance prohibiting the knowing harboring of illegal aliens in rental housing a preempted "regulation of immigration" under the federal Constitution?

2. Is a local ordinance prohibiting the knowing harboring of illegal aliens in rental housing impliedly field preempted by federal immigration law?

3. Is a local ordinance prohibiting the knowing harboring of illegal aliens in rental housing impliedly conflict preempted by federal immigration law?

4. Is a local ordinance prohibiting the employment of unauthorized aliens impliedly conflict preempted by federal immigration law?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum")[1] is a nonprofit organization founded in 1981. From its inception, Eagle Forum has consistently: defended American sovereignty and promoted adherence to the U.S. Constitution; opposed unlawful behavior, including

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; *amicus* lodged the parties' written consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

illegal entry into and residence in the United States; stood in favor of enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens; and defended federalism, including the ability of state and local government to protect their communities and to maintain order. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

A group of landlords, tenants, employers, and employees (collectively, "Plaintiffs") from the City of Hazleton, Pennsylvania, brought this action to enjoin enforcement of two City ordinances: (1) Ordinance 2006-13, the Rental Registration Ordinance ("RO"); and (2) Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-6, (collectively the "Illegal Immigration Relief Act" or "IIRAO"). Plaintiffs allege that these ordinances are preempted both by the Immigration and Naturalization Act ("INA"), as amended by the Immigration Reform & Control Act of 1986 ("IRCA"), and by the federal government's exclusive authority under the Constitution to regulate immigration.

On remand from this Court's *vacatur* for reconsideration in light of *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968 (2011),[2] the Third Circuit again has held the ordinances preempted both by the Constitution and by federal immigration law, under both field and conflict preemption. In doing so, the Third Circuit recognized that *Whiting*

[2] *City of Hazleton v. Lozano,* 131 S. Ct. 2958 (U.S. 2011)

foreclosed some of the Third Circuit's prior reasoning, but drew some additional theories from this Court's subsequent decision in *Arizona v. U.S.,* 132 S.Ct. 2492 (2012).

Constitutional Background

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three forms of federal preemption: express, field, and conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). Two potentially competing presumptions underlie preemption cases. First, courts presume that statutes' plain wording "necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993), where the statutory text's ordinary meaning presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992). Second, courts apply a presumption against federal preemption of state authority "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Even if Congress preempted *some* state action, the presumption against preemption still applies to determine the *scope* of preemption. *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996).

Under U.S. CONST. art. I, §8, cl. 4, Congress has plenary power over immigration. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica,* 424 U.S. 351, 354 (1976), this Court has never held that every "state enactment which in any way deals with

aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355.

Statutory Background

Under INA §274(a)(1)(A)(iii), it is a federal crime to "conceal[], harbor[], or shield[] from detection, or attempt[] to conceal, harbor, or shield from detection, [an illegal] alien in any place, including any building or any means of transportation" in "knowing or in reckless disregard of the fact that [that] alien has come to, entered, or remains in the United States in violation of law." 8 U.S.C. §1324(a)(1)(A)(iii). Under §274(c), not only federal immigration agents designated by the Attorney General but also "all other officers whose duty it is to enforce criminal laws" may enforce §274.[3] *See* 8 U.S.C. §1324(c). Moreover, since 1996, the Racketeer Influenced and Corrupt Organizations Act ("RICO") has deemed violations of INA §274 as predicate offenses, PUB. L. NO. 104-132, Title IV, §433, 110 Stat. 1214, 1274 (1996) (enacting 18 U.S.C. §1961(1)(F)), which allows enforcing §274's requirements not only by private parties, 18 U.S.C. §1964(c), but also in state court. *Tafflin v. Levitt,* 493 U.S. 455, 458 (1990).

IRCA amended INA to provide federal civil and criminal sanctions for employing "unauthorized

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[3] The Senate version of §274(c) provided that "all other officers *of the United States* whose duty it is to enforce criminal laws" could enforce §274, but the Conference Committee struck "of the United States" to enable non-federal enforcement. *Gonzales v. City of Peoria,* 722 F.2d 468, 475 (9th Cir. 1983) (*citing* Conf. Rep. No. 1505, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1358, 1360, 1361) (emphasis added).

aliens" and expressly to preempt state and local employer-based sanctions "other than through licensing and similar laws." 8 U.S.C. §1324a(h)(2). Although IRCA addressed its preemptive scope with respect to employment-related sanctions, nothing in the enacted law addressed its preemptive scope with respect to the purchase or rental of real property.

The City adopted its ordinances on illegal aliens to address a variety of public health and safety issues, ranging from increased demands on the local housing stock and the public fisc to increased crime (including murder). Pet. at 7; *Lozano v. City of Hazleton,* 496 F. Supp. 2d 477, 542 n.69 (M.D. Pa. 2007). The RO requires landlords to obtain a permit before renting a dwelling unit, and it requires any tenant to provide basic information (including citizenship or immigration status) to obtain an occupancy permit. RO §6.a; App. 85. The information collected via the RO is used for enforcing the IIRAO. The IIRAO has two relevant parts: (1) employment provisions for revoking the business license of any entity that knowingly employs unauthorized aliens and refuses to correct the violation after notice, §4.A-B; App. 62-63, with a safe harbor against loss of license for employers using the E-Verify Program, §4.B(5); App. 64; and (2) rental provisions that deny permits to those knowingly providing rental accommodations to an illegal alien. §5.A; App. 67. With both sets of provisions, the IIRAO relies on federal definitions of unlawful presence in the United States. §§3.D, 3.E, 3.G, 4.B(3), 6.A; App. 61-64, 70, and federal determinations of status pursuant to the authority provided by 8 U.S.C. §1373(c).

§§4.B(3), 7.E, 7.G; App. 63-64, 74-75. IIRAO enforcement will be tolled if an employer or landlord seeks re-verification of an alien's status from the federal government. §§7.A-E; App. 71-74.

SUMMARY OF ARGUMENT

This Court's decisions in *Whiting* and *Arizona* have created confusion in the lower courts with respect to implied conflict preemption in the absence of concrete conflict between state and federal law. This Court should resolve that confusion by confining the conflict-preemption aspects of *Arizona* to the specific employment-based aspects that IRCA addressed (namely, an express savings clause for employer-based sanctions and an implied conflict preemption of employee-based sanctions). *See* Section I, *infra.*

The Third Circuit's unprecedented finding of field preemption of these local ordinances as alien removal and registration requirements drastically overstates the impact of the Hazleton ordinances. Making rental housing unavailable in one city in one state does not "remove" anyone in the immigration-law meaning of that term. Similarly, requiring the disclosure of immigration status for a permissible non-registration purpose does not elevate every such otherwise-permissible exercise of state and local authority into a preempted alien-registration law. *See* Sections II.B-II.C, *infra.* Finally, the allowance for state and even private enforcement of anti-harboring laws under RICO undermines field-preemption claims to exclusive federal enforcement of those provisions. *See* Section II.A, *infra.*

The Third Circuit's finding of preemption of the City's employer-based sanctions conflicts with the *Whiting* Court's treatment of a similar Arizona law. Any differences between the Arizona law in *Whiting* and the Hazleton ordinance here either are so inconsequential as to justify finding no preemption or so unique as to justify either dismissing this as an overbroad facial challenge or (at best for Plaintiffs) enjoining only those narrow applications for which the Court finds serious actual conflict. *See* Section III, *infra.*

ARGUMENT

On the housing-related issues, the Hazleton ordinances are similar to the ordinance of the City of Farmers Branch, Texas, at issue in *City of Farmers Branch, Texas v. Villas at Parkside Partners,* No. 13-516 (U.S.), in which *amicus* Eagle Forum filed an *amicus* brief two days ago. Unless the briefing cycles for these two related cases diverge, this Court presumably will consider the two cases at the same conference; for that reason, this *amicus* brief does not reiterate the arguments that *amicus* Eagle Forum made in *Farmers Branch,* although those arguments apply equally here. Instead, this *amicus* brief focuses on the additional issues that set the *Hazleton* and *Farmers Branch* decisions apart.

I. THIS COURT MUST RESOLVE THE TENSION BETWEEN *WHITING* AND *ARIZONA* ON CONFLICT PREEMPTION

Amicus Eagle Forum respectfully submits that the recent *Arizona* decision unintentionally undercut a key component of the *Whiting* decision with respect to finding conflict preemption in the absence of an

actual conflict. By way of background, conflict preemption includes both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because the ordinances do not make it impossible to comply with both federal immigration law and the Hazleton ordinances, Plaintiffs necessarily raise the latter type of conflict-preemption claim.

Being far less concrete, these types of preemption claims can "wander far from the statutory text" and improperly "invalidate[] state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth v. Levine,* 555 U.S. 555, 583 (2009) (Thomas, J., concurring). As happened here, these types of claims can become "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" and thereby "undercut the principle that it is Congress rather than the courts that preempts state law." *Whiting,* 131 S.Ct. at 1985 (interior quotations omitted). *Amicus* Eagle Forum respectfully submits that the *Arizona* decision gave the impression of reviving this practice whenever the lower courts perceive an unstated balance in a statutory program.

Even without retreating from *Arizona,* this Court can and should limit that holding to the special circumstances that the Court found there: namely, that based on IRCA's "text, structure, and history,"

"Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment" because Congress had determined to confine employment-related penalties on the employers that Congress addressed expressly in IRCA. 132 S.Ct. at 2505. Under this view, the housing issues in the Hazleton ordinances would remain open to state and local regulation. Silence on such issues is more likely to indicate federal ambivalence than to indicate an unstated mandate for an unspecified balance. *Villas at Parkside Partners v. City of Farmers Branch, Texas,* 726 F.3d 524, 573 (5th Cir. 2013) (Elrod and Jones, JJ., dissenting). It is precisely because of these two alternate possibilities – the preemptive and non-preemptive interpretations – that courts apply the presumption against preemption in *all* areas "because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine,* 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted).

By contrast, the Third Circuit considered it relevant – and almost dispositive – that "Congress has not banned persons who lack lawful status or proper documentation from obtaining rental or any other type of housing in the United States." App. 47. Leaving aside of the hyperbole of discussing "housing in the United States" when only housing in Hazleton is at issue, the correct application of this Court's precedents and our federalist structure would be to ask whether Congress has "clearly and manifestly" *banned* state or local government from taking those

actions. If not – *i.e.,* if the statute can be interpreted to *allow* state and local government to take those actions – the presumption against preemption favors the non-preemptive interpretation: "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (interior quotations omitted).

While the presumption against preemption unambiguously is required as a matter of law, *Arizona,* 132 S.Ct. at 2501; *Santa Fe Elevator,* 331 U.S. at 230; *Wyeth,* 555 U.S. at 565, it also is a fair policy to apply to disputes between federal and state power. Congress retains the ability to reverse unwanted court findings of non-preemption by enacting new statutes that expressly preempt the state and local laws in question. State and local government lack a corresponding freedom to reverse judicial findings of preemption that exceed what Congress intended to preempt.

Relying on *Arizona,* 132 S.Ct. at 2503, the Third Circuit expressed concern over states setting state-law penalties for federal-law violations that differ from the federal-law penalties for those violations. App. 46. While the federalist framework identified in *DeCanas, Whiting,* and *Arizona* does indeed oust the states from setting such state-law requirements and penalties in fields that Congress has fully occupied for the federal government, *Arizona,* 132 S.Ct. at 2502-03, that has absolutely no bearing on state and local actions in fields *not fully occupied* by the federal government. Thus, for example, states cannot set

state-law penalties for violating federal alien-registration requirements, *Id.* ("[p]ermitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted"), and states are field preempted from adopting state-law requirements in that field. *Id.* But that does not mean states cannot set their own penalties in fields where states *can* set their own requirements (*e.g.,* speed limits on federal interstate highways and in federal parks). If housing and employer-based sanctions are *not* field preempted, *see* Sections II-III, *infra,* the Third Circuit's basing conflict preemption on *Arizona* and federal enforcement priorities is simply misplaced. Conversely, if those areas *were* field preempted, conflict preemption would be superfluous.

II. THE THIRD CIRCUIT'S ANALYSIS OF FIELD PREEMPTION FOR HARBORING CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

The Third Circuit held the Hazleton ordinances field preempted on a variety of theories – regulation of immigration status in housing, removal of aliens, alien registration – all of which are without support from other circuits or this Court. Significantly, the Third Circuit splits with both the Fifth and Eighth Circuits in their review of similar local ordinances. *Villas at Parkside Partners v. City of Farmers Branch, Texas,* 726 F.3d 524 (5th Cir. 2013) (finding only conflict preemption); *Keller v. City of Fremont,* 719 F.3d 931 (8th Cir. 2013) (finding no preemption). The following three sections refute the Third Circuit's various field-preemption theories.

A. Federal Law Does Not Occupy the Field of Regulating Housing

The Third Circuit deemed federal immigration law to occupy the field of regulating the conjunction of housing and immigration status, including enforcement. App. 38-43. Even if Congress intended INA §274 to preempt competing state and local standards, the 1996 RICO amendments and the resulting state-court enforcement and private enforcement are inconsistent with the federal exclusivity that the Third Circuit envisions. On the other hand, if Congress did *not* intend INA §274 to preempt competing state and local standards, then *DeCanas* and *Whiting* would leave housing open to state and local regulation.

At the outset, the circuits are split on the scope of the federal "harboring" crime, specifically on whether merely renting to an illegal alien constitutes harboring versus whether harboring requires an element of concealment. For example, "provid[ing] an apartment for the undocumented aliens" can fall within the federal crime of "harboring," *U.S. v. Tipton,* 518 F.3d 591, 594 (8th Cir. 2008), which "mean[s] 'any conduct tending to substantially facilitate an alien's remaining in the United States illegally.'" *U.S. v. Rubio-Gonzalez,* 674 F.2d 1067, 1073 & n.5 (5th Cir. 1982) ("the words 'harbor,' 'conceal' and 'shield from detection' are [not] synonymous," and "'harbor' is perhaps a somewhat broader concept than 'conceal' or 'shield from detection'")); *U.S. v. Acosta de Evans,* 531 F.2d 428, 430 (9th Cir. 1976) ("purpose of the section is to keep unauthorized aliens from entering or *remaining* in

the country" and that "purpose is best effectuated by construing 'harbor' to mean 'afford shelter to' and [we] so hold.") (emphasis in original). Other circuits have found that "harboring" means conduct tending to "prevent government authorities from detecting the alien's unlawful presence." *U.S. v. Ozcelik,* 527 F.3d 88, 100 (3d Cir. 2008); *U.S. v. Kim,* 193 F.3d 567, 574 (2d Cir. 1999). This litigation therefore presents the opportunity for this Court to resolve that underlying split.

If harboring encompasses merely renting to illegal aliens, of course, Plaintiffs would lose the war, even if they won this preemption battle because cities and even private individuals could enforce against harboring violations under RICO, 18 U.S.C. §§1961(1)(F), 1964(c), including in state court. *Tafflin,* 493 U.S. at 458. Even if harboring encompasses more than merely renting to illegal aliens, however, the case for federal exclusivity would remain unsupportable.

In answer to the City's argument that 8 U.S.C. §1324(c) allows state and local enforcement of federal harboring provisions, the Third Circuit based its field-preemption holding in part on 8 U.S.C. §1329's perceived exclusion of local enforcement from housing-related immigration issues. *See* App. 41-43. By its terms, however, §1329 applies only to "all causes, civil and criminal, *brought by the United States*" (emphasis added). Because it applies only to federal actions, §1329 is necessarily silent on non-federal actions. Contrary to the Third Circuit's view, "section 1324(c) expressly allows for state and local enforcement." *In re Jose C.,* 45 Cal.4th 534, 552, 198

P.3d 1087, 1099 (Cal. 2009); *City of Peoria,* 722 F.2d at 475 (§1324's text and legislative history establish that "federal law does not preclude local enforcement of the criminal provisions of [INA]"), *overruled on another ground by Hodgers–Durgin v. De La Vina,* 199 F.3d 1037, 1040 n.1 (9th Cir. 1999). In addition, by making harboring violations a predicate offense under RICO, Congress enabled not only enforcement in state court, *Tafflin,* 493 U.S. at 458, but also by private parties. 18 U.S.C. §§1961(1)(F), 1964(c). In summary, regardless of what level of concealment is necessary to establish harboring, federal exclusivity in enforcement is unsupportable.

B. The Ordinances Do Not "Remove" Aliens from the City or from Anywhere Else

The Third Circuit deemed Hazleton's regulation of local housing a "thinly veiled attempt to regulate residency under the guise of a regulation of rental housing," App. 40, which both the Constitution (App. 39) and INA field preempt as an attempt to regulate residence in the United States:

> INA's comprehensive scheme "plainly precludes state efforts, whether harmonious or conflicting, to regulate residence in this country based on immigration status."

App. 40 (*quoting Lozano,* 620 F.3d at 220).

Denying access to rental housing in Hazleton, Pennsylvania, is not removal from the United States. Indeed, the City does not regulate home purchases at all, so the ordinances may discourage residence in the City but they do not "remove" anyone from the City, much less from the United States. The City is simply indifferent to whether illegal aliens locate

elsewhere in Pennsylvania or the rest of the country. If implied "removal" met the test for removal under either the Constitution or INA, then *DeCanas* and *Whiting,* respectively, would have come out differently by denying illegal aliens the ability to work for a living.

C. The Hazleton Ordinance Does Not Register Aliens

The Third Circuit also conflated the RO's requirements with field-preempted alien registration requirements. App. 55-56. As preempted by *Hines* and *Arizona,* an alien-registration law is one that registers aliens as aliens. *Hines v. Davidowitz,* 312 U.S. 52, 65-66 (1941); *Arizona,* 132 S.Ct. at 2502-03. Here, by contrast, Hazleton requires all renters to provide their immigration status for a permissible non-registration purpose. In other words, when the end is not registration itself, but some other permissible purpose, the requirement is not an alien-registration requirement. Under Plaintiffs' and the Third Circuit's theory, by contrast, any regulatory regime that inquired into immigration status (*e.g.,* driver's licenses, public benefits), *cf.* 8 U.S.C. §§1621-1622 (limiting public benefits for illegal aliens), would be field preempted as an alien-registration requirement.

III. THE THIRD CIRCUIT'S ANALYSIS OF EMPLOYMENT-SANCTION PREEMPTION CONFLICTS WITH *WHITING*

Splitting with *Whiting,* the Third Circuit held that INA conflict preempts Hazleton's employer sanctions for employing illegal aliens. By focusing on what Hazleton rightly calls "picayune distinctions,"

Pet. at 16, between IRCA and Hazleton's ordinance, the Third Circuit demonstrates that only in the rarest situations – or perhaps the clearest and most manifest situations – should this Court allow conflict preemption based on a perceived balance or framework struck *sub silentio* by Congress. *See* Section I, *supra.* Because the holding here is insupportable under *Whiting* – which *Arizona* did not overrule – this Court should reverse.

The Third Circuit faults the City for covering independent contractors where Congress in IRCA did not, App. 18, but cites only a federal regulation, *id.* at 19 (*citing* 8 C.F.R. §274.1(f)), as evidence of the perceived "intricate framework of IRCA." *Id.* The promulgation of §274.1(f) was silent on federal preemption. *Compare* 52 Fed. Reg. 8762 (Mar. 19, 1987) (proposed rule) *with* 52 Fed. Reg. 16,216 (May 1, 1987) (final rule). In analogous circumstances this Court found such silence to warrant no deference to agency views on federal preemption. *Wyeth,* 555 U.S. at 576-81. Similarly, in a dissent joined by the Chief Justice and Justice Scalia, and not disputed by the majority, Justice Stevens questioned the entire enterprise of administrative preemption when the presumption against preemption applies:

> Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, *Watters* arose in an area more preemptive than federal law generally, *id.* at 12 (majority), so the Stevens dissent is even more persuasive here. The circuits also are dubious of administrative preemption, by rulemaking, when the presumption against preemption applies.[4] Clearly federal agencies – which draw their delegated power from Congress – cannot have a freer hand in this arena than Congress itself.

Even assuming *arguendo* that the ordinance splits with IRCA on the independent-contractor issue and that that split would qualify as conflict preemption in an appropriate case, this is not that case. First, the distinction between true independent contractors and unacknowledged common-law employees is narrow, *Vizcaino v. Microsoft Corp.,* 120 F.3d 1006, 1009-10 (9th Cir. 1997) (*en banc*), and illegal aliens are unlikely to be truly independent contractors. Second, the appropriate remedy would be to dismiss this facial challenge under *U.S. v. Salerno,* 481 U.S. 739, 745 (1987), for failure to

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[4] *See, e.g., Nat'l Ass'n of State Utility Consumer Advocates v. F.C.C.,* 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review … under *Chevron,* this presumption guides our understanding of the statutory language that preserves the power of the States to regulate"); *Albany Engineering Corp. v. F.E.R.C.,* 548 F.3d 1071, 1074-75 (D.C. Cir. 2008); *Massachusetts v. U.S. Dept. of Transp.,* 93 F.3d 890, 895 (D.C. Cir. 1996); *Fellner v. Tri-Union Seafoods, L.L.C.,* 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt,* 194 F.3d 176, 182-83 (1st Cir. 1999).

"establish that no set of circumstances exists under which the Act would be valid," *accord* Pet. at 43-45, or, *at best for Plaintiffs,* to enjoin applying the ordinance only against independent contractors. This litigation provides no basis for enjoining Hazleton's enforcement against *employers.*

As the City explains, the Third Circuit's other two perceived splits also are slight at best and non-existent in practice. Pet. at 18-19.[5] More importantly, a factor that the Third Circuit did not consider should control here: Congress legislated in a field historically occupied by the states and did not adopt express preemption. While that perhaps does not rule out finding preemption based on a perceived balance that Congress might (or might not) have intended, courts must require that the implicit congressional intent is "clear and manifest." *Santa Fe Elevator,* 331 U.S. at 230; *Wyeth,* 555 U.S. at 565. If reasonable jurists might differ on how to interpret a particular law, then no jurist can hold that reasonable Senators or Representatives *necessarily*

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[5] The other two conflicts involve the availability of a safe harbor for using the I-9 form and the standard for triggering an investigation. *Id.* As the City explains, IRCA's I-9 safe harbor concerns criminal liability, but the employer still must cease the illegal employment; with the City's ordinance, that same act of ceasing the illegal employment also avoids any penalty. *Id.* at 18. Thus, an employer challenged under the Hazleton ordinance would end up in the same place as an employer challenged under federal law. In addition, the difference in investigatory triggers between a complaint's "substantial probability of validity" under IRCA and its validity under the ordinance is not a sufficient basis for pre-enforcement review, *FTC v. Standard Oil Co. of California,* 449 U.S. 232, 238 n.7 (1980), much less preemption.

meant to adopt the more-restrictive interpretation *sub silentio.*

CONCLUSION

The petition for a writ of *certiorari* should be granted.

November 27, 2013

Respectfully submitted,

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