

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

Plaintiffs-Appellees,

v.

CITY OF HAZLETON,

Defendant-Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (No.3:06-CV-01586)**

**BRIEF OF *AMICI CURIAE* NON-GOVERNMENTAL ORGANIZATIONS
DEDICATED TO INTERNATIONAL HUMAN RIGHTS
IN SUPPORT OF THE APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Amici curiae National Economic and Social Rights Initiative (“NESRI”) and Columbia Law School Human Rights Clinic (“Columbia Clinic”) are not corporate entities for which a corporate disclosure statement is required (see Fed. R. App. P. 26.1).

STATEMENT OF INTEREST BY *AMICI CURIAE*

Amici curiae are dedicated to the implementation of international human rights norms within the United States and therefore file this brief in favor of Plaintiffs-Appellees. *Amici* believe that the issues raised in Lozano v. City of Hazleton significantly impact the protection of basic human rights of both immigrants and non-immigrants in the United States.

Amicus Curiae NESRI, a non-profit organization founded in 2004, works to advance legal standards in the United States that ensure dignity and access to the basic resources needed for civic participation and the development of the full potential of all people. NESRI works to promote human rights, in particular economic and social rights. NESRI undertakes advocacy as well as provides technical assistance and develops expert materials for domestic advocates.

Amicus Curiae Columbia Clinic provides students with hands-on experience working on active human rights cases and projects to bridge theory and

practice. Working in partnership with experienced attorneys and institutions engaged in human rights activism, both in the United States and abroad, students contribute to effecting positive change locally and globally. In recent years, the Columbia Clinic has worked on several matters concerning human rights issues in the United States.

All parties have consented to the filing of this *amici* brief, which is respectfully submitted pursuant to the second sentence of Federal Rule of Appellate Procedure 29(a) in favor of Appellees and in support of affirmance of the District Court's decision.

SUMMARY OF ARGUMENT

As detailed in full in Appellees' principal brief filed on April 8, 2008, this case centers on the City of Hazleton's "Illegal Immigration Relief Act Ordinance." The provisions of this ordinance, and the accompanying Tenant Registration Ordinance (together, the "Hazleton IIRA" or the "IIRA"), were designed to impose harsh sanctions on undocumented immigrants and those who employ and provide housing to them. See Appellee Br. at 6-16. The sweeping municipal ordinances violate the due process rights of affected individuals by providing *no* pre-deprivation notice or hearing and only limited and inadequate post-deprivation procedural protections. See id. at 14. *Amici* join in full the

arguments made by Appellees demonstrating that the Hazleton IIRA is a clear affront to the United States Constitution and federal law.

Amici submit this brief in order to bring to the Court's attention the Hazleton IIRA's severe impact on two basic human rights – rights to housing and to earn a minimal living – which are widely recognized within international human rights law and across the world in national jurisprudence. While the nature and contours of these rights, both internationally and transnationally, are affected by whether a person has a legal claim to live and work in a country, they are significant values to be taken into account when assessing punitive measures taken against any person, including the individuals impacted by the Hazleton IIRA.

International and transnational law strongly reaffirm every country's right to control its borders. But the methods by which a country undertakes this task should not be immune from scrutiny. The remedy for unauthorized presence is clearly deportation, and that remedy should be undertaken directly and within the context of due process protections. Indirect measures intended to deprive persons of basic human rights, such as shelter and subsistence – i.e., the right to secure one's basic livelihood – are inappropriate and inconsistent with the fundamental legal values and norms of civilized nations.

While opinions vary across the globe as to which benefits governments must extend to undocumented immigrants unless and until they are

deported, international norms clearly prohibit intentionally creating conditions that deny individuals basic survival rights such as subsistence and shelter. Here, the City of Hazleton, lacking *de jure* authority to determine the legal status of immigrants or to deport unlawful residents, has attempted *de facto* to expel individuals whom the city deems unlawfully present, by cutting off their access to employment and housing, thus denying their basic rights to subsistence and shelter. This is particularly problematic because the individuals most likely to be affected are those with already meager resources, and these further deprivations may threaten basic survival rights.

Moreover, the IIRA denies these basic rights to subsistence and shelter without the protections of due process. The principles of due process relied upon by the District Court in striking down the Hazleton IIRA under United States law are echoed in international law, as well as in the domestic legal regimes of other mature democracies. The IIRA fails to comport with these principles.

Even if the Hazleton IIRA provided procedural protections, the City itself, as well as the employers and landlords expected to comply with its ordinances, lack the capacity to determine federal immigration status accurately. Thus, the Hazleton IIRA creates an impermissible risk that employers and landlords will, out of fear of the IIRA's harsh sanctions, deny employment and housing to individuals on the basis of their race or ethnicity – regardless of their

actual immigration status – thus running afoul of international norms prohibiting discrimination on those bases.

The following analysis of international law and the laws of our sister nations demonstrates widespread international recognition of the above-mentioned rights to due process, subsistence (as well as a decent standard of living), housing, and non-discrimination in employment and housing. The Hazleton IIRA *aims* to undermine these rights for individuals deemed “illegal” and, as a matter of fact, undermines the rights for many others mistakenly presumed or suspected of being “illegal.” Upholding the IIRA, and other similar local laws elsewhere, would effectively deny these basic rights to a large class of persons within the United States. The United States Supreme Court, when faced with a state law and school district policy aimed at excluding undocumented immigrants from public education, warned that: a denial of basic rights to a large class of persons “raises the specter of a permanent caste The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.” Plyler v. Doe, 457 U.S. 202, 218-19 (1982).

The decision below should be affirmed because, in addition to the violations of Constitutional and federal law found by the District Court, the Hazleton IIRA runs directly counter to basic international human rights norms and indeed the fundamental principles of a democratic society.

ARGUMENT

I. INTERNATIONAL AND COMPARATIVE LAW ARE PERSUASIVE AUTHORITIES IN DETERMINING WHETHER THE HAZLETON IIRA VIOLATES INDIVIDUAL RIGHTS

American jurists, including members of this Court, have long recognized that international and comparative law perspectives are persuasive authorities in interpreting federal law. See generally *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law.”); see also Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int’l L. 43, 44 (2004) (explaining the framers’ and early Justices’ recognition of the importance of compatibility of United States law with international law).

The Third Circuit in particular has looked to foreign law in a variety of legal settings, including in circumstances analogous to those here, where the Court is addressing the scope of individual rights. For example, in deciding the criminal insanity defense standard for this Circuit, the Court criticized the M’Naghten standard by “point[ing] out that many highly civilized European nations [such as Sweden, Denmark, Norway, France, Belgium, Germany, Luxembourg, Finland, and Scotland] have adopted rules of law relating to the criminal responsibility of offenders suffering from mental disorders or mental weaknesses which bear no relation to the M’Naghten Rules.” United States v. Currens, 290 F.2d 751, 761, 763, 765-767 (3d Cir. 1961). In another case

involving due process norms, this Court gave great weight to English common law in interpreting the meaning of the “right of trial by jury” under the United States Constitution based on the common legal heritage of the two countries. McKeon v. Cent. Stamping Co., 264 F. 385, 389 (3d Cir. 1920).

The Supreme Court has similarly relied on international and comparative legal sources in reaching several recent landmark decisions on individual rights. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (abolishing death penalty for juveniles citing the weight of the international consensus against the practice); Lawrence v. Texas, 539 U.S. 558, 573 (2003) (striking down the enforcement of anti-sodomy laws against consenting adults citing parallel precedent from the European Court of Human Rights); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (barring death penalty for mentally disabled offenders citing that the practice has been overwhelming disapproved by the world community).

Outside of the due process context, this Court has relied on international sources in cases spanning immigration law, maritime law, criminal law, and tort law. *See, e.g., China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 289 (3d Cir. 2003) (holding that arbitration award was reviewable and observing that “international law overwhelmingly favors some form of judicial review of an arbitral tribunal’s decision that it has jurisdiction over

a dispute”); The Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 75-76 (3d Cir. 1994) (citing general principles of international law, as articulated by the Restatement (Third) of the Foreign Relations Law of the United States, in addressing judicial authority to enjoin a sovereign); United States v. Rosero, 42 F.3d 166, 170-71 (3d Cir. 1994) (opinion by then Judge Alito) (relying on customary international law in determining the meaning of an undefined term in a federal narcotics statute); United States v. Noonan, 906 F.2d 952, 955, 959-60 (3d Cir. 1990) (citing, in case of first impression regarding the effect of presidential pardon, “the basis of long-held traditional views on the effect of a pardon, covering diverse periods and sources from . . . seventeenth century English cases to those in contemporary courts of Great Britain and the British Commonwealth [such as New Zealand and Tasmania]”); United States v. Wright-Baker, 784 F.2d 161, 167-68 (3d Cir. 1986) (citing international law, as articulated by the Restatement (Second) of the Foreign Relations Law of the United States and another commentary, in determining whether the United States has extraterritorial jurisdiction to enforce federal narcotics law on the high seas); Bradshaw v. Rawlings, 612 F.2d 135, 142 (3d Cir. 1979) (citing standards in several European countries in determining whether a university was per se liable for under-21 drinking); Lindquist v. Dilkes, 127 F.2d 21, 23 n.9, 24 (3d Cir. 1941) (citing French Civil Code and English insurance law in determining the scope of the

common law doctrine of maintenance and care of seamen).

Not only is there practical value in examining how other courts have analyzed similar issues,¹ but analysis of international and comparative law also ensures that United States courts, and this Circuit in particular, maintain their intellectual leadership in areas such as human rights jurisprudence. Indeed, the opinions of this Court have served as models for countries around the world. For example, in the immigration context, this Court’s decision in Fatin v. Immigration & Naturalization Service, 12 F.3d 1233 (3d Cir. 1993), was cited by the Australian High Court in determining whether Chinese nationals seeking recognition as refugees under Australian law were “refugees” within the meaning of the 1951 Convention Relating to the Status of Refugees. See A v. Minister for Immigration & Ethnic Affairs, (1997) 190 C.L.R. 225 (Austl.). Similarly, in AO v. Minister for Justice, Equality & Law Reform, 1 I.R. 1 [2003] (Ir.), the Irish Supreme Court noted the approach taken by this Court in Acosta v. Gaffney, 558 F.2d 1153 (3d

¹ Chief Judge Scirica recently discussed the Principles and Rules of Transnational Civil Procedure, which combine elements of common law and civil law procedural norms, and observed that “the Transnational Principles and Rules may cause us to reexamine the foundations of our respective procedural rules with a view toward considering revisions. Over time, this reexamination may encourage transnational harmonization of civil procedure.” Louis F. Del Duca, *Symposium: Globalization of Civil Procedure – The ALI & UNIDROIT Principles and Rules of Transnational Civil Procedure Symposium: Introduction*, 25 Penn St. Int’l L. Rev. 495, 498 (2006).

Cir. 1977), when determining the scope of the constitutional rights of Irish-born children of foreign nationals seeking refugee status and threatened with deportation orders.

As the wealth of Supreme Court and Third Circuit precedent citing international and foreign legal sources illustrates, United States courts do, as an empirical matter, consider international and foreign law when resolving domestic legal issues. Moreover, the cross-border exchange is reciprocal, as courts around the world look to this Court when addressing similar legal questions, including those concerning individual rights. Here, international and comparative law perspectives are particularly relevant because, as demonstrated below, the Hazleton IIRA runs directly counter to the applicable norms recognized by international law and the laws of other nations.

II. INTERNATIONAL DUE PROCESS NORMS ARE CONSISTENT WITH THE DISTRICT COURT'S HOLDING

The District Court permanently enjoined the enforcement of the Hazleton IIRA due to, *inter alia*, the ordinance's violation of Constitutional due process standards. See Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 518-38 (M.D. Pa. 2007). The IIRA is similarly at odds with analogous due process standards under international law and the law of other nations that share our democratic values.

The Universal Declaration of Human Rights provides that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Universal Declaration of Human Rights, art. 10, U.N. Doc. A/810 (Dec. 12, 1948). Similarly, under article 14 of the International Convention on Civil and Political Rights (“ICCPR”), the State parties (which include the United States) agree that “[i]n the determination of . . . rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a *competent*, independent, and impartial tribunal established by law.” ICCPR, art. 14(1), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the U.S. Sept. 8, 1992) (emphasis added); see also The American Declaration of the Rights and Duties of Man, art. XVIII OAS Res-XXX (signed by the U.S. May 2, 1948) (“Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”); American Convention on Human Rights, art. 8, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (signed by the U.S. June 1, 1977) (“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, . . . for the determination of his rights and obligations of a civil,

labor, fiscal, or any other nature.”); *id.* art. 25(1), (2) (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state” and “any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state.”).

A review of the domestic due process standards adhered to by other democracies affirms that a fair hearing by a court of competent jurisdiction is universally recognized as a basic requirement when individual rights are at stake. For example, the U.K. Human Rights Act of 1998 incorporates the provisions of the European Convention on Human Rights into the law of the United Kingdom and grants minimum due process guarantees, including “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953). Similarly, Article 24 of the Canadian Charter of Rights and Freedoms provides that “[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” See also, e.g., Basic Law for the Federal Republic of Germany, GG, art. 19 (“Should any person’s right

be violated by public authority, recourse to the court shall be open to him. . . .”); Constitution of India, India Const., art. 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law.”); Constitution of the Republic of South Africa, S. Afr. Const. 1996, ch. 2 § 38 (“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief.”); Constitution of Japan, Kenpō, arts. 31, 32 (“No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.” and “No person shall be denied the right of access to the courts.”).

The Hazleton IIRA violates these international norms of due process because it fails to provide adequate hearings by a competent tribunal, or any other effective recourse, to those individuals whose rights are at stake. The IIRA provides no pre-deprivation hearing, and the ordinance only permits post-deprivation hearings before local and state courts, which lack jurisdiction to determine immigration status. See Lozano, 496 F. Supp. 2d at 536 (“The Pennsylvania courts . . . do not have the authority to determine an alien’s immigration status. Federal law makes no provision for a state court to make a decision regarding immigration status.”). A hearing before a court powerless to adjudicate the issue before it fails to provide a *competent* tribunal to determine the

underlying rights of the persons affected by the IIRA. In short, the IIRA's lack of pre-deprivation protections, including even basic notice to the affected individuals, and its ineffective post-deprivation procedures contravene international principles of due process.

III. THE HAZLETON IIRA'S PROVISIONS CONTRAVENE THE INTERNATIONALLY RECOGNIZED RIGHTS TO BASIC SUBSISTENCE, TO SHELTER, AND TO NON-DISCRIMINATION IN EMPLOYMENT AND HOUSING

In the absence of the legal authority to deport immigrants – or even the ability to determine whether immigrants are unlawfully present – the City of Hazleton seeks to exclude undocumented immigrants by preventing them from securing even a minimal subsistence or shelter within its municipal boundaries. The Hazleton IIRA thereby contravenes international norms protecting basic rights of survival, and does so not only for those specifically targeted by the ordinance – undocumented immigrants – but also for those mistaken for or incorrectly assumed to be among the targeted group. Given the demographics of Hazleton, those mistakenly and incorrectly assumed to be undocumented will inevitably be Latino. See Appellee Br. at 3 (citing A1135-42; A1169-70; A1326-31). Thus, the IIRA also encourages violations of the rights to non-discrimination in employment and housing for Latino citizens and legal residents discriminated against by employers and landlords unwilling or unable to determine their immigration status. As the international and comparative law standards set forth below elucidate, the

restriction of these rights by the IIRA runs directly counter to norms widely recognized by the international community.

A. The Hazleton IIRA Contravenes The Right To Basic Subsistence

International law recognizes that all persons have the right to basic subsistence and livelihood. See, e.g., Universal Declaration of Human Rights, art. 3 (“Everyone has the right to life, liberty and security of person.”); id. art. 25 (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.”); ICCPR, art. 6(1) (“Every human being has the inherent right to life.”); International Covenant on Economic, Social and Cultural Rights (“ICESCR”), art. 11, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (signed by the U.S. Oct. 5, 1977) (“The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family.”).

The right to basic subsistence can in fact be seen as a precondition for the protection and exercise of all other basic rights. The Swiss Federal Court has found, for example, that a basic minimum level of subsistence must be provided to undocumented immigrants who could not be deported because this was a necessary condition for the exercise of their other basic rights – including the right to life, the right to human dignity, and the principle of equality. V v. Einwohnergemeinde X. und Regierungsrat des Kantons Bern, BGE/ATF 121 I 356 (Switz. 1995).

Economic realities in the United States tie the realization of this basic human right of subsistence to the ability to find employment and to earn a living. Indeed, it is through freely entered employment relationships that people secure basic subsistence and livelihood with dignity. The *federal* government alone has the power to regulate the admission, employment, and deportation of immigrants. By seriously impinging on their subsistence rights, the City of Hazleton is essentially using *local* law to “deport” immigrants from Hazleton without regard to the federal law and federal enforcement policies that represent the only legitimate regulation of immigration in the United States. Such a blunt instrument, producing such a harsh result – potentially denying employment and shelter to an entire class of persons living in the community – contravenes the most basic of rights, the right to subsist and survive.

B. The Hazleton IIRA Contravenes The Right To Work And The Right To Non-Discrimination In Employment For Latino Citizens And Legal Residents

International agreements, and the bodies vested with the power to interpret them, recognize that the right to work should be free from arbitrary interference: “[E]veryone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.” Universal Declaration of Human Rights, art. 23. Under the ICESCR, the parties agree to safeguard “the right to work, which includes the right of everyone to the

opportunity to gain his living by work which he freely chooses or accepts.”

ICESCR, art. 6(1). The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”) states that “everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.” Protocol of San Salvador, art. 6(1), O.A.S.T.S. No. 69 (entered into force Nov. 16, 1999). The European Charter of Fundamental Rights, to which all member states of the European Union are parties, provides that “[e]veryone has the right to engage in work and to pursue a freely chosen or accepted occupation.” Charter of Fundamental Rights of the European Union, art. 15, 2000 O.J. (C 364) 1 (entered into force Dec. 7, 2000).²

The right to work is further elaborated through national constitutional and legislative provisions. Each European Union country has effectuated the right to work within its domestic framework. Countries that explicitly provide for a right to work in their constitutions include Belgium, the Netherlands, Italy, Spain,

² Article 15 provides in full that: “(1) Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation; (2) Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State; (3) Nationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.”

Portugal, Sweden, Luxembourg, Norway, Denmark, Austria, Finland and Greece.³

The United Kingdom, although it does not have a written constitution, recognizes the right to work through its adoption of the European Charter as part of U.K. domestic law. Neal, supra n.3, at 52-53.

To be sure, many countries, including the United States, restrict the right to work of foreign nationals who are within their borders without authorization. However, as discussed above, the Hazleton IIRA impairs the right to work of Latino *citizens* and *legal residents* whose initial or continued employment is wrongfully precluded by employers' attempts to comply with the ordinance or who are wrongfully faced with actual and threatened complaints under the ordinance.

Thus, the IIRA also threatens the fundamental principle of non-discrimination in employment. Under the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), which has been ratified by the United States, State parties "guarantee the right of everyone, without

³ Constitution of Belgium, art. 23; Constitution of the Netherlands, GW., art. 19; Constitution of Italy, Cost., art. 4; Constitution of 1978 of Spain, C.E., art. 35; Constitution of 1976 of Portugal, art. 59; Constitution of Sweden, RF, ch. 2, art. 20; Constitution of Luxembourg, art. 11(4); Constitution of Denmark § 75; Constitution of Finland, art. 15; Constitution of Greece, SYN Constitution, art. 22(1); see also Alan C. Neal, Fundamental Social Rights at Work in the European Community 54-57 (Dartmouth Publ'g. Co. 1999).

distinction as to race, colour, or national or ethnic origin, to equality before the law . . . in the enjoyment of . . . the right to free choice of employment, to just and favourable conditions of work” and “protection against unemployment.” CERD, art. 5(e)(i), 660 U.N.T.S. (entered into force Jan. 4, 1969) (ratified by the U.S. Oct. 21, 1994).⁴ Many nations, including countries that, like the United States and Western Europe, have highly developed legal systems as well as significant immigrant populations, have prohibitions against discrimination in employment as basic constitutional rights. Argentina’s Constitution declares that “[a]ll the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: to work and perform any lawful industry” Constitution of Argentina, Const. Arg., § 14. Likewise, under the Brazilian Constitution, “[a]ll persons are equal before the law, without any distinction whatsoever, and Brazilians and foreigners resident in Brazil are assured of inviolability of the right of life, liberty, equality, security, and property, on the following terms: . . . the practice of any work, trade or profession is free, observing

⁴ The United Nations Committee on the Elimination of Racial Discrimination specifically recommends that parties to CERD, including the United States, “remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health” and “take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.” Recommendation No. 30: Discrimination Against Non-Citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Oct. 1, 2004).

the professional qualifications which the law may establish.” Constitution of Brazil, C.F., art. 5.

As this brief survey of international and foreign law illustrates, at a bare minimum, mature democracies guarantee the right to work and non-discrimination in employment as basic rights. The Hazleton IIRA’s employment provisions violate these principles by threatening the right to work, and to be free from discrimination in exercising that right, for those mistakenly identified as or presumed to be undocumented immigrants – in this case, Latino citizens and legal residents.

As mentioned above, undocumented immigrants’ access to legal employment is restricted in many countries, including the United States, and there does not yet exist an international consensus as to the right to work and non-discrimination in employment for undocumented immigrants. It is worth noting, however, that international and regional human rights law increasingly supports the principle of equality in employment for all workers, documented or undocumented. The major international agreements addressing employment rights and the rights of migrant workers extend the fundamental principles of non-discrimination and equality to migrant workers,⁵ and international law is increasingly applying these

⁵ For example, under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, “it shall not
(continued...)

principles to undocumented immigrants, whether or not they fit the category of migrant workers.

A recent advisory opinion by the Inter-American Court of Human Rights illustrates this trend. The Mexican government requested the opinion due to widespread workplace discrimination against their nationals working as migrant workers in foreign states. See *Juridical Condition and Rights of Undocumented Immigrants*, OC-18/03, Sept. 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18, ¶¶ 1-2 (2003). Specifically, the Inter-American Court addressed whether the labor rights of undocumented workers were subject to equal protection principles as expressed in the provisions of a number of international treaties and declarations.⁶ The court answered in the affirmative, holding that under international law, nations were not free to discriminate arbitrarily against undocumented workers because “the

be lawful to derogate in private contracts of employment from the principle of equality of treatment.” U.N. Doc. A/45/49 (entered into force July 1, 2003). Similarly, the U.N. Sub-Commission on the Promotion and Protection of Human Rights issued a 2003 report on the rights of non-citizens clarifying that non-citizens are entitled to equality of treatment with respect to labor rights. U.N. Econ. & Soc. Council, Sub-Comm. on the Promotion and Prot. of Human Rights, *Prevention of Discrimination: The Rights of Non-Citizens*, U.N. Doc. E/CN.4/Sub.2/2003/23 (May 26, 2003).

⁶ Charter of the Organization of American States, arts. 3 & 17, 119 U.N.T.S. 3 (entered into force Dec. 13, 1951); American Declaration on the Rights and Duties of Man, art. II; American Convention on Human Rights, arts. 1(1), 2, & 24; Universal Declaration on Human Rights, arts. 1, 2(1) & 7; ICCPR, arts. 2(1), 2(2), 5(2) & 26.

migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed.” Id. ¶ 173(8). While the protection of the labor rights of the undocumented cannot yet be said to represent an international consensus, the expansion of these rights should be pursued on the basis of the fundamental principles of equality and non-discrimination upon which global consensus undoubtedly exists.

Here, the Hazleton IIRA not only curtails the employment of undocumented individuals but it also creates incentives to discriminate on the basis of race and national origin among lawful residents and citizens without providing any countervailing anti-discrimination provisions. Under the IIRA, United States citizens and legal residents of Latino descent inevitably face interference with their right to work at the hands of employers fearful of violating the ordinance. See Appellee Br. at 3. This result contravenes basic anti-discrimination principles of international law regarding the right to work for both citizens and migrants alike.

C. The Hazleton IIRA Contravenes The Rights To Housing And To Non-Discrimination in Housing

As the United Nations Commission on Human Settlements has explained, “[a]dequate housing is enshrined as a fundamental element of the right to an adequate standard of living and as a basic human right in several international instruments.” U.N. Comm’n on Human Settlements, Position Paper, available at <http://www.unhabitat.org/pmss/getElectronicVersion.asp?nr=1272&alt=1>. Indeed, the Universal Declaration of Human Rights states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.” Universal Declaration of Human Rights, art. 25(1). The ICESCR provides similar protection: “recogniz[ing] the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing.” ICESCR, art. 11(1); see also International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43(1)(d) (“Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to . . . access to housing.”).⁷

⁷ Many other international covenants and conventions also specifically address the basic right to housing. See, e.g., ICCPR, art. 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”); Convention on the Elimination of All Forms of Discrimination Against Women, art. 14(2)(h), U.N. Doc. A/34/46 (entered (continued...))

The right to housing is not only recognized by international conventions but it is also enshrined in the constitutions of more than 50 nations. A sampling of this list includes: Argentina, Const. Arg., § 14 (“the States shall grant . . . access to worthy housing”); Belgium, art. 23(3) (“Everyone has the right to lead a life in conformity with human dignity . . . includ[ing], in particular, the right to decent accommodation.”); Ecuador, art. 13 (“Every person enjoys the following guarantees . . . the right to a standard of living that assures health, food, clothing, housing, medical assistance and the necessary social services”); Mali, art. 16 (“Education, instruction, formation, work, housing, leisure, health and social protection shall constitute recognized rights.”); Mexico, Const. D.O., art. 4 (“Every family has the right to enjoy decent and proper housing.”); Panama, art. 113 (“The state shall establish a national housing policy with the purpose of ensuring the enjoyment of this social right to all of the population, especially low-income groups.”); Portugal, art. 65(1) (“Everyone shall have the right for himself and his family to a dwelling of adequate size satisfying standard of hygiene and comfort

into force Sept. 3, 1981) (“State Parties . . . shall ensure to [rural] women the right . . . to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”); Convention on the Rights of the Child, art. 27(3), U.N. Doc. A/44/49 (entered into force Sept. 2, 1990) (“State Parties . . . shall in case of need provide material assistance and support programmes [to children], particularly in regard to nutrition, clothing and housing.”).

and preserving personal and family privacy.”); and the Russian Federation, Konst. RF, art. 40(1) (“Everyone shall have the right to a home.”).

While some countries like South Africa have taken on domestic obligations to provide government-supported housing to all needy residents,⁸ international law currently sets a lower bar. International law recognizes that, while governments are not generally obligated to provide housing, governments must protect, *inter alia*, equal access for all to adequate shelter. The Hazleton IIRA falls below even this minimal standard by barring undocumented workers

⁸ South Africa provides one of the strongest examples of a country that both recognizes the right to housing and also affirmatively requires the state to assist people in South Africa in realizing this right. South Africa’s constitution provides that “[e]veryone has the right to have access to adequate housing,” and it further obligates the government to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.” S. Afr. Const. 1996 § 26(1)-(2). In October 2000, the Constitutional Court of South Africa reiterated and enforced section 26 of the constitution, holding that it “obliges the state to act positively to ameliorate” the desperate conditions in which hundreds of thousands of people are living in South Africa, and this obligation includes providing access to housing to those who are not able to support themselves. Government of the Republic of South Africa v. Grootboom & Others, 2000 (11) BCLR 1169 (CC) 93. The court went on to observe that the right of access to adequate housing ensures that individuals are afforded basic human needs, and “[a] society must seek to ensure that the basic necessities of life are provided to *all* if it is to be a society based on human dignity, freedom and equality.” Id. ¶ 44 (emphasis added). Recognizing that the South African constitution requires that “everyone” be treated with care and concern, and that the state take “reasonable” measures to achieve recognition of this right, the South African Court held that a policy “that excludes a significant segment of society” is not reasonable. Id. ¶¶ 43, 44.

from letting, leasing, or renting any dwelling units. See Appellee Br. at 14-15.

Such a complete restriction on an individual's right even to seek housing is outside of the acceptable practices evidenced by international law and the practice of our peer nations.

Additionally, like all other basic human rights, “the right to adequate housing applies to everyone” and “enjoyment of this right must not . . . be subject to any form of discrimination.” The Committee on Economic, Social, and Cultural Rights, General Comment 4 ¶ 6, U.N. Doc. E/1992/23 (1991). Indeed, CERD explicitly prohibits discrimination with respect to the right to housing. CERD, art. 5(e)(iii). Likewise, the United Nations Office of the High Commissioner for Human Rights has recognized that “[a]dequate housing is universally viewed as one of the most basic human needs” and that this right is “one to which everybody is entitled [– it] is the right of every child, woman and man – everywhere.” U.N. Office of the High Comm’r for Human Rights, Fact Sheet No. 21, The Human Right to Adequate Housing, available at <http://www.unhchr.ch/html/menu6/2/fs21.htm>. Consistent with this principle, the United Nations Commission on Human Rights adopted Resolution 2001/28(e)(i), which called upon all States “to give full effect to housing rights . . . without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [and] to

counter social exclusion and marginalization of people who suffer from discrimination on multiple grounds, in particular by ensuring non-discriminatory access to adequate housing for indigenous people and persons belonging to minorities.” U.N. Comm’n Human Rights, No. E/CN.4/2001/28 (2000).

Here, the Hazleton IIRA discriminatorily infringes on the right to housing on the basis of race and national origin. On its face, the law is targeted at “illegal alien[s]” but in practice its effects and application would inevitably be over-inclusive. Namely, United States citizens and lawful residents belonging to racial and ethnic minorities would be selectively impacted when landlords deny housing to individuals that they suspect or wrongly assume to be subject to the Hazleton IIRA. And, as mentioned above with regards to the IIRA’s violation of due process, the law provides inadequate opportunity for wrongfully aggrieved parties to contest a status determination by a landlord or the City. Accordingly, the Hazleton IIRA vitiates the housing rights of citizens, legal immigrants, and undocumented immigrants alike.

CONCLUSION

The Third Circuit should affirm the District Court's permanent injunction of the Hazleton IIRA. Not only is the Hazleton IIRA inconsistent with United States law, but it also is incompatible with international law and the law of other democratic nations. The Third Circuit has consistently acknowledged the inherent value of looking to international law and the law of other mature democracies in resolving domestic legal issues concerning individual rights. While international instruments and foreign law do not recognize an absolute right to work or to housing for unlawful residents, they do not permit nations, in lieu of deportation, to deny such individuals due process or the means to secure their basic livelihood and shelter. Moreover, the lack of due process, and lack of any reliable mechanism by which the City of Hazleton can determine federal immigration status, would impermissibly result in United States citizens and lawful residents being denied employment and housing on the basis of their race and ethnic origin.

For the foregoing reasons, *Amici* respectfully request that this Court affirm the District Court's decision to permanently enjoin the Hazleton IIRA.

Dated: New York, NY
April 17, 2008

Respectfully submitted,

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I hereby certify pursuant to LAR 46.1 that I was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit on April 22, 2005, and I am presently a member in good standing at the Bar of said Court.

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I hereby certify that:

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I hereby certify that on this day a copy of the foregoing brief was filed electronically with the Court, and an original and ten (10) copies of the brief were filed with the clerk of the Court by Federal Express. I further certify that also on this day two (2) copies of the brief were served by Federal Express upon the following counsel of record:

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