

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT



PEDRO LOZANO; HUMBERTO HERNANDEZ; ROSA LECHUGA; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3, a Minor, By His Parents; JANE DOE 1; JANE DOE 2; JANE DOE 3; JOHN DOE 4, a Minor, By His Parents; BRENDA LEE MIELES; CASA 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
THE HONORABLE JAMES M. MUNLEY, JUDGE PRESIDING
(CASE NO. 3:06CV1586)

BRIEF OF *AMICI CURIAE* APPLESEED, NATIONAL LATINO OFFICERS ASSOCIATION, AND NATIONAL BLACK POLICE ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amicus curiae Appleseed is a non-profit network of sixteen independent public interest justice centers in the U.S. and Mexico. One of national Appleseed's core areas of work is ensuring that immigrants are well-served by their communities and afforded the rights and opportunities they need to become full, productive participants in American society. Appleseed's Immigrant Policy Program focuses on improving law, policy and practice on immigrant issues at both state and local levels, in conjunction with several of its Centers nationwide. Appleseed or members of its network have previously participated in similar litigation challenging local anti-immigration ordinances, including by filing an *amicus curiae* brief in *Riverside Coalition of Business Persons and Landlords, et al. v. Township of Riverside*, No. L-2965-06 (N.J. Super. Ct. Law Div).

Amicus curiae National Latino Officers Association is a fraternal and advocacy organization with a membership of 10,000 uniformed and civilian employees, predominantly within city and state law-enforcement agencies. NLOA's mission is to create strong bonds between the Latino community and law-enforcement agencies, while promoting candid and productive communication. Over many years, NLOA, composed primarily of Latino officers, has earned respect and trust within the Latino immigrant community by advising residents of their rights, fighting discrimination, and facilitating a mutual dependence between

the community and law enforcement. NLOA previously filed an *amicus* brief in the U.S. Supreme Court and the Eastern District of New York, and its members have testified before Congress on issues relating to discrimination and law enforcement.

Amicus curiae National Black Police Association is a nationwide organization of African-American police associations dedicated to fairness and effective law enforcement. With approximately 35,000 members in 140 chapters, NBPA has helped develop a strategy for Community-Oriented Policing, aiming to create a bond between minority officers and the communities they serve. NBPA both trains current officers in establishing better relationships within their communities, and provides scholarship programs for youth who are interested in becoming police officers. NBPA believes that only a true, cooperative relationship between residents and police officers can lead to safer communities. NBPA also aims to improve the relationships between police departments and minority populations by evaluating the effect of policies on minority communities, recruiting minority police officers on a national scale, and teaching officers to act with professionalism and compassion in combating corruption, brutality, and racial discrimination. NBPA has previously filed an *amicus* brief in the U.S. Supreme Court.

A motion for leave to file this brief accompanies the brief.

SUMMARY OF ARGUMENT

Hazleton’s anti-immigration ordinances widen the network of agencies — and now, citizens — responsible for enforcing the nation’s immigration laws. With its Tenant Registration Ordinance (“RO”), which prohibits leasing a dwelling to any undocumented immigrant, Hazleton impermissibly seeks to expand the role of local law-enforcement officials, empowering police to investigate, arrest and detain undocumented immigrants suspected of violating civil provisions of the Immigration and Nationality Act. The RO also empowers landlords to deny housing to individuals who cannot obtain occupancy permits, including those unable to prove citizenship or legal residency. Hazleton’s Illegal Immigration Relief Act Ordinance (“IIRA”) prohibits the employment and harboring of undocumented aliens within Hazleton; as its primary enforcement mechanism, the IIRA likewise empowers any official, business entity, or City resident to file a complaint with the Hazleton Code Enforcement Office alleging that a landlord is harboring an undocumented immigrant or that a business employs an unlawful worker.

Hazleton’s expansion of the enforcement of federal immigration law in this manner is unprecedented in its scope, but not in its roots. While Hazleton has departed from the traditional division of law-enforcement resources, its efforts are rooted in the country’s long and unfortunate history of discrimination against

immigrants. As that history has proven, however, such acts of discrimination are as unwise as they are unjust. This is no less true with respect to Hazleton's ordinances.

In addition to the reasons set forth in Appellees' brief, Hazleton's ordinances should be rejected for three reasons.

First, regulations such as Hazleton's, which look to local law-enforcement authorities to enforce immigration restrictions, endanger communities. By undermining relations between police and the communities they serve, and by draining local law-enforcement agencies' scarce resources, such regulations divert local law enforcement from their most important mandate — making communities safer. For these reasons, a consensus of state and local law-enforcement agencies opposes regulations such as Hazleton's.

Second, Hazleton's ordinances are only the most recent examples of discrimination against immigrants. Without a voice in the political process, immigrants — particularly undocumented immigrants — are too often unfairly singled out for burdens that others need not endure. Fortunately, either with the passage of time or through judicial intervention, these injustices are overturned. This Court should follow the lead of courts before it and affirm the District Court's decision.

Third, while Hazleton’s ordinances may target undocumented immigrants, all immigrants — including citizens and legal residents — suffer from the discrimination the ordinances teach and breed. Hazleton’s ordinances effectively empower ordinary citizens to enforce federal immigration laws, but do not give them any tools or guidance for doing so. Consequently, unless the District Court’s decision is affirmed, even well-intentioned citizens will turn to crude proxies for immigration status, resulting in rank discrimination against all immigrants, including citizens and legal residents.

ARGUMENT

I. LAW-ENFORCEMENT OFFICIALS OPPOSE HAZLETON’S ORDINANCES AS A THREAT TO PUBLIC SAFETY.

Hazleton’s RO requires all tenants of rental units to obtain an occupancy permit, for which they must prove that they are citizens or lawful residents.¹ As part of its enforcement mechanism, the RO authorizes the Hazleton Police Department, the Code Enforcement Office, and other local agencies, to examine the paperwork of those seeking permits to determine if federal law permits their residency.² Similarly, the IIRA authorizes citizens to file a complaint with the Hazleton Code Enforcement Office alleging that a landlord is harboring an

¹ RO § 7.b.1.g.

² RO § 8.a.

undocumented immigrant or that a business employs an unlawful worker. The Code Enforcement Office — an administrative agency without expertise in criminal enforcement — would likely rely on the Police Department, both to investigate the validity of complaints and to work with federal immigration officials concerning individuals' immigration status. Hazleton police are, therefore, now authorized to enforce federal immigration law, albeit under the guise of local tenancy and employment ordinances.

Hazleton's expansion of local law enforcement, like other recent state and local proposals or enactments, runs counter to the traditional division of law-enforcement responsibilities. Historically, state and local enforcement of federal immigration law has been limited to the criminal provisions of the INA.³ Enforcement of the INA's civil provisions — including detection, apprehension and deportation of undocumented immigrants — has traditionally been the sole province of the federal government.⁴ Accordingly, the District Court properly held that federal law forbids Hazleton from enforcing any of the provisions of its

³ Immigration and Nationality Act of 1952, Pub. L. No. 78-414, 66 Stat. 166 (codified, as amended, at 8 U.S.C. §§ 1101 et seq. (1995)).

⁴ *See generally* Congressional Research Service, Library of Congress, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* (Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf> (last visited Apr. 10, 2008).

ordinances, noting that the “ordinances disrupt a well-established federal scheme for regulating the presence . . . of immigrants in the United States.”⁵

The traditional allocation of law-enforcement responsibilities exists for good reasons. Federal authorities are more equipped and better trained to enforce federal immigration laws, which are complicated and ever-changing. Relying upon local law-enforcement authorities to enforce such laws would strain their already limited resources. Worse, it would undermine the community-policing initiatives that many local law-enforcement officials rely upon to protect their communities.

For these reasons, *Amici* echo the widespread opposition among state and local law-enforcement officials to regulations, like Hazleton’s, that look to local law-enforcement authorities to enforce immigration restrictions. Indeed, by one recent count, more than 70 state and local law-enforcement agencies and 15 law-enforcement associations actively oppose a role for local law enforcement in immigration policy.⁶ As detailed below, these agencies’ and associations’ opposition makes a compelling case against regulations, such as Hazleton’s, that

⁵ *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007).

⁶ The National Immigration Forum’s list of more than 300 organizations that oppose local enforcement of federal immigration law is available at <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/OppositiontoSLenforcement.pdf> (last visited Apr. 10, 2008).

divert local law enforcement from their most important mandate — making communities safer.

A. By Undermining Community-Policing Initiatives, Local Enforcement of Immigration Law Jeopardizes Public Safety.

Local law-enforcement officials' opposition to regulations such as Hazleton's rests on a number of grounds, but none is more basic or alarming than this: local enforcement of immigration law undermines community-policing initiatives, which play a significant role in combating crime and terrorism.⁷

Community policing involves police officials engaging communities in a working partnership to reduce crime and promote public safety;⁸ they do so by working together to define community needs and implement crime-prevention

⁷ See, e.g., David A. Harris, *The War on Terror, Local Police And Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 Rutgers L.J. 1 (2006) (concluding that local enforcement of immigration law undermines anti-terrorism efforts).

⁸ See U.S. Dep't of Justice, Office of Community Oriented Policing, *What is Community Policing?*, available at <http://www.cops.usdoj.gov/print.asp?Item=36> (last visited Apr. 10, 2008); Vera Institute of Justice, U.S. Dep't of Justice, Office of Community Oriented Policing, *Building Strong Police-Immigrant Community Relations: Lessons from a New York City Project*, at 2 (Aug. 2005), available at http://www.cops.usdoj.gov/files/ric/Publications/Building_PoliceImmigrant_Relations.pdf (last visited Apr. 10, 2008).

strategies.⁹ Law-enforcement agencies across the country have embraced community policing. Over 12,000 police departments are currently engaged in such efforts.¹⁰

Community policing has become “the predominant style of policing today”¹¹ for a simple reason: it works. For example, the New Haven, Connecticut Police Department, attributes a 60% reduction in crime rates between 1990 and 2007 to the Department’s adoption of a community-policing program.¹² In 2002, Philadelphia Mayor John Street announced that Operation Safe Streets, a community-policing initiative intended to eliminate the city’s open air drug trade, had resulted in a 15% decrease in serious crime.¹³ By contrast, since the federal

⁹ U.S. Dep’t of Justice, Office of Community Oriented Policing, *Mayors, Police Chiefs Turn Spotlight on Success of Community Policing*, available at <http://www.cops.usdoj.gov/Default.asp?Item=535> (last visited Apr. 10, 2008).

¹⁰ *Id.*; see also Matthew J. Hickman and Brian A. Reaves, *Community Local Police Departments 1999*, U.S. Dep’t of Justice, Bureau of Justice Statistics, at iii (Feb. 2001) (64% of local police departments had full time community-policing officers during 1999).

¹¹ Steven G. Brandl, *Reflections on the Criminal Justice System After September 11, 2001: Back to the Future: The Implications of September 11, 2001 on Law Enforcement Practice and Policy*, 1 Ohio St. J. Crim. L. 133, 140 (2003).

¹² See Hilary Faxon, *Shooting Crime Rate on the Rise*, Yale Daily News, Oct. 3, 2007.

¹³ See Mayor John Street, *Operation Safe Streets is Working!*, available at <http://ework.phila.gov/philagov/radio/prelease.asp?id=51> (last visited Apr. 10, 2008).

government drastically cut Community Oriented Policing Services funding to the Philadelphia Police Department in 2003, 600 officers have left, murder has increased by 14.2% and violent crime by 3.4%.¹⁴

The defining element of community policing is the development of relationships between police and their communities — many of which, like Hazleton, include undocumented immigrants. Police officers rely upon these relationships to obtain information critical to the prevention and investigation of crime. According to the Chief of Police in Princeton, New Jersey, for example, “[l]ocal police agencies depend on the cooperation of immigrants, legal and illegal, in solving all sorts of crimes and in the maintenance of public order.”¹⁵ As relationships between police and the community improve, police are better able to identify and address the underlying causes of crime.¹⁶

¹⁴ Press Release, Joseph R. Biden, Jr., *Abandoning the Front Line: The Federal Government’s Responsibility to Help Fight Crime in Our Communities* (Sept. 22, 2006), available at http://biden.senate.gov/press/press_releases/release/?id=0298d927-6012-42a1-815e-1d66b5d8a851 (last visited Apr. 10, 2008).

¹⁵ See Elizabeth Llorente, *State Orders Cops to Help U.S. Immigration Agents*, *The Record*, Sept. 20, 2005.

¹⁶ U.S. Dep’t of Justice, Bureau of Justice Assistance, *Understanding Community Policing: A Framework for Action* at 4 (Aug. 1994), available at <http://www.ncjrs.gov/pdffiles/commp.pdf> (last visited Apr. 10, 2008).

Hazleton’s ordinances threaten to inhibit cooperation between police and immigrant communities by involving the Police Department in the investigation of complaints against allegedly undocumented immigrants and their employers and landlords, as well as the verification of individuals’ immigration status. As the former Chief of the Sacramento Police Department warned in the all-important context of anti-terrorism efforts, for local police “[t]o get into the enforcement of immigration laws would build wedges and walls [between the police and the community] that have taken a long time to break down.”¹⁷ For this reason, the International Association of Chiefs of Police — the world’s oldest and largest association of law-enforcement executives— publicly expressed concern that measures such as Hazleton’s ordinances would have a “chilling effect” on the willingness of legal and undocumented immigrants “[to report] criminal activity or assist[] police in criminal investigations.”¹⁸ Legal and undocumented immigrants, already less likely to report crime,¹⁹ would be deterred from sharing information

¹⁷ Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. Times, Apr. 29, 2002, at A1 (internal quotations omitted).

¹⁸ Press Release, Int’l Ass’n of Chiefs of Police (Dec. 1, 2004), available at http://www.iacp.org/documents/index.cfm?document_id=634&document_type_id=2&fuseaction=document (last visited Apr. 10, 2008).

¹⁹ Robert C. Davis and Edna Erez, U.S. Dep’t of Justice, Nat’l Inst. Of Justice, *Immigrant Populations as Victims: Toward a Multicultural Criminal Justice System, Research in Brief*, at 4 (May 1998), available at <http://www.ncjrs.gov/pdffiles/167571.pdf> (last visited Apr. 10, 2008).

with police out of fear that any contact could mean deportation of themselves or family members.²⁰ This risk is especially acute given the significant percentage of families of mixed immigration status.²¹

Ultimately, increased reluctance to report crimes or suspicious activity would make immigrants even more vulnerable to crime, labor abuse, and unsafe housing conditions. According to a spokesman for the Arlington County, Virginia Police Department, “a very likely outcome of [local enforcement of immigration laws is] an entire segment of the population shutting down because they are afraid of you” and thus “a group of people who’s ripe for additional victimization.”²²

But immigrants would not be the only victims of the threat to community policing; we all lose when local law enforcement’s relationship with the community they protect is compromised. The Major Cities Chiefs Association — an organization composed of chiefs of the sixty-four largest police departments in

²⁰ See, e.g., Craig E. Ferrell, *Immigration Enforcement: Is it a Local Issue?*, *The Police Chief*, Feb. 20, 2004, available at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=224&issue_id=22004 (last visited Apr. 10, 2008).

²¹ Michael Fix, et al., *The Integration of Immigrant Families in the United States* 15 (Urban Institute 2001) (85% of immigrant families are mixed status families, with at least one parent who is a non-citizen and one child is a U.S. citizen), available at http://www.urban.org/UploadedPDF/immig_integration.pdf (last visited Apr. 10, 2008).

²² See David Cho, *Some Laborers Arrested In Va. Face Deportation*, *Wash. Post*, Oct. 27, 2004, at A1 (internal quotations omitted).

the United States and Canada — has articulated this concern. “Such a divide between the local police and immigrant groups would . . . eliminate the potential for assistance from immigrants in solving crimes or preventing future terrorist[] acts.”²³

Thus, while Hazleton’s ordinances may appear to assign only a limited role to the Police Department, it is no exaggeration to say that they obstruct the Department’s mandate to keep Hazleton safe. Thanks to the TRO entered in the court below, Hazleton’s ordinances have not yet been enforced. Nevertheless, the District Court found that immigrants already fear that “police were stopping them on the sidewalks or stopping them on the driveway and asking for documentation.”²⁴

If the District Court’s decision were reversed, and the ordinances enforced, the fear experienced by Hazleton’s immigrants would deepen dramatically. Relations between local police and the immigrant community would deteriorate

²³ Major Cities Chiefs, *M.C.C. Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies*, at 6 (June 2006), available at http://www.majorcitieschiefs.org/pdfpublic/mcc_position_statement_revised_cef.pdf (last visited Apr. 10, 2008) (hereinafter, “*M.C.C. Recommendations*”); see also Int’l Ass’n of Chiefs of Police, *Police Chiefs Guide to Immigration Issues*, at 21 (July 2007), available at <http://www.theiacp.org/documents/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf> (last visited Apr. 10, 2008).

²⁴ *Lozano*, 496 F. Supp. 2d at 496 n.17.

further still. Such a result would undermine the Police Department's efforts to make Hazleton safe for *all* residents — citizens, lawfully admitted residents, and undocumented immigrants alike.

B. Local Law-Enforcement Agencies Lack the Resources and Training Necessary to Effectively Enforce Immigration Law.

The folly of Hazleton's ordinances — and local enforcement of immigration law in general — extends beyond the threat to community policing. Due to the complexity of immigration law and local law-enforcement agencies' limited resources, local enforcement of immigration law is wholly ineffective.

Simply put, Hazleton police and their colleagues across the country have neither the resources nor the training to enforce immigration laws. The International Association of Chiefs of Police reports that over 76% of all police departments in the United States have 25 or fewer officers serving populations up to 25,000.²⁵ Federal funding for local law enforcement has been cut significantly in the past five years.²⁶ As the Chief of Police in Houston recently told Congress, “the cost [of enforcing federal immigration law] in terms of manpower, facilities

²⁵ Int'l Ass'n of Chiefs of Police, *Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement* (Feb. 2004), available at <http://www.theiacp.org/documents/pdfs/Publications/ImmigrationEnforcementconf.pdf> (last visited Apr. 10, 2008).

²⁶ *Id.*

and equipment necessary for local agencies to address the 8-12 million illegal immigrants currently living in the United States would be overwhelming.”²⁷

As the District Court found, moreover, “federal immigration rules and the decision whether an alien should be removed are very complex. More than resorting to the Basic Pilot Program or the Systematic Alien Verification for Entitlements (‘SAVE’) is necessary to determine if the federal government seeks the removal of an individual from the United States.”²⁸ Hazleton’s police, like local law-enforcement agencies around the country, are simply not equipped to navigate the complexities of federal immigration law as they juggle the heavy burdens of enforcing state and local law. Like many local law-enforcement officials, the Chief of the St. Paul, Minnesota Police Department has wondered, “How am I supposed to decide as a police officer who I should ask for papers?”²⁹

The answer is costly and time-consuming: specialized and intensive training to familiarize local officers with the range of factors and documents that contribute

²⁷ Border Security and Immigration Enforcement: Hearing Before the H. Comm. on Homeland Security, Subcomm. on Investigations, 109th Cong. (2006) (statement of Harold Hurtt, Chief of Police, Houston, Tex.).

²⁸ *Lozano*, 496 F. Supp. 2d at 532; *see also Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977).

²⁹ Isaac Peterson, III, *This is Your Ministry*, Minn. Spokesman-Recorder, Dec. 11, 2003 (internal quotations omitted).

to the determination of an individual's immigration status.³⁰ Federal immigration agents undergo more than seventeen weeks of training.³¹ Providing such training to local police departments would require a considerable commitment of agency resources, leaving fewer resources available for traditional law-enforcement duties.³²

Ambiguities in Hazleton's ordinances compound the already difficult challenge of training Hazleton's police to enforce federal immigration law. Under the RO, for example, Hazleton's Police Department is charged with examining the paperwork of those seeking occupancy permits to determine if they are properly in the country. But the RO does not set forth the types of paperwork that qualify as "proper identification" of citizenship and/or residency.³³ It is therefore unclear how police officers are to decide what documentation is valid. In some cases, the police would be unable to deduce an applicant's immigration status from

³⁰ Int'l Ass'n of Chiefs of Police, *Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement* (Feb. 2004), available at <http://www.theiacp.org/documents/pdfs/Publications/ImmigrationEnforcementconf.pdf> (last visited Apr. 10, 2008).

³¹ See National Council of La Raza, *State and Local Police Enforcement of Federal Immigration Laws: A Toolkit for Advocates*, at 7 (March 2006), available at <http://www.nclr.org/content/resources/detail/41508/> (last visited Apr. 10, 2008).

³² See, e.g., Ferrell, *supra* note 20.

³³ *Lozano*, 496 F. Supp. 2d at 537.

paperwork or the lack thereof. For instance, a potential occupant currently without the requisite paperwork may be in the process of adjusting her immigration status or may have been granted “implicit” permission to remain in the United States by the federal government.³⁴ For these reasons, among others, federal law requires immigration status to be determined by a federal immigration judge,³⁵ and the District Court properly held the RO’s enforcement procedures preempted.³⁶

It therefore comes as no surprise that local law-enforcement officials view laws such as Hazleton’s as unfunded mandates bound to overburden local enforcement agencies. As the Chief of the San Antonio Police Department warned, “[a]ny time we get mandates and more work without a commensurate amount of resources, something has to suffer.”³⁷ The Commissioner of the Philadelphia Police Department recently agreed, warning that police “enforcement of local and state laws, as well as . . . current Homeland Security duties, would be compromised” by mandatory enforcement of federal immigration law.³⁸

³⁴ *Id.* at 531.

³⁵ *See* 8 U.S.C. § 1229a(a)(1).

³⁶ *Lozano*, 496 F. Supp. 2d at 533.

³⁷ Elaine Aradillas, *Sheriff, Top Cop Blast INS Proposal*, San Antonio Express News, Apr. 5, 2002, at 1A (internal quotations omitted).

³⁸ *See* Immigration Issues: Hearing Before the S. Comm. on Judiciary, 109th Cong. (2006).

Thus, regulations such as Hazleton's ordinances are simply not worth their risks. A consensus of law-enforcement officials agrees that local law-enforcement agencies lack the resources and training to enforce federal immigration law with any degree of effectiveness. Due to their inefficacy, therefore, ordinances such as Hazleton's offer no reward to weigh against the very real risk that local enforcement of immigration law will undermine public safety by compromising community-policing efforts.

II. HAZLETON'S ORDINANCES SHOULD BE REJECTED AS MIRRORING PREVIOUSLY INVALIDATED ANTI-IMMIGRANT LEGISLATION.

Throughout U.S. history, the political process has been abused to disfavor immigrant groups whom that process excludes. States have fashioned legislation targeting unpopular immigrants, depriving them of social services or erecting obstacles to their employment. Federal policies have likewise disadvantaged unpopular immigrant groups, excluding them from entering the country or, in extreme cases, authorizing their detention based on nothing more than their country of origin.

Hazleton's ordinances follow these ugly and unfortunate precedents. Like other examples of legislation reflecting irrational animus, fear and prejudice

against immigrants, Hazleton’s ordinances are based on nothing more than “animosity” toward a currently “politically unpopular group.”³⁹

Courts are the last bulwark against such abuse of the political process. Justice Harlan Fiske Stone long ago asked whether “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”⁴⁰ In the decades since, federal courts have responded with a resounding “yes,” invalidating efforts to use the political process to discriminate against those excluded from that process. And even when courts have hesitated to invalidate such efforts — most infamously, in the Japanese internment cases — their reluctance has been “overruled in the court of history.”⁴¹

This Court should continue the judiciary’s important role as a vanguard for tolerance and human dignity, and affirm the invalidation of Hazleton’s ordinances.

³⁹ *Romer v. Evans*, 517 U.S. 620, 634 (1996).

⁴⁰ *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4 (1938).

⁴¹ *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Ca. 1984).

A. Throughout U.S. History, Legislatures Have Enacted Anti-Immigrant Laws and Policies Based on Irrational Fear, Prejudice and Animus.

The history of U.S. immigration is one of revolving “cycles of invitation and exile.” Immigrants are first welcomed during times of labor shortage and then subjected to cruel treatment during economic downturns.⁴²

During waves of anti-immigrant legislating, laws take two forms: restrictive immigration laws, and measures “aimed at making things more difficult for those who are already here.”⁴³ The federal government is responsible for the former, setting limits on immigration.⁴⁴ But both the federal and state governments have enacted measures targeting immigrants already present in the U.S. by requiring them to register with states⁴⁵ or the federal government,⁴⁶ prohibiting immigrants

⁴² Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile, in Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States*, 190, 190 (Juan F. Perea ed. NYU Press 1997) (hereinafter, *Immigrants Out!*).

⁴³ *Id.*

⁴⁴ *See, e.g.*, Chinese Exclusion Acts, ch. 126, 22 Stat. 58 (1882), ch. 1064, 25 Stat. 504 (1888) (prohibiting Chinese immigration) (repealed 1943); Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (establishing immigration quotas based on country of origin) (repealed 1943).

⁴⁵ *Hines v. Davidowitz*, 312 U.S. 52, 62 n.8 (1941) (citing WWI-era legislation creating registration programs passed in Connecticut, Florida, Iowa, Louisiana, Maine, New Hampshire and New York, and recent legislation in Pennsylvania, North Carolina and South Carolina, among others).

from owning property⁴⁷ or pursuing certain livelihoods,⁴⁸ prohibiting the teaching in, or of, foreign languages,⁴⁹ and depriving immigrants of the right to social services, public healthcare and education.⁵⁰

Early anti-immigrant laws targeted Chinese immigrants.⁵¹ As the numbers of Chinese grew, so did general prejudice against them.⁵² In response, the

(Footnote continued from previous page.)

⁴⁶ Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002).

⁴⁷ *Oyama v. California*, 332 U.S. 633, 636 (1948) (striking down California land law forbidding “aliens ineligible for American citizenship” from owning, leasing, acquiring, or transferring agricultural land).

⁴⁸ *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (law ostensibly regulating laundry business enforced only to exclude Chinese from industry); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948) (striking down law prohibiting issuance of commercial fishing license to certain immigrants); *Oyama*, 332 U.S. 633 (striking down law forbidding certain immigrants from owning, leasing, acquiring, or transferring agricultural land).

⁴⁹ *Meyer v. Nebraska*, 262 U.S. 390 (1923) (overturning conviction for teaching German).

⁵⁰ See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down law withholding public education from children of undocumented immigrants); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (1995) (striking down law withholding public education, health care, and social services from undocumented immigrants).

⁵¹ *Chae Chan Ping v. U.S. (The Chinese Exclusion Case)*, 130 U.S. 581, 594 (1889).

⁵² *Oyama*, 332 U.S. 633, 651-52 (Murphy, J., concurring).

California legislature passed anti-immigrant laws based on “hostility to the race and nation” of Chinese immigrants.⁵³

At the turn of the twentieth century, national animus turned against Japanese immigrants. California enacted numerous laws limiting the rights of Japanese immigrants, aiming to make “economic life in California as uncomfortable and unprofitable for them as legally possible.”⁵⁴ Anti-Japanese hostility reached a cruel pinnacle in the forced relocation and internment of persons of Japanese descent as World War II exacerbated “the long campaign” against the Japanese.⁵⁵

Another cycle soon followed. The *Bracero* Program, a bilateral agreement between the U.S. and Mexico, allowed hundreds of thousands of Mexicans to enter the U.S. as temporary agricultural employees. When demand for this labor source waned, the United States deported over 1.3 million Mexican immigrants — including some U.S. citizens — in a program dubbed “Operation Wetback.”⁵⁶

⁵³ *Yick Wo*, 118 U.S. at 374.

⁵⁴ *Oyama*, 332 U.S. at 653-54 (Murphy, J., concurring) (noting that 17 and 20 such laws were proposed in 1909 and 1911, respectively).

⁵⁵ *Korematsu v. United States*, 323 U.S. 214 (1944); *Takahashi*, 334 U.S. at 423.

⁵⁶ Aristide R. Zolberg, *Reforming the Back Door: The Immigration Reform and Control Act of 1986 in Historical Perspective*, in *Immigration Reconsidered: History, Sociology, and Politics* 315, 319 (Virginia Yans-McLaughlin ed., Oxford University Press, 1990).

Nevertheless, large numbers of Mexican immigrants continued to enter the United States.⁵⁷ As Mexican and Latin American immigration increased, states responded by passing laws limiting access to state services and education based on immigrant status.⁵⁸ The Supreme Court observed that these undocumented immigrants make up a group “whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state . . . may wish to subject them.”⁵⁹

B. Federal Courts Can Act as a Vanguard Against Such Irrational Fear, Prejudice and Animus.

Federal courts have consistently struck down laws passed by states and municipalities which would have restricted the rights of immigrants. In 1886, the Supreme Court held that the Equal Protection clause of the 14th Amendment applied to aliens, and struck down a law excluding Chinese immigrants from operating laundries in San Francisco.⁶⁰ The Court also struck down state laws

⁵⁷ *Immigrants Out!*, *supra* note 42, at 198.

⁵⁸ *See, e.g., Plyler*, 457 U.S. 202 (striking down Texas state law targeting Mexican immigrants); *League of United Latin Am. Citizens*, 908 F. Supp. 755 (striking down California law targeting Mexican immigrants).

⁵⁹ *Plyler*, 457 U.S. at 220, n.18 (internal citations omitted).

⁶⁰ *Yick Wo*, 118 U.S. at 374.

prohibiting persons of Japanese descent from obtaining fishing licenses,⁶¹ and from owning or occupying agricultural land within the state of California.⁶²

Federal courts have protected undocumented immigrants, as well. In 1982, the Supreme Court declared unconstitutional a Texas law that withheld funds from school districts for the education of children who were not “legally admitted” into the United States and authorized school districts to deny enrollment to such children.⁶³ More recently, California’s Proposition 187 required law enforcement, social services, health care and public education personnel to verify the immigration status of all persons with whom they came into contact, report undocumented individuals to state and federal authorities, and deny services to these undocumented immigrants.⁶⁴ State police chiefs criticized the measure, warning that it would drain resources, defeat community-policing efforts, and likely result in the violation of civil rights.⁶⁵ (State and local police officials today

⁶¹ *Takahashi*, 334 U.S. 410.

⁶² *Oyama*, 332 U.S. 633.

⁶³ *Plyler*, 457 U.S. at 205.

⁶⁴ *League of United Latin Am. Citizens*, 908 F. Supp. 755.

⁶⁵ Jeff Collins, *Will 187 Give Cops New Beat?; Police: Even in the proposition's birthplace, police can't tell what its impact might be*, Orange County Register (California), Nov. 4, 1994, at B01.

echo these concerns in their criticism of the Hazleton ordinances.⁶⁶) Soon after the law was enacted, a federal district court declared most of its provisions unconstitutional.⁶⁷

Courts have sometimes hesitated to vindicate the rights of immigrant groups, only to see their hesitation later condemned. Most infamous is the example of the Supreme Court's refusal to invalidate the internment of Japanese Americans.⁶⁸ Years later, however, a federal court ruled that the Supreme Court's original decision was a legal anachronism "overruled in the court of history."⁶⁹ A Congressionally-appointed commission later found that the internment was "motivated largely by race prejudice, wartime hysteria and a failure of political leadership."⁷⁰ Based on these conclusions, Congress appropriated \$1.65 billion to be paid as reparations to "acknowledge the fundamental injustice of" the internment.⁷¹

⁶⁶ *See supra* Section I.

⁶⁷ *League of United Am. Citizens*, 908 F. Supp. 755.

⁶⁸ *See Korematsu*, 323 U.S. at 215-16.

⁶⁹ *See Korematsu*, 584 F. Supp. at 1420.

⁷⁰ 50 U.S.C. App. § 1989a.

⁷¹ 50 U.S.C. App. § 1989, § 1989b-3.

C. This Court Should Follow the Judicial Tradition of Striking Down Laws, Such as Hazleton’s Ordinances, Based on Irrational Fear, Prejudice and Animus.

Hazleton’s ordinances, like their historical predecessors, were passed to target an unpopular minority with little or no voice in the political process.

Hazleton’s decision to enact these ordinances in an effort to make the city “one of the toughest . . . in America for illegal aliens,”⁷² is a reprise of anti-immigrant campaigns a century ago. These ordinances, in other words, continue the most recent wave of anti-immigrant laws targeting Mexicans and other Latin Americans — a wave of laws that many federal courts have already seen fit to invalidate.⁷³

That Hazleton’s ordinances do not single out a particular ethnic group does not save them from criticism. The ordinances are based on and foster prejudice toward Latinos.⁷⁴ The Supreme Court has found that while a law may draw

⁷² Michael Rubinkam, *Hispanics Flee Pa. Town in Advance of Crackdown*, The Associated Press, Oct. 31, 2006 (quoting Hazleton Mayor Lou Barletta).

⁷³ See, e.g., *Plyler*, 457 U.S. 202; *League of United Latin Am. Citizens*, 908 F. Supp. 755 (striking down California law targeting Mexican immigrants).

⁷⁴ See *infra* Section III. See also Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue, in Immigrants Out!*, 165, 171-72 (citing studies finding that the use of the term “illegal alien” refers to Mexicans).

distinctions based on federal immigration status rather than ethnicity, such laws are thinly veiled, unconstitutional attempts to target particular groups.⁷⁵

This Court should follow the strong tradition of federal courts, and affirm the District Court's ruling.

III. LOCAL IMMIGRATION ORDINANCES SUCH AS HAZLETON'S TRIGGER DISCRIMINATION AGAINST ALL IMMIGRANTS.

The impact of Hazleton's ordinances is not limited to undocumented immigrants. By deputizing average citizens to enforce immigration law against their employees, tenants and neighbors, the ordinances create an atmosphere of suspicion and vigilantism. They thereby breed discrimination against legal residents and undocumented immigrants alike, as well as citizens who, though born and raised in the U.S., share a common heritage with the immigrant groups the ordinances target.

Already, a climate of intimidation pervades cities once friendly and hospitable to immigrants.⁷⁶ Legal residents who left big cities for small towns like Hazleton in search of affordable housing and better employment find themselves

⁷⁵ See, e.g., *Takahashi*, 334 U.S. at 422 (Murphy J., concurring) (law directed at non-citizens was "the direct outgrowth of antagonism toward persons of Japanese ancestry . . . designed solely to discriminate against such persons." See also *Plyler*, 457 U.S. 202.

⁷⁶ Rubinkam, *supra* note 72.

unwelcome.⁷⁷ Some have been sent hate mail or been told to “[g]o back to [their] own country.”⁷⁸ Ordinances such as Hazleton’s compound this message.

Unsurprisingly, only months after Riverside, New Jersey passed an ordinance penalizing those who employed or housed undocumented immigrants, “hundreds, if not thousands, of recent immigrants from Brazil and other Latin American countries had fled.”⁷⁹

Hazleton’s anti-immigration ordinances fuel this climate of intimidation by placing landlords, business owners, and local residents on the front line in the war against illegal immigration. In debates surrounding the passage of such ordinances across the country, immigrants are wrongly associated with everything from drug trafficking to murder, and blamed for an overall diminution in the quality of life.⁸⁰ These associations are baseless; data does not support the proposition that crime

⁷⁷ *Lozano*, 496 F. Supp. 2d at 484.

⁷⁸ *Id.* at 509-10; Rubinkam, *supra* note 72.

⁷⁹ Ken Belson and Jill P. Capuzzo, *Town Rethinks Laws Against Illegal Immigrants*, N.Y. Times, Sept. 26, 2007, at A1.

⁸⁰ Milan Simonich, *Hazleton Draws a Hard Line; Ordinance Aimed at Illegal Immigrants Puts Mayor at Center Stage*, The Pittsburgh Post-Gazette, Aug. 27, 2006, at A1; Ordinance 2006-18, § 2(C).

rates are increasing, nor does evidence suggest that illegal immigrants are disproportionately responsible for crime.⁸¹

Worse still, by charging landlords, business owners, and local residents with the task of enforcing immigration laws against their neighbors, Hazleton's ordinances also lead to rampant enforcement mistakes. The ordinances "deputize" landlords to determine who among their tenants is an "illegal alien" under federal law, a task Justice Blackmun found "impossible" even for a state — let alone a local municipality or an untrained civilian.⁸² Once an allegation of illegality is made, local municipalities must verify the suspected person's identity using federal immigration data, which is frequently unreliable. One recent study showed that, between 2002 and 2004, immigration data stored on the National Crime Information Center database resulted in **false positives 42% of the time.**⁸³

⁸¹ In fact, data shows the crime rate is actually decreasing in Hazleton. Zogby International, Survey Prepared for the Greater Hazleton Area Civic Partnership 23 (Aug. 2007), available at <http://media.timesleader.com/documents/Hazleton+Final+Report+October+2007.pdf>. (last visited Apr. 10, 2008)

⁸² *Plyler*, 457 U.S. at 236 (Blackmun, J., concurring).

⁸³ Ordinance 2006-18 § 4(B)(3); Hannah Gladstein, *et al.*, NYU Migration Policy Inst., *Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using the National Crime Information Center Database, 2002-2004* 3 (2005), available at http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf (last visited Apr. 15, 2008).

Even if immigration data from the federal government were more accurate, mistakes in civil enforcement of immigration laws are inevitable. Determining an individual's immigration status is much more complicated than simply searching a database. Immigration status can change in the course of days, and remains uncertain until a final order of removal has been issued by the federal government.⁸⁴ Thus, an individual's immigration documents may be out of date while she is in the process of applying for a visa extension. Likewise, an individual may temporarily fail to qualify for a student visa because he failed to register for enough college credits. As the District Court recognized, neither individual in the preceding examples would necessarily be deported under federal immigration provisions, and yet, under local immigration ordinances like Hazleton's, they could be denied a place to live.⁸⁵ Similarly, while the federal government has, in certain circumstances, allowed mixed-immigration-status families to remain intact or reside in federally subsidized housing,⁸⁶ Hazleton's ordinances would prevent such families from living together.

⁸⁴ *See supra* note 35, and accompanying text.

⁸⁵ *Lozano, supra* note 77.

⁸⁶ *See* 24 C.F.R. § 5.508(e); *Yolano-Donnelly Tenant Ass'n v. Cisneros*, No. S-86-846 MLS PAN, 1996 U.S. Dist. LEXIS 22778, at *13 (E.D. Cal. Mar. 8, 1996).

Faced with these uncertainties, landlords, business owners and local residents may resort to crude proxies to enforce Hazleton’s ordinances, resulting in discrimination against legal immigrants and undocumented immigrants alike. Without reliable guides for determining an individual’s immigration status, landlords and business owners will likely suspect an individual because of, say, her dark skin or Spanish accent, or because foreign music can be heard from the speakers of her car. This is not an ungrounded fear. Untrained local police relied on precisely these proxies during the Chandler, Arizona immigration raids, rounding up scores of legal residents because they “looked Mexican.”⁸⁷ The Chandler case illustrates that “[r]acial profiling is a routine aspect of immigration law enforcement.”⁸⁸ As law-enforcement associations have pointed out, “[p]olice officers, who receive no training in the intricacies of immigration law, are bound to make mistakes . . .”⁸⁹ As civilians receive even less training than police, such

⁸⁷ See Mary Romero and Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police’s Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 Clev. St. L. Rev. 75, 90-91 (2005).

⁸⁸ Brief for the Nat’l Latino Officers Ass’n, *et al.* as *Amici Curiae* Supporting Respondent at 28, *Muehler v. Mena*, 544 U.S. 93 (2005) (No. 03-1423), 2003 U.S. Briefs 1423.

⁸⁹ *Id.*

instances of racial profiling almost certainly will recur under ordinances such as Hazleton's.

Threatened with strict sanctions, moreover, business owners may altogether refuse to deal with individuals they suspect are undocumented immigrants.

Conscientious landlords and business owners may adopt an informal policy of refusing to rent to or hire any immigrants or persons of Latino descent.⁹⁰ Others may fire or evict individuals who are the subject of a complaint rather than dealing with the costs and uncertainty of verifying their immigration status.

Such patterns of behavior are well-documented. Following the passage of the Immigration Reform and Control Act of 1986, which attached civil and criminal sanctions to the hiring of unauthorized workers, many employers reported that they no longer hired people with an accent or a foreign appearance.⁹¹ A decision not to hire an individual based on perceived origin or ethnicity is clearly illegal, but as experience under IRCA shows, businesses may choose to risk potential liability for discriminatory conduct rather than bear the costs of non-compliance with local ordinances.

⁹⁰ Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 Denv. U. L. Rev. 1041, 1052-53 (2007).

⁹¹ 8 U.S.C. § 1324a; General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination* 5-6 (1991), available at <http://archive.gao.gov/d24t8/140974.pdf>.

It is not hard to imagine the parade of other, equally deleterious, consequences that will likely ensue if Hazleton’s ordinances are not invalidated. Undocumented victims of domestic violence may not file a police complaint for fear of losing their job or apartment. Residents of “mixed households” — households consisting of undocumented immigrants, legal residents, and U.S. citizens — may withdraw from civil society for fear that their conduct, as viewed by landlords or local police, may harm their undocumented family members.⁹² Legal residents may be evicted for hosting an undocumented relative in their rented apartment for as little as one weekend.⁹³

Because Hazleton’s ordinances are currently enjoined, the full extent of their potential fall-out cannot yet be determined. As the District Court correctly found, however, the country’s previous experience with laws such as Hazleton’s — as well as the record concerning Hazleton’s ordinances themselves — prove that enforcement of immigration laws by landlords and business owners will unjustly deprive individuals of their constitutional rights.⁹⁴

⁹² Tiffany Walters Kleinert, *Note and Comment: Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 DePaul L. Rev. 1103, 1121-22 (2006).

⁹³ *See* Ordinance 2006-18 §5(A).

⁹⁴ *Lozano*, 496 F. Supp. 2d. at 534, 537.

CONCLUSION

Hazleton’s anti-immigration ordinances are part of a history of discrimination against immigrants — a history that serves no “credit to a nation that prides itself, at least historically, on being the friendly haven of the tired and the oppressed of other lands.”⁹⁵ Fortunately, however, “[o]pposition to laws . . . singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country,” as well.⁹⁶ In the case of Hazleton’s ordinances, that opposition includes a vocal consensus of state and local law-enforcement officials, who oppose the expansion of state and local officials’ role in enforcing federal immigration law. This Court should heed their warning, and affirm the District Court’s decision invalidating Hazleton’s pernicious anti-immigration ordinances.

⁹⁵ *Oyama*, 332 U.S. at 652 (Murphy, J., concurring).

⁹⁶ *Hines*, 312 U.S. at 70 (emphasis added).

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CERTIFICATE OF BAR MEMBERSHIP

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

/s/ Mark David McPherson
Mark David McPherson

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Appleseed, *et al.* Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (Microsoft Word 2000), the word count of the brief is 6,941, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, certificate of bar membership, certificate of virus check and this certificate of compliance. The hard copy and the electronic copy of this brief are identical.

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Case Name: Lozano v. Hazleton

Docket Number: 07-3531

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