IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PEDRO LOZANO, et al,
Plaintiffs :
:
:
vs : #06-CV-1586
:
:
CITY OF HAZLETON, et al, :
Defendants :

VOLUME 9

BEFORE: HONORABLE JAMES M. MUNLEY
UNITED STATES DISTRICT JUDGE

PLACE: SCRANTON, PENNSYLVANIA

PROCEEDINGS: NON-JURY TRIAL

DATE: THURSDAY, MARCH 22, 2007

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1 (The following is an excerpt of the proceedings.)
2 MR. KOBACH: Let me begin by thanking the Court for
3 its courteous and permissive treatment of all the attorneys
4 present today. I think you have been very kind to us in our
5 missteps throughout this case in terms of procedure before
6 the Court and in terms of questioning witnesses.
7 Let me also thank opposing counsel for their
8 demeanor and help in making this go smoothly.
9 Let me also invite you to tell me to slow down if I
10 am doing so. Tell me to repeat myself, if I said something
11 too quickly, and feel free to interrupt me with questions as

12 well. I would certainly appreciate it.
13 The three operative briefs here which I'm going to
14 refer to from time to time are really these:
15 On January 23rd, the Defendants submitted a
16 memorandum of law supporting our motion to dismiss. I will
17 refer to that as the first Defendants' brief.
18 The second brief came from the Plaintiffs. That
19 was their February 12th response and cross motion for summary
20 judgment memo of law.
21 Then the third one is our March 2nd response
22 memorandum. In order to avoid redundancy, what we did in
23 that response was not just simply recite the same arguments
24 over again, we treated it as a reply brief. So when you're
25 looking at this issue, you can go from the January brief to
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1 the Plaintiffs' response in February, and you will see our
2 response to their response in March.
3 Now, Mr. Walczak spent about 20 minutes offering
4 you a story and some quotations from the dictionary about
5 scapegoating. Your Honor, I'm not going to waste the Court's
6 time telling you story or a narrative or quoting the
7 dictionary. I will go straight to the law, because as you
8 have recognized, this is a case about law. I will plug in
9 the facts where appropriate when we walk through the legal
10 argument here.
11 Before I do, I just want to mention two quick
12 things that were pointed out at the end of Plaintiffs'
13 closing. The first one is the question of the amendment of
14 the ordinance. We had the amendment of the ordinance in
15 December, which was the implementation amendment, 2006-40,

16 which simply added a Section 7. That has always been before
17 the Plaintiffs and Defendants and the Court since the second
18 amended complaint.
19 I guess the question really goes to the last -- the
20 amendments this week, which deleted solely or primarily and
21 added the word knowingly.
22 Your Honor, this is something we encounter
23 frequently in Constitutional law. Just off the top of my
24 head, I can think of a case where the lower courts and the
25 Supreme Court regarded this perfectly appropriate to look at
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1 the most recent version of the statute. That was Santa Fe
2 Independent School District versus Doe.
3 THE COURT: Were those amendments during the
4 proceedings?
5 MR. KOBACH: They were amendments by a school board
6 after the case was filed, and I don't have the case in front
7 of me. That was the famous case about the prayers at a
8 football game, and the school board changed the prayer policy
9 during the pendency of the case, and the Court simply ruled
10 on the latest version of it to avoid the mootness problem.
11 The second reason why it would be appropriate to
12 rule on the latest version is that the deletion of the word
13 solely and primarily, and the addition of the word knowingly
14 is consistent with what the Defendants have been saying the
15 ordinance meant all along.
16 Plaintiffs were simply saying, no, this is a -- we
17 don't think your words mean what they say they mean. Those
18 were true clarifications. There was no change in the meaning
19 of the ordinance.

20 Mr. Walczak said this on the fly, so he might not
21 have had time to think it through, but he said, well, this
22 would fall under the cessation of illegal activity sort of
23 exception to the mootness doctrine.
24 Your Honor, there has been no activity. The
25 ordinance has never gone into effect. All of those cases
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1 talk about an entity, a city or a State stopping the
2 enforcement of an act, and then the likelihood they might
3 resume.
4 Again, those aren't apposite, because injunctive
5 relief on a facial challenge on an act that has never been
6 put into effect, so it is a completely different scenario.
7 Then let me mention one other point that
8 Mr. Walczak alluded to, or didn't allude to, he went straight
9 to. He says that the Defendant didn't give you proper case
10 law, and that the Defendants have been sloppy with the case
11 law. He cited the case of us not giving proper cases on the
12 legislative immunity issue. He's right. We didn't give you
13 any case law on legislative immunity.
14 Typical of Plaintiffs' counsel, Mr. Walczak is not
15 being legally accurate or precise. We gave you case law on
16 legislative privilege. Legislative privilege is the
17 Constitutional privilege of a legislator to not be questioned
18 either on the stand or in any other forum by a government
19 entity. Legislative immunity is the right not to be sued for
20 damages. Again --
21 THE COURT: You were asking for legislative
22 privilege?
23 MR. KOBACH: Yes.

24 THE COURT: And I didn't agree with you.
25 MR. KOBACH: You didn't agree with me. That is
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1 quite all right. That issue is gone now, because he has
2 already testified that is a truly moot issue now, but I
3 merely point to show that we have been meticulous in our
4 citation of law.
5 I don't mind his statement that our cases are
6 incorrect, or that he didn't know the difference, but I do
7 mind his statement that our cases have been incorrect,
8 because we have been very, very careful, and I would be
9 deeply embarrassed if we were not so correct.
10 I want to walk through the outline I gave you in
11 the opening statement and show what we learned since, and I
12 think that is the best way to approach this case and the best
13 way to approach the law is have the legal outline of all the
14 issues, and then see where the facts fit in, and just to
15 remind you, the six big issues I think really are standing,
16 preemption under immigration law, third; due process, fourth;
17 equal protection, fifth; preemption under the Fair Housing
18 Act, six; the legitimate exercise of city police powers.
19 Let's go to standing. There will be a lot of the
20 plugging in of the facts here. Your Honor, I wish I could
21 say to you or to your clerks that writing the standing
22 section of this opinion is going to be easy, but it is not.
23 When I was a clerk on the Tenth Circuit this is
24 precisely the type of case that I dreaded. The reason being
25 is you have multiple Plaintiffs and you have multiple claims,
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1 and you have to show that each Plaintiff has standing to
2 bring each relevant claim, or at least show that at least one
3 Plaintiff has standing to bring each of those claims for the
4 Court to have jurisdiction to reach the issue.
5 Now, while it is difficult, and I think fair to say
6 a pain to make a standing adjudication in a case like this,
7 it is not quite as bad as it might seem at first glance.
8 There is a silver lining, and that is if a Plaintiff doesn't
9 have -- the Plaintiffs must meet all of their requirements of
10 standing. If any Plaintiff fails on one of the requirements,
11 then that Plaintiff drops out, then we can go to the next
12 group of Plaintiffs.
13 So you don't necessarily have to give the whole
14 grid of every possible standing element for each Plaintiff if
15 some of them fail on one of them.
16 So let's go through each group of Plaintiffs and
17 see if they truly do have standing based on the facts in this
18 case.
19 Now, I mentioned that there are four questions that
20 all go to Constitutional standing, except for the prudential
21 one. So three go to Constitutional standing. Four go to the
22 prudential standing. I will just repeat those.
23 Does the Plaintiff assert an injury to a legally
24 cognizable interest?
25 Second, are the injuries based on concrete
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1 showings, not speculation?
2 Third, are the injuries the direct result of the
3 ordinance, not contingent on the actions of third parties?
4 Fourth, do the Plaintiffs have standing to bring

5 preemption -- this is the prudential one -- are they within
6 the zone of interest in national immigration laws to allow
7 them to a preemption claim there?
8 I want to go quickly to a point that Mr. Walczak
9 raised. On the first issue, injury to a legally cognizable
10 interest, Mr. Walczak came up here and said, no, no, all we
11 have to show you is any burden. Mr. Kobach was confused. We
12 just need to show you some potential burden. It doesn't have
13 to be injury to a legally cognizable interest.
14 Your Honor, it has to be injury to a legally
15 cognizable interest under Third Circuit Law and the U.S.
16 Supreme Court. You can't just say, I'm abstractly burdened.
17 You have to show what interest is injured.
18 The Third Circuit case is AFGE versus Styles, and
19 that is 123 Fed. Appx. 51 at Page 52. That was a 2004 case
20 in the Third Circuit. The Court specifically looked for a
21 legally cognizable injury. In fact, that is an exact
22 quotation, and they were citing the famous Defenders of
23 Wildlife opinion from the U.S. Supreme Court. That analysis
24 is on Page 12 of our January brief.
25 So there is clear case law saying, no, it's not
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1 just any burden. It is a legally cognizable injury that has
2 to be asserted.
3 The second thing that Mr. Walczak threw out there
4 rather briefly is all we need to show is a trifle, an
5 identifiable trifle will suffice.
6 Here Plaintiffs are mischaracterizing a Third
7 Circuit case. That is the Public Interest Research Group of
8 New Jersey versus Powell Duffryn Terminals, and this is

9 discussed on Pages 6 and 7 of our March brief, but basically
10 in response to the requirement that an injury cannot be
11 speculative, Plaintiffs make a great deal of the following
12 words from the Third Circuit: "These injuries need not be
13 large. An identifiable trifle will suffice."
14 That is certainly correct. In terms of economic
15 injury, it doesn't have to be large. It doesn't have to be
16 $1,000. There is no quantitative threshold for standing.
17 However, there is a qualitative threshold, and that is that
18 regardless of the size of the injury, even if the injury is
19 only $10, it cannot be based on speculation.
20 So the identifiable trifle language from the Third
21 Circuit goes to quantity, not to the speculative quality of
22 the injury. So that case law doesn't really get them around
23 the requirement that they have such a hard time getting over,
24 and that is the speculative nature of all of this.
25 Again, if this case had been brought with a
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1 Plaintiff who was actually the subject of enforcement, they
2 wouldn't have a standing problem, but they do, because they
3 are doing it so prematurely on the face of the ordinance and
4 not as applied.
5 Let's go to the first question and walk through
6 those four. Is injury to legally cognizable interest present
7 here then? No.
8 Does someone have a legally cognizable interest in
9 selling lunch to a person who is here in violation of Federal
10 law? No, because you would be asserting an interest in the
11 ongoing violation of Federal law so that the person could
12 come to your restaurant and dine.

13 Does have a person have a legally cognizable
14 interest in renting an apartment to someone whose tenancy
15 would result in unlawful presence or continue their unlawful
16 presence? No. Furthermore, the landlord also doesn't have
17 an interest in his own violation, which would be in harboring
18 under the Federal immigration laws.
19 Does one have a legally cognizable interest in
20 employing an illegal alien? Again, no, Federal law makes it
21 very clear that one cannot do that.
22 So to assert interest in contracts that entail a
23 violation of law is not permissible, and the Supreme Court
24 said so way back in Armstrong v. Toler "Where the contract
25 grows immediately out of, and is connected with an illegal or
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1 immoral act, a Court of justice will not lend its aid to
2 enforce it."
3 Now, the anonymous Plaintiffs, we just heard a
4 little more detail about them from Mr. Walczak, and, frankly,
5 we know very little of their details. This cognizable injury
6 requirement hits the anonymous Plaintiffs very hard.
7 According to Mr. Walczak, John Doe No. 1 does not
8 know his legal status. Your Honor, that does not mean that
9 he lacks a legal status. The Federal Government knows his
10 legal status. He either falls into one of the many
11 categories of aliens lawfully present in the United States or
12 he does not.
13 The City can know his status if it asks the Federal
14 Government pursuant to Title 8 of the U.S. Code Section
15 1373(c). So his status is knowable. He may not be aware of
16 it, but he could certainly find out, too, if he decided to go

17 and ask, but one might imagine that he has a reason not to go
18 and ask.
19 What about the other three John Does; Joe Does
20 Three and Five and Jane Doe Seven? Now, according to
21 Mr. Walczak, those three are unlawfully present, so,
22 therefore, they have no right to remain under Federal law,
23 and clearly, they don't have a legally cognizable interest in
24 a contract for tenancy so they can remain under Federal law
25 or a contract for employment so they can work in violation of
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1 Federal law.
2 Now, he also said, those people are not criminal,
3 and Hazleton should not be unwelcoming of them. All three of
4 those individuals have violated the civil provisions -- we
5 know that -- the civil provisions that make unlawful presence
6 a violation of Federal law, the civil provision of the
7 Immigration and Nationality Act. Those three are probably
8 also criminals, too.
9 Unlawful entry into the United States is a crime
10 under Section 1325(a). Failure to notify the Federal
11 Government if you are alien, failure to notify the Federal
12 Government of your latest address if you move is a crime
13 under Section 1306(b). Misuse of a Social Security number;
14 in other words, using a number that you have made up or
15 someone else's number is a crime. I didn't bring up that
16 cite, but I'm sure you won't be displeased about that.
17 I can tell you from my years at the Justice
18 Department that the vast majority, almost all of the illegal
19 aliens apprehended by the United States Government are guilty
20 of at least two Federal crimes in addition to their unlawful

21 presence on the civil basis.
22 Now, we don't have enough of assistant U.S.
23 attorneys in the country to prosecute all of the immigration
24 crimes, so the vast majority are simply deported or removed,
25 which is a civil procedure, and they are not prosecuted for
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1 their crimes, but that is a matter of resources.
2 Now, let's go through the next part of it. Have
3 the Plaintiffs established -- the second question on
4 standing, have the Plaintiffs established a concrete injury
5 that is not based on speculation? Let's break it down by
6 groups.
7 The business Plaintiffs, we learned at trial that
8 Mr. Lechuga, one of the primary business Plaintiffs, had
9 these stores, and these stores were forced to close down. We
10 learned that his Tamaqua store closed down in 2005 before the
11 Hazleton ordinance was even enacted. His client base in that
12 case had been deported. We learned that his Hazleton store
13 was actually earning more in the second quarter of 2006 when
14 the ordinance was passed than it was in the second quarter of
15 2005 before the ordinance was even discussed.
16 The fact that the Lechugas were more than a year
17 behind in their mortgage payments prompted the mortgage
18 company to foreclose on the store property in the summer of
19 2006. They had been behind since the summer of 2005, and it
20 was at that point, when foreclosure was eminent that they
21 opened the restaurant in February of 2006, when they were up
22 to their eyeballs in debt.
23 They provided absolutely no evidence at trial, not
24 a thing, not a single receipt from a cash register, not a

25 single profit and loss statement. It appears that the
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1 Lechugas were not actually keeping profit and loss
2 statements. Nothing to establish how many customers they had
3 before the ordinance and how many customers they had after
4 the ordinance. They put nothing into evidence, Your Honor.
5 The Plaintiffs must prove, when we get to the trial
6 stage, Plaintiffs must prove, not just assert, prove their
7 standing.
8 Now, Mr. Lechuga is not an employer that would be
9 subject to the employment provisions of the act. He never
10 was, and he stated under oath, he never intended to be an
11 employer. He wouldn't be hiring anyone else. His standing
12 is premised entirely on the loss of customers.
13 Remember, these ordinances are prospective only.
14 He has to show a future loss of customers. Something he
15 cannot do, again, because of the premature nature of this
16 case.
17 Remember something else, Your Honor. We learned
18 when the Mayor was on the stand that 23 new Hispanic-owned
19 businesses have been opened since June of 2006 and the
20 present. Twenty-three Hispanic-owned businesses. Now, that
21 is contrary to the Plaintiffs' claim and to the Lechugas'
22 claim that they can't make money in this context of
23 post-Hazleton ordinance.
24 Moreover, one of those businesses is a restaurant
25 in the exact same location of Mr. Lechuga's restaurant, and
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1 that restaurant appears to be surviving. Why are those
2 businesses prospering? Why are there more businesses opening
3 up? Because, Your Honor, they are good business people and
4 they are following sound business practices.
5 The next set of Plaintiffs, landlord Plaintiffs.
6 Mr. Lozano conceded that I cannot say, quoting directly,
7 whether the ordinance makes it more or less likely that it
8 will be rented, referring to his apartment.
9 That is correct. It is pure speculation to guess
10 whether he will be able to rent that apartment out to some
11 person who walks in and says, hey, I would like some rental
12 accommodations or not. He simply has not been able to show.
13 He conceded, he cannot even speculate at this point.
14 Now, Mr. Lozano also learned for the first time
15 that some of his tenancies may not be within the City limits
16 of Hazleton. The only injury that he could point to was two
17 tenants in his Hazleton apartments that he thought might be
18 illegally present in the United States and they left one day
19 without explanation. Well, they wouldn't be covered by the
20 ordinance anyway if their tenancy was already -- if their
21 tenancy was already in existence. The ordinance only covers
22 tenancies that are entered into in the future.
23 Furthermore, we don't know why they left. They
24 might have found a job in Ohio. They might have found a job
25 in California. Who knows. We can't speculate that the
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1 ordinance caused them to leave.
2 Finally, if they did leave because of the
3 ordinance, the ordinance would not have affected them because
4 of its prospective nature. So they were mistaken, and that

5 mistake and belief cannot be a basis for standing.
6 Let's to the organizational Plaintiffs, the
7 associations. Now, an organizational Plaintiff can only have
8 standing if it has either individual members that the
9 organization is suing on behalf of, or there is an injury to
10 the association itself.
11 Now, injury to an association itself is very
12 difficult. I teach standing law, and I can't think of a case
13 where the Supreme Court -- I'm sure there is one at the lower
14 level, but I can't think of one where the association was
15 recognized as having standing because of injury to itself.
16 They most always have to sue on behalf of members.
17 Now, let's just -- it's unclear. They haven't been
18 very precise in their briefs about what kind of association
19 standing they're asserting, but let's just walk through it.
20 The PSLC has not established that the Pennsylvania
21 Statewide Latino Coalition has failed to establish any injury
22 to itself. Dr. Lopez conceded that the organization was
23 formed because of the ordinance, formed after the ordinance,
24 and the organization was formed to oppose the ordinance. So,
25 if anything, the ordinance gave birth to the organization.
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1 There is clear Supreme Court precedent that an
2 organization that comes into existence or its primary purpose
3 is to oppose a law doesn't have standing to bring suit
4 against that law.
5 The Supreme Court said this in Simon versus East
6 Kentucky Welfare Rights Organization, and that case was not
7 in our briefs. That is 426 U.S. 26 at Pages 39 and 40. Very
8 quickly, I will just quote one sentence, "Our decisions make

9 clear that an organization's abstract concern with a subject
10 that could be affected by an adjudication does not substitute
11 for the concrete injury requirement of Article Three.
12 Insofar as these organizations seek standing based on their
13 special interest in the health problems of the poor, their
14 complaint must fail." The Court goes on to say if they have
15 standing on the basis of individual members.
16 The PSLC cannot show any standing in the terms of
17 injury to the association itself. Now, they have implied in
18 their briefs, although they didn't really get into it much on
19 the stand, that maybe there is a loss of membership problem,
20 or maybe the expense of holding a rally might be an injury.
21 We had to buy some supplies to hold that rally.
22 Well, Mr. Molina told us on the stand that he was
23 surprised how the Hazleton ordinance stimulated membership,
24 caused more people to come, and 20 new people, people he had
25 never seen before, signed up to become members at the meeting
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1 that they held in order to oppose the Hazleton ordinance. He
2 described the rally as well attended.
3 So what about the possibility of standing based on
4 the expense of holding a rally? The ordinance did not cause
5 the rally to come into existence, Your Honor. The desire of
6 an organization to hold a rally and to spend money making
7 public demonstrations is not an injury. I have searched all
8 of Federal case law. I can't find anything even close to
9 this. So if you want to find that that's an injury, we would
10 be treading new grounds, but I have not seen any case where
11 the desire of an organization to hold a demonstration
12 constitutes an injury for that organization.

13 So at this point, without injury to the
14 organization, PSLC is going to have to fall back and say,
15 well, maybe we have injury to our individual members. So on
16 the stand, he was asked which members are in Hazleton and are
17 hurt by the ordinance. He identified the Lechugas, Dr. Lopez
18 and Anna Arias.
19 Now, all three of those do not have standing. The
20 Lechugas we haven already analyzed on the basis of their
21 business standing. Dr. Lopez and Anna Arias -- let's see.
22 We asked Dr. Lopez on the stand whether he was a landlord. I
23 don't think he is. Anna Arias may be a landlord. I think
24 she may be, so she falls in the landlord standing, which I
25 will get to in a minute. So their standing falls into the
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1 other groups, and they have not alleged any facts at trial
2 specific to them in any event.
3 Now, let's go to the Hispanic Business Association.
4 Mr. Espinal testified that the Hazleton Hispanic Business
5 Association didn't form until August of 2006 after the
6 ordinance was passed -- I'm sorry. The Pennsylvania
7 Statewide Latino Coalition had formed beforehand, but then
8 they had their meeting of additional members after 2006. My
9 mistake, Your Honor. It was the Hazleton Hispanic Business
10 Association that formed after the ordinances were passed.
11 So anyway, the claim of loss of members to Hazleton
12 Hispanic Business Association is logically impossible because
13 they did not exist prior to the formation -- prior to the
14 passage of the ordinances.
15 Now, Mr. Espinal also purchased a rental property
16 after 2006, after November of 2006, after the ordinance was

17 passed, expecting he would profit from it. He purchased it
18 and began renovating it. Again, that suggests that as a
19 landlord, he doesn't perceive that these ordinances are going
20 to have a problem or be a problem for him.
21 What about loss of membership to the Hazleton
22 Hispanic Business Association? Well, remember, the
23 organization didn't come into existence until after the
24 ordinance, so it's hard for them to say, well, we went up,
25 and then we went down all after the ordinances, and so that
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1 is going to be improbable, if not impossible, for them to
2 show.
3 Let's go to Casa Dominicana. Casa Dominicana bases
4 its standing on injury to the association itself. That,
5 again, is going to be very hard to show. The association
6 raised more money in November of 2006 than in a similar
7 effort of 2005, and, again, they raised more money after the
8 ordinances and probably because of the ordinances passage.
9 It does not rely on dues for members to finance its
10 organization.
11 Now, remember, they claim that maybe they lost some
12 members because of this ordinance. Well, only three people
13 were specifically identified, and in the first case, the only
14 connection between the ordinances and that person's departure
15 was some speculation based on newspaper articles. In the
16 second and third cases of people who left, the individual
17 stated to Mr. Saldana, and he said on the stand that they
18 were present in the United States illegally. So those people
19 were already having an incentive to leave prior to, and they
20 wouldn't have, of course, a cognizable interest in staying

21 even if they could show that the ordinances were the direct
22 result of their leaving.
23 Enough of that. Let's get to their standing
24 question. Is the injury the direct result of the ordinance
25 and not the result of independent actions not before the
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1 Court? The Plaintiffs didn't say much on this point, but,
2 again, I just want to hit the high points here. The injury
3 cannot be the product of the independent action of a third
4 party, and that is from the Duquesne Light Company precedent
5 of the Third Circuit, and that is in our briefs.
6 This completely knocks out the businessowner
7 Plaintiff standing. Think about this, Your Honor. The
8 businessowner Plaintiffs say, well, we lost customers at our
9 restaurant and at our store because people stopped coming in.
10 Well, that requires -- for that to happen, which is, of
11 course, speculative, that requires the people coming in to
12 make an independent decision, I'm not going to shop here
13 anymore. I'm not going to eat at this restaurant because of
14 the Hazleton ordinance. That is an independent third party
15 not before the Court. That is why you don't see standing
16 resting on that kind of premise in the precedents of the
17 United States Courts.
18 Let's go to the last question under standing. Are
19 Plaintiffs within the zone of interest of the Immigration and
20 Nationality Act and, therefore, able to bring a preemption
21 challenge?
22 Mr. Walczak belittled a decision from Justice
23 O'Connor, which we never characterized as a Supreme Court
24 precedent. Justice O'Connor was sitting in her, I believe,

25 circuit capacity in INS versus Legal Assistance Project of
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1 the LA County of Federation of Labor. It is cited in U.S.
2 reports, 510 U.S. 1301.
3 She said the fact that the INS regulation may
4 affect the way an organization allocates its resources, or,
5 for that matter, the way an employer who currently employs
6 illegal aliens, or a landlord who currently rents to illegal
7 aliens allocates its resources, does not give standing to an
8 entity which is not within the zone of interest statute to
9 protect, and that was referring to the Immigration and
10 Nationality Act when she said the zone of interest of the
11 statute.
12 Are you bound in the same sense by a circuit
13 precedent of statement of Justice O'Connor to the extent of a
14 U.S. Supreme Court decision? No, you are not, but I think to
15 ignore it would be a mistake.
16 Now, there is one more thing that has happened on
17 standing, and that is that the Plaintiffs have shifted ground
18 a little bit in their briefs. They didn't do this in court,
19 but in briefs they shifted ground, and they said -- I think
20 they realized the weakness of the business associations and
21 the landlord standing. So they said, well, really, if the
22 injury is the cost, time and resources that we have had to
23 spend complying, it's a cost of compliance injury, that
24 because there is a new ordinance out there, we have to comply
25 with it, and that is going to be a pain in the neck, and it's
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1 just going to cost us time.

2 Cost of compliance has never been recognized by the
3 Supreme Court, and I'm pretty sure not by any inferior
4 Federal court as a basis for standing. I did a search of
5 every possible way for that issue, and I couldn't find a
6 single case resting on cost of compliance.
7 The Plaintiffs offer only two circuit decisions,
8 Salem and Friendship Medical Center. If you look at our
9 March brief on Page 11, we go through and point out in both
10 of those cases, it wasn't -- the standing wasn't based on
11 cost of compliance, and indeed, the Court specifically found
12 in both cases that it was the threat of prosecution in both
13 cases gave the Plaintiffs standing, not the cost of
14 compliance with a new law.
15 We're done with standing. Let's go to Federal
16 preemption. I think one of the core issues in this case.
17 Now, let's remember the two observations at the beginning
18 whenever we look at Federal preemption -- the transition
19 music was appreciated.
20 The first one is this: The heavy presumption in
21 any Federal preemption case is that the State statute or
22 local statute is not preempted. That is the presumption not
23 only in the immigration act preemption cases, but in any
24 other preemption cases.
25 The second observation here is the congressional
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25

1 intent is the cornerstone of preemption. So not only will
2 they have to show that it fails under one of the De Canas
3 tests, three tests of De Canas, which Mr. Walczak didn't go
4 through -- again failed to go through, but you have to rest
5 your -- hang your hat on one of those De Canas prongs while

6 you're looking at congressional intent, and they have failed
7 to do so.
8 Let's look at the De Canas test, and that is De
9 Canas versus Bica, and it's cited ad nauseam in all of the
10 briefs. The three questions of De Canas are Number One, is
11 this a regulation of immigration? Number two, has Congress
12 occupied the field and completely displaced the states from
13 the field? Number three, is there conflict preemption such
14 that the ordinance defeats the objectives of Congress? That
15 third question has those four subsidiary questions, and I
16 will get to that in a minute.
17 Let's go to the regulation of immigration. Are the
18 ordinances a regulation of immigration? The Supreme Court in
19 De Canas said very clearly that a regulation of immigration
20 is a regulation, quote, that defines who may enter the
21 country or defines the conditions under which lawfully
22 admitted aliens may remain -- sorry -- legal entrance may
23 remain, end quote.
24 This ordinance doesn't do either, and indeed, it
25 would be hard to imagine how it could do either of those
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1 things. It relies on Federal definitions of whether an alien
2 is lawfully present or not. It doesn't attempt to send
3 Hazleton officials down to the southern border or up to the
4 northern border to monitor who can come into the country and
5 impose standards at the border or ports of entry.
6 The other way it becomes a regulation of
7 immigration would be if it defines conditions under which
8 legal aliens can remain in this country, not illegal.
9 Hazleton doesn't do that. It doesn't define, establish

10 discrepancies between green card holders living in the City
11 versus temporary visa holders. So clearly it's not a
12 regulation of immigration under De Canas.
13 I think for the Plaintiffs to claim that, and they
14 really haven't addressed that issue very soundly in their
15 briefs at all. I think they kind of gloss over it and say,
16 well, it's obviously a regulation of immigration, but they
17 never go to the definition in De Canas.
18 Remember, in De Canas itself, the Court found that
19 a California law that imposed penalties on employers of
20 illegal aliens, very similar to this law, was not a
21 regulation of immigration. So it is going to be pretty hard
22 for them to hang this one on that first precedent of De
23 Canas.
24 Let's go to the second one. Has Congress occupied
25 the field and displaced all State and local legislation in
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1 the field? Now, this is a purely legal question, purely
2 legal. Has Congress acted? We look at congressional
3 statutes. They push all states off this area of legislation.
4 Well, the Plaintiffs argue, well, this is a complex
5 regulatory scheme. Yes, immigration law is complex and it is
6 largely regulatory. Some of it is more just blunt criminal
7 penalties, but it is largely regulatory.
8 Again, they completely ignore the De Canas
9 decision. De Canas rejected the possibility that Congress
10 had displaced the States from the field in immigration
11 legislation, and furthermore, none of the Federal Court
12 opinions after De Canas, and I will go through those opinions
13 in a minute; there's about four of them, none of them have

14 ever found that Congress has displaced the States from the
15 field, that Congress has an instant intent to say that the
16 States can do nothing.
17 Indeed, in IRCA, the 1986 Act, which made it a
18 crime for the first time under Federal Law for employers to
19 hire illegal aliens, in that case, Congress did have express
20 preemption and it said, no, states, you may not impose
21 criminal penalties on employers, but it opened an express
22 window. It said, but you may employ licensing and other
23 similar laws in the form of sanctions on employers, and so
24 that is what Hazleton does; licensing, takes away the
25 business license, and the other similar is the penalty, the
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1 threat of a possible private right of action by some
2 discharged employee.
3 We have a long analysis of why, compared to
4 virtually no analysis in their briefs, of why this
5 constitutes another similar law, the private right of action.
6 The third De Canas question -- this one we will
7 have to dwell on for a little longer -- this is, is there
8 conflict preemption such that the local law would defeat the
9 objectives of Congress?
10 Again, De Canas stands for the principle that the
11 states are free to enact statutes as long as they are
12 harmonious with Federal objectives, and the Supreme Court has
13 never departed from this holding in the 31 years since De
14 Canas, nor has any circuit court questioned the basic premise
15 of De Canas, and touchtone is congressional intent when you
16 are going to conflict preemption. You have to ask, well,
17 what was the intent of Congress? Is this somehow in conflict

18 with what Congress wanted?
19 On this subject, the Plaintiffs actually have
20 presented some indirect argument. So I'm going to go through
21 where they might place their argument. Mr. Walczak didn't
22 really do that precisely for you, but I will try to do their
23 job for them and show you how the arguments we heard on the
24 stand might pose some sort of conflict preemption, because I
25 think that's what they're trying to say. I think that is the
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1 only way that their arguments, we could make sense of them.
2 Opposing counsel implied during the Mayor's cross
3 examination whether international relations might be
4 indirectly affected by Hazleton's ordinance, and he
5 reiterated it just now, and that these international
6 relations, the regulation thereof is, of course, a matter for
7 the Federal Government.
8 Hazleton does not attempt to regulate international
9 relations, but to say that a State statute that has some
10 indirect effect on international relations because somebody
11 might leave Hazleton and might go to Canada or go to Mexico
12 or go to some other country, and that is one person crossing
13 the border in the other direction, that that somehow affects
14 international relations, it very well might affect
15 international relations, but no Court has found that an
16 indirect effect on international relations is a preemption
17 under the international commerce clause. Never seen that,
18 Your Honor.
19 If you think about it, there is a good reason why
20 not. Just about every law that the Pennsylvania legislature
21 passes has an effect on international relations in some

22 attenuated way. If you criminalize some behavior, someone
23 from another country who was thinking about coming in and to
24 engage in that behavior might not come in.
25 Anytime a Pennsylvania district attorney seeks the
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1 extradition of a criminal who has fled to another country,
2 that affects international relations. In fact, that's a core
3 of our international disputes with Mexico. Does that mean
4 that State prosecutors can't prosecute the Mexican offenders?
5 No, of course, not. They can prosecute, and the State
6 legislators can pass laws which will affect our relations
7 with the Mexican government. That does not result in
8 preemption.
9 Let's go to those four subsidiary questions under
10 conflict preemption. Does the local law represent concurrent
11 enforcement? Because if does, it's not preempted.
12 Now, concurrent enforcement means you make at the
13 local level -- you penalize behavior at the local level that
14 is already penalized at the Federal level. Concurrent
15 enforcement activity is not preempted.
16 The Ninth Circuit said in Gonzales v. Peoria where
17 State enforcement activities do not impair Federal regulatory
18 interest concurrent enforcement activity is authorized.
19 THE COURT: If I may, let me just ask you in this
20 area, 8 U.S.C. Section 1324(a), with regard to restrictions
21 on employment of unauthorized aliens, the provisions of this
22 section preempt any State or local imposing civil or criminal
23 sanctions on those who employ or who recruit for employment
24 unauthorized aliens.
25 Now, does that mean that Hazleton's ordinance with

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1 regard to employment are preempted?
2 MR. KOBACH: No, Your Honor. That's the window I
3 was talking about. You will see the words in the parentheses
4 in that code, and it says, except for licensing or other
5 similar laws.
6 THE COURT: So licensing?
7 MR. KOBACH: Right.
8 THE COURT: So is it your position then that State
9 or a local government can make any restrictions on employment
10 of these unauthorized workers, as long as compliance with the
11 laws have prerequisite to the business of --
12 MR. KOBACH: No.
13 THE COURT: What are the limits?
14 MR. KOBACH: Limits are they have to fall within
15 those words in the parentheses. It has to have licensing
16 sanctions or has to -- or other similar -- licensing or
17 similar is the way it is phrased. So the licensing part is
18 simple.
19 THE COURT: What are the limits as far as
20 restrictions are concerned, even in light of that?
21 MR. KOBACH: I suppose there would be nothing
22 preventing a city from forever taking away a business
23 license, not just doing it for 30 days. There is no
24 restriction as to how long they can take away that license.
25 The other restriction is, and this goes to the

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1 private right of action for a discharged employer, we

2 maintain that is a similar law.
3 So the Court would have to ask, does that fall
4 within the definition of a similar law, the private right of
5 action for the discharged employee? If the Court found that
6 it was not, the Court would have to, I suppose, strike that
7 provision, since it is severable, but we believe, and we have
8 presented a lot of case law in our March brief which explains
9 why that would constitute a similar law.
10 That, to be fair, Your Honor, you will have to
11 tread new ground on that one. I'm not aware of any case
12 interpreting or any similar in that particular code. We cite
13 examples of how you might analogize from other sections of
14 State and Federal law.
15 Let's go to this concept more directly then of
16 concurrent enforcement. Numerous Federal circuits; namely,
17 the Fifth, Eighth and the Ninth have all confirmed that if
18 you provide an apartment or other housing to illegal aliens,
19 that fits squarely within the Federal crime of harboring, and
20 that is defined at Section 1324(a)(1)(A)(3) of Title 8.
21 The most directly on point case is the Ninth
22 Circuit precedent of the Aguilar, U.S. versus Aguilar, and
23 that is 883 F.2d at pages 669 to 70.
24 Now, the prohibition of harboring is, therefore,
25 consistent with Federal anti-harboring statutes as
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1 interpreted by the U.S. Circuit Courts in the Fifth, Eighth
2 and Ninth circuits, but the employment provision, which we
3 were just talking about, is also consistent because Hazleton
4 is fit within that parentheses.
5 If Hazleton imposed criminal penalties, we

6 acknowledge that would have been preempted. If Hazleton had
7 done something like that, that would have been preempted.
8 That is one of the few examples in the entire Immigration and
9 Nationality Act, Your Honor, which you have right in front of
10 you, of a provision in the act that can constitute express
11 preemption where Congress says no State shall.
12 Now, the interesting thing that Plaintiffs are
13 trying to do here is they are trying to say, well, there is
14 an implied preemption as well. There is a lot of Supreme
15 Court case law on this in our briefs. You can't have implied
16 preemption standing next to express preemption, because if
17 Congress was in the business of preempting that day when they
18 wrote that section, you can't assume, well, Congress
19 expressly preempted, but then they implicitly preempted the
20 same thing.
21 In other words, that would make the express
22 preemption redundant, mere surplusage in the words of Chief
23 Justice Marshall. So you can't have implied preemption and
24 express preemption on the same page. That is why we just
25 have to go to the language when it comes to employer
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1 sanctions.
2 The other observation here is the addition of the
3 word knowingly by the City Council. Again, that was those
4 two sentences of Section 4n(a) of the ordinance. The second
5 section already had the word knowingly in it.
6 Any reasonable reading, we think, would include the
7 first section obviously had to have it, too, because the
8 second sentence was about the affidavit, and so the first
9 sentence describing the violation would presumably

10 incorporate what the affidavit swears you aren't going to do,
11 but to clarify, again, this is just a clarification, the City
12 has said, okay, we will put knowingly in the first sentence
13 for you, too, if this is a source of confusion -- for the
14 Plaintiffs I'm referring to.
15 Now, let's go one step further in matching Federal
16 law. You have heard us say, and you have heard people on the
17 stand say that this is close enough to Federal law. This is
18 a mirror. This is roughly concurrent with Federal law.
19 The Plaintiffs learned, apparently for the first
20 time, and one of their experts learned, someone who called
21 themselves an expert in immigration law, Mr. Rosenblum,
22 learned for the first time that there actually is a provision
23 in Federal law that involves private complaints.
24 I just heard Mr. Walczak say it again, and
25 apparently he must not have been here during the Rosenblum
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1 cross examination. There is a private complaint provision in
2 Federal law. This is nothing new that Hazleton has done.
3 That is found at Section 1324a(e)(1)(A). There is already a
4 complaint procedure in Federal Court.
5 What about the other example of Hazleton matching
6 Federal law? That is the trebled damages clause, the idea
7 that you can get trebled damages against the employer under
8 the Hazleton act. That is found in Federal law, too. It is
9 in the RICO statutes, but I gave you the cite. I gave
10 Plaintiffs the cite in the opening -- I don't remember when
11 it was. It was sometime early last week. It is Title 18 --
12 Section 1601(6) of Title 18. That was part of these massive
13 immigration reforms of 1996.

14 Congress said, you know what? We are going to make
15 it a RICO eligible violation, a racketeering and corruption
16 organization's eligible violation to systematically conspire
17 to violate the immigration laws. They use the word conspire
18 because it fits more nicely into the RICO statute, and these
19 cases that we brought up were examples of lawsuits in the
20 Courts today suing under that provision.
21 Now, the reason I brought up the Mohawk precedent
22 that went to the Supreme Court -- and I think they know
23 this -- it was not because I was saying there was binding
24 precedent handed down by the Supreme Court. I was just
25 saying, hey, have you heard of that decision? That was a
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1 case brought under these RICO statutes. The case is back in
2 front of the Eleventh Circuit right now. I know one of the
3 attorneys in the case.
4 It is one of the leading cases in enforcing that
5 provision of the law with a private right of action. We
6 never asserted that case for the meaning of the Supreme
7 Court. They did remand it back down, because they found that
8 the Eleventh Circuit hadn't answered one of the important
9 question.
10 I also mentioned the Tyson case. In fact, a couple
11 of the Defense witnesses were experts in the Tyson case as
12 well. That's another case involving private right of action
13 by employees who are suing their former employer or, in some
14 cases, current employer because under the Federal law, you
15 can sue for Federal damages even if you are still employed by
16 the individual.
17 The second question under conflict preemption, is

18 compliance with both the Federal law and the local law
19 possible? This is a question, Your Honor, that you have to
20 ask any time you are doing a preemption case -- you're
21 evaluating a preemption case, because as the Courts have
22 said, it is not -- it is preemption -- let me rephrase it.
23 The preemption is, is compliance possible? That is
24 the correct way of phrasing it. Then the question from the
25 individual's perspective is, is it impossible for me to
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1 comply with both? In other words, is there no way that I
2 could be compliant with the Federal law and compliant with
3 the local law?
4 If there is some way you might be incompliant with
5 both, that is not good enough to show preemption. You got to
6 show that you will necessarily, no matter where you stand,
7 you cannot be under both the Federal and the State law, and
8 consistent with those laws, that there will necessarily be a
9 conflict.
10 That is laid out by the Ninth circuit precedent
11 that came down a couple weeks ago, now three weeks ago,
12 Incalza versus Fendi, which I mentioned in the opening
13 statement, where the Ninth Circuit just held that a
14 California State employment law was not preempted by the
15 Federal Immigration Reform and Control Act of the employment
16 provisions you have in front of you, not those exact
17 provisions, but that larger act that was passed in 1986.
18 In order to ascertain whether preemption had
19 occurred, the California Court asked, is inevitable conflict
20 going to occur? Is it inevitable that a person will not be
21 able to be under both statutes and obeying both statues, and

22 the Court said, no. The Court said tension between the
23 statutes is not enough. Tension where there might be some
24 slight differences in the wording of the statute, that is not
25 enough.
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1 There has to be inevitable conflict so the person
2 cannot stand within the legal protection, so to speak, or be
3 legal under both statutes.
4 Now, the Plaintiffs have not offered you any
5 explanation or any witness that is unable to comply with
6 Federal law and the Hazleton ordinance. In order to win on
7 preemption, they have got to show you how a person would be
8 unable to comply with both. Now, since they haven't made the
9 argument, I will try to make it for them, and I will show you
10 why their argument is going to fail.
11 One suggestion that they made, that they could try
12 to plug in here, it kind of comes close, is their suggestion,
13 well, there is a eight-day period under the Federal
14 regulations for complying under the Basic Pilot Program.
15 That eight-day period where there is a tentative
16 non-confirmation where you can challenge it before it becomes
17 a final non-confirmation.
18 Hazleton, they noted has a three-day period for a
19 business to correct any violation, but note very carefully
20 the Hazleton ordinance says that the three-day clock doesn't
21 start ticking -- the City will not act until it is a final
22 verification. If there's any tentativeness, if there is any
23 uncertainty that the Federal Government has not rendered a
24 final verification -- that is found in Section 7 -- then the
25 three-day clock doesn't start ticking.
@

1 As Mr. Cutler reasoned on the stand, and I think
2 absolutely correctly, you have the eight-day clock until you
3 have the final answer from the Federal Government, and only
4 then, once you have a final answer, does the three-day clock
5 of Hazleton start ticking. That is not a conflict.
6 This is another one I think that they might be
7 going in this direction with. They made this argument. They
8 said that what if an alien doesn't have his documents with
9 him and he's got to go to register under the tenant
10 registration ordinance, and he's lost all of his documents.
11 He is truly undocumented in the sense that they use that
12 word.
13 Well, as their own expert, Mr. Yale-Loehr,
14 acknowledged, under Federal law, every alien must carry
15 documentation with him, every alien in the United States.
16 That is Section 1304(e), and indeed, I quoted one of Mr.
17 Yale-Loehr's own articles back to him, where he said those
18 words, every alien has to have some registration document,
19 and registration document is defined broadly in the Federal
20 regs, and it is defined at 8 CFR 264.1.
21 The bottom line is that Federal law already
22 requires you to have something on your person. So if you
23 show up at the registration -- you show up to register with
24 the Hazleton City officials, and you don't have anything,
25 well, technically you're in violation of Federal law already.
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1 As a practical matter, we showed under cross
2 examination that Hazleton is very permissive, intends to be

3 very permissive, and has already issued notices that are very
4 permissive. They will accept any document. They're not
5 going to turn anyone away. Even if the document doesn't even
6 look like one that would establish under the Hazleton's
7 officials, you know, limited knowledge of Federal law that
8 would establish legal presence, they're just going to take
9 anything.
10 The reason they're just going to take any document
11 is that this is not an enforcement provision. It's just
12 getting the names and basic identifying information so that
13 if there is ever any enforcement in the future, the
14 information is already at hand. It is more efficient. The
15 City will have what it needs. It would be less of an
16 imposition, although the tenant will, of course, have his
17 opportunity, he will be told, and it will be said, do you
18 have any more documents? Did you find your green card or
19 whatever? Did you find whatever document you needed? He
20 will have that opportunity, but the City will also be able to
21 have some information at its hand to begin with.
22 Now, let's get to the third question under conflict
23 preemption. Well, we're going to have to figure out what
24 Congress intended, aren't we? If we're going to say there is
25 a conflict with the objectives of Congress, we've got to
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41

1 figure out what Congress intended.
2 Recall in my opening statement I mentioned the
3 seven specific acts that show Congress' intent with regard to
4 what States can do concerning illegal aliens who might be
5 residing there, and I will quickly run through the seven, and
6 I will come back to the important ones.

7 1986, the Immigration Reform and Control Act. That
8 is first one.
9 Number two, the building of the SAVE System, which
10 was actually started back in 1987, but in 1996 is when the
11 regs were promulgated that made it what it is today.
12 Number three, the Law Enforcement Support Center,
13 which funds were first appropriated for that in 1994.
14 Number four, Section 1373 of Title 8 which gives
15 the Federal -- imposes an obligation on the Federal
16 Government to answer anytime a State asks a question about an
17 alien.
18 Number five, the Personal Responsibility and Work
19 Opportunity Reconciliation Act. That is the Welfare Reform
20 Act of '96.
21 Number six, the Basic Pilot Program being created.
22 Number seven, the last one, is Section 1357(g)(10),
23 which recognizes the unpreempted authority of States to
24 assist and cooperate with the Federal Government in
25 identifying and removing -- identifying and removing illegal
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1 aliens, which assumes that States will have to have some way
2 of identifying.
3 Your Honor, this is overwhelming evidence of
4 Congress' intent to encourage states; number one, to
5 determine alien status where authorized by law, and number
6 two, to assist the Federal Government by denying benefits to
7 illegal aliens, by denying a safe harbor to illegal aliens,
8 and by using, to the extent possible, their own resources to
9 augment Federal resources in the rebuilding of the rule of
10 law in immigration law.

11 Now, the Plaintiffs have not given you any counter
12 evidence of intent. They haven't shown you anything else
13 that Congress has done. It's just, oh, no, no. Congress
14 really doesn't want the States and cities to help. They
15 really don't want concurrent enforcement. They have not
16 shown you that. They haven't shown you that in their briefs
17 either.
18 Now, this is where I want to -- I'm going to again
19 do their job for them and plug in the arguments of
20 Mr. Yale-Loehr. I think you could put his arguments in here.
21 You could think that maybe his arguments show a contrary
22 intent by Congress.
23 He has one theory. There are basically three
24 arguments, and I think they are all silly, but let's go
25 through them, and hopefully you will think they are silly,
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43

1 too.
2 Number one, he offers the theory that an illegal
3 alien is not really illegal until a Federal Immigration Judge
4 says he is illegal. He is not unlawfully present until a
5 Federal Judge issues -- a Federal Immigration Judge issues an
6 order of removal, and that, therefore, if that theory were
7 true, that would show a contradiction or a conflict of
8 Congress' intent.
9 Every circuit court to address that question --
10 THE COURT: Says what? What do they say?
11 MR. KOBACH: -- has rejected the theory.
12 THE COURT: Where does it come down?
13 MR. KOBACH: Has said, no, that your unlawful
14 presence begins when you commit the violation under Federal

15 law, not when an immigration judge says.
16 THE COURT: What violation are you talking about?
17 MR. KOBACH: Any violation of immigration law, when
18 your unlawful status begins.
19 So if you step across the border, you sneak across
20 the border, the moment you set foot in the country, that's
21 when you're illegal, not when some judge two years later
22 says, oh, by the way, we're going to deport you. Your
23 unlawful status begins when you step across the border.
24 If you have a visa, your unlawful status begins the
25 day the visa expires or your period of stay expires.
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1 THE COURT: Taking your expert witness Cutler
2 yesterday, I don't mean to throw you off, but what rights
3 does this illegal person have that commits the crime?
4 Once they step in the country, they don't have
5 documentation, is that a crime?
6 MR. KOBACH: That is a crime. To enter unlawfully
7 is a crime without inspection.
8 THE COURT: What rights do they have, that is the
9 question that is interesting?
10 Because Mr. Cutler yesterday was on the stand, and
11 he talked about the illegal, and he is caught in the act.
12 He's caught with an AK-47 in his hand and five bails of
13 heroin. I asked him a question. I said, is he entitled to a
14 lawyer? He said, oh, yes. He's arrested and he goes to
15 criminal court.
16 MR. KOBACH: It actually depends, Your Honor. If
17 he's literally caught in the act of crossing the border,
18 Federal law does allow for the border patrol in its

19 discretion to immediately remove them on site.
20 But in that case, that is not going to happen. The
21 Federal Government has the option of prosecuting for a whole
22 host of crimes, including the crime of entering the United
23 States. Now, it's a misdemeanor to enter the first time.
24 It's a felony to enter the second time.
25 So they can convict him of the drug trafficking,
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1 the possession of the firearm unlawfully, and they can
2 convict him of the immigration crimes. So that is what
3 usually happens. The assistant U.S. attorney who has the
4 case, and it might be the District of Arizona, or wherever it
5 happens, would have the option to prosecute, and the Federal
6 Government almost always does prosecute.
7 There is another option. They can also -- if he
8 gets into the country, and he's not caught right as he's
9 crossing the border, he's caught the next day driving down
10 the highway somewhere, at that point, he would be placed in
11 removal proceedings, and in the removal proceedings, he would
12 have the opportunity to have a lawyer. He would have all
13 kinds of procedural protections before an Article Two
14 immigration judge.
15 THE COURT: So he goes through all those rights
16 before the administrative agency, and then he can also
17 appeal?
18 MR. KOBACH: That can be appealed. The immigration
19 judge's ruling can be appealed to the Board of Immigration
20 Appeals, which is like an appellate court within the
21 Department of Justice, and then from there, it is appealed to
22 the circuit courts. It kind of skips the Federal District

23 Court and goes straight to the circuit at that point. So
24 there are lot of options.
25 An individual in that situation could probably be
@



1 convicted -- prosecuted and convicted under State law,
2 prosecuted and convicted under Federal law for the drug or
3 gun violations, prosecuted and convicted under Federal law
4 for the immigration crimes, or he could be just removed.
5 Everyone could decline to prosecute and just remove him
6 straight away, deport him straight away.
7 THE COURT: But these Defendants who are
8 discovered, especially in the drug area, they are all
9 prosecuted?
10 MR. KOBACH: The Federal Government has a policy --
11 THE COURT: Not only does the Federal, but the
12 State government across the street, right?
13 MR. KOBACH: It's the current policy of the U.S.
14 Department of Justice to place a heavy emphasis, and some
15 people even refer to it as quotas, for each U.S. attorney to
16 be an emphasis on how many drug prosecutions, and also right
17 now immigration prosecutions are part of their -- three areas
18 of preference right now for U.S. attorneys are drugs, gun
19 violations and immigration violations.
20 I was talking about this theory that they have that
21 you're not really illegal until an immigration judge says so.
22 The Tenth Circuit rejected that pointblank in Atandi. That's
23 376 F.3d 1186 at Page 1188.
24 I will quote for you. An alien who is only
25 permitted to remain in the U.S. for the duration of his
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1 status becomes "illegally or unlawfully in the U.S. upon
2 commission of a status violation. We look to the date of the
3 status violation to determine when the alien's presence
4 became unauthorized, not to when that violation is recognized
5 by official decree." Then they, in turn, quoted those other
6 decisions, the Eight Circuit and the Fifth Circuit, which
7 come to the same conclusion.
8 The Eighth Circuit, I have already given the
9 precedent to the Court. That was Igbatayo with the Fifth
10 Circuit, and these are -- I think they are in our briefs.
11 Igbatayo is 764 F.2d at Page 1040, and Bazargan is 992 F.2d
12 at 847.
13 Your Honor, let me just give you an analogy that
14 kind of explains the following of Mr. Yale-Loehr's theory.
15 Most illegal aliens are guilty of status violations. In
16 other words, you take on a status of being unlawfully
17 present, and then you walk around with that status all day,
18 and you don't have to commit additional violations. You just
19 have that status that makes you illegal.
20 It doesn't matter if you're committing additional
21 violations when you wake up in the morning. You have that
22 status violation. I would like to think of those as
23 analogous to driving under the influence. If you are behind
24 the wheel and your blood level is above the threshold for
25 intoxication, you're in that status of D.U.I., that status of
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1 drunk driving. You will come out of that status at some
2 point when your blood alcohol level comes down below the

3 level, but it doesn't matter how carefully you're driving.
4 It doesn't matter if you come to a complete stop and you wait
5 there for 30 seconds at every stop sign and you drive 10
6 miles per hour below the speed limit and you're so careful
7 while you're drunk driving. Your status as a drunk driver --
8 it is a rough analogy -- your status is still consistent. So
9 you are drunk driving. You are guilty of that crime the
10 entire time that you are in that state, in that position,
11 just like an illegal alien is guilty during his term of
12 unlawful presence.
13 What Mr. Yale-Loehr's theory would say is you are
14 not really guilty of drunk driving until you're caught and
15 successfully prosecuted in a court of law. Only then can we
16 say you were drunk driving. You were not actually violating
17 the law if you didn't get caught. That's his theory. It is
18 absurd, I think, and I don't think that word is too strong,
19 and that is why the Courts have not rejected.
20 The other theory that he's thrown out is it is
21 impossible to define what it means to be unlawfully present
22 in the United States. It is so complicated, Federal
23 immigration law is, we can't give a precise definition of
24 what that means.
25 Well, there are two answers to that. The Atandi
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1 case, which I just gave the citation to, talked about the
2 fact that there is a definition and the regulations. It is
3 27 CFR 478.11, but, you know, even if there weren't a
4 definition, it doesn't matter.
5 For preemption purposes, the State law doesn't have
6 to be in compliance with the Federal law, and there has to be

7 a Federal definition of all terms in the Federal law. You
8 have to be consistent with the Federal law, and that is why
9 the Hazleton ordinance meets that standard, because it is
10 drafted so carefully so that an illegal alien is only an
11 illegal alien if under Federal law he's illegal.
12 An unauthorized worker, an unauthorized alien is
13 only unauthorized if under Federal law he is unauthorized,
14 and even then it has to be confirmed by the Federal
15 Government. So the consistency shows no conflict with the
16 objectives of Congress.
17 I wanted to make a point here, just to wrap this
18 up, this provision of my argument up. If the Plaintiffs'
19 theories were correct that immigration law is so complicated
20 we can't tell, and certainly Hazleton can't tell whether
21 someone is illegal or not, or if you're never illegal until
22 an immigration judge says so, even if those arguments were
23 correct, then four provisions of law would make no sense.
24 Section 1621 of the U.S. Code says no State can
25 give public benefits to an illegal alien. Well, wait a
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1 minute. If you are not illegal until an immigration judge
2 says you're illegal, then no State will have any meaningful
3 way of doing it.
4 If we don't know what unlawful presence means or an
5 illegal alien means, then we aren't going to be able to make
6 that judgment as a State government, so that wouldn't make
7 any sense.
8 Another provision of Federal law that wouldn't make
9 any sense is Title 8, Section 1623 of the U.S. Code, which
10 says no alien unlawfully present in the United States can be

11 given a post-secondary education benefit, like in-state
12 tuition, or something like that, unless all U.S. citizens get
13 that benefit.
14 Well, again, that wouldn't make any sense. If
15 states are supposed to check and determine if an alien is
16 lawfully present when an alien comes to college, well, how do
17 we do that if there is no definition of unlawful presence if
18 it's too complicated for States to know?
19 Clearly Congress was intending States to check
20 before they give benefits, before an alien is given a
21 post-secondary education benefit.
22 The other provision that doesn't make any sense is
23 Section 1373(c). That is one that says if a State asks, the
24 Federal Government must answer. Well, that wouldn't make any
25 sense. If it's impossible to know --
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1 THE COURT: Which one is that? Would you repeat
2 that one?
3 MR. KOBACH: 1373(c), and that says anytime a State
4 or local government asks about an alien's status, the Federal
5 Government is obliged to give an answer.
6 I can give you an exact quote if you want. "The
7 Immigration and Naturalization Service shall respond to an
8 inquiry by a Federal, State or local government agency
9 seeking to verify or ascertain the citizenship or immigration
10 status of any individual. "
11 Well, if it is impossible to know anyone's
12 immigration status, how can you make sense of that? Congress
13 was assuming that people have a status and you can verify it.
14 Furthermore, that the States can ask. You can't make sense

15 of that law if the States are not allowed to ask.
16 The last one, the fourth one that doesn't make
17 sense under their view of the world is Section 1357(g)(10),
18 and that one says that States may participate -- they have
19 unpreempted authority to participate in the identification,
20 apprehension, detention or removal of aliens not lawfully
21 present in the United States.
22 Again, how could a state participate in the
23 identification of an alien not lawfully present in the United
24 States if we don't know -- we don't have any way of knowing
25 or defining what unlawful presence is? Again, it doesn't
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1 make sense.
2 The final argument that they make, which I'm going
3 to plug into preemption for them, is the argument that Mr.
4 Walczak kind of brought up in the questioning of Mr. Cutler
5 yesterday, and it went like this:
6 Well, you know, isn't it possible that the Federal
7 Government -- he repeated this argument just now, too -- the
8 Federal Government has made a careful decision not to
9 enforce, that there is a decision whenever the Federal
10 Government decides not to deport someone, that is a conscious
11 policy decision, and so if Hazleton does anything to disrupt
12 that person, to take them out of their accommodations or make
13 them lose their job, then Hazleton is in conflict with the
14 Federal decision not to deport them?
15 Now, that is analogous to Mr. Walczak saying, as
16 he's driving home to Pittsburgh -- and I'm sure he will be
17 very happy to do that this afternoon -- if he's caught
18 speeding while he's driving home, and the officer gives him a

19 break and says, go ahead, kid, that Mr. Walczak is now
20 authorized to speed. Because the State Government has made a
21 decision not to enforce against him, he is now authorized to
22 speed.
23 That argument is folly, and there are three basic
24 flaws if you break it down. One, it is inconsistent with the
25 Immigration and Nationality Act. Those are the laws of the
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1 United States. Those laws don't go away because a district
2 office of ICE is so overwhelmed they don't have enough people
3 to deport all the individuals that come in one night, or they
4 don't have people to go out and get them from Hazleton or go
5 out and get them from Pittsburgh.
6 So it's inconsistent with that, because the law is
7 the law, regardless of whether a prosecutorial decision is
8 made because of resources. We can't enforce, we don't have
9 enough people.
10 Secondly, as Mr. Cutler testified yesterday, that
11 prosecution decision is made on the ground. That is made by
12 the individual ICE agent. Look, I'm overloaded. I can't do
13 this one. Let him go. That is what they say quite often
14 from the Law Enforcement Support Center. When an officer
15 calls, a State Trooper calls and says, I have a van full of
16 ten people, I think they are all illegal, and then he
17 confirms they are illegal, sometimes, unfortunately, the Law
18 Enforcement Support Center says, you know what? It's the
19 middle of the night. The nearest person we have is 300 miles
20 away. You will have to let them go.
21 That is a decision made by a lower level officer.
22 It is not run up the chain to his superiors, and it's

23 certainly not run up the chain to the Secretary of Homeland
24 Security. That doesn't reflect the policy of the United
25 States.
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1 The third reason the argument makes no sense, under
2 preemption law, it is the intent of Congress, the intent of
3 Congress that matters, not the intent of a lower level
4 executive official. So inconsistency with a lower level
5 executive doesn't do it for preemption purposes.
6 To wrap up preemption, and to move in the last 19
7 minutes and 30 seconds to the other issues -- I got my little
8 egg timer here just in case. I have to control myself.
9 THE COURT: That must be from a classroom.
10 MR. KOBACH: I haven't used it in the classroom
11 yet, but I do use it in court from time to time.
12 I mentioned those precedents after De Canas versus
13 Bica where these Courts have applied that. There is
14 basically four or five, depending on how you define them,
15 cases that apply to post-De Canas rules under the Immigration
16 and Nationality Act, and let me just run through them really
17 quickly.
18 The first one was Merten. The State of Virginia
19 adopted a policy barring illegal aliens from attending any
20 universities in the State, and that policy was upheld by the
21 Eastern District of Virginia.
22 The State of Arizona, second example, and that
23 Court applied De Canas, and I think that case is a really
24 good one for you to use because the Court walks through the
25 same analysis that you see here.
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1 The second case is the Proposition 200 case coming
2 out of Arizona, and that was Friendly House versus
3 Napolitano. Now, Proposition 200 denied benefits, denied all
4 state benefits to illegal aliens. So the State had to
5 decide, is this person in front of me an illegal alien or
6 not? A lot of the same issues at issue in this case.
7 Now, what happened in that case is the District
8 Court for the District of Arizona found no preemption, and
9 then when it went to the Ninth Circuit, the Ninth Circuit
10 said, wait a minute here. We're not even going to get to the
11 merits because these guys don't have standing.
12 It was a similar coalition of interest that tried
13 to challenge the Arizona proposition. The Ninth Circuit said
14 no standing. We don't have jurisdiction, so we are not even
15 going to get to the merits.
16 So that is why when we looked at that case, if you
17 look at the Ninth Circuit decision, you're not going to see
18 merits. It is at 419 F.3d 930, and the District Court
19 decision which did get to the merits was never fully
20 published, but you can get it, obviously. It's CV-04-00649
21 in December of 2004. They didn't report it, because it was
22 improper for the District Court to have even gotten to the
23 merits.
24 Another case is Cupertino versus Salazar, and that
25 was a State court decision by a Superior Court in Arizona,
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1 which held that the Arizona anti-smuggling act, which
2 basically was a State crime that replicated the Federal crime
3 of smuggling aliens into the United States. It's a State

4 crime. It's a pretty high level penalty, that that was not
5 preempted, and that Court went through the De Canas test, and
6 we attached that as an appendix to one of our briefs.
7 Let's go to due process. An important observation
8 here. In my 11 years of teaching Constitutional law, I
9 cannot recall -- I'm sure there is one. I don't want to say
10 there isn't one ever, but I can't recall a single due process
11 decision that was rendered as a result of a purely facial
12 challenge. This is a facial challenge to the face of the
13 statute.
14 Due process challenges usually involve a person
15 whose process was not due, who did not get adequate process.
16 There might be one out there. I'm not aware of it.
17 Due process cases are almost always as applied so
18 we can actually evaluate the process that the person was
19 given.
20 Now, to prevail on a facial challenge under due
21 process, the Plaintiffs will have to show that the City's
22 ordinances necessarily deny due process. They can't theorize
23 and say, what if Bob Dougherty messes up and he forgets to
24 give this person an adequate chance to rebut the City's
25 accusation? What if something happens, and it can
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1 conceivably in some hypothetical situation, there might be a
2 violation of due process? No.
3 In a facial challenge, you've got to show that
4 necessarily there is not enough process on the face of the
5 statute.
6 So the question here is, does the Plaintiff have a
7 deprivation of a cognizable property interest? That is the

8 first question. If so, is enough process provided that is
9 sufficient to reduce the risk of erroneous deprivation under
10 Matthews v. Eldridge? Ultimately, the Matthews v. Eldridge
11 test is, do they have adequate notice and opportunity to be
12 heard?
13 So let's jump to the second prong. I have already
14 talked about the legally cognizable interest. There is
15 plenty of notice in this statute. There is notice in
16 Sections 4.B.3 and 5.B.3 of the ordinance.
17 In addition, we learned from Mr. Dougherty on the
18 stand that it is the practice of the City when enforcing all
19 of its ordinances to first go to the person who is
20 potentially guilty of violating the ordinance and give them a
21 warning, talk to them and say, hey, we are looking at you for
22 this. That is their policy with all ordinances he said, and
23 that is going to be their policy with respect to this
24 ordinance. It is no different than any other.
25 THE COURT: Do we look at that? Do we look at what
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1 their practice is, or do we look at the ordinance?
2 MR. KOBACH: I think you look at both, Your Honor.
3 Since this is a purely speculative case, you have to say,
4 what is the past policy and practice? We have the testimony
5 on the stand of the head enforcement official, but that is in
6 addition to notice that is already in the ordinance.
7 So you will have the person -- you're being told by
8 the City code office, you know, someone has explained about
9 this. We want to let you know. You can tell us anything you
10 might know. The second, we have notice in 4.B.3 and 5.B.3 of
11 the ordinance.

12 The second question is, do you have an opportunity
13 to be heard? Is there some opportunity to acquit yourself,
14 to say that, yeah, there has been a mistake here? That is
15 present on the face of the ordinance, too, in Sections 4.B.3
16 and 5.B.3, as well as in Sections 7.C.2 and 7.D.2.
17 Furthermore, on the stand, Mr. Dougherty said when
18 the employer comes in and when the landlord comes in and
19 says, yeah, here are the numbers for my tenant, or here are
20 the appropriate numbers and name of my employee,
21 Mr. Dougherty is not going to say, get out of my office. I
22 don't want to hear anything from you.
23 The employer is going to have an opportunity to
24 say, no, this has been a big mistake, or the landlord can
25 say, no, I did not knowingly do this. I found out about this
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1 later. I haven't violated your ordinance, sir. So there is
2 an opportunity to be heard there at the provision of
3 information stage.
4 THE COURT: That is where?
5 MR. KOBACH: That is 4.B.3 and 5.B.3.
6 THE COURT: And in effect where is that, the
7 opportunity?
8 MR. KOBACH: When the landlord has the opportunity
9 to come in and say -- he is requested by the ordinance to
10 come in and provide any numbers or any information he has
11 about the tenant.
12 THE COURT: I think we have to look at the
13 ordinance, because every community, and I know the community
14 I live in, depends upon who you are and whether somebody is
15 new in their neighborhood, in the community, and maybe

16 sometimes what political party you belong to. I don't know.
17 I think you have to look at the ordinance.
18 Do you have law that says that you can look at -- I
19 know we have testimony from Mr. Dougherty who means well on
20 the stand.
21 MR. KOBACH: That is why this is such a weird case,
22 Your Honor. It is such a strange case because due process
23 cases, I'm not aware of them being brought on facial
24 challenges. Almost every, you know, landmark due process
25 case involves an individual who has had the law applied
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1 against him.
2 So, Your Honor, I can't give you a definite answer.
3 We will have to find such a case, and then find what the
4 Court looked to in that case.
5 Then, finally, there is the other process. In
6 addition to the administrative process, the City gives full
7 judicial process, and that is adequate to meet Matthews v.
8 Eldridge, and that is in Section 7.F, where any of the four
9 individuals; employee, employer, tenant or landlord, can
10 bring an action to immediately stop enforcement at any stage
11 and say, okay, wait a minute. There has been a mistake here.
12 They can bring an action to stop enforcement.
13 THE COURT: And they bring that, and they bring
14 that before the magistrate. You are going to be asking what
15 training does the magistrate have, you know, the local
16 magistrate have with regard to these very, which we have been
17 here for two weeks, very convoluted matters?
18 MR. KOBACH: The magistrate, Your Honor -- I guess
19 the training that is applicable is the training of

20 interpreting the City's ordinances, which he does all the
21 time, but the magistrate in this, it says so in Section 7 of
22 the ordinance, the magistrate has to defer to Federal
23 findings on immigration enforcement. We don't ask the
24 magistrate to get into that. He has to defer to a Federal
25 finding, which is a rebuttable presumption.
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1 THE COURT: Under the ordinance, isn't there an
2 appeal to the common pleas court, but there, again, very
3 complex?
4 MR. KOBACH: Absolutely, Your Honor.
5 We lay this out in our briefs. Most of the
6 situations you can envision of going to that magistrate would
7 be, I didn't violate -- the terms of this ordinance say that
8 it has to be an employee. He's not technically my employee
9 under the definition of the ordinance. The terms of this
10 ordinance say that I need to be given three days. I was only
11 given two days.
12 The only situation which might be complicated would
13 be if the individual says, no, I'm not really unlawfully
14 present. The Federal Government says I am unlawfully
15 present, but I'm not really unlawfully present. That would
16 be complicated. I concede that. But, again, it is not
17 impossible. There is no precedent that says you can't allow
18 a State judge to investigate that issue.
19 THE COURT: I was a State judge for a long time. I
20 am just saying for a Federal judge it is very convoluted.
21 MR. KOBACH: Let's jump to equal protection, the
22 solely or primarily language.
23 Now, Mr. Walczak said, no, it's still a violation

24 of the equal protection clause, even though you take out that
25 language. Well, he says on the surface it might be better,
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1 but in reality, it won't change. In reality, in the way it
2 is enforced on the ground, it won't change.
3 Well, now he's talking about it as applied
4 challenge. He's making a surface challenge. He's making a
5 challenge on the face of the statute. So they put themselves
6 into this position by suing at this early stage.
7 Second problem is that the equal protection clause
8 constrains the behavior of States, not the behavior of
9 private individuals. So let's imagine that all kinds of
10 private individuals asserted allegations based on race in
11 their complaint, just imagine that.
12 Well, the City is precluded from acting and
13 precluded from considering those things in its enforcement
14 process. Your Honor, put it this way: You, as a private
15 individual, not in your judicial capacity, you as a private
16 individual can discriminate all you want in the privacy of
17 your own home.
18 If you want to give lamb to people of Irish descent
19 and mutton to people of non-Irish descent, which I would
20 understand, I'm Irish, but you might want to do that. You
21 can do it. Private discrimination is not affected by the
22 equal protection clause. Now, of course, Congress through
23 Section E of the Fourteenth Amendment has passed laws --
24 THE COURT: The Irish would never do that.
25 MR. KOBACH: No, of course, not. Maybe save the
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1 good beer for the Irish and give the canned beer to the rest
2 of us.
3 The point is that you have to show discrimination
4 by the government entity, not by a private individual, and
5 they haven't addressed that very fundamental presumption of
6 equal protection law.
7 Then, finally, Mr. Walczak might not have been in
8 the courtroom when Mr. Dougherty was on the stand, but he
9 said that all complaint forms in the City, we put a little
10 boilerplate language at the bottom that says it is a penalty
11 under State law to make a false swearing.
12 Furthermore, under the Pennsylvania Criminal Code,
13 unsworn falsification to an official is also a penalty, and
14 that is at Title 18 Section 4904 of the Pennsylvania
15 Consolidated Statutes, Unsworn Falsification to Authorities.
16 It is a misdemeanor of the second degree.
17 So even if there were these spurious allegations,
18 you would have -- you will have, as Mr. Dougherty said, when
19 they get around to printing out a complaint form, they will
20 stick that boilerplate language at the bottom, plus even so,
21 you have a penalty under State law regardless of whether that
22 boilerplate language is there.
23 Then we go to the question of minimal scrutiny.
24 Let's assume -- and this is where the facts really come in.
25 This is pretty much where I will end up.
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1 THE COURT: Where are you?
2 MR. KOBACH: Minimal scrutiny under the equal
3 protection clause.

4 Minimal scrutiny is the correct standard of review
5 here, because they haven't alleged that the City is
6 discriminating on the basis of a specific classification, and
7 so question is, did the City act reasonably?
8 This is where so much of our testimony has been on,
9 and I'm not giving it much time, because, frankly, it's an
10 easy question. Has the City a legitimate interest in
11 reducing crime, reducing expenditures? Has the City shown
12 some rational connection -- they don't have to show a
13 scientific connection -- some rational connection?
14 Crime; I'm not going to go through all the
15 statistics. There has been a rational connection
16 established. It went from three violations over a five-year
17 period to five immigration -- sorry -- five criminal acts by
18 illegal aliens in 2005 to 19 in 2006, and these 19 cases were
19 not disorderly conduct. They weren't vandalism.
20 We're talking about murder, the rape of a six-year
21 old girl, the rape of girlfriend at knifepoint, the stabbing
22 of a girlfriend in the stomach multiple times, the selling of
23 crack cocaine on a playground, the shooting of a 22 caliber
24 or 38 caliber handgun on a playground, and assault on a law
25 enforcement officer, as well as other drug trafficking
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1 crimes.
2 You know, these are not vandalism. These are
3 serious crimes, and the City acted rationally in looking at
4 that.
5 The City also saw that bar chart. It didn't see
6 the chart. It wasn't made yet. It saw an increase in
7 violent crimes, and you could see that. You go from about 50

8 in 2003 to 88 in 2005 and 83 in 2006.
9 So in addition to these individual crimes, the City
10 sees the notorious gang MS-13 show up, and specifically
11 apprehends an MS-13 member and becomes aware of his brother,
12 who is also an MS-13 member, and the Latin Kings, both gangs
13 that rely upon illegal alien members. They recruit actively
14 among the illegal alien communities, as our gang expert
15 testified yesterday. Indeed, Mr. Lewis testified that 90
16 percent of MS-13 members are illegal aliens.
17 So it is natural to be concerned that when a
18 deadly, illegal alien based gang shows up, there might be
19 some concurrence here between the presence of a large number
20 of illegal aliens in Hazleton and the presence of these
21 gangs. It makes it easier for these gangs to operate.
22 As Mr. Lewis said on the stand, the 2005 National
23 Gang Trends Survey confirms that these gangs are recruiting
24 and operating within particularly illegal alien segments of
25 the population. Why? Because those individuals are more
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1 ideologically suitable, shall we say, for bringing in, and
2 also maybe more psychologically suitable for recruitment into
3 the gang.
4 Not surprisingly we have learned that one-third of
5 all the gang arrests in Hazleton in the last two years have
6 been arrests of illegal aliens. With respect to MS-13, it is
7 only illegal aliens that we know of.
8 Now, Mr. Rumbaut's testimony that you heard Mr.
9 Walczak talk about at great length, the problem with his
10 testimony, and you will see this in the deposition video, is
11 that he conflates illegal and legal, and Mr. Cutler talked

12 about this briefly during his testimony.
13 You can't lump all aliens together. He's
14 absolutely right. Rumbaut is right. If you lump all aliens
15 together, you don't find a disproportionate commission of
16 crimes -- disproportionate crime rate among all aliens.
17 The reason is that legal aliens are actually the
18 least likely to commit crimes in the United States of all
19 the sub groups. Why? Because they have been screened. You
20 don't get a green card until you have been checked for a
21 criminal card. You don't get a visa until the State
22 Department checks you at the consular office overseas, and as
23 a result, it is no surprise, legal aliens are actually less
24 likely than the rest of us U.S. citizens to commit crimes,
25 because U.S. citizens, we're not screened before we're
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1 allowed to be born.
2 So you have that very low likely group, legal
3 aliens, and then you have U.S. citizens in the middle, and
4 then you have illegal aliens who are highly likely to commit
5 crimes. Indeed, many of them commit crimes in addition to
6 their immigration violation.
7 So if you add these, the high group and the low
8 group, you get something in the middle, and it is not much
9 different than a U.S. citizen. That is the point that
10 Mr. Rumbaut's testimony is problematic on.
11 Also, Mr. Camarota pointed out another thing that
12 Mr. Rumbaut was not aware of. Mr. Camarota, remember, the
13 person hired by the census bureau to crunch their statistics
14 for them, he pointed out if you are looking at criminal data,
15 you cannot rely on census information about the prison

16 population, because they don't have interviews with the
17 prisoners themselves, and the census bureau has to guess at
18 the nationality of 40 percent of the prisoners.
19 He said, so, therefore, Rumbaut's methodology
20 doesn't work. Mr. Rumbaut probably didn't know about that.
21 Mr. Camarota testified on stand that this is an inside dirty
22 laundry problem with the census bureau. We don't publish the
23 fact that we're guessing, but you can't rely on that data as
24 Mr. Rumbaut does.
25 We've heard about the fiscal burden. We've heard
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1 about the fact that the City is at its legal maximum of
2 taxable revenue. The mill levy cannot go up. Relief through
3 local sales taxes is not permissible under State law. The
4 City is landlocked. There is no room to annex more property
5 and get revenue that way. So the City decided, we have to
6 stop taking on illegal aliens who are consuming more in
7 resources than we collect in revenues and to the tune of the
8 minimum of $5,000 a year per household according to
9 Mr. Camarota.
10 Think of it this way, Your Honor: Hazleton is like
11 a boat that is in danger of sinking. Every person that comes
12 in and brings in additional deficits without contributing to
13 the revenues makes the boat sink a little lower, and Hazleton
14 has a rational interest in saying, okay, you are legally
15 welcome on this boat, but we can't take more people on who
16 are causing it to sink further without contributing any
17 revenue which buoys it up, and the City has a rational
18 interest in doing so.
19 Emergency room wait times, we heard about five to

20 six-hour wait times. We heard about the hospital, the
21 profits of the hospital Mr. Walczak mentioned. Yeah, the
22 hospital is profitable. It is going down. It was $12
23 million last year, according to the stipulation, and $4
24 million in -- 12 million in 2005 and 4 million in 2006, but
25 the emergency room is bleeding. The emergency room has seen
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1 $8 million a year, over $8 million a year in expenses, losses
2 to the hospital.
3 You heard Mr. Camarota, again, the man that the
4 bureau relies on, tell you that not only is the use of
5 emergency rooms something that is a problem, the uninsured
6 use. You remember the interchange where he said 13 percent
7 of the general population doesn't have insurance, but 65
8 percent of illegal aliens. So that contributes directly to
9 burdens on the hospital.
10 So let me wrap it all up. Is there a reasonable
11 connection between some of these problems and illegal aliens?
12 Yes, absolutely. The rational basis test is met. If this
13 case were under strict scrutiny, that would be a lot harder
14 for the City, but when it's rational basis, the burden is on
15 the Plaintiffs. You know, it wouldn't matter instead of
16 having ten attorneys here, they had 100 attorneys, they are
17 not going to be able to show that the City lacks a rational
18 basis.
19 The same analysis goes to the legitimate police
20 powers. The City only has to show a rational basis to use
21 its police powers. So exactly that analysis that I just
22 walked through applies there.
23 The only remaining claim is the Fair Housing Act,

24 and the Fair Housing Act, again, rests on a distortion.
25 Number one, the Fair Housing Act does not apply --
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1 discriminating against illegal aliens is not a proscribed
2 basis for classifying under the Act, and secondly, Mr.
3 Walczak said he's not an expert in FHA law, and that was a
4 true statement by Mr. Walczak.
5 He said that FHA prohibits ordinances that may have
6 a disparate impact in the future, may have a disparate impact
7 in the future. Well, actually the words disparate impact
8 don't appear in the FHA, and the concept of disparate impact
9 in the future is not one that the Court has recognized,
10 because you have to show a disparate impact has occurred, and
11 then use that evidence of how it's been applied to show that
12 there was a disparate impact. They're fishing for something
13 here, but they will not be able to make an FHA claim.
14 Well, Your Honor, I think we are very close to the
15 end. These ordinances were painstakingly drafted. The
16 Constitutional violations are imagined. The Plaintiffs have
17 failed to show standing, and remember, at this stage, they
18 have to prove standing, not just assert it.
19 With respect to the equal protection and police
20 powers arguments, the City has had a rational basis. They
21 haven't been able to show otherwise.
22 Due process in Matthews v. Eldridge, it's a very
23 low hurdle, only notice and an opportunity to be heard.
24 Your Honor, think of it this way; Federal law
25 requires the City to thread the needle. You have to avoid
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1 preemption. You have to use terms that are consistent. You
2 can't make your own judgments. You can't have City officials
3 making their own decisions. You have to rely on Federal
4 decisions, but if you successfully thread that needle, then
5 you can use the needle, and that is what Hazleton must be
6 allowed to do, to use the needle to stitch their City back up
7 again.
8 Thank you, Your Honor.
9 THE COURT: Thank you very much, Mr. Kobach. It
10 was a very interesting and a very well-done argument.
11 THE COURT: Now, Mr. Walczak, you have ten minutes
12 for rebuttal. Do you wish to take it?
13 MR. WALCZAK: I'm sorry. I thought it was an hour,
14 Your Honor.
15 THE COURT: We will call you on that.
16 MR. WALCZAK: It will not take 10 minutes. Do we
17 get points for that?
18 It was interesting to hear Mr. Kobach say that this
19 ordinance -- these ordinances were painstakingly drafted and
20 painstakingly redrafted and painstakingly redrafted again,
21 and I'm not sure how many times they were painstakingly
22 redrafted, but I guess we now have, at least for today, the
23 target that we're shooting at.
24 I'm not going to cover all the cases that Mr.
25 Kobach covered. I mean, those are all contained in the
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1 briefs that have been filed. We will file more briefs and
2 make sure that we kill a few more trees here in Pennsylvania.
3 THE COURT: Don't kill me with them briefs. I have
4 a lot of them.

5 MR. WALCZAK: I heard we were doing 200-page
6 limits.
7 Let me just say that what wasn't mentioned before
8 is that there are two similar ordinances in the country that
9 were drafted in the wake of Hazleton with Hazleton's
10 encouragement on which there have been decisions made.
11 One of them is in Valley Park, Missouri, and I
12 believe this actually came down on the first day of our trial
13 here last Monday. That case is Reynolds versus The City of
14 Valley Park. I have a copy of the trial court opinion.
15 That's a State Court decision.
16 THE COURT: We have a copy of that.
17 MR. WALCZAK: Mr. Kobach was counsel for Valley
18 Park in that case as well, and it did decide on State law
19 grounds, but let me just note one paragraph in the Court's
20 conclusion, because, you know, we see in Valley Park that,
21 too, was painstakingly drafted and then redrafted, and the
22 Court was having the same problem in Valley Park because they
23 kept shifting the target.
24 The Court said this case is not moot when a party
25 files suit seeking to void a local ordinance. A Defendant
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1 cannot unilaterally moot the litigation by repealing the
2 ordinance. They cite to a 1993 U.S. Supreme Court case.
3 Furthermore, the Court finds the new ordinances are
4 sufficiently similar to the old ordinances, and that they are
5 directed to the same class of people and conduct and include
6 some of the same penalties. Given that the substance of the
7 new ordinance is the same, the Court concludes the challenge
8 conduct will continue.

9 So the Court did not find those cases moot, and
10 then went on to rule that they are, in fact, in conflict with
11 State law.
12 The other decision that has come down, and I
13 believe it was alluded to in the opening is the case out of
14 Escondido, California, and that is at 465 F. Supp. 2d 1043,
15 and, in fact, that was an application for a temporary
16 restraining order, and it was in front of Judge John Houston
17 in the United States District Court for the Southern District
18 of California, and while it was an application for a TRO,
19 there was a full evidentiary hearing held, and the judge did,
20 in fact, issue a merits decision. So the judge addressed the
21 merits of that ordinance.
22 In that ordinance, they only had the harboring
23 provision. They were not going after the employers or
24 employees in that case, and the Court found that, in fact,
25 the ordinance violated preemption on two of the three
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1 grounds, and also found that there were procedural due
2 process violations, but significantly on field preemption,
3 Judge Houston found that, quote, the facts in De Canas are
4 inapposite to the instant action, which is what we've argued
5 here. De Canas was decided before Congress waded into the
6 field in 1986, and he expressed serious concerns in regards
7 to the field preemption of the ordinance by existing Federal
8 statutes.
9 THE COURT: I don't know whether we have that. Do
10 we have that opinion? We have it.
11 MR. WALCZAK: Then Judge Houston found in terms of
12 conflict preemption, this Court has serious concerns

13 regarding Defendant's use of Federal resources and procedures
14 for a private benefit, and the burden that it would cause to
15 the Federal Government for the latter to conduct a formal
16 hearing to make the requisite finding of fact and conclusions
17 of law for the Defendant, that the ordinance uses the
18 Immigration and Nationality Act to define illegal alien
19 implies that it will likely place burdens on the Department
20 of Justice and Homeland Security that will impede the
21 function of those Federal agencies.
22 I note those two opinions for the Court, and thank
23 you for the Court's patience and attention.
24 THE COURT: Very good. Thank you very much, Mr.
25 Walczak.
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1 (At this time, the excerpt concluded.)
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REPORTER'S CERTIFICATE

I, SUZANNE A. HALKO, Official Court Reporter for the United States District Court for the Middle District of Pennsylvania, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the within-mentioned proceedings had in the above-mentioned and numbered cause on the date or dates hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

Suzanne A. Halko, RMR,CRR
Official Court Reporter

REPORTED BY:

SUZANNE A. HALKO, RMR,CRR
Official Court Reporter
United States District Court
Middle District of Pennsylvania
Scranton, PA  18501-0090

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