UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PEDRO LOZANO, *et al.*, *Plaintiffs*, v. CITY OF HAZLETON, *Defendant.*	)	No. 3:06-cv-1586 (Hon. James M. Munley)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND CROSS MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations of every size in every industrial sector and geographic region of the country. A principal function of the Chamber is to advocate the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses. The Chamber has participated as *amicus curiae* in numerous cases before federal courts that have raised issues of vital concern to the nation's businesses. The Chamber has also been involved heavily in efforts to ensure that federal immigration legislation is uniform, fair, and appropriate to the needs of businesses.

The ordinance enacted by the City of Hazleton, Pennsylvania—the constitutionality of which is at issue in this case—applies to manufacturers, retailers, hotels and restaurants, construction contractors, service providers, and all other businesses in Hazleton, many of which are Chamber members. The Chamber thus has an interest in the outcome of this case, and the Chamber's views may assist the Court in deciding Defendant's pending Motion to Dismiss and Plaintiffs' Cross Motion for Summary Judgment.

INTRODUCTION AND STATEMENT OF FACTS

In July 2006, the City of Hazleton, Pennsylvania enacted an Ordinance (the "Ordinance"),[1] which attempts to regulate the employment of undocumented aliens within the city.[2] Under that law (as amended), anyone may file a complaint of illegal hiring. The Hazleton Code Enforcement Office investigates complaints and, if it is unable to verify an employee's work authorization status, the employer has three days to "correct" the situation. Ordinance §§ 4(B)(3)-(4), 7(C). If the employer does not comply, the city deprives the business of its operating permit and shutters it, until such time as the employer "correct[s]" the violation. *Id.* § 4(B)(4). If the city alleges the business employed two or more illegal aliens, the Ordinance also forces the business to join the federal government's voluntary, experimental Basic Pilot Program. *Id.* § 4(B)(6). Further, the Ordinance also creates a novel private right of action: any discharged employee can hold its employer strictly liable for treble damages and attorney's fees if the employer happened to employ an illegal alien at the time of the plaintiff's discharge. *Id.* §

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[1] In response to this litigation, the original Ordinance was superseded in September 2006 by Ordinance 2006-18, which was in turn amended by Ordinance 2006-40 (adding § 7). In this brief, "Ordinance" refers to Ordinance 2006-18 as amended by 2006-40.

[2] The discussion herein is limited to the Ordinance's provisions regulating employers.

4(E). Moreover, unlike under federal law, there is no opportunity for an employer to be heard by the city agency before penalty is imposed.

Federal law, however, takes a different approach in imposing upon employers the burdens of enforcing immigration law. In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359—"the most comprehensive immigration reform effort in the United States in 20 years." S. Rep. No. 99-132, at 18 (1985). Although federal law prior to 1986 evinced "at best … a peripheral concern with employment of illegal entrants," *De Canas v. Bica*, 424 U.S. 351, 360 (1976), IRCA provides a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (emphasis added).

The Ordinance—and the patchwork of various municipal schemes it has already inspired—is inconsistent with this uniform, comprehensive federal scheme, and conflicts with Congress' careful weighing of the interests of federal law enforcement, employers, and workers.[3] The Ordinance is unconstitutional for two

[3] At least 35 other municipalities throughout the country already have enacted laws targeting illegal immigration, many of which are modeled on (if not identical to) Hazleton's ordinance. *See, e.g.*, M. Rubinkam, *Laws Against Illegals Floundering: The Measures Targeting Illegal Immigrants are Facing Early Setbacks in the Courts*, Intelligencer (Philadelphia Region), Jan. 21, 2007, at A6.

principal reasons: (1) it is preempted by federal law, and (2) it violates the Due Process Clause of the Fourteenth Amendment.

First, the Ordinance is preempted. Congress has expressly preempted all state and local laws that "impos[e] civil or criminal sanctions ... upon those who employ ... unauthorized aliens." 8 U.S.C. § 1324a(h)(2). This assures a uniform system of employer regulation that provides businesses nationwide with a single, consistent regulatory framework to assist in policing federal immigration law. Additionally, it relieves employers (particularly those operating in multiple local jurisdictions) of the burden of complying with a patchwork of different and potentially inconsistent obligations. The statutory savings clause in § 1324a(h)(2) for "licensing and similar laws" does not save the Ordinance because that exception only permits municipalities to tack on a consequence for a proven violation of federal law; it does not allow Hazleton to alter the federal scheme that Congress enacted after more than a decade of consideration.

Even if the savings clause applied, the Ordinance would still be preempted because it conflicts with federal law. Most importantly, although federal law only imposes liability when an employer knowingly employs an undocumented alien, Hazleton's ordinance imposes liability without any proof that an employer has any actual knowledge that an employee is an undocumented alien or otherwise lacks proper work authorization. The Ordinance also conflicts with federal work

authorization verification requirements. Federal law struck an important balance when it conscripted employers into the regulation of immigration, requiring only that an employer complete an I-9 Form. The law allows employers to rely on a variety of documents to verify work authorization status, and makes voluntary employers' use of the Basic Pilot Program (an experimental electronic work authorization verification computer system). Hazleton's Ordinance disrupts this balance by imposing an entirely different verification scheme on employers and seeking to force employers to use Basic Pilot. Lastly, the Ordinance conflicts with federal anti-discrimination laws by subjecting employers to liability on the basis of factors that federal law prohibits employers from considering.

Second, the Ordinance is unconstitutional because it violates the Due Process Clause of the Fourteenth Amendment. The Ordinance provides no opportunity for an employer accused of employing an undocumented alien to challenge that accusation before depriving the business of its right to operate. Indeed, the Ordinance contains no standards by which local officials must prove a violation before confiscating an employer's property rights.

For each of these reasons, the Ordinance is void and unenforceable, and the Chamber respectfully urges this Court to deny Defendant's Motion to Dismiss and grant Plaintiffs' Cross Motion for Summary Judgment.

FEDERAL STATUTORY BACKGROUND

Pursuant to the Constitution's grant of authority to Congress to "establish a uniform Rule of Naturalization" (U.S. Const. art. I, § 8, cl. 4), Congress initially declined to impose any direct regulatory burdens on employers with respect to enforcement of the nation's immigration laws. Beginning in 1971, Congress continuously conducted "[e]xtensive and comprehensive hearings" on proposals to prohibit employment of undocumented aliens, and heard testimony from numerous witnesses, including representatives of the Chamber. *See* H.R. Rep. No. 99-682(I) (1986), 1986 U.S.C.C.A.N. 5649, 5655-5660; S. Rep. No. 99-132, at 18-26 (1985). These efforts produced a voluminous record detailing the competing considerations surrounding the employment of undocumented workers.[4]

Ultimately, Congress enacted IRCA in 1986, which established a comprehensive and uniform system by which employers must verify the work

[4] *See, e.g.*, *Joint Hearing Before Subcomms. of the H. & S. Judiciary Comms.*, 99th Cong. 71-72 (1985) (statement of K. Alexander, on behalf of the U.S. Chamber of Commerce) (explaining that while the Chamber does not support "employers who intentionally hire illegal aliens or take unfair advantage of their situation," it is important that Congress not "impose[] an unnecessary burden on the vast majority of good-faith employers" and avoid "potential discrimination resulting from [an employer sanctions] provision"); *id.* at 77-78 (urging Congress to be "particularly sensitive to the potential burdensome impact of the various reform proposals on small business owners"); *Hearing Before Immigration & Refugee Policy Subcomm. of the S. Judiciary Comm.*, 98th Cong. 42 (1983) (statement of R. Thompson, Chairman of the U.S. Chamber of Commerce) (explaining that although the Chamber "does not condone the hiring of illegal aliens," Congress should seek "targeted enforcement against intentional violators, that minimizes the burden on the vast majority of good faith employers").

eligibility of their employees. IRCA makes it unlawful "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien," 8 U.S.C. § 1324a(a)(1)(A) (emphasis added), but provides a substantial safe harbor for employers who "compl[y] in good faith" with the statute's work authorization verification process (the "I-9 Form process"). *See* 8 U.S.C. § 1324a(a)(3). Under that process, the employer must complete an I-9 Form and inspect applicant documents that establish both identity and eligibility to work in the United States. *See* 8 C.F.R. § 274a.2(b) (explaining I-9 Form process). An employer must accept any document on a list promulgated by the federal government as long as a document "reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(b)(1)(A).[5] The government has the burden of proving a violation of these requirements in an adversarial hearing before an impartial Administrative Law Judge before sanctions are imposed. *See* 8 U.S.C. § 1324a(e)(3); 28 C.F.R. pt. 68; *see also* H.R. Rep. No. 99-682(I), 1986 U.S.C.C.A.N. at 5661.

In enacting IRCA, Congress was acutely aware of the concerns expressed by the Chamber and others, and Congress explained clearly that it intended that the law would deter illegal immigration while being "the least disruptive to the

[5] An employer need only "[p]hysically examine the documentation presented by the individual establishing identity and employment eligibility ... and ensure that the documents presented appear to be genuine and to relate to the individual." 8 C.F.R. § 274a.2(b)(ii)(A). The regulation lists the documents that are acceptable. *See id.* § 274a.2(b)(v).

American businessman and would also minimize the possibility of employment discrimination." H.R. Rep. No. 99-682(I), 1986 U.S.C.C.A.N. at 5660; *see also* S. Rep. No. 99-132, at 8-9 (1985). Congress further expressed particular concern that the law not impose excessive burdens on small businesses or for isolated violations. *See, e.g.*, H.R. Conf. Rep. No. 99-1000 (1986), 1986 U.S.C.C.A.N. 5840, 5841 ("The Conferees expect the [INS] to target its enforcement resources on repeat offenders and that the size of the employer shall be a factor in the allocation of such resources."); S. Rep. No. 99-132, at 32 ("The Committee seeks to avoid placing an undue burden on [small] businesses, which are estimated to represent 50 percent of employers but only 5 percent of employees.").

SUMMARY OF ARGUMENT

Hazleton's Ordinance usurps the uniform, comprehensive legislation Congress enacted to prohibit employment of undocumented aliens. As explained below, the Ordinance is preempted by federal law because it runs afoul of IRCA's express preemption clause, and does not fall within the terms of the statute's narrow savings clause. Moreover, regardless of the savings clause, the Ordinance is conflict preempted because it interferes with federal law's scienter requirement, rewrites federal work authorization verification rules, and conflicts with federal anti-discrimination rules. Finally, the Ordinance's enforcement provisions violate

employers' federal due process rights. Accordingly, Hazleton's Ordinance is unconstitutional and void.

ARGUMENT

I. THE ORDINANCE IS PREEMPTED BY FEDERAL LAW.

Under the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2), federal law may either expressly or implicitly preempt state or local law. *See Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985). This is "fundamentally ... a question of congressional intent." *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

In cases of express preemption, Congress "ma[kes] its intent known through explicit statutory language." *Id.* Implied preemption, on the other hand, arises in one of two circumstances. Field preemption occurs when a state or municipality purports to "regulate[] conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* Conflict preemption can occur "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotation marks omitted) (emphasis added). The Third Circuit has explained that "federal and state law need not be contradictory on their faces for preemption to apply. It is sufficient that the state law 'impose[s] ... additional conditions' not contemplated by Congress." *Surrick v. Killion*, 449 F.3d 520, 532 (3d Cir. 2006) (quoting *Sperry v. Florida*,

373 U.S. 379, 385 (1963)); *see also Fasano v. Fed. Reserve Bank*, 457 F.3d 274, 287 (3d Cir. 2006) (explaining that "where the state law at issue [goes] beyond the relevant federal law, courts do not hesitate to find conflict preemption").

Preemption arguments carry particular force in the immigration context, because regulation of immigration and immigrants, legal and illegal, is "unquestionably exclusively a federal power." *De Canas v. Bica*, 424 U.S. 351, 354 (1976);[6] *see also Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (explaining that the exclusivity of federal immigration control is an incident of the "supremacy of the national power in the general field of foreign affairs"). As the Supreme Court has explained, "[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute ...." *Hines*, 312 U.S. at 62-63.

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[6] The Supreme Court did note in *De Canas* that "the fact that aliens are the subject of a state statute" does not mean the state law is "*per se* pre-empted by [the federal government's] constitutional power," and concluded that a state statute penalizing employers who employed illegal aliens was not preempted since then-existing federal law evinced "at best ... a peripheral concern with employment of illegal entrants." 424 U.S. at 355, 360. But as Plaintiffs explain at length in their Memorandum of Law, *De Canas* was decided ten years before Congress enacted the IRCA, which provided comprehensive regulation of the employment of illegal aliens and expressly preempted state and local law.

A. IRCA Expressly Preempts The Ordinance.

IRCA expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ ... unauthorized aliens." 8 U.S.C. § 1324a(h)(2). This broad preemption provision forbids Hazleton, or any other municipality or a state, from altering the substantive law governing the employment of illegal aliens.

Hazleton's Ordinance, however, does precisely that. First, § 4(E) of the Ordinance creates a private right of action under which discharged employees may recover treble damages and attorney's fees from their employer if they show only that "the business entity was employing an unlawful worker." This rewrites federal immigration law by abolishing the requirement that employers act knowingly before liability is imposed. Instead, the Ordinance holds employers strictly liable with no requirement of proof that the employer knew it employed an undocumented alien.

Second, even Hazleton's so-called licensing scheme in § 4(B) is expressly preempted because it alters the substance of federal immigration law. That section rescinds a business operating permit if the Hazleton Code Enforcement Office finds an employer to be employing an undocumented alien and the employer "fails to correct a violation of this section within three business days." Ordinance § 4(B). Hazleton argues essentially that because the penalty involves a business permit, the

Ordinance falls within the savings clause of § 1324a(h)(2). This argument is simply wrong.

Hazleton's Ordinance goes well beyond the powers reserved to municipalities in IRCA's savings clause. The savings clause in § 1324a(h)(2) only permits localities to impose license forfeitures when the federal immigration standards applicable to employers have been violated—not to impose on employers a patchwork of differing local immigration standards. As Congress itself explained, the savings clause preserves the authority of state and local governments to suspend or revoke licenses of those who are "found to have violated the sanctions provisions in this legislation." H.R. Rep. No. 99-682(I), 1986 U.S.C.C.A.N. at 5662 (emphases added). Instead of merely tacking on an additional penalty to employers who violate federal law, the Ordinance seeks to rewrite federal law by (1) altering the federal scienter requirement to make employers strictly liable for any employment of undocumented aliens, and (2) imposing upon employers new and different systems of employment verification. Such broad efforts to rewrite immigration law (backed by the harsh sanction of the loss of a business permit) fall far outside the narrow tack-on penalty exception provided by Congress.[7]

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[7] The Supreme Court "has repeatedly declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000).

B. The Ordinance Is Preempted Because It Conflicts With Federal Law.

Even if IRCA's savings clause saved § 4(B) of the Ordinance from express preemption, Hazleton's scheme would still be invalid because it conflicts with federal law. Laws falling within savings clauses are still invalid if they conflict with federal law. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873-74 (2000) (holding that a state law saved from express preemption by a savings clause was still invalid under conflict preemption); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (explaining that the fact a state law is not expressly preempted "does not mean that the express clause entirely forecloses any possibility of implied pre-emption"). Here, the Ordinance impermissibly conflicts with federal law in three critical respects.

1. The Ordinance Abolishes The Federal Scienter Requirement.

After years of consideration, Congress decided in 1986 to impose only limited burdens on employers: prohibiting an employer from hiring an illegal alien only if the employer "know[s] the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A) (emphasis added). To avoid liability, Congress established the I-9 Form process, whereby an employer may satisfy its obligations by examining documents establishing identity and work authorization to see that each

"reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(b)(1)(A); 8 C.F.R. § 274a.2(b)(ii)(A).

The Ordinance, however, impermissibly conflicts with this federal scheme. Section 4(E) of the Ordinance flatly rejects the federal scienter requirement and imposes a regime of strict liability. Any discharged employee may recover treble damages and attorney's fees from their employer upon proof that "the business entity was employing an unlawful worker," without respect to the employer's state of mind or compliance with the I-9 Form process. Ordinance § 4(E). Section 4(A) of the Ordinance likewise makes it unlawful to hire, recruit, or refer an illegal alien for employment within the city, with no requirement that the employer know that the applicant is undocumented or failed to follow the federal I-9 Form process.[8]

Nor does an employer somehow "know" that it is employing an illegal alien upon notification by Hazleton officials. That notification is based upon a check of federal databases pursuant to 8 U.S.C. § 1373. *See* Ordinance § 4(B)(3). Upon receiving a § 1373 request, federal immigration officials check the federal Verification Information System (formerly called the Alien Status Verification Index), *see, e.g.*, Alien Status Verification Index, 66 Fed. Reg. 46,812, 46,814-15

[8] Indeed, the only mention of a knowledge requirement arises not in the permit deprivation provision, but only in connection with its permit application affirmation requirement. *See* Ordinance § 4(A) (requiring applicants for business permits to affirm that they "do not knowingly utilize the services or hire any person who is an unlawful worker").

(Sept. 7, 2001), which contains the same information searchable by private parties through the voluntary and experimental Basic Pilot Program, *see* Expansion of the Basic Pilot Program, 69 Fed. Reg. 75,997, 75,998 (Dec. 20, 2004). As the Department of Homeland Security has made clear, however, this information provides at best a "tentative nonconfirmation[]" of work status, since federal records are not in all cases accurate and "nonconfirmation" can be generated by many factors unrelated to actual work authorization status. *See* DHS, *Report to Congress on the Basic Pilot Program* 2, 3-5 (2004), available at http://www.uscis.gov/files/nativedocuments/BasicFINALcongress0704.pdf (emphasis added) (hereinafter "DHS 2004 Report to Congress").[9] Federal law is clear:

> A tentative nonconfirmation received from [a federal agency] does not mean that the employee is not authorized to work, and employers may not interpret it as such. There are many reasons why a work-authorized individual may be the subject of a tentative nonconfirmation, including mistakes on the Form I-9 by either the employer or the employee, inaccurate data entry by the employer, legal change of the employee's name, or erroneous, incomplete, or outdated Government records.

[9] As the researchers who conducted the official 2001 comprehensive review of the Basic Pilot Program discovered, "[m]ost federal officials interviewed agreed that the efficient operation of the pilot program was hindered by inaccuracies and outdated information in INS databases." *INS Basic Pilot Evaluation Summary Report* 17 (2001), available at http://www.uscis.gov/files/nativedocuments/INSBASICpilot_summ_jan292002.pdf.

Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. 48,309, 48,312 (Sept. 15, 1997) (emphasis added); *see also* DHS 2004 Report to Congress, at 2-3 (same). Thus, a federal "nonconfirmation" (on which the Ordinance impermissibly relies as proof of an employee's work authorization status) does not and cannot provide an employer with knowledge of the employee's actual work authorization status.

Sections 4(A) and 4(E) of the Ordinance are inconsistent with federal law and conflict with Congress' objectives and purposes. Thus, the Ordinance is preempted.

2. The Ordinance Is Inconsistent With Federal Employee Verification Provisions.

The Ordinance also sets up a verification and enforcement scheme that is entirely different from the governing federal law. Under federal law, an employer satisfies its obligations by completing an I-9 Form and inspecting the applicant's documents to see that they "reasonably appear[] ... to be genuine," 8 U.S.C. § 1324a(b)(1)(A), and is presumed not to have violated the law if it relies in "good faith" on those documents, *id.* § 1324a(a)(3).

Section 4(B) of the Ordinance imposes a different—and conflicting—work authorization verification scheme on employers. Pursuant to the Ordinance, an employer must provide the city with "identity information ... regarding any persons alleged to be unlawful workers," which the city in turn submits to federal

immigration officials. Ordinance § 4(B)(3). In the event the city cannot verify the employee's status, the employer must "correct [the] violation"—that is, terminate the employee—within three business days. *Id.* § 4(B)(4). This is not, however, the I-9 Form process of verification that Congress imposed.[10] Indeed, the Ordinance's three-day compliance window conflicts with the rules governing the Basic Pilot Program (which, as explained below, the Ordinance seeks to force upon employers contrary to federal law). Those federal rules afford an employee subject to a tentative finding of nonconfirmation "8 Federal Government work days to resolve any discrepancy in SSA records, including updating the database if appropriate." Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. at 48,312 (emphasis added); *see also* DHS 2004 Report to Congress, at 2-3 (stating that the employee has 10 days in which to resolve the discrepancy). "During this period, the employer may not terminate or take adverse action against the employee based upon his or her employment eligibility status." Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. at 48,312 (emphasis added); *see also* DHS 2004 Report to Congress, at 2-3 (same).

[10] The Ordinance contains no provision allowing an employer to refrain from firing the employee in the event the employer wishes to contest the federal determination of "nonconfirmation," clarify the bases on which that determination was made, or even consult with the employee (which may not be possible within three days if, for example, the employee is on vacation or otherwise unavailable). Nor is there any safe harbor for employers who relied reasonably and in good faith on the applicant's documents and followed the I-9 Form procedure.

The Ordinance further conflicts with federal law because it seeks to force employers to use the federal Basic Pilot Program, an experimental federal electronic work authorization computer system. Congress, however, decreed that this program be strictly voluntary.[11] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 402(a), 110 Stat. 3009-546, 3009-656 ("[T]he Attorney General may not require any person or other entity to participate in a pilot program."). The Ordinance seeks to destroy the voluntary nature of that experimental program. First, the Ordinance's safe harbor provision is much more limited than the I-9 Form safe harbor under federal law. The Ordinance requires employers to have "verified the work authorization of the allegedly unlawful worker(s) using the Basic Pilot Program." Ordinance § 4(B)(5). Second, the Ordinance requires employers to "enroll[] in" and "participate in" Basic Pilot as a condition of regaining their business permit once it is rescinded. *Id.* § 4(B)(6)(b). Third, it exposes employers to treble damages suits by discharged employees if the employer is found to employ an undocumented alien and the employer "was not participating in the Basic Pilot [P]rogram." *Id.* at § 4(E)(1). Fourth, it forces an employer to use Basic Pilot if it wishes to obtain "a secondary or additional verification by the federal

[11] Congress has considered, but has not adopted, proposals creating a new electronic verification system and imposing penalties upon employers who fail to use it. *See, e.g.*, S. 2611, 109th Cong. § 301 (2006); H.R. 4437, 109th Cong. § 703 (2005).

government of the worker's authorization" once the city has concluded that the employer is in violation of the Ordinance. *Id.* § 7(C)(2). Fifth, it requires a business to participate in Basic Pilot "[a]s a condition for the award of any City contract or grant" of $10,000 or more. *Id.* § 4(D).

Congress, by contrast, deliberately permitted employers to choose among a variety of verification methods—including the voluntary use of Basic Pilot—to satisfy their I-9 obligations, as long as the employer relies in good faith on documents that "appear to be genuine." *See* 8 U.S.C. § 1324a(b)(1)(A); 8 C.F.R. § 274a.2(b).[12] As the Supreme Court explained in *Geier*, a state or local law that imposes penalties unless a business adopts a standard that is merely one of several options established by federal law "present[s] an obstacle to the variety and mix of [standards] that the federal regulation sought," and thus conflicts with federal law. 529 U.S. at 881.

By threatening employers with liability and civil penalties if they fail to use Basic Pilot (and requiring violators to sign up for Basic Pilot as a condition of regaining their operating permit), Hazleton has (as in *Geier*) erected an

[12] Regulations promulgated by a federal agency, acting within the scope of its lawful powers, may preempt inconsistent state and local laws. *See, e.g., United States v. Locke*, 529 U.S. 89, 109-10 (2000).

impermissible obstacle to Congress' carefully considered legislative and regulatory scheme.[13]

3. The Ordinance Is Inconsistent With Federal Anti-Discrimination Laws.

Enforcement of the Ordinance "shall be initiated by means of a written signed complaint ... submitted by any City official, business entity, or City resident" that "include[s] an allegation" of illegal hiring. Ordinance § 4(B)(1). The only prohibited basis for such an allegation are those made "solely or primarily on the basis of national origin, ethnicity, or race." *Id.* § 4(B)(2). Nothing, however, appears to prohibit complaints based on such factors as foreign appearance, accent, foreign language, or name.

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[13] The Ordinance's verification requirements may also conflict with other requirements for participation in the Basic Pilot Program. All employers who choose to participate in Basic Pilot must enter into a Memorandum of Understanding with the federal government, under which the employer agrees that its use of information is governed by the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, and that any information received from federal agencies under the Basic Pilot Program will be "safeguard[ed]" and kept strictly confidential, "including ensuring that it is not disseminated to any person other than employees of the Employer who need it to perform the Employer's responsibilities under this [Memorandum of Understanding]." Memorandum of Understanding § II.C.12, available at https://www.vis-dhs.com/EmployerRegistration/RequestParticipation.aspx?AccessMethod=WEB-BP. Nothing in the agreement between employers and the federal government allows an employer to disclose such information to a local official acting under color of a local ordinance.

Federal law, however, prohibits employers from subjecting employees to different procedures on the basis of such factors. As the Department of Justice has explained,

> To request to see identity and employment eligibility documents only from ... persons who appear or sound foreign, is a violation of the employer sanctions laws and may also be a violation of Title VII of the Civil Rights Act of 1964. You should not discharge present employees, refuse to hire new employees, or otherwise discriminate on the basis of foreign appearance, accent, language, or name.

Handbook for Employers: Instructions for Completing Form I-9, at 18 (1991), available at http//www.uscis.gov/files/nativedocuments/m-274.pdf. Indeed, it was in part because of concerns about discrimination that Congress enacted the federal system of immigration enforcement—and not the more searching system that Hazleton seeks to impose. *See* H.R. Conf. Rep. No. 99-1000, 1986 U.S.C.C.A.N. at 5842 (stating that the concern that "some employers may decide not to hire 'foreign' appearing individuals to avoid sanctions" led Congress to enact the anti-discrimination provisions of IRCA). For this additional reason, the Ordinance conflicts with federal law and is invalid.[14]

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[14] The Ordinance is also field preempted. The Supreme Court has explained:

> [T]he categories of preemption are not rigidly distinct. Because a variety of state laws and regulations may conflict with a federal statute, whether because a private party cannot comply with both sets of provisions or because the objectives of the federal statute are frustrated, field pre-emption may be understood as a species of conflict pre-emption.

II. THE ORDINANCE VIOLATES EMPLOYERS' RIGHTS TO PROCEDURAL DUE PROCESS UNDER THE UNITED STATES CONSTITUTION.

Under the Fourteenth Amendment, persons subject to civil sanctions by states or localities have a due process right to notice and a fair hearing before being deprived of a protected interest. *See Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970).[15] The interests protected by the Due Process Clause extend to, *inter alia*, conventional property as well as a person's "good name, reputation, honor, or integrity." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Under Pennsylvania law, a business permit is property. *See Young J. Lee, Inc. v. Commw., Dep't of Revenue*, 474 A.2d 266, 270 (Pa. 1983) ("Government licenses generally constitute a form of property insofar as they are an entitlement to engage

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Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 n.6 (2000) (internal quotation marks and citations omitted); *see NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 348 (3d Cir. 2001) (same). IRCA is a near-textbook example of a statute in which Congress has occupied the field; the Supreme Court has recognized that IRCA provides a "comprehensive scheme prohibiting the employment of illegal aliens in the United States," *Hoffman Plastic*, 535 U.S. at 147, and there is no question that the federal interest in the field of immigration is dominant, *see, e.g.*, *Hines*, 312 U.S. at 62-63. A state law is field preempted where, as here, the federal scheme is "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplemental state regulation," and "the field is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Hillsborough County*, 471 U.S. at 713 (internal quotation marks omitted).

[15] Business entities qualify as "persons" under the Due Process Clause. *See, e.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936).

in a valuable activity[,] ... which triggers procedural rights under the due process clause of the Fourteenth Amendment."); *City of Philadelphia v. 2600 Lewis, Inc.*, 661 A.2d 20, 22 (Pa. Commw. Ct. 1995) ("Government licenses to engage in a business or occupation create an entitlement to partake of a profitable activity, and therefore, are property rights.").

The Ordinance subjects a business entity to the loss of its business permit if it does not act within three business days to "correct" a violation alleged by local officials exercising unfettered discretion. *See* Ordinance § 4(B)(3)-(4). The only review process afforded to business entities under the ordinance is a right to seek judicial review of the imposition of sanctions *post hoc*. *See id.* § 7(F) (permitting a post-deprivation challenge).[16] This process does not provide business entities an

[16] Hazleton implausibly argues that the requirement that employers must provide the city with information regarding employee work authorization status (Ordinance § 4(B)(3)) constitutes a "hearing" that satisfies due process. *See* Def.'s Mot. at 60. The required submission of documents, without any opportunity for the employer to make arguments in its favor, is clearly not a hearing, since it lacks the common indicia of a "hearing." *See, e.g.*, *Rogin v. Bensalem Twp.*, 616 F.2d 680, 694 (3d Cir. 1980) (listing the common elements of due process as including "an opportunity to make an oral presentation," "a means of presenting evidence, "an opportunity to cross-examine witnesses or to respond to written evidence," "the right to be represented by counsel," and "a decision based on the record with a statement of reasons for the result"); *see also United States v. Barnhart*, 980 F.2d 219, 222 (3d Cir. 1992) (same). Defendant offers no good reason why the circumstances for the deprivation at issue here are so distinct from other due process cases as to permit the elimination of all these indicia of a "hearing."

opportunity to be heard prior to license suspension or revocation nor does it require local officials to prove the validity of any violation before imposing sanctions.[17]

Where a procedural due process right attaches, courts must examine three factors in evaluating whether the affected person or entity has been afforded sufficient process: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976); *see also Graham v. City of Philadelphia*, 402 F.3d 139, 145-46 (3d Cir. 2005). Where a state or locality deprives a person or entity of property by operation of law, "absent the necessity of quick action by the state or the impracticality of providing any predeprivation process" a post-deprivation hearing is usually "constitutionally inadequate," particularly where "the State's only [post-deprivation] process comes in the form of an independent tort action." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (internal quotation marks

[17] Federal law, by contrast, provides that the federal government has the burden of proving that an employer has employed illegal aliens, and employers may not be subject to any civil or criminal penalties for employing illegal aliens without first being afforded an adversarial hearing before a federal Administrative Law Judge. *See* 8 U.S.C. § 1324a(e); 28 C.F.R. pt. 68.

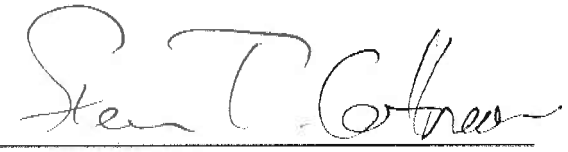
omitted); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (applying the *Eldridge* factors and noting that "[w]e tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations") (internal quotation marks omitted); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 213 (3d Cir. 2001) (stating that "[u]sually, the process that is constitutionally 'due' must be afforded before the deprivation occurs—the state must provide predeprivation process," and noting an exception only when "the complained of conduct is 'random and unauthorized'").

Here, Hazleton clearly cannot justify denying a meaningful pre-deprivation remedy before depriving an employer of its business permit. The private interest affected by the action—forcing business entities to cease operations—is unquestionably significant. Moreover, given that Hazleton's Ordinance imposes this deprivation on entities that cannot document the status of allegedly unlawful workers within three days and does not provide local officials with any comprehensive standards to determine whether violations have occurred, *see generally* Ordinance § 4, the risk of an erroneous deprivation is high. Finally, there is simply no exigency or compelling fiscal or administrative reason for the lack of a pre-deprivation hearing. Hazleton's failure to provide meaningful pre-deprivation process violates the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court deny Defendant's Motion to Dismiss, and grant Plaintiffs' Cross Motion for Summary Judgment.

Respectfully submitted,



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CERTIFICATION OF WORD COUNT

Pursuant to this Court's order of March 2, 2007, granting the Chamber of Commerce of the United States of America leave to file a brief that is not longer than 6,000 words, I hereby certify that the foregoing brief contains 5,884 words, excluding the Table of Contents, Table of Authorities, and Statement of Interest of the *Amicus Curiae*. This count was generated by the Microsoft Word word processing program.

Steven T. Cottreau