No. 07-3531

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PEDRO LOZANO, *et al.*

Appellees,

v.

CITY OF HAZLETON,

Appellant.

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *and* THE ARIZONA CHAMBER OF COMMERCE AND INDUSTRY, THE COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY, THE FLORIDA CHAMBER OF COMMERCE, THE ILLINOIS CHAMBER OF COMMERCE, THE INDIANA CHAMBER OF COMMERCE, THE KANSAS CHAMBER OF COMMERCE, THE KENTUCKY CHAMBER OF COMMERCE, THE MISSOURI CHAMBER OF COMMERCE AND INDUSTRY, THE NEW JERSEY CHAMBER OF COMMERCE, THE NORTH CAROLINA CHAMBER OF COMMERCE, THE OKLAHOMA STATE CHAMBER OF COMMERCE AND ASSOCIATED INDUSTRIES, THE TENNESSEE CHAMBER OF COMMERCE AND INDUSTRY, AND THE WEST VIRGINIA CHAMBER OF COMMERCE IN SUPPORT OF APPELLEES

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Carter G. Phillips
Eric A. Shumsky
Robert A. Parker
Brian E. Nelson
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

CORPORATE DISCLOSURE STATEMENT

None of the *amici curiae* are publicly traded corporations. There are no parent corporations or other publicly held corporations that own 10% or more of any *amicus curiae*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

BILLS & LEGISLATIVE HISTORY

OTHER AUTHORITIES

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America is the world's largest federation of businesses, with an underlying membership of more than three million businesses and organizations of every size, in every industrial sector and geographic region. The state chambers of commerce are composed of and represent the interests of businesses large and small, as well as local chambers of commerce. Collectively, their membership encompasses more than 150,000 businesses with millions of employees. *Amici* advocate the business community's interests in cases involving issues of national concern, as did the U.S. Chamber in the court below. *Amici* also have been involved in efforts to ensure that federal immigration legislation is uniform, fair, and appropriate to the needs of businesses and their lawful employees.

As representatives of business, *amici* are uniquely well-suited to address the questions of federal preemption presented here. *Amici*'s members operate in states and municipalities that, like Hazleton, have enacted or considered laws that undermine the national uniformity and careful balancing of interests Congress sought to achieve in enacting the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. §§ 1324a, 1324b).[1]

[1] Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Notwithstanding federal primacy in regulating immigration generally—and the careful balance struck by the IRCA in particular—several state and local governments have recently determined for themselves that the federal system of employment verification is insufficient, and have concluded (as did Hazleton's officials in the trial below) that "the federal government is not adequately addressing the issue" of illegal immigration. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 522 n. 44 (M.D. Pa. 2007); *see* A1289-90, 1486. These states and municipalities have responded by enacting employee verification and employer sanction regimes that differ from the federal scheme, and from one another. The result is a patchwork of inconsistent legislation that undermines the comprehensive employment verification scheme Congress enacted, and fractures the national uniformity that was Congress's goal. This mish-mash burdens businesses throughout the country, particularly small businesses and businesses that operate in multiple jurisdictions.

The district court, in a thoroughly reasoned opinion, properly concluded that Hazleton's ordinance is preempted by federal law. *Lozano*, 496 F. Supp. 2d at 518-529. Hazleton now raises 29 separate claims of error, bringing to mind Justice Jackson's admonition that the more errors a party claims, the less likely they are to

be valid.[2] As Appellees explain, Hazleton's protestations of error are based on fundamental misunderstandings of federal law.

Amici submit this brief to provide detail about two issues, both of which are critical to explaining why Hazleton's law is preempted. *First*, this brief discusses the many different state and local immigration laws that recently have been enacted around the country. The extent to which Congress's purposes have been undermined does not depend solely on the relationship between the IRCA and the Hazleton ordinance. Rather, preemption analysis requires this Court to consider the full range of state and local regulation that a holding of non-preemption would authorize. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989). Hazleton's statute is one of an ever-growing number of such laws. Hundreds of bills addressing this subject are introduced in state legislatures and city councils every year, and dozens of these statutes and ordinances have already been enacted. If the IRCA is held not to preempt laws like Hazleton's, national employers soon will have to comply with scores—if not hundreds—of different regimes that govern the basic task of verifying the employment status of its employees. That is precisely what Congress intended to avoid.

[2] Justice Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 Temp. L. Q. 115, 119 (1951).

Second, we provide a fuller discussion of the breadth and depth in which federal law regulates the verification of employees' work authorization status. The numerous and detailed provisions of 8 U.S.C. § 1324a, complemented by equally technical implementing regulations, make clear that Congress enacted this statute with the goal of creating a comprehensive and uniform regulatory system. The legislative history of the IRCA confirms as much, and the Supreme Court has said so in a case Hazleton never cites. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). The IRCA is precisely the sort of "comprehensive and reticulated statute" that preempts state and local law. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980).

Part of this federal scheme is the Basic Pilot Program. Federal law is explicit that Basic Pilot is voluntary and experimental. The reason for this is simple—Congress wished to test whether verification systems other than the I-9 Form process mandated by the IRCA could be effective. That Congress acted deliberately in making Basic Pilot voluntary for private employers is clear from its contrasting decision to make the program mandatory for certain federal-government entities. Hazleton's effort to make Basic Pilot mandatory for private employers is preempted.

A final word about the immigration debate underlying this case is in order. *Amici* do not support the knowing employment of illegal immigrants. It is against

federal law to knowingly employ illegal workers, and employers who violate this law are subject to an extensive and exclusive federal system of administrative adjudication and penalty. The efficacy and wisdom of that choice, which Congress made more than 20 years ago, is not at issue here. The question presented by this case is whether Hazleton may impose different and additional requirements than the ones Congress mandated. It may not.

ARGUMENT

I. HAZLETON'S ORDINANCE IS ONE OF A GROWING NUMBER OF INCONSISTENT STATE AND LOCAL LAWS REGULATING EMPLOYMENT VERIFICATION.

In evaluating whether Hazleton's law is preempted, the Court must take account of the full range of state and local regulation that will be authorized by a determination of no preemption. *See Buckman*, 531 U.S. at 350 (considering the consequences of "50 States' tort regimes"); *Bonito Boats*, 489 U.S. at 161 (considering the "prospect" of action by "all 50 States"). When, as here, "one of [Congress's] purposes was to create a uniform system" of national regulation, the federal scheme would be "obliterated" if courts allowed "[a] patchwork of state substantive laws" regulating the same thing. *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 590 (3d Cir. 1989); *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 996 (2008); *Air Transp. Ass'n of Am. v. Cuomo*, __ F.3d __, 2008 WL 763163, at *4-5, *6 (2d Cir. Mar. 25, 2008).

That, however, is precisely what is occurring as the result of enactments like Hazleton's. The National Conference of State Legislatures reports that 244 employer-related immigration bills were introduced in 45 states in 2007, and 20 states enacted legislation. NCSL, *2007 Enacted State Legislation Related to Immigrants and Immigration* at 2, 7-10 (Jan. 31, 2008), *available at* http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf; *see also* Pew Charitable Trusts, *State of the States Report–2008* at 56-62, *available at* http://archive.stateline.org/flash-data/StateOfTheStates2008.pdf (documenting the "cacophony" of recent state and local laws).[3]

These laws impose diverse and often inconsistent requirements on employers. The result has been the worst of all worlds. On the one hand, many of the laws are somewhat similar because they derive from common interest groups, and so together they modify the balance Congress struck. On the other hand, there are numerous differences among them, and so they undercut the uniformity Congress thought so important.

State and local governments have, for instance, imposed inconsistent verification requirements. These conflict with federal law by restricting the range of work-authorization options that Congress granted employers. *See infra* at 12-15,

[3] MALDEF and the Fair Immigration Reform Movement have catalogued local laws to the same effect. *See* http://www.maldef.org/publications/pdf/ACF21F6.pdf; http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/database-of-ordinances.html.

19-24; Red Br. 49-64. For example, Arizona and Mississippi require every employer to use the Basic Pilot Program to verify work authorization status. Ariz. Rev. Stat. § 23-214; Miss. Employment Protection Act (S.B. 2988) § 2(3)(d), (4)(b)(i) (signed into law Mar. 17, 2008). In Oklahoma and Utah, any employer wishing to do business with a public entity must verify its employees using a state-created "Status Verification System," which purports to encompass the Basic Pilot Program, the "Social Security Number Verification Service" (SSNVS),[4] and independent "third party" verification systems (which do not yet exist and are not authorized by federal law). 25 Okla. Stat. §§ 1312, 1313(B)(2); Utah Code Ann. § 63-99a-103. Businesses seeking public contracts in the municipalities of Hazleton; Valley Park, Missouri; and Mission Viejo, California; and in Colorado, Minnesota, Georgia, and Rhode Island, may *only* use the Basic Pilot Program.[5] Illinois, on the other hand, *forbids* employers from using Basic Pilot. 820 Ill. Comp. Stat. § 55/12. And Tennessee and Louisiana restrict the number and types of documents employers can use to verify work authorization status to those ap-

[4] Federal law, however, forbids using the SSNVS for any purpose other than verifying information for year-end wage reports. *See* SSA, *Social Security Number Verification Service Handbook* (Sept. 2007), *available at* http://www.ssa.gov/employer/ssnvs_handbk.htm.

[5] Ordinance No. 2006-18 § 4(D) (Hazleton); Ordinance No. 1736 § 4(D) (Valley Park); Ordinance No. 07-260 (Mission Viejo); Colo. Rev. Stat. § 8-17.5-102; Minn. Exec. Order 08-01 (Jan. 7, 2008); Ga. Code Ann. § 13-10-91; R.I. Exec. Order 08-01 (Mar. 27, 2008).

proved by state authorities. Tenn. Code Ann. § 50-1-106; La. Rev. Stat. § 23:992.2.

These varying requirements are enforced by a patchwork of differing sanctions—all of which depart from Congress's scheme, and none of which is contingent on any finding of federal liability. Hazleton's law is one of several that allows local officials to independently determine that a business has hired an illegal alien, and suspend or revoke the employer's ability to do business. Similar laws exist in Arizona, Mississippi, Tennessee, West Virginia, and the municipalities of Valley Park, Missouri; Beaufort County, South Carolina; and Apple Valley, California.[6]

Oklahoma and Louisiana take a different approach: they subject employers to state-law tort actions for civil damages brought by any former employee if a state court or commission determines that the business employed an illegal alien in the same job category. 25 Okla. Stat. § 1313(C); La. Rev. Stat. 23:994. Mississippi provides a similar tort action. Miss. S.B. 2988 § 2(4)(d). Hazleton also has created a tort claim, albeit with strict liability and treble damages. Ordinance No. 2006-18 § 4(E). In Louisiana and West Virginia, and in Suffolk County, New York, local authorities may impose civil and criminal penalties on employers they

[6] Ariz. Rev. Stat. § 23-212; Miss. S.B. 2988 § 2(7)(e); Tenn. Code Ann. § 50-1-103(e); W. Va. Code § 21-1B-7; Ordinance No. 2006-18 § 4(B) (Hazleton); Ordinance No. 1736 § 4(B) (Valley Park); Ordinance No. 2006/31 § 4(E) (Beaufort County); Resolution No. 2006-82 (Apple Valley).

deem to have hired illegal aliens. La. Rev. Stat. § 23:993; W. Va. Code § 21-1B-5; Local Law No. 52-2006 § 8 (Suffolk County).

These are just a few of the immigration-related employer requirements that states and municipalities have imposed on employers in recent months, and many more are under consideration. Congress, however, left no room for a patchwork of laws imposing conflicting requirements. It valued uniformity, and carefully balanced a number of competing considerations, as we discuss next.

II. THE IRCA COMPREHENSIVELY REGULATES EMPLOYMENT VERIFICATION AND BROADLY PREEMPTS STATE AND LOCAL LAWS.

As the district court properly recognized, "More than one hundred years of federal regulation have made the federal supremacy over immigration an intricate affair." *Lozano,* 496 F. Supp. 2d at 521. Specifically relevant here, federal law comprehensively regulates every aspect of employment verification. Red Br. 50-53, 55. Congress has specified the methods that employers and employees may use to verify employment authorization; a range of civil and criminal penalties for violations; a safe harbor for good-faith compliance with the law; and a comprehensive federal administrative system for adjudicating violations and determining liability. 8 U.S.C. § 1324a. This already-thorough statutory scheme is supplemented by detailed regulations. *See* 8 C.F.R. § 274a *et seq.*; 28 C.F.R. pts. 44, 68.

Rather than duplicate Appellees' analysis, this section focuses on three specific issues that merit additional discussion. *First*, we further describe the complex federal system that governs employee verification. The district court correctly analyzed this federal scheme and applied well-established preemption principles to find that Hazleton's ordinance poses an obstacle to federal law set forth in detailed statutory and regulatory provisions.[7] Hazleton largely ignores these principles, instead relying heavily on the Supreme Court's pre-IRCA decision in *De Canas v. Bica*, 424 U.S. 351 (1976), and a claim that Hazleton is merely engaged in "concurrent enforcement." Both arguments fail.

Second, we discuss the federal Basic Pilot Program. Federal law is explicit that Basic Pilot is voluntary. This is with good reason: it is riddled with errors and imposes substantial burdens on private employers. Hazleton's contrary argument misunderstands the relationship between Basic Pilot and the federal I-9 Form process, the document-based work authorization verification system Congress requires every employer in the country to use, and which Hazleton scarcely mentions.

Finally, we address Hazleton's novel cause of action for employment discrimination. Hazleton contends that this provision is not preempted because it imposes no "sanction." As the district court correctly held, this argument is wrong.

---

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

A. The IRCA Comprehensively Regulates Employee Status Verification.

1. Beginning in 1971, and in every year thereafter, Congress conducted "[e]xtensive and comprehensive hearings" on prohibiting the employment of illegal aliens. *See, e.g.*, H.R. Rep. No. 99-682(I) at 52-56 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5656-60; S. Rep. No. 99-132 at 18-26 (1985). These efforts produced a voluminous record that detailed the competing considerations in dealing with problems that arise from the employment of illegal workers. *See, e.g.*, *Joint Hearing Before Subcomms. of the H. & S. Comms. on the Judiciary*, 99th Cong. 71-78 (1985) (statement of K. Alexander, U.S. Chamber of Commerce); *Hearing Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 98th Cong. 42 (1983) (statement of R. Thompson, Chairman, U.S. Chamber of Commerce).

As a result of these efforts, Congress enacted the IRCA. That statute and its extensive implementing regulations created a "comprehensive scheme prohibiting the employment of illegal aliens in the United States" that "forcefully made combating the employment of illegal aliens central to the policy of [federal] immigration law." *Hoffman Plastic*, 535 U.S. at 147 (quotation marks omitted). It was "the most comprehensive reform of our immigration laws since 1952," and "the product of one of the longest and most difficult legislative undertakings of recent memory." Statement of the President Upon Signing S. 1200 (Nov. 10, 1986), *re-*

printed in 1986 U.S.C.C.A.N. 5856-1, 4. Critically important here, Congress expressly intended immigration law to be enforced "uniformly." IRCA § 115, 100 Stat. at 3384.

The "keystone and major element" of the statute, *see* 1986 U.S.C.C.A.N. at 5856-1, is "an extensive 'employment verification system.'" *Hoffman Plastic*, 535 U.S. at 147; *see* 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). The 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). Employers discharge their responsibilities under this section by completing an I-9 Form and inspecting documents that establish the employee's identity and eligibility to work in the United States. 8 C.F.R. § 274a.2(b). An employer must accept any document on a list promulgated by the federal government that "reasonably appears on its face to be genuine." Employees are under no obligation to present any particular document, nor may employers ask them to do so. 8 U.S.C. § 1324a(b)(1)(A); *see* 8 C.F.R. §§ 274a.2(b)(1)(ii)(A), 274a.2(b)(1)(v). The law creates a safe harbor for employers who "compl[y] in good faith." *Id.* § 1324a(a)(3).

Federal law creates a Byzantine array of allowances and exceptions for individuals wishing to work in the United States, and vests federal agencies with ex-

clusive authority to administer these requirements.[8] Whether an employer knowingly hired an illegal worker is committed to a specialized federal administrative review system, which affords employers the right to an adversarial hearing before a federal Administrative Law Judge at which the government bears the burden of proof. Every aspect of this procedure is spelled out in lengthy and detailed statutory and regulatory provisions. *See* 8 U.S.C. § 1324a(e); 28 C.F.R. pt. 68. If an employer is found to have knowingly employed an illegal alien, the IRCA and its implementing regulations specify civil and criminal sanctions, including graduated monetary penalties, civil injunctions against repeat offenders, and criminal fines of up to $3,000 per illegal worker and six months in prison. *See* 8 U.S.C. § 1324a(e)(4), (f); 8 C.F.R. § 274a.10(b)(1)(ii)(A). The ALJ's decision is subject to administrative appellate review, then federal judicial review. 8 U.S.C. § 1324a(e)(7), (8).

[8] As one example of the detail and complexity of the federal regulatory scheme, 8 C.F.R. § 274a.12(a) and (c) allow work authorization for lawful permanent residents; lawful temporary residents; refugees; asylees; persons granted withholding of removal, extended voluntary departure, or temporary protective status; parents or children of certain lawful permanent residents; certain spouses, fiancées, and dependents of holders of A, G, K, and J visas; persons subject to the federal government's "Family Unity Program"; certain persons holding visas E-J, L, and O-V, and a variety of Mexican and Canadian visa-holders under NAFTA; certain applicants for asylum, withholding of removal, cancellation of removal, and suspension of deportation; certain staff and employees of holders of B, E, F, H, I, J, and L visas; and battered spouses and children under the Violence Against Women Act.

In addition, the IRCA requires the President to monitor the effectiveness of the verification system, and to transmit to the House and Senate Judiciary Committees detailed written reports of proposed changes well in advance of the effective date. 8 U.S.C. § 1324a(d). Any change in the documents used to prove work authorization status is a "major change" that requires two years' written notice to Congress. *Id.* § 1324a(d)(3)(A)(iii), (D)(i).

2. Not only was the IRCA meant to be uniform and comprehensive; it also was calibrated to balance competing policy goals. Congress intended that the IRCA would deter illegal immigration, while being "the least disruptive to the American businessman and … also minimiz[ing] the possibility of employment discrimination." H.R. Rep. No. 99-682(I) at 56, 1986 U.S.C.C.A.N. at 5660; S. Rep. No. 99-132 at 8-9. Indeed, "the legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process." *Collins Foods Int'l, Inc., v. INS*, 948 F.2d 549, 554 (9th Cir. 1991). Congress 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 at 86 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5841; S. Rep. No. 99-132 at 32. The statute represents "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely af-

fected." *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991).

In short, the specific methods Congress chose—a range of verification methods, a safe harbor for good-faith compliance, and a graduated list of civil and criminal penalties, among others—were carefully selected to achieve a compromise among multiple objectives.

3. Hazleton's ordinance ignores the balance that Congress struck. Hazleton has focused singlemindedly on one of the IRCA's goals—preventing illegal immigration—while ignoring Congress's other objectives of assuring national uniformity, avoiding burdens on businesses, and preventing discrimination. In so doing, Hazleton has "upset[] the balance of public and private interests so carefully addressed by" federal law. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624, 634 (1982). When Congress enacts a comprehensive statutory and regulatory scheme to address competing policy objectives, states and municipalities may not "'impose … 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)). As the Supreme Court explained in *Hines v. Davidowitz*, "where the federal government … has enacted a complete scheme of regulation …, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement the federal law, or en-

force additional auxiliary regulations." 312 U.S. 52, 66 (1941); *see also Buckman*, 531 U.S. at 348-50; *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614-19 (1986).[9]

For this reason, it is no answer to argue that Hazleton is merely pursuing "concurrent enforcement." Blue Br. 56-60. Hazleton properly concedes that concurrent state regulation is permissible only "[w]here state enforcement activities do not impair federal regulatory interests." *Id.* at 57 (quotation marks omitted). Hazleton's ordinance, however, does serious violence to the regulatory interests that Congress balanced in the IRCA. *First*, as noted, Hazleton has taken one of Congress's multiple goals and elevated it above the others. That was the ordinance's stated purpose; it is its obvious effect; and therefore, because it "present[s] an obstacle to the variety and mix of [standards] that the federal regulation sought," it is preempted. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000); *Edgar*, 457 U.S. at 634 (state laws that "upset the careful balance struck by Congress" are preempted); *Ouellette*, 479 U.S. at 494.

Second, even if Hazleton's ordinance did pursue the same objectives as Congress, it still would be preempted because it "interferes with the *methods* by which the federal statute was designed to reach [its] goal." *Gade v. Nat'l Solid*

[9] These cases, among others, make clear that Hazleton is flatly mistaken to argue (at 68) that "preemption occurs only if 'compliance with both state and federal law is impossible.'" "Impossibility" is one, but not the only, form of conflict preemption.

Wastes Mgmt. Ass'n, 505 U.S. 88, 103 (1992) (emphasis added); *contra* Blue Br. 70-71 (asserting that "'identical purposes'" preclude preemption). It is commonplace that a "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971). Here, Congress selected particular methods by which to effectuate its goals. These include the I-9 Form verification process, 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b); the federal system of graduated employer penalties for knowing violations of federal law, 8 U.S.C. §1324a(e)(4), (f); 8 C.F.R. §274a.10(b)(1)(ii)(A); the safe harbor for good-faith I-9 Form compliance, 8 U.S.C. § 1324a(a)(3); and the administrative system for adjudicating compliance, 8 U.S.C. § 1324a(e); 28 C.F.R. pt. 68. Hazleton's ordinance radically departs from Congress's "'specially designed procedures … to obtain uniform application of its substantive rules,"' and therefore it is preempted. *Lockridge,* 403 U.S. at 287-88.[10]

For the same reason, Hazleton is mistaken to argue that its ordinance is not preempted on the theory that Congress "*encourage[s]* state and local efforts to reinforce federal immigration law." Blue Br. 60, 61-65. That Congress contem-

[10] The cases Hazleton cites (at 57) are not to the contrary. Those cases addressed the specific question whether state police officers who observed federal crimes could make arrests. But in none of those cases is there any hint of a federal statutory scheme, as here, that includes a specific, comprehensive and exclusive mechanism of enforcement and adjudication.

plated some limited role for states hardly means that every state and town in the country may regulate the employment of immigrants however they see fit, regardless of the conflict with federal law. On the contrary, Congress's decision to give states and localities a few specific, limited roles gives rise to a strong implication that Congress did not intend to allow them to regulate broadly. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994).

4. Finally, Hazleton relies heavily on *De Canas v. Bica*, 424 U.S. 351 (1976), arguing that the district court's "greatest error" was to distinguish that case. Blue Br. 36; *see also id.* at 36-38, 52-56. *De Canas*, however, has little bearing on this case. As Judge Munley explained, *De Canas* was decided a decade before the IRCA's enactment. 496 F. Supp. 2d at 524. It interpreted the preemptive effect of a different statute (the Immigration and Nationality Act ("INA")), and concluded that the INA evinced "at best … a peripheral concern with employment of illegal entrants," 424 U.S. at 360, and so Congress *at that time* had not preempted state regulation of the employment of aliens, *id.* at 358. The IRCA, however, filled precisely this gap; "the employment of illegal aliens [became] central to the policy of immigration law." *Hoffman Plastic*, 535 U.S. at 147. Whereas *De Canas* found "uniform national rules" and "general sanctions" lacking in the INA, 424 U.S. at 360 n.9, the IRCA enacted just such rules and sanctions as part of "the most comprehensive reform of our immigration laws since 1952," 1986 U.S.C.C.A.N. at

5856-1. Hazleton offers no reason to interpret *De Canas* as though the IRCA never existed.[11]

B. The Basic Pilot Program Is Voluntary, And Deliberately So.

A second component of the Hazleton ordinance is its requirement that employers use the federal Basic Pilot Program, sometimes called "E-Verify." The ordinance: (1) requires employers to use that system to verify all employees as the only safe harbor from liability, Ordinance § 4(B)(5); (2) requires employers to "enroll[]" and "participate in" Basic Pilot as a condition of regaining a rescinded business permit, *id.* § 4(B)(6)(b); (3) 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); and (4) requires businesses with city contracts or grants to use the program, *id.* § 4(D).

Congress, however, deliberately made Basic Pilot voluntary and experimental. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 403(a), 110 Stat. 3009-546, 3009-659.[12] This

[11] Hazleton's assertion (at 54) that the district court "lack[ed] the authority to set aside a binding precedent of the U.S. Supreme Court" is frivolous. That principle of course does not apply when the statute interpreted by the Supreme Court subsequently was amended. *See Cook v. Wikler*, 320 F.3d 431, 434 (3d Cir. 2003).

[12] Sections 401 through 405 of IIRIRA, which deal with pilot programs, are codified in a note appended to 8 U.S.C. § 1324a.

is absolutely clear from the statutory text. Section 402 of IIRIRA is entitled "*Voluntary* Election to Participate in a Pilot Program" (emphasis added). The statute authorizes employers to "*elect* to participate in that pilot program." *Id.* § 402(a) (emphasis added); *see also id.* § 402(c)(2)(A) (participating employer is an "electing person"). The federal government "may not require any person or other entity to participate." *Id.* § 402(a).[13] The Attorney General is required to "widely publicize … the voluntary nature of the pilot programs." *Id.* § 402(d)(2); *accord id.* § 402(d)(3)(A). This all stands in marked contrast to Congress's decision to make participation in Basic Pilot *mandatory* for designated federal-government entities. *See* IIRIRA § 402(e)(1), (2).

Basic Pilot is voluntary for good reason: it is error-prone and requires participating employers to weigh possible benefits against serious burdens. An employer wishing to use Basic Pilot enters into a Memorandum of Understanding with the federal government, which allows it to access a federal Internet database

[13] *See also INS Basic Pilot Evaluation–Summary Report* v, 4 (Jan. 29, 2002), *available at* http://www.uscis.gov/files/nativedocuments/INSBASICpilot_summ_jan292002.pdf (Basic Pilot was designed "to determine, on a test basis, whether pilot verification procedures can improve on the existing I-9 system by reducing false claims to U.S. citizenship and document fraud, discrimination, violations of civil liberties and privacy, and employer burden").

The Basic Pilot Program is authorized on a temporary basis and is due to terminate later this year. *See* Expansion of the Basic Pilot Program, 69 Fed. Reg. 75,997, 75,998 (Dec. 20, 2004). Congress has not adopted proposals to create a mandatory electronic verification system. *See, e.g.*, H.R. 98, 110th Cong. § 5(a) (2007); H.R. 1951, 110th Cong. § 3 (2007).

containing Social Security numbers thought to be valid. *See* Expansion of the Basic Pilot Program, 69 Fed. Reg. 75,997, 75,998 (Dec. 20, 2004); E-Verify Memorandum of Understanding ("*MOU*"), *available at* http://www.uscis.gov/files/nativedocuments/MOU.pdf. This database provides only a "*tentative* nonconfirmation[]" of work authorization status,[14] because federal records are often inaccurate:

> A tentative nonconfirmation … 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.

Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. 48,309, 48,312 (Sept. 15, 1997) ("*Pilot Programs*"); *see also MOU* ¶¶ II.C.9-10; *DHS 2004 Report* 2-5.

Online verification may be convenient for some employers, but it imposes serious burdens. Upon receiving a tentative nonconfirmation, the employer must suspend action on the employee for 8-10 work days to allow the employee to contest the result with the Social Security Administration ("SSA") or DHS. See *Pilot Programs*, 62 Fed. Reg. at 48,312; *DHS 2004 Report* 2-3. The employer must sus-

[14] *See* Dep't of Homeland Security, *Report to Congress on the Basic Pilot Program* 2-5 (June 2004) ("*DHS 2004 Report*"), *available at* http://www.uscis.gov/files/nativedocuments/BasicFINALcongress0704.pdf.

pend action during any subsequent period "while SSA or DHS is processing the verification request." *MOU* ¶ II.C.10. According to the most recent review of the Basic Pilot Program commissioned by DHS, the average length of time to resolve a challenge to a tentative nonconfirmation ranges from 19 to 74 days. *Findings of the Web Basic Pilot Evaluation* 78-79 (September 2007) ("*Findings*"), *available at* http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf. "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*, 62 Fed. Reg. at 48,312; *MOU* ¶ II.C.10; *DHS 2004 Report* 2-3.

Indeed, the DHS-commissioned report specifically recognized that "improvements are needed … if the Web Basic Pilot becomes a mandated national program." Specifically, "*the database used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification*." *Findings* xxi, 56-57 (emphasis added). The study found an error rate among naturalized citizens of almost 10%, *id.* at xxv-xxvi, 57, and found that a foreign-born work-authorized individual was 30 times more likely to receive an erroneous tentative nonconfirmation than a U.S.-born individual. *Id.* at xxi, xxv, 97, 100. These problems subject work-authorized foreign-born individuals, including naturalized citizens, to discrimination and "potential harm arising from the Web Basic Pilot process." *Id.* at xxv. Fixing these problems, the study found, "will take considerable time and will

require better data collection and data sharing between SSA, USCIS, and the U.S. Department of State than is currently the case." *Id.* at xxvi, 149-50.

Moreover, many employers—particularly small businesses and those that recently started using the Program—complained of serious problems, including:

- "los[s of] their training investment … because they are not allowed to take adverse actions against employees while the employees are contesting the tentative nonconfirmation finding[s]," *id.* at xxii, 68;

- difficulty understanding and internalizing the Basic Pilot Program's special rules, resulting in a "substantial" rate of employer non-compliance with the applicable requirements and procedures, *id.* at xxii-xxiv, 70-80;

- employees having to spent their time traveling to SSA field offices to attempt to resolve errors in the database, *id.* at 64, 101; and

- slow response times by federal agencies when asked to review tentative nonconfirmations, *id.* at 66.

Unsurprisingly, "most U.S. employers have not volunteered to use the pilot program," and expansion of the Program has led to continuing "downward trends in [employer] satisfaction and compliance." *Id.* at xxi, xxviii, 142.

The district court correctly determined that federal law preempts Hazleton's attempt to make mandatory that which Congress expressly made voluntary. 496 F. Supp. 2d at 526-27. On appeal, Hazleton belittles this decision as relying on "slight differences." Blue Br. 69. It reasons that because the federal government believes this system holds promise (and encourages employers to use it on a voluntary basis), Hazleton may *require* its use, to the exclusion of other verification op-

tions available under federal law.[15] This analysis upends preemption doctrine, neglects the reasons *why* the system is experimental and voluntary, and ignores the range of document-based verification options Congress adopted as part of the mandatory I-9 Form process. It is not for Hazleton (or any other state or municipality) to decide that the I-9 Form process has failed to achieve its objectives, just as it is beside the point that Hazleton likes the Basic Pilot Program and distrusts document-based verification. Hazleton's ordinance stands in clear conflict with Congress's express decision to make Basic Pilot voluntary, and it restricts the range of options adopted by Congress by mandating use of this one system. It therefore is preempted. *Geier*, 529 U.S. at 881-82 (state laws that interfere with the "variety and mix of [standards] that the federal regulation sought" are preempted); *see also Ouellette*, 479 U.S. at 494; *Edgar*, 457 U.S. at 634.

C. Hazleton's Civil Damages Claim Against Employers Of Illegal Aliens Is Preempted.

The IRCA expressly preempts state and local laws that "impos[e] civil or criminal sanctions (other than through licensing and similar laws) upon those who

[15] Hazleton also asserts (at 70) that "[t]he federal government requires federal contractors to participate in E-Verify." This is mistaken. Its argument relies on Secretary Chertoff's recent remark that he had "initiated a rulemaking process" that may eventually lead to such a requirement. A2921. But even if such a rule had been adopted, and even if it were not precluded by IIRIRA § 402(a), a requirement that *federal* contractors use Basic Pilot in some circumstances does not mean that a municipality is entitled to require other businesses to use the Program, for whom Basic Pilot is voluntary as a matter of federal law.

employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Section 4(E) of Hazleton's ordinance, which creates a private right of action—with strict liability and treble damages—is preempted by this provision, and each of Hazleton's contrary arguments fails.[16]

First, Hazleton argues that civil damages are not "sanctions." Blue Br. 47-50. This argument defies the word's plain meaning. A "sanction" is a "restrictive measure used to punish a specific action or to prevent some future activity," which manifestly includes civil actions for damages. *Webster's Third New Int'l Dictionary* 2009 (1971); *accord Black's Law Dictionary* 1341 (7th ed. 1999) ("A penalty or coercive measure that results from failure to comply with a law, rule, or order."). Indeed, by its very nature, "Tort law … is a regulatory regime designed to prevent harmful behavior by attaching a financial *sanction* to it." *Ball v. City of Chicago*, 2 F.3d 752, 757 (7th Cir. 1993) (Posner, J.) (emphasis added). This is all the more true of a scheme like Hazleton's, which imposes treble damages. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (punitive damages are "sanctions to achieve punishment or deterrence").

Accordingly, the Supreme Court repeatedly has recognized that tort liability may "disrupt[a] federal scheme no less than state regulatory law to the same ef-

[16] Appellees explain (at 65-75) why the narrow, parenthetical savings clause for "licensing and similar laws" does not apply, and we do not repeat that analysis here.

fect," and so may be equally preempted. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008); *see also id.* at 1008 (tort liability "'is designed to be a potent method of governing conduct and controlling policy,'" and "a tort judgment therefore establishes that the defendant has violated a state-law obligation"); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 204, 208 (2004) (Congress's "comprehensive legislative scheme" preempted state tort remedies); *Geier*, 529 U.S. at 881-82 (state tort actions that conflict with the purposes of federal regulation are preempted). This Court recently reaffirmed that *Geier* and its progeny "adopted the principle that ordinary preemption principles apply to a state tort action where an actual conflict with a federal objective is at stake." *Colacicco v. Apotex, Inc.*, __ F.3d __, 2008 WL 927848, at *10 (3d Cir. Apr. 8, 2008).[17] Hazleton's brief acknowledges none of these principles.

Second, Hazleton argues that its cause of action should be treated as a "similar law" under the § 1324a(h)(2) savings clause. Blue Br. 51-52. The district court properly held, however, that the savings clause does not apply to stand-alone schemes of the sort Hazleton has enacted. 496 F. Supp. 2d at 518-21; *see* Red Br. 65-75. What is more, Hazleton fails to explain how a local-law cause of action for

[17] Hazleton's assertion that its right of action should not be preempted because it "does not *guarantee* success at litigation," Blue Br. 49, is peculiar. Hazleton cannot "sever[] the connection between the ordinance and any eventual money damages awarded," *id.*, any more than any of the other state-law tort schemes found preempted in the cases cited above.

treble damages is "similar" to a licensing law as the IRCA uses that term. Hazleton asserts (at 52) that a local ordinance qualifies as a "similar law" if it "makes it difficult for a business entity" to employ illegal workers, deters such conduct, and "is a penalty that applies only against the business entity." But the same could be said for *any* sanction, and Hazleton's interpretation therefore would rob the savings clause of meaning.

Third, Hazleton does not address the many ways in which its cause of action conflicts with federal law. The court below properly recognized that Hazleton cannot require state or local courts to determine that a person is an "illegal alien," since those tribunals "do not have the authority to determine an alien's immigration status. Federal law makes no provision for a state court to make a decision regarding immigration status. Such status can only be determined by [a federal] immigration judge." 496 F. Supp. 2d at 536; *see also Gutierrez v. City of Wenatchee*, 622 F. Supp. 821, 824 (E.D. Wash. 1987) ("[t]here is simply no jurisdictional authority" for a state court to determine whether an alien is lawfully present in the United States); *Ochoa v. Bass*, __ P.3d __, 2008 WL 650662, at *4 (Okla. Crim. App. Mar. 12, 2008) ("United States immigration laws are numerous and complex, and whether an undocumented alien has committed a federal criminal offense cannot and need not be decided by a state trial court."). Hazleton does not dispute this fact in its brief, nor does it grapple with the serious collateral conse-

quences that would flow from a state court's determination of work authorization status. *See Montana v. United States*, 440 U.S. 147, 151-53, 163-64 (1979) (state-court determinations have *res judicata* effect in subsequent federal proceedings); *Ochoa*, 2008 WL 650622, at *4 ("[i]t is easy to foresee numerous collateral problems arising when a [state] trial court asks about citizenship status"). And it offers no principled justification for permitting municipalities to interfere with the exclusive federal system for determining immigration and work authorization status.

Hazleton also fails to address the district court's determination that the ordinance's cause of action conflicts with the federal *scienter* and safe harbor provisions. *See Lozano*, 496 F. Supp. 2d at 526. Congress chose to impose liability only on those who "knowingly" employ illegal workers, and it exempted those who "compl[y] in good faith" with the I-9 Form provisions. 8 U.S.C. § 1324a(a)(1), (3). Hazleton's civil damages provision, however, contains no *scienter* requirement at all, and makes employers strictly liable unless they use the Basic Pilot Program. Ordinance § 4(E). As the district court correctly determined, this substantially broadens employer liability beyond what Congress intended. 496 F. Supp. 2d at 526. Hazleton instead argues (at 88) that its civil remedy must be permissible because Congress created a civil remedy in RICO. But this argument misstates federal law; although alien-smuggling and -harboring under 8 U.S.C. § 1324 is a RICO predicate act, the IRCA's employment provision under § 1324a

is not. *See Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 611 (6th Cir. 2004); 18 U.S.C. § 1961(1)(F). And, in any event, the city is mistaken in its seeming belief that it can enact any ordinance it chooses, so long as it vaguely resembles federal law, regardless of Congress's decision to enact a uniform and comprehensive federal framework that carefully balanced competing legislative goals.

* * *

The IRCA was "one of the longest and most difficult legislative undertakings of recent memory." 1986 U.S.C.C.A.N. at 5856-4. The final product, representing the collective work of eight successive Congresses, was carefully tuned to satisfy the multiple policy objectives inherent in a system of national employment verification. Whether the systems and methods Congress designed to meet its goals have in fact been successful may be open to debate. But that debate, and the debate over remedying any perceived deficiencies in the system, must take place in Congress. States and localities simply may not decide for themselves that Congress struck the wrong balance, and so unilaterally undermine Congress's enactment.

CONCLUSION

For the foregoing reasons, and the reasons stated in Appellees' brief, the decisions below should be reversed.

Respectfully submitted,

/s/ Carter G. Phillips

Carter G. Phillips
Eric A. Shumsky
Robert A. Parker
Brian E. Nelson
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

No. 07-3531

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PEDRO LOZANO, *et al.*

Appellees,

v.

CITY OF HAZLETON,

Appellant.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 29(d), the attached *amicus* brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,960 words.

The hard copy and electronic copy of this brief are identical.

The electronic copy of this brief has been checked for viruses using McAfee VirusScan Enterprise 8.5i.

DATED: April 17, 2008

/s/ Robert A. Parker
Robert A. Parker

No. 07-3531

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PEDRO LOZANO, *et al.*

Appellees,

v.

CITY OF HAZLETON,

Appellant.

CERTIFICATE OF BAR MEMBERSHIP

The undersigned attorneys hereby certify that they have been admitted to practice before the United States Court of Appeals for the Third Circuit, and are members in good standing of the bar of this Court.

DATED: April 17, 2008

/s/ Carter G. Phillips
Carter G. Phillips

/s/ Eric A. Shumsky
Eric A. Shumsky

/s/ Robert A. Parker
Robert A. Parker

No. 07-3531

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PEDRO LOZANO, *et al.*

Appellees,

v.

CITY OF HAZLETON,

Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2008, I caused the foregoing BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *et al.* to be filed with the United States Court of Appeals for the Third Circuit by electronic transmission to electronic_briefs@ca3.uscourts.gov, with ten (10) copies filed with the Clerk by first-class mail.

On the same date, I served the foregoing brief by first-class mail upon the following:

Harry G. Mahoney
Carla P. Maresca
Andrew B. Adair
DEASEY, MAHONEY & VALENTI, LTD.
1601 Market Street, Suite 3400
Philadelphia, PA 19103

Kris W. Kobach, Professor
UNIVERSITY OF MISSOURI-KANSAS CITY, SCHOOL OF LAW
5100 Rockhill Road, Law 1-200
Kansas City, MO 64112

Michael M. Hethmon
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., N.W.
Suite 335
Washington, D.C. 20001

Thomas G. Wilkinson, Jr.
Thomas B. Fiddler
Ilan Rosenberg
Elena Park
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103

Foster Maer
Ghita Schwarz
Jackson Chin
PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street, 14th Floor
New York, NY 10013-281

Witold J. Walczak
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
313 Atwood Street
Pittsburgh, PA 15213

Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Lucas Guttentag
Jennifer C. Chang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111

Mary Catherine Roper
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
P.O. Box 40008
Philadelphia, PA 19106

Shamaine Daniela
Laurence E. Norton, II
COMMUNITY JUSTICE PROJECT
118 Locust Street
Harrisburg, PA 17101

DATED: April 17, 2008

/s/ Robert A. Parker
Robert A. Parker