IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 07-3531

PEDRO LOZANO; HUMBERTO HERNANDEZ ROSA LECHUGA; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3, a Minor, By His parents; JANE DOE 1; JANE DOE 2; JANE DOE 3; JOHN DOE 4, a Minor, By His Parents; BRENDA LEE MIELES; CASA DOMINICANA OF HAZLETON, INC.; HAZLETON HISPANIC; PENNSYLVANIA STATEWIDE LATINO COALITION; JANE DOE 5; JOSE LUIS LECHUGA; JOHN DOE 7,	:
Plaintiffs below, Appellees,	:
v.	: An appeal from the United States District Court for the Middle District of Pennsylvania
CITY OF HAZELTON,	:
Defendant below, Appellant.	: Case No. 3:06 CV 1586

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND FILED IN SUPPORT OF DEFENDANT-APPELLANT FOR REVERSAL OF THE JUDGMENT BELOW

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Pedro Lozano, et al. v. City of Hazleton, No. 07-3531

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None.

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None.

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None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

/s/ Andrew L. Schlafly Dated: February 12, 2008
Andrew L. Schlafly
Attorney for Eagle Forum Education & Legal Defense Fund

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STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY TO FILE

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is a nonprofit organization founded in 1981. For more than twenty years it has defended American sovereignty. Eagle Forum ELDF promotes adherence to the U.S. Constitution and has repeatedly opposed unlawful behavior, including illegal immigration. Eagle Forum ELDF consistently stands in favor of enforcing immigration laws, and allowing local governments to take steps to avoid the harm of illegal immigration.

Eagle Forum ELDF has also long defended federalism, including the ability of state and local governments to protect themselves and maintain order.

Eagle Forum ELDF thereby has a direct and vital interest in the issues presented before this Court.

The Third Circuit has cited and quoted favorably an Eagle Forum ELDF *amicus* brief in the past. *See C. N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 169 n.11 (3rd Cir. 2005).

Eagle Forum ELDF requested consent to file this brief, which it received from defendant but received only a promise by plaintiffs not to oppose a motion to file this brief. Such motion accompanies this brief. Now-Justice Samuel Alito,

when he served on this Court, held that *amicus briefs* should be widely allowed. *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3rd Cir. 2002).

BACKGROUND

Illegal aliens committed heinous crimes in the small, bedroom community of Hazleton in 2006, which justifiably sparked tremendous alarm and outrage. These offenses included several murders. Appx. A1382-83, A1674. In a close-knit, previously safe community where many know each other, these crimes shocked the residents. The feeling of security in the town was immediately shattered, and the practices of generations of residents were suddenly altered for the worse. Obviously when parents hear about such crimes they reflexively fear allowing their children to play outside as they had been doing. The bike-riding by children ends, and the elderly become too afraid to venture outside for walks.

The court below recognized this valid community concern about crime by illegal aliens. "Certain testimony at trial concerned … crimes committed by illegal aliens in Hazleton. The City cited these crimes as the reason for passing its ordinances." *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 542 n.69 (M.D. Pa. 2007). It was not the quantity of crime, but its shocking nature, that spurred the small community to act in self-defense. A single heinous crime can frighten and chill a community without any repetition, just as the kidnapping of the Lindbergh

baby shocked our entire nation in 1932.[1] An entire generation of parents changed their practices and lived in fear because of that single, statistically insignificant crime, and the heinous crimes in 2006 in the town of Hazleton had a dramatic, adverse affect on its way of life.

The Hazleton crimes were committed by persons who were there unlawfully and, indeed, were unlawfully in the United States. These and other illegal aliens break the law in settling in Hazleton, break other laws to escape detection and, sometimes, break the laws just to survive. Raised in a vastly different culture and often unable to communicate with their new neighbors, it is not surprising that illegal aliens commit crimes that shock local residents and threaten their way of life. Clearly the vast majority of illegal aliens would never rape or murder anyone, but it is equally clear that some illegal aliens are committing crimes of a foreign nature that have a terrorizing effect on American communities.

One of the largest cities in this Third Circuit, Newark, New Jersey, is no stranger to terrifying violence. Eleven times as populous as Hazleton, Newark is accustomed to tragic violence occurring on almost a daily basis, as in many large cities.[2, 3] But a crime reportedly perpetrated by an illegal alien in August 2007

[1] Renowned journalist H.L. Mencken called the isolated crime of the Lindbergh kidnapping "the greatest story since the Resurrection." http://www.law.umkc.edu/faculty/projects/ftrials/Hauptmann/Hauptmann.htm (viewed 1/5/08).
[2] http://www.city-data.com/city/Hazleton-Pennsylvania.html (viewed 1/8/08)
[3] http://www.city-data.com/city/Newark-New-Jersey.html (viewed 1/8/08)

shook the city of Newark to its foundation: the murder of four teenage musicians as they enjoyed an evening on a school playground. College-bound in a month, these African American teenagers were role models for their family members and friends.[4] But a 28-year-old illegal alien from Peru, Jose Carranza, reportedly led a gang to rob and brutally execute these teenagers in cold blood.[5] Only one victim survived, and the others were later found dead at the scene. Parents knew that this was not a crime that anyone, even the worst of American criminals, would commit. Carranza hid and would only surrender to the Mayor of Newark personally. He had been out on bail at the time for another crime – the repeated rape of a 5-year-old girl.[6] "For the first time anyone could remember, killings in Newark were an international story," the New York Times observed.[7]

Illegal aliens have imported other crimes that shock the conscience. Another example of an illegally imported crime is the practice of illegal aliens driving the wrong way on a superhighway at night – with their lights off. As incredible as it sounds, this has occurred repeatedly and caused the death of numerous unsuspecting American drivers. Apparently this outrageous practice helps aliens avoid detection. "Years ago, you would never hear of an alien smuggler going the

[4] Erin McClam and David Porter, "4 promising students symbols of scourge of Newark's violence," The Associated Press State & Local Wire (Aug. 11, 2007)
[5] Serge F. Kovaleski, "A Band of Men and Boys," N.Y. Times B1 (Aug. 15, 2007).
[6] William Kleinknecht and Jeffery C. Mays, "Criticism spurs probes of slaying suspect's bail," Newark Star-Ledger 14 (Aug. 14, 2007).
[7] Kareem Fahim, "Biggest Test for Newark's New Badge," N.Y. Times B1 (Sept. 12, 2007).

wrong way down a highway with his lights turned off," explained federal prosecutor Sherri Walker Hobson of California in 2002. "Now, smugglers are disregarding the danger and bringing people across at any cost." [8] The practice reportedly started for aid in smuggling illegal immigrants, but has expanded to smuggling drugs.[9] Alfredo Alvarez Coronado, an illegal alien from Mexico, pled guilty for his role in a crash on Interstate 8 on June 24, 2002 that killed six people. "The June 24 crash near Pine Valley was part of a rash of incidents involving smugglers speeding on the wrong side of the road, often with their vehicles' headlights off."[10]

There are many other examples of heinous crimes imported by illegal aliens, and how adept they can be at dodging deportation. Alejandro Rivera Gamboa was an illegal alien from Mexico charged with choking a 15-year-old girl to death. Before that he had been arrested four times for drunken driving.[11] Juan Lizcano, an illegal alien, was convicted and sentenced to death in 2007 for killing Dallas Police Officer Brian Jackson in 2005.[12] Ricardo Cepates, here illegally from Honduras, raped three adults, two college students and a 14-year-old girl,

[8] Marisa Taylor, "Man pleads guilty in immigrant smuggling crash case; Six died in wrong-way collision on I-8 in June," San Diego Union-Tribune B1 (Dec. 5, 2002).
[9] Rene Sanchez "Immigrant Smuggling Thrives Near Border; 100 People Are Found Trapped in L.A. 'Drop House,'" Washington Post (Apr. 23, 2004).
[10] *Id.*
[11] Brian Donohue, "How criminals dodge deportation," Newark Star-Ledger, 1 (Aug. 21, 2007)
[12] Dianne Solis, "Dallas woman leads the charge against an illegal influx," Dallas Morning News (Nov. 26, 2007).

frightening many in New Brunswick, New Jersey before he was arrested and convicted.[13] At a sentencing hearing where he received 139 years in jail, at taxpayer expense, he "blam[e]d his reign of terror on alcohol and drugs before declaring: 'I am not a monster.'"[14]

When shocking crimes hit the close-knit Hazleton community, the town responded with a mild form of self-defense: it merely required that its tenants and employees are lawfully there as they implicitly claim. Specifically, the City of Hazleton passed ordinances entitled the "Illegal Immigration Relief Act Ordinance" ("IIRA") that:

- would have imposed modest initial fines on landlords who rent to illegal aliens;[15]
- would have required tenants to register with City Hall and buy a rental permit; and
- would have denied business permits to companies that hire illegal immigrants.

The impact of the IIRA is unknown because it was never allowed to take effect. A group led by illegal aliens sued to enjoin the ordinances and the district court invalidated them.

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[13] Donohue, *supra* n.12.

[14] Jim O'Neill, "Middlesex serial rapist gets 139 years in prison," Newark Star-Ledger 6 (Feb. 5, 2005).

[15] A mandatory initial warning entailed no fine, and only if that warning is ignored is a fine of merely $250 imposed for each offense. IIRA Section 5, http://www.hazletoncity.org/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf

Without mentioning the heinous crimes that motivated these ordinances, the lower court tacitly acknowledged that the City of Hazleton "was motivated by a desire to protect public safety by limiting the crimes committed by illegal immigrants in the city and to safeguard community resources expended on policing, education and health care" and that "[t]he City presented evidence that some crimes were committed by illegal aliens." *Lozano*, 496 F. Supp. 2d at 542. The court also found that "the City program that provides penalties for those who employ or provide housing for undocumented persons in the City is rationally related to the aim of limiting the social and public safety problems caused by the presence of people without legal authorization in the City." *Id.* But the court invalidated the ordinances on constitutional grounds, preventing a community from implementing these self-defense measures.

The invalidation by the lower court of these ordinances *on their face* sets a precedent that prevents any community in its jurisdiction from protecting itself against illegal aliens, no matter how compelling the crisis. By grounding its ruling in the Supremacy Clause, the court prevents any municipality from excluding illegal aliens regardless of how egregious and shocking the crimes or how destructive the unlawful residents become to the community.

ARGUMENT

Plaintiffs' facial challenge to the ordinances fails to satisfy the exacting standard repeatedly emphasized by the U.S. Supreme Court. Plaintiffs must show that there is no set of circumstances – not relaxed enforcement, not a change in federal policy, and not far greater and more heinous crimes – under which the ordinances would be valid. The decision below did not make the requisite finding with respect to its grounds for invalidating the ordinances. Indeed, such a finding of facial unconstitutionality is impossible on this record; the constitutionality of the ordinances should only be reviewed on an as-applied basis.

In addition, fundamental principles of federalism and self-defense entitle a community to pass ordinances to protect it against lawless behavior. Nothing in the United States Constitution or federal law prevents voters in a municipality from excluding persons who are unlawfully there. Rule of Law means that, at a minimum, law-breakers cannot overturn laws attempting to stop their unlawful activity.

This action was led by plaintiffs, who are admittedly unlawfully residing in the United States and in Hazleton, to obtain protection by the courts for conduct that is undeniably unlawful. The court below applied the Supremacy Clause to prevent a community from defending itself against violations of federal law. This is an untenable and unprecedented use of the Supremacy Clause, and should be

reversed. Under federalism, communities may exclude persons who are not there lawfully under federal law.

I. Plaintiffs' Facial Challenge to the Ordinances Fails to Satisfy the *Salerno* Standard.

As noted by the decision below, plaintiffs' lawsuit constitutes a *facial challenge* to the ordinances, but plaintiffs fell far short of the requisite showing for unconstitutionality of a law on its face. The court below acknowledged that "Plaintiffs present a facial challenge to the ordinances, not an 'as-applied' challenge" and "Plaintiffs could not bring an 'as-applied' challenge as the ordinances have not yet been applied." *Lozano v. City of Hazleton*, 496 F. Supp. 2d at 546 & n.73. For such a challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). *See also Belitskus v. Pizzingrilli*, 343 F.3d 632, 648 n.10 (3d Cir. 2003) ("In order to successfully prosecute such a challenge, plaintiffs would have to establish that no set of circumstances exist under which mandatory filing fees are valid."). The decision below failed to apply this required heavy burden with respect to its invalidation of the ordinances. This is not a First Amendment case where there is some relaxation of the presumption against facial challenges. *See Virginia v. Hicks,* 539 U.S. 113, 118 (2003) ("The First

Amendment doctrine of overbreadth is an exception to [the] normal rule regarding the standards for facial challenges.").

It is well-established by the U.S. Supreme Court that "[a] facial challenge to a legislative Act is … the most difficult challenge to mount." *Salerno,* 481 U.S. at 745. "The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* The Court emphasized that in order to succeed in a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id. See also Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n.5 (1982).

There are several compelling reasons for judicial restraint with respect to attempts to invalidate not-yet-applied laws. For example, a demand for facial invalidation implicates the issue of ripeness because the demand seeks "'premature interpretatio[n] of statutes' on the basis of factually barebones records." *Sabri v. United States,* 541 U.S. 600, 609 (2004) (quoting *United States v. Raines,* 362 U.S. 17, 22 (1960)). Moreover, as the Supreme Court emphasized just two terms ago, facial invalidation is counter to the judicial preference not to "nullify more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood,* 546 U.S. 320, 329 (2006). A facial challenge also interferes with the norm of statutory

construction that enables avoidance of constitutional questions based on how narrowly a law is applied. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973).

The court below turned this standard of judicial restraint on its head by *rejecting* testimony of constitutional application of the law because the challenge was facial in nature. Robert Dougherty, Hazleton's Director of Planning and Public Works, explained how the IIRA would be applied in a manner respectful of constitutional procedures. *Lozano*, 496 F. Supp. 2d at 535 n.59 (citing N.T. 3/16/07 at 39-40). He testified, for example, that adequate notice would be given even though not required by the IIRA. The court below, however, dismissed all of his testimony on the grounds that this was a facial challenge and thus how the ordinances would be applied is irrelevant. "As we are dealing with a facial challenge to the Ordinance and not an 'as applied' challenge, we do not have to take into consideration the testimony of the manner in which the Code Enforcement Office intends to enforce the ordinances." *Id.* at 535 n.59. That is plainly incorrect: *Salerno* requires the court "to take into consideration" how the law might be applied constitutionally, and to refrain from invalidating it if there is a possible constitutional application. Moreover, the burden is on the plaintiffs, not the defendant, to prove that "no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. Plaintiffs failed to satisfy this burden,

and it was reversible error for the lower court to dismiss defendant's unrebutted testimony of constitutional application.

The invalidation of the IIRA below rests on a disagreement by the federal judge with how the city official testified, under oath, that he would enforce the law. There is no question that the city official was permitted by the law to enforce in the manner in which he testified. The court did not rule that was anything illegal or even unreasonable about the way in which the official said the law would be enforced. Instead, the court simply dismissed all of the testimony of constitutional application in striking down the law, despite *Salerno*'s admonishment otherwise. Writing for the U.S. Supreme Court, Justice Brennan held that "[t]he delicate power of pronouncing an [act] unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *Raines,* 362 U.S. at 22. Moreover, plaintiffs cannot prevail by claiming that there may be some unconstitutional application of the IIRA against someone else. *See New York v. Ferber,* 458 U.S. 747, 767 (1982) ("[A] person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court."); *Warth v. Seldin,* 422 U.S. 490, 499 (1975).

The preemption portion of the ruling below was likewise defective for its speculative nature, without due consideration of whether any constitutional

application of the ordinances was possible. Instead, the lower court relied heavily on experts brought in by plaintiffs to opine about what may or may not happen if the ordinances were applied, a scenario that would be far better handled by deferring to an as-applied challenge. For example, the court relied on testimony by Stephen Yale-Loehr, "an expert in immigration law," who claimed that "the federal government frequently exercises its discretion not to try to remove persons from the country even though they may lack lawful immigration status." *Lozano*, 496 F. Supp. 2d at 530 n.56 (citing N.T. 3/19/2007 at 114, 127). But obviously Hazleton could easily accommodate such a position by the federal government – if the federal government even wanted such accommodation – and it was error for the court to conclude that "[a]lthough these aliens are permitted to work and implicitly to remain in the United States, they would be denied housing in Hazleton under the IIRA and RO." *Lozano*, 496 F. Supp. 2d at 531. In the unlikely event such a scenario developed and Hazleton was at odds with the federal government, then an as-applied challenge would be appropriate. Speculation that such a conflict *may* occur does not justify invalidating the ordinances.

Already courts in other jurisdictions are rejecting the precedent set by the court below, or at least distinguishing it. On January 31, 2008, a federal court in the Eastern District of Missouri upheld two ordinances of the City of Valley Park "substantially similar" to the ordinances at issue here: one penalized landlords

who leased to illegal immigrants, and the other penalized the employment of illegal immigrants. *See Gray v. City of Valley Park*, 2008 U.S. Dist. LEXIS 7238, *31 n.13 (E.D. Mo. Jan. 31, 2008). That court noted how plaintiffs there relied "heavily upon [this] recent Pennsylvania decision …. The Court respectfully notes that the Pennsylvania decision is not binding, and therefore, the Court will conduct its own thorough analysis of the issues presented." *Id.* In dismissing the plaintiffs' complaint with prejudice, the *Valley Park* decision particularly noted that "in the context of a facial attack, Plaintiffs do not have standing to raise an equal protection claim on behalf of potential employees." *Id.* at *72.

In *Roe 1, et al.*, v. *Prince William County*, 2007 U.S. Dist. LEXIS 88405 (E.D. Va. Dec. 3, 2007), a federal court dismissed a challenge to that County's resolutions and orders designed to protect against the ravages of illegal immigration. "Neither the Resolution nor the Orders direct the actions of private citizens or criminalize behavior that was not already punishable by local, state, or federal ordinance, and thus fear of such punishment does not create a cognizable injury." *Id.* at *14. The same could be said about the IIRA, and plaintiffs' facial challenge to it should be dismissed. *See also Coalition of Latino Clergy, Inc. v. Henry*, 2007 U.S. Dist. LEXIS 78658 (N.D. Okla. Oct. 22, 2007) (dismissing a facial challenge to an Oklahoma anti-illegal immigration statute, and distinguishing the decision below).

II. The Decision Below Erred in Overlooking How Principles of Federalism Support the Ordinances.

"Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself …." So wrote the first Justice John Harlan in *Jacobson v. Massachusetts,* 197 U.S. 11, 27 (1905). That decision has been cited favorably over 1600 times. Yet the ruling below took away from a community – and from all other communities in its jurisdiction – "the right to protect itself" against the unlawful taking up of residency and employment in the community. The lawlessness that follows is predictable and, if a community's "right to protect itself" is allowed, entirely preventable.

Federalism permits and encourages local government to experiment with measures that enhance their general welfare and safety. In our system of dual sovereignties, there is ample room for both to address the problem of illegal immigration. In no way has Congress ever suggested that illegal immigration is to be protected, respected or tolerated. The court below implicitly ruled that federal preemption operates *in favor of law-breakers* and prevents local communities from passing laws in self-defense. This ruling is contrary to well-established principles of federalism and should be reversed.

The U.S. Supreme Court has repeatedly – and emphatically – held that ensuring public safety is in the traditional domain of state (and local) government.

In fact, this aspect of federalism is so well-established that the federal government could not interfere with it even if Congress and the President so attempted. Local government -- not the federal government -- exercises police power to enhance the safety and public welfare of a community. *See, e.g., United States v. Morrison,* 529 U.S. 598, 615 (2000) (noting, while invalidating a federal encroachment into the state domain, that "the suppression of [violent crime] has always been the prime object of the States' police power"). This federalism is central to our system of government, as Justice Kennedy wrote in the seminal ruling:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (citing Henry Friendly, "Federalism: A Foreword," 86 Yale L. J. 1019 (1977) and G. Wood, *The Creation of the American Republic, 1776-1787*, pp. 524-532, 564 (1969)).

This fundamental doctrine applies as strongly in immigration law as in other areas of law. The seminal United States Supreme Court precedent in this field is the unanimous decision of *De Canas v. Bica*, 424 U.S. 351 (1976), which upheld a state law penalizing the employment of illegal aliens. It upheld the state law because "it focuses directly upon these *essentially local problems* and is tailored to combat effectively the perceived evils." *Id.* at 357 (emphasis added). The

Hazleton ordinances do likewise and thus are constitutional under this ruling, which remains good law. Where, as here, the state law did not "discriminate[] against aliens lawfully admitted to this country," it is constitutional. *Id.* at 358 n.6.

Where a dispute concerns "the usual constitutional balance between the states and the federal government," then statutory construction requires that Congress "must make **unmistakably clear** its intention to [alter the balance] in the statute's language." *Premiere Network Servs. v. SBC Comm.*, 440 F.3d 683, 690 n.8 (5th Cir. 2006) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) and *Gonzales v. Oregon*, 546 U.S. 243 (2006), emphasis added). Congress did not make it "unmistakably clear" in the federal immigration law that it preempts all local laws motivated by safety concerns, such as the ordinances at issue here. Where "Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it," state law must remain applicable. *Gonzales v. Oregon*, 546 U.S. at 275.

"Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Congress never authorized such a complete disregard of state law for medical practice, an area in which "[s]tates lay claim by right of history and expertise." *Gonzales v. Raich*, 545 U.S. 1, 2224 (2005) (O'Connor, J., dissenting) (quoting *Lopez,* 514 U.S. at 583 (Kennedy, J., concurring)). ""It also seems

appropriate … to emphasize the kinship between our well-established presumption against federal pre-emption of state law." *Jones v. United States*, 529 U.S. 848, 859 (2000) (Justices John Paul Stevens and Clarence Thomas, concurring) (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978)).

The court below did not mention "federalism" once in its opinion, except in reference to the law review article, Peter J. Spiro, *Learning to Live with Immigration Federalism,* 29 Conn. L. Rev. 1627, 1633 (1997). The lower court does mention *De Canas*, but discounts it by saying that federal law has changed since then. Yet the Supreme Court has never overruled or even doubted that precedent. Instead, the real change since the time of *De Canas* has been a strengthening of federalism. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (establishing a presumption that Congress did not supersede state law in a products liability case). The lower court held that *Medtronic* does not apply because "[i]mmigration is an area of the law where there is a history of significant federal presence and where the States have not traditionally occupied the field. In fact, as set forth more fully below, immigration is a federal concern not a state or local matter." *Lozano*, 496 F. Supp. 2d at 518 n.41. But the Hazleton ordinances do not regulate immigration; they enforce law and order by excluding persons who are not lawfully there under existing federal law. Had Hazleton attempted to regulate who may cross the national borders, that reasoning below would apply.

Instead, Hazleton takes no position on who may immigrate, and its ordinances neither expand nor contract federal law concerning immigration.

As Justice John Paul Stevens wrote for the Supreme Court in *Medtronic*:

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases … we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." … [W]e used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in *Cipollone*. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.

Id. at 485 (citations omitted). The ordinances here were plainly motivated by the "health and safety" of the community, where local government has "historic primacy." Yet under the decision below, municipalities are helpless to act in self-defense with ordinances regardless of how many heinous crimes, and regardless of how heinous the crimes. That is inconsistent with our federal system. *See Lehman Bros. v. Schein*, 416 U.S. 386, 393-94 (1974) (Rehnquist, J., concurring) (emphasizing the significance of cooperative federalism and comity in our federal system); *Slaughter-House Cases*, 16 Wall. 36, 62 (1873) (holding that the States have traditionally enjoyed great latitude under their police powers to legislate as "'to the protection of the lives, limbs, health, comfort, and quiet of all persons'") (quoting *Thorpe* v. *Rutland & Burlington R. Co*., 27 Vt. 140, 149 (1855)).

"[M]erely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field," a unanimous Supreme Court held in an opinion written by Justice Thurgood Marshall. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985). The Court continued, "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Id.* at 719 (citing *Rice* v. *Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)).

Plaintiffs argue that overall crime had decreased during the period of increased immigration into the community, but that obviously misses the point just as citations to general statistics on kidnapping would have calmed no one after hearing about the Lindbergh kidnapping. The customary and predictable occurrence of familiar crimes does not address the chilling effect caused by unexpected crimes of murder. A heinous crime can be shockingly unacceptable even though it occurs in a statistically infrequent manner. Hazleton took steps it felt necessary to defend itself and re-establish a secure community. Federalism requires respect for that exercise of local control, and this challenge to the ordinances on their face should be denied.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Dated: February 12, 2008

CERTIFICATION OF BAR MEMBERSHIP

The undersigned herewith certifies that he is a member of the Bar of the United States Court of Appeals for the Third Circuit, having been admitted on motion of Richard F. Collier, Jr., on March 12, 2003.

Dated: February 12, 2008

By: /s/ Andrew L. Schlafly
Andrew L. Schlafly
Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
Pedro Lozano, et al. v. City of Hazleton, No. 07-3531

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Dated: February 12, 2008

/s/ Andrew L. Schlafly
Andrew L. Schlafly
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CERTIFICATE OF SERVICE

I, Andrew L. Schlafly, counsel for *amicus curiae* Eagle Forum Education & Legal Defense Fund, does hereby certify that the text of this brief in electronically filed form is identical to the text of the paper form and that the electronically filed brief has been checked for virus content using an updated McAfee-powered antivirus scanner supplied by AOL. The undersigned hereby certifies that on February 13, 2008, he served two true copies of the attached brief, via first-class, postage-prepaid U.S. mail, to:

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