Memorandum June 29, 2006

TO: Hon. Paul E. Kanjorski
Attention: Tom Nicholls

FROM: Jody Feder & Michael Garcia
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SUBJECT: Legal Analysis of Proposed City of Hazleton Illegal Immigration Relief Act Ordinance

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This memorandum is in response to your request for legal analysis of the proposed "City of Hazleton Illegal Immigration Relief Act Ordinance," particularly as it relates to federal law concerning the "aiding and abetting" of illegal immigrants in the United States, Title VII of the Civil Rights Act, and the Fair Housing Act (FHA). Among other things,[1] the proposed ordinance would (1) deny business permits, city contracts, or grants to for-profit entities that have "aided and abetted" illegal aliens or immigration anywhere within the United States, including by employing or renting/leasing property to illegal aliens, or aiding in the establishment of a day laborer center that does not verify legal work status; and (2) impose civil monetary penalties upon illegal aliens who rent or lease property, and persons who knowingly rent/lease property to such aliens. For the reasons described below, there is reason to believe that state and federal courts would be precluded on preemption grounds from enforcing many aspects of the proposed ordinance, as such matters are already regulated under the Immigration and Nationality Act (INA). While the proposed ordinance does not facially violate Title VII of the Civil Rights Act or the FHA, it might nonetheless give rise to legal challenges if it results in discrimination on the basis of national origin rather than citizenship.

Relevant Federal Immigration Law

Through the INA, the federal government has instituted a comprehensive framework to regulate the admission and removal of aliens. Persons who violate INA requirements are

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[1] Section 6 of the proposed ordinance, which would declare English to be the official language of Hazleton and require official documents to be in English unless otherwise specified by federal, state, or local law, does not facially appear to raise any notable legal concerns. *See, e.g.,* Alexander v. Sandoval, 532 U.S. 275 (2001) (finding that private individuals could not bring suit under Title VI of the Civil Rights Act against Alabama on account of the alleged, disparate, discriminatory impact of its "English-only" policy).

potentially subject to criminal and/or civil penalty. The following discussion briefly describes relevant federal laws prohibiting various forms of assistance to illegal aliens. It does not consider provisions relating to such matters as document fraud.[2]

Hiring Unauthorized Aliens. INA§ 274A generally prohibits the hiring, referring, recruiting for a fee, or continued employment of illegal aliens. Violators may be subject to cease and desist orders, civil monetary penalties, and (in the case of serial offenders) criminal fines and/or imprisonment for up to 6 months. Notably, INA § 274A expressly preempts any state or local law imposing civil or criminal sanctions upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.[3] However, state and local regulation of such practices through licensing and similar laws is *exempted* from this general preemption requirement.[4]

It should also be noted that under INA § 274B, employers are prohibited from discriminating against any individual (other than an unauthorized alien) on account of that alien's national origin or citizenship status.

Harboring Unauthorized Aliens or Encouraging or Inducing Them to Enter or Reside in the United States. INA § 274 criminalizes various activities relating to the bringing in and harboring of aliens who lack the lawful authority to enter or remain in the United States, and also criminalizes certain other activities concerning the transportation of such aliens or the encouragement or inducement of such aliens to reside in the United States. Courts have generally interpreted the scope of INA § 274 broadly. For example, some courts have found that the mere sheltering of an alien, knowing or in reckless disregard of the alien's unlawful status, is a ground for criminal liability, regardless of whether it was done surreptitiously.[5] Further, at least one federal appellate court has found that in order for a person to be held criminally liable for encouraging or inducing an unauthorized alien to enter or reside in the United States, "all that the government needed to establish was that...[the individual] knowingly helped or advised the alien[]."[6]

Under INA § 274, aiding and abetting the commission of a listed offense (other than bringing an alien to the United States without authorization or hiring smuggled aliens) is itself a criminal offense. Additionally, in accordance with 18 U.S.C. § 2, a person who "aids,

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[2] For a discussion of the various federal restrictions on immigration-related document fraud, see CRS Report RL32657, *Immigration-Related Document Fraud: Overview of Civil, Criminal, and Immigration Consequences*, by Michael John Garcia.

[3] INA § 274A(h)(2); 8 U.S.C. § 1324a.

[4] *Id. See generally* H.R. REP. 99-682(I), at 58 (1986) (describing purpose behind licensing exemption).

[5] *E.g.,* United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989) (finding that a church official violated the harboring provision when he invited an illegal alien to stay in an apartment behind his church, and interpreting harboring statute as not requiring an intent to avoid detection); United States v. Rubio-Gonzalez, 674 F.2d 1067 (5th Cir. 1982) (suggesting that "harboring" an alien is a broader concept than other smuggling provisions relating to the concealment of an alien or the shielding of an alien from detection); United States v. Acosta De Evans, 531 F.2d 428 (9th Cir. 1976) (upholding harboring conviction of defendant who provided illegal aliens with apartment, and concluding that harboring provision was not limited to clandestine sheltering only).

[6] United States v. Fuji, 301 F.3d 535, 540 (7th Cir. 2002).

abets, counsels, commands, induces or procures" the commission of a criminal offense against the United States may be punishable as a principal.

Unlawful Entry and Reentry of Aliens. Aliens who enter or attempt to enter the U.S. without proper authorization are subject to exclusion or removal.[7] In addition, INA § 275(a) makes it a criminal offense for an alien to (1) enter or attempt to enter the United States at any time or place other than as designated by immigration officers; (2) elude examination or inspection by immigration officers; or (3) attempt to enter or obtain entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.[8] In many circumstances, such aliens may also be subject to civil monetary penalties. Pursuant to INA § 276, aliens who unlawfully reenter the United States in violation of an order of removal or exclusion are subject to heightened criminal penalties.

Persons who aid and abet violations of INA §§ 275-276 may be charged under the federal aiding and abetting statute, 18 U.S.C. § 2, thereby subjecting them to the same *criminal* (as opposed to civil) penalties as the principal. As discussed previously, such persons could also be charged under INA § 274 (concerning the bringing in and harboring of illegal aliens).

Preemption Issues Related to the Proposed Ordinance

Background on Preemption of State and Local Immigration Regulation. The Supremacy Clause of the U.S. Constitution provides that federal laws and treaties are "the supreme Law of the Land."[9] Accordingly, when Congress acts within the scope of its constitutional authority, the laws it enacts may preempt state or local action within that field. State or local action may be preempted by federal law on a number of grounds. In general, a valid act of Congress may preempt state or local action in a given area if (1) an express statement of preemption is given; (2) it appears that Congress intended to occupy the regulatory field, implicitly precluding state or local action in that area; or (3) state or local action conflicts with the federal scheme.[10]

While federal and state power to regulate certain matters is concomitant**,** the Supreme Court has long recognized that the regulation of immigration "is unquestionably exclusively a federal power."[11] In the 1941 case of *Hines v. Davidowitz*,[12] the Supreme Court ruled that enforcement of a Pennsylvania statute requiring the registration of aliens was precluded by the Federal Alien Registration Act of 1940, which established a comprehensive federal scheme for the registration of aliens. Although the federal law did not expressly preempt the

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[7] *E.g.,* INA §§ 212(a)(6)-(7),(9), 237(a)(1); 8 U.S.C. §§ 1182(a)(6)-(7),(9), 1227(a)(1).

[8] 8 U.S.C. § 1325(a). INA §275 also imposes criminal penalties upon persons who engage in marriage or commercial enterprise fraud for the purpose of evading immigration requirements. 8 U.S.C. § 1325(c)-(d).

[9] U.S. CONST. art. VI, cl. 2.

[10] *See, e.g.,* Silkwood v. Kerr-McGee Corp, 464 U.S. 238, 248-249 (1984); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 203-204 (1983).

[11] DeCanas v. Bica, 424 U.S. 351, 354 (1976).

[12] Hines v. Davidowitz, 312 U.S. 52 (1941).

earlier state law, the Court, noting that the "basic subject of the state and federal laws [was] identical,"[13] held that:

> the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it. And where the federal government, in the exercise of its superior authority in this field, 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 enforce additional or auxiliary regulations.[14]

Although federal law preempts most state or local action addressing immigration, the Supreme Court has never held that "every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted."[15] In the 1976 case of *DeCanas v. Bica*, the Supreme Court held that state regulation of matters only tangentially related immigration would, "absent congressional action[,]...not be an invalid state incursion on federal power."[16]

Preemption Issues Related to the Proposed Ordinance. As an overarching matter, the proposed ordinance would impose new regulations upon immigration matters wholly separate from those enacted by the federal government. These regulations would govern many types of conduct already covered or contemplated by federal immigration law, but do so in a different manner.[17] Some of the regulations contained in the proposed ordinance would be coextensive in geographic breadth as federal immigration law, covering activities occurring anywhere in the United States. In sum, the proposed ordinance would arguably create a new immigration regulatory regime independent from the federal system. Such a regime would very likely be found by a reviewing court to be preempted in whole or in part by federal immigration laws, just as similarly-comprehensive state and local laws regulating immigration matters have been.[18]

Some provisions of the proposed ordinance appear to raise significant preemption concerns, as they involve conduct that comes under the purview of federal immigration law. For example, § 5 of the proposed ordinance would impose civil penalties upon illegal aliens

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[13] *Id.* at 60.

[14] *Id.* at 66-67 (internal citations omitted).

[15] *DeCanas*, 424 U.S. at 355.

[16] *Id.* at 356.

[17] For example, the proposed ordinance would regulate many activities relating to "illegal aliens," and limit persons' ability to interact with persons falling in such category (e.g., through hiring or employing such persons, or renting property to them). While the INA designates certain categories of aliens as subject to exclusion or removal, ineligible for employment, or disqualified from receiving public benefits, these categories are not identical in scope, and the INA does not define persons in any such category as "illegal aliens."

[18] *E.g., Hines*, 312 U.S. at 52; League of United Latin American Citizens v. Wilson, 908 F.Supp. 755 (C.D.Cal. 1995) (finding that voter-approved California initiative measure requiring state personnel to verify immigration status of persons with whom they come into contact, report persons in United States unlawfully to state and federal officials, and deny those persons certain benefits was preempted by the INA).

who rent or lease property in Hazleton, as well as upon persons who knowingly rent or lease property to such aliens. As previously discussed, the INA establishes a comprehensive scheme regulating the admission and removal of aliens, and imposes additional civil and (in certain cases) criminal penalties upon aliens present in the United States in violation of the INA. Further, the INA regulates and imposes penalties upon various forms of assistance given to illegal aliens, including providing shelter to such aliens or encouraging or inducing them to reside in the United States. While Congress has not expressly preempted states and localities from imposing additional penalties upon persons who commit such violations, it may have nonetheless preempted such activity by occupying the regulatory field of immigration law enforcement. The proposed ordinance appears to impose "additional or auxiliary regulations" upon illegal aliens and persons who assist them in remaining in the United States, beyond those that had been intended by Congress when it enacted the INA.[19] Per the reasoning of the Supreme Court in *Hines*, enforcement of § 5 of the proposed ordinance would arguably be preempted by the INA.

It should also be noted that provisions of the proposed ordinance concerning the renting/leasing of property to illegal aliens might potentially conflict with the regulations of certain federal housing assistance programs. Some of these programs permit the renting/leasing of housing to "mixed families," defined as families whose members include both those with citizenship or eligible immigration status and those without citizenship or eligible immigration status.[20] To the extent that the requirements of §§ 4-5 of the proposed ordinance concerning renting /leasing to illegal aliens conflict with federal regulations and policies, they might be subject to legal challenge on preemption grounds.[21]

Nonetheless, it appears that the City of Hazleton could potentially regulate *some* "aiding and abetting" conduct under § 4 of the proposed ordinance without giving rise to preemption concerns. As previously mentioned, the INA expressly provides that it *does not* preempt states and localities from independently regulating the employment of illegal aliens through licensing and similar laws. Accordingly, it does not appear that Hazleton would necessarily be preempted from denying licenses to businesses that employ illegal aliens (at least within the City of Hazleton), though it is unclear whether this exemption would also cover the denial of city contracts and grants to business entities that violate the proposed ordinance. Additionally, some of the conduct prohibited in the proposed ordinance,

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[19] It could potentially be argued that, in denying certain persons city contracts, grants, and business permits under the proposed ordinance, the City of Hazleton would be acting as a market participant, and accordingly its actions would not be subject to certain preemption-related restrictions otherwise placed upon state and local regulatory power. *See* White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983). However, the "market participant" doctrine serves as a defense in cases where the federal government has not enacted an "interrelated scheme of law, remedy, and administration" that explicitly or implicitly preempts state or local activity in a given field, especially when such activity is of such a restrictive nature as to be "tantamount to regulation." Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc., 475 U.S. 282 (1986). Given the scope of activity covered by the proposed ordinance, as well as the comprehensive nature of federal immigration law, it appears unlikely that a reviewing court would apply the "market participant doctrine" to uphold the proposed ordinance against a preemption challenge.

[20] *See* 24 C.F.R. §§ 5.504, 5.520; William O. Russell, III, Deputy Assistant Secretary for Public Housing and Voucher Programs, U.S. Dept. of Housing and Urban Development, *Memorandum on Eligibility of Mixed Families for Public and Assisted Housing,* March 11, 2004.

[21] It should be noted that many federal housing assistance programs permit states and localities to retain significant regulatory authority over housing matters.

including the establishment of day laborer centers that do not verify legal work status, is not regulated by the INA. It therefore does not appear that a locality is necessarily preempted from regulating such conduct (at least when such activity is within its jurisdiction), given the Supreme Court's analysis in *DeCanas* permitting state and local regulation which is only indirectly related to matters covered under the INA.

However, even if state and local regulation of certain conduct involving immigration is not preempted *in all circumstances*, the *manner and scope* of such regulation may nevertheless trigger preemption or other constitutional concerns. One factor that courts may consider in determining whether a local ordinance is preempted by federal immigration law is whether the ordinance "focuses directly upon...essentially local problems and is tailored to combat effectively the perceived evils."[22] Section 4 of the proposed ordinance would impose civil penalties on an entity that "aids and abets" (or has a parent or subsidiary that "aids and abets") illegal aliens *anywhere in the United States*, rather than simply in the City of Hazleton. The scope of § 4 of the proposed ordinance does not appear narrowly tailored to address particular, essentially local problems facing the residents of Hazleton, and instead appears aimed at deterring U.S. immigration violations nationwide. Accordingly, it does not appear that a preemption challenge against the proposed ordinance could be answered on the grounds that the ordinance in narrowly tailored to focus upon a local problem.

Notably and separate from the issue of preemption, while a state or locality may regulate the activities of a foreign (i.e., non-state or non-local) corporation within the state or locality, the Due Process Clause of the Fourteenth Amendment prohibits it from regulating or interfering with what the corporation does wholly outside of its territory.[23] Therefore, it does not appear that Hazleton could regulate the conduct of for-profit entities occurring outside its jurisdiction that may "aid and abet" illegal aliens.

The *manner* in which Hazleton chooses to implement the proposed ordinance might also raise significant preemption issues. While § 4 of the proposed ordinance prohibits any activity by a for-profit entity that "aids and abets illegal aliens or illegal immigration," it does not provide a mechanism to determine whether a immigration violation has occurred. Indeed, the proposed ordinance does not define the meaning of the term "illegal alien," and this term is not used or defined under the INA. Even the INA does not completely preempt the City of Hazleton from regulate persons on account of activities related to alienage status, it is not clear that Hazleton could regulate conduct relating to alienage using different categorizations than those employed by the INA.

The INA generally vests authority to the Attorney General and Secretary of Homeland Security to administer and enforce all laws relating to immigration and naturalization, including determinations regarding the immigration status of aliens (though such determinations are subject to judicial review in many circumstances).[24] Accordingly, it would appear that states and localities are preempted by federal law from making their own independent assessment as to whether an alien has committed an immigration violation and imposing penalties against such aliens (along with persons who have provided them with assistance) on the basis of that assessment. Such authority is conferred exclusively to

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[22] *Id.* at 357.

[23] *E.g.,* St. Louis Cotton Compress Co. v. State of Arkansas, 260 U.S. 346 (1922).

[24] INA §§ 103, 242, 287; 8 U.S.C. §§ 1103, 1252, 1357.

designated federal authorities by the INA.[25] The proposed ordinance might have a better chance of surviving a preemption challenge if its penalties were triggered by a federal determination of an alien's unlawful status, rather than a determination by local Hazleton authorities.

Relationship to Federal Civil Rights Statutes

As part of your request, your office questioned whether the proposed ordinance would conflict with existing federal anti-discrimination laws. Specifically, you questioned whether the ordinance could lead to violations of Title VII of the Civil Rights Act and the Fair Housing Act (FHA). Under Title VII of the Civil Rights Act,[26] employers are prohibited from discriminating on the basis of race, color, religion, sex, or national origin.[27] However, the Supreme Court has ruled that, with respect to Title VII, "the term 'national origin' does not embrace a requirement of United States citizenship."[28] In reaching this result, the Court reasoned that national origin refers to the country in which someone is born or from which his or her ancestors came. Since individuals who share the same national origin do not necessarily share the same citizenship status, the Court determined that Title VII's prohibition on national origin discrimination does not necessarily make it illegal for employers to discriminate on the basis of citizenship status or alienage. Thus, the proposed ordinance in question does not, on its face, appear to conflict with Title VII.[29]

However, it is possible that the proposed ordinance could, when applied, result in violations of Title VII in situations where discrimination on the basis of citizenship would have the effect or purpose of discriminating on the basis of national origin. For example, employers who are concerned about inadvertently hiring unauthorized aliens may become reluctant to hire individuals from certain ethnic backgrounds, and such reluctance could have the unlawful effect of discriminating on the basis of national origin. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national origin discrimination. As the Court has noted, "Title VII prohibits discrimination on the basis of

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[25] It should be noted that states and localities are not prohibited from *enforcing* federal immigration law in many circumstances. It is generally recognized that states and localities may *enforce* the criminal provisions of the INA. *E.g.,* Gonzalez v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983); United States v. Vasquez-Alvarez, 176 F. 3d 1294 (10th Cir. 1999). *See generally* CRS Report RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, by Lisa M. Seghetti, Stephen Vina, and Karma Ester. Further, under INA § 287(g), the Attorney General is permitted to enter agreements with states and localities to permit their law enforcement officers to perform additional duties relating to immigration law enforcement. However, the ability of states and localities to *enforce* federal immigration law does not permit them to impose new and additional penalties upon persons on account of federal immigration violations. While the former is permitted in certain circumstances, the latter is generally precluded pursuant to the Supremacy Clause.

[26] 42 U.S.C. §§ 2000e *et seq*.

[27] *Id*. at §2000e-2.

[28] Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (U.S. 1973).

[29] Title VII contains a preemption provision that states, "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e-7. In other words, state laws that conflict with Title VII are preempted.

citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."[30] Thus, the proposed ordinance could give rise to legal challenges under Title VII.

Like Title VII, the FHA prohibits discrimination on a number of grounds, including national origin, although the FHA forbids discrimination in the sale or rental of housing rather than employment.[31] In the housing context, as in the employment context, courts have found that citizenship discrimination does not automatically constitute national origin discrimination under the FHA, although courts have held that the FHA would prohibit citizenship discrimination if such discrimination had the purpose or effect of discriminating on the basis of national origin.[32] As a result, it appears that the proposed ordinance does not directly conflict with the FHA,[33] although it could give rise to legal challenges under the FHA if landlords' compliance with the ordinance results in national origin discrimination.

It is also possible that the ordinance could give rise to violations of 42 U.S.C. § 1981. This provision, which was originally enacted as part of the Civil Rights Act of 1870, states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The Supreme Court has held that § 1981 prohibits alienage discrimination by governmental actors.[34] The Court, however, has never addressed the question of whether § 1981 bars alienage discrimination by private actors, and the federal courts of appeals that have considered the issue are split with regard to this question.[35] As a result, it is possible, but not certain, that a court might find that an employer or landlord who, in complying with the proposed ordinance, refused to employ or rent to an unauthorized alien was violating § 1981.

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[30] *Farah*, 414 U.S. at 92.

[31] 42 U.S.C. §§ 3604(a).

[32] *See, e.g.*, Espinoza v. Hillwood Square Mut. Asso., 522 F. Supp. 559 (D. Va. 1981).

[33] Like Title VII, the FHA contains a preemption provision that states, "Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this title shall be effective, that grants, guarantees, or protects the same rights as are granted by this title; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid." 42 U.S.C. § 3615.

[34] Takahashi v. Fish & Game Com., 334 U.S. 410, 419 (U.S. 1948).

[35] *See, e.g.*, Anderson v. Conboy, 156 F.3d 167, 180 (2d Cir. 1998) (holding that § 1981 prohibits alienage discrimination by private parties); Duane v. Government Employees Ins. Co., 37 F.3d 1036, 1042-43 (4th Cir. 1994) (holding that § 1981 prohibits alienage discrimination by private parties); *contra* Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343, 1351-52 (5th Cir. 1987) (holding that § 1981 does not prohibit private discrimination on the basis of alienage).