

No. 07-3531

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PEDRO LOZANO, et al.,

Plaintiffs-Appellees,

v.

CITY OF HAZLETON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

**BRIEF OF AMICI CURIAE INCLUDING THE MEXICAN AMERICAN
LEGAL DEFENSE AND EDUCATIONAL FUND, PUBLIC INTEREST
LAW CENTER OF PHILADELPHIA, ANTI-DEFAMATION LEAGUE,
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND,
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LEGAL
MOMENTUM, LAMBDA LEGAL, NATIONAL IMMIGRATION LAW
CENTER, SOUTHERN POVERTY LAW CENTER AND OTHERS IN
SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), and with the consent of the defendant-appellant and the plaintiffs-appellees, the Mexican American Legal Defense and Educational Fund (MALDEF) presents this brief of amici curiae in support of the district court's decision to strike down the anti-immigrant, anti-Latino ordinances enacted by Hazleton, Pennsylvania. MALDEF, joined by a number of national civil rights organizations and Pennsylvania-based Latino and immigrant advocacy organizations, believes that the Hazleton ordinances – and others like them – discriminate on the basis of race and national origin and therefore run afoul of the Equal Protection Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 2. Accordingly, all amici have a strong interest in challenging these ordinances.

MALDEF seeks to safeguard the civil rights of the 45 million Latinos living in the United States and to empower the Latino community to participate fully in American society.

The Public Interest Law Center of Philadelphia (PILCOP) is dedicated to advancing the constitutional promise of equal citizenship to all persons irrespective of race, ethnicity, national origin, disability, gender or poverty.

The Anti-Defamation League (ADL) fights anti-Semitism and all forms of bigotry, defends democratic ideals and protects civil rights for all.

The Asian American Institute works to empower the Asian Pacific American community through advocacy, by utilizing research, education and coalition building.

The Asian American Justice Center works to advance the human and civil rights of Asian Americans through advocacy, public policy, education and litigation.

The Asian American Legal Defense and Education Fund focuses on issues affecting Asian Americans through litigation, advocacy, education and organizing.

The Asian Pacific American Legal Center (APALC) advocates for civil rights, provides legal services and education and builds coalitions to positively influence and impact Asian Pacific Americans.

Centro Legal works to empower Latinos through legal advocacy and serves as a community law office for Latinos in Minnesota.

Comite de Apoyo a los Trabajadores Agricolas (CATA – The Farmworkers Support Committee) is a nonprofit membership organization for migrant farm workers in Pennsylvania, New Jersey and Maryland.

Friends of Farmworkers works to improve the living and working conditions of indigent farm workers, mushroom workers, food processing workers and workers from immigrant and migrant communities.

The Hispanic Bar Association of Pennsylvania provides a forum for Hispanic and other lawyers interested in promoting the social, professional and educational advancement of Hispanic attorneys and the Hispanic community.

Immigration Equality works to end discrimination in immigration law and advocates for equal treatment for the lesbian, gay, bisexual, transgender and HIV-positive community.

The Jewish Social Policy and Action Network (JSPAN) works to advance equality and opportunity for all women and men and to protect the Constitutional liberties and civil rights of Jews, other minorities and the weak in our society.

Lambda Legal pursues litigation, public education and advocacy on behalf of equality and civil rights for lesbians, gay men, bisexuals, transgender people and those with HIV.

La Raza Centro Legal provides indigent individuals access to the legal system by providing legal services, community outreach and advocacy.

The Lawyers' Committee for Civil Rights Under Law works to secure equal justice under the law by addressing factors that contribute to racial justice and economic opportunity.

The League of United Latin American Citizens (LULAC) advances the economic condition, educational attainment, political influence, health and civil rights of Hispanic Americans.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy.

The National Alliance for Latin American and Caribbean Communities (NALACC) seeks to improve the quality of life for Latino immigrants in the United States and countries of origin.

The National Center for Lesbian Rights is committed to advancing the civil and human rights of lesbian, gay, bisexual and transgender people and their families through litigation, public policy advocacy and public education.

The National Council of La Raza works to improve opportunities for Hispanic Americans through applied research, policy analysis and advocacy.

The National Immigration Law Center (NILC) works to advance and promote the rights and opportunities of low-income immigrants and their family members.

The Pennsylvania Immigration and Citizenship Council (PICC) represents the needs of immigrants, migrants, refugees and other new Americans living in Pennsylvania to policy makers, public officials and the public.

The Southern Center for Human Rights is dedicated to enforcing the civil and human rights of people in the criminal justice system in the South.

The Southern Poverty Law Center fights all forms of discrimination and works to protect society's most vulnerable members through litigation, education and monitoring organizations that promote hate.

The Welcoming Center for New Pennsylvanians connects newly arrived individuals from around the world with the economic opportunities they need to succeed in the region.

INTRODUCTION

At times in U.S. history, such as in the days of the infamous “Chinese exclusion laws,” immigration law and policies expressly discriminated on the basis of race or national origin. To comport with modern sensibilities, modern anti-immigrant measures, in contrast, tend to be neutral on their face. Because a facially neutral law may still be discriminatory in violation of the Fourteenth Amendment, the Supreme Court has consistently recognized that a court must examine the totality of circumstances surrounding the legislation’s passage to determine if it was enacted, maintained or enforced with a discriminatory intent.

Under this standard, laws such as the “Illegal Immigration Relief Act” and “Tenant Registration” ordinances passed in Hazleton, Pennsylvania constitute impermissible discrimination. By purportedly targeting “illegal aliens,” the laws negatively affect Latinos irrespective of citizenship status. Commentary describing an anti-immigrant rally in Hazleton highlights the undercurrent of

racism that influenced the passage of the facially neutral anti-immigrant ordinances at issue in this case:

I'm not Latino, but the anger displayed at the rally – held in support of Hazleton's anti-immigration mayor, Lou Barletta – was enough to give anyone with a soul a serious case of the chills.

....

About 700 people attended the rally, where some in attendance tried to link illegal Mexican immigrants with the 9/11 attacks. Other speakers accused illegal immigrants of carrying infectious diseases, increasing crime and lowering property values.

If Alabama's late segregationist Gov. George Wallace had been present, he would have wondered who hired away his speechwriters.

Mike Seate, *Rage Over Illegals Brings '60s to Mind*, PITTSBURGH TRIB.-REV., June 7, 2007.

Although the district court correctly struck down Hazleton's ordinances under the doctrines of preemption and due process, a review of the evidence demonstrates that the City of Hazleton enacted the ordinances with a racial and national origin-based invidious intent. Consequently, amici urge this Court to uphold the district court's decision for the additional reason that these ordinances violate the Equal Protection Clause of the Fourteenth Amendment. Amici also urge this Court to affirm the district court's decision to allow the plaintiffs with uncertain immigration status to proceed anonymously.

ARGUMENT

I. No Stranger to This Land: Our Country's Enduring History of Anti-Immigrant Sentiment.

A. Early Discrimination Directed Against "Ethnic" Immigrants.

Anti-immigrant sentiment has been pervasive in the United States since the nation's founding. In the 1700s, Benjamin Franklin himself claimed that German immigrants corrupted U.S. society because they would not assimilate.¹ See Jason Englund, *Small Town Defenders or Constitutional Foes: Does the Hazleton, Pa, Anti-Illegal-Immigration Ordinance Encroach on Federal Power?*, 87 B.U.L. REV. 883, 886 (2007). Historically, immigrants, who are viewed as different in appearance, religion or language, and arrive in large numbers, trigger the most vehement nativist responses. For example, when Irish Catholic immigrants began arriving in the United States in significant numbers in the 1800s, they were targeted for discrimination. See Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution and Undocumented Aliens in the 1990s*, 30 CASE W. RES. J. INT'L L. 57, 84 (1998). Once here, the Irish had difficulty finding work, the now infamous "No Irish Need Apply" signs propped in the windows of prospective employers. Nancy Cervantes et al., *Hate Unleashed:*

¹ Indeed, anti-German sentiment existed 150 years later. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (overturning a Nebraska law that prohibited the teaching of languages other than English, and noting that the legislation was based on fears that children of immigrants would not fully assimilate).

Los Angeles in the Aftermath of Proposition 187, 17 CHICANO-LATINO L. REV. 1, 4 (1995).

Later, Asian immigrants faced similar discrimination. In the late 1800s, politicians clamored to end Chinese immigration, raising alarms about the “yellow peril” of this “inferior” race. See Darren Seiji Teshima, A “Hardy Handshake Sort of Guy”: *The Model Minority and Implicit Bias About Asian Americans in Chin v. Runnels*, 11 ASIAN PAC. AM. L. J. 122, 127 (2006); see generally Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (1995) (analyzing the motivation and impact of anti-Chinese immigration laws). President Grover Cleveland described the Chinese as “ignorant of our constitution and laws, impossible of assimilation with our people, and dangerous to our peace and welfare.” Alexander Lukin, *The Bear Watches the Dragon: Russia’s Perceptions of China and the Evolution of Russian-Chinese Relations Since the Eighteenth Century* 72 (2003) (quoting President Cleveland). The Chinese, in addition to being racially derided, were blamed for any number of social ills, including crime, economic downturns and corruption. See Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 124-25 (1995). In response, Congress enacted the infamous “Chinese exclusion laws,” effectively suspending almost all immigration from China, which the U.S. Supreme Court upheld. See

Chae Chan Ping v. United States, 130 U.S. 581 (1889). In California, hatred and fear of the Chinese was so entrenched that the state constitution included a provision prohibiting their employment. See *In re Tiburcio Parrott*, 1 F. 481, 494-95 (C.C.D. Cal. 1880) (quoting Cal. Const. 1879, art. XIX); see also Charles J. McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 539-55 (1984) (documenting California laws taxing Chinese immigrants and otherwise discouraging their employment and residence in the state).

Japanese immigrants early in the twentieth century fared no better. Proponents of restricting Japanese immigrants sought to save “California – the White Man’s Paradise.” See Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650 (1995). California targeted Japanese immigrants with the “alien land laws,” which prevented them from owning the land they farmed. See generally Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998) (analyzing history surrounding anti-Asian roots of alien land laws and linking their popularity with the internment of persons of Japanese ancestry during World War II). The ability of Japanese immigrants to earn a living in ways other than farming was also restricted. For example, during World War II,

California prevented foreign-born Japanese from obtaining fishing licenses. *See, e.g., Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

Racism has led to limits on immigration from other parts of the world. Proponents of immigration restrictions in the 1920s advocated the imposition of national origin quotas limiting immigrants from eastern and southern Europe. *See generally* Rachel Silber, *Eugenics, Family & Immigration Law in the 1920s*, 11 GEO. IMMIGR. L.J. 859 (1997). Maintaining the nation's racial purity was their chosen call to arms. As President Calvin Coolidge said when he signed the Immigration Act of 1924 into law, "America must remain American." *See* Thomas C. Leonard, *Protecting Family and Race: the Progressive Case for Regulating Women's Work*, AM. J. ECON. & SOC., July 2005. In support of the restrictive legislation, proponents asserted that the American gene pool was polluted by "dysgenic" southern and eastern European immigrants. Silber, *supra*, at 872. Jews and Italians were described as "beaten men from beaten races, representing the worst failures in the struggle for existence." Curran, *supra*, at 93.

B. Overt Discrimination Goes (Slightly) Underground.

Before the 1960s, outright reliance on racism and national origin discrimination fueled the call for restrictions on the immigration of certain types of newcomers. But sensibilities changed and overt discrimination fell out of national favor with the emergence of the civil rights movement. *See* Kevin R. Johnson,

Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness, 73 IND. L.J. 1111, 1131-32 (1998). Modern immigration laws appear more neutral in limiting immigration: instead of relying on racial justifications for restricting undesirable immigrants, these laws use legal status or language ability to limit or prohibit immigration. Despite their facial neutrality, however, many of these laws are discriminatory in intent and impact. *Id.* at 1133.

Proposition 187, passed by California voters in 1994, exemplifies the new type of discriminatory immigration law. The initiative would have denied undocumented immigrants access to public services, including health care and public education. One provision of the law went so far as to require public officials and teachers to report suspected undocumented students and parents to immigration authorities. Like the district court in this case, a federal court enjoined Proposition 187 from taking effect. *See League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

Proposition 187 was unquestionably directed at persons of Mexican ancestry, citizens and noncitizens alike. Just as past generations railed against the Germans, Irish, Chinese and Japanese, a new generation of restrictionists now directed their antipathy toward persons of Mexican ancestry. Proponents of Proposition 187 expressed concern about "a Mexico-controlled California," people

who would hold “our language, our culture, and our very history in contempt,” and “Third World cultures who come in, they shoot, they beat, they stab and they spread their drugs around in our school system.” Johnson, *supra*, at 654-57 (quoting initiative supporters). These concerns, of course, had nothing to do with immigration status. Nor did the law’s proponents take pains to hide their racist sentiments – one crowed that opponents hurt their own cause by showing “Mexican flags and brown faces” on television. *Id.* at 657.

Importantly, Proposition 187 did not affect only undocumented immigrants. After the measure’s passage, hate crimes against Latinos and Asian-Americans – citizens and noncitizens alike – increased; hate crimes against Latinos in particular surged nearly 25 percent. See Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities’ Democratic Citizenship*, 60 OHIO ST. L.J. 399, 454 (1999).

Similar to the immigration laws, “English-only” laws, like the one enacted in Hazleton in conjunction with the Illegal Immigration Relief Act, can be facially neutral but enacted with a discriminatory intent.² Today, “the inability to speak English coincides neatly with race.” Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and*

² In the 1980s and 1990s, “English-only laws” proliferated in states with large numbers of Spanish speakers, including Florida and California. Lazos Vargas, *supra*, at 435-37.

Conflict in an Immigration-Driven Multiracial Society, 81 CAL. L. REV. 863, 874 (1993). Language thus can serve as a convenient proxy for race. See Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1239-43 (2000) (exploring phenomenon of discrimination through proxy).

C. “Illegal Alien” Becomes a Proxy For Racial and National Origin-Based Discrimination.

In recent years, both state and local governments have attempted to regulate “illegal aliens.”³ Since 2006, legislation targeting undocumented immigrants living and working in the United States spread like wildfire from California to states such as Pennsylvania, New Jersey, Missouri, Georgia and Texas. The movement, to date, has spurred anti-immigrant ordinances and laws in communities in at least 22 states. See MALDEF, *List of Local Anti-Immigrant Legislation*, available at <http://www.maldef.org/publications/index.cfm> (last visited Apr. 15, 2008). These ordinances typically prohibit hiring or leasing property to undocumented immigrants, and a number make English the city’s

³ Amici do not challenge *all* immigration restrictions. The federal government has broad authority to regulate immigration. However, state and local ordinances that establish rules for the treatment of aliens thwart the federal government’s role in regulating immigration. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971); *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001); *Hines v. Davidowitz*, 312 U.S. 52, 66-67, 74 (1941). Amici believe that local immigration restrictions like the Hazleton ordinances in this case violate both the Supremacy Clause and the Equal Protection Clause of the United States Constitution.

official language. Some go further and restrict the number or type of unrelated persons living in the same household. All of these laws were designed to make the towns difficult places to live for undocumented immigrants.

At roughly the same time, many states introduced legislation targeting illegal immigration, with provisions ranging from statewide employer-sanction schemes to anti-harboring provisions. *See* National Conference of State Legislatures, *2007 Enacted State Legislation Related to Immigrants and Immigration* (rev. Jan. 31, 2008), available at <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>. In 2007, two states in particular, Arizona and Oklahoma, passed harsh anti-immigration legislation. *See, e.g.*, Ariz. Rev. Stat. Ann. § 23-212; Okla. St. Ann. tit. 25, § 1313.

Changes in national racial demographics are one cause of these laws' popularity. Latino immigrants in recent years have moved in substantial numbers to states with small immigrant populations, such as North Carolina, Iowa, Ohio, and South Carolina. *See* Jill Esbenshade, *Special Report: Division and Dislocation: Regulating Immigration through Local Housing Ordinances* (Immigration Policy Center) 3-4 (2007), available at www.ilw.com (search "Esbenshade" then follow hyperlink). Many towns in these states – including more than half of all the largest localities passing or proposing anti-immigration ordinances – have experienced a rapid increase in their Latino population. *Id.* at 5.

Many people are unable or unwilling to distinguish between Latinos who are U.S. citizens or lawful permanent residents and those who are undocumented. *See id.* at 3. In the modern debate over immigration, the phrase “illegal aliens” is often code for Mexicans or Latinos generally. *See* Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (2004) (analyzing legal construction of “illegal alien” in U.S. immigration history). Despite the stereotype, a majority of Latinos are *not* foreign born, let alone undocumented. *See* Esbenshade, *supra*. For example, a supporter of anti-immigrant legislation in Nebraska contended that “probably 99 percent” of people who speak Spanish are unlawfully in the country. Leslie Reed, *Your Legislature: Setback for Immigration Bill*, OMAHA WORLD-HERALD, Feb. 29, 2008. It is fear of these “others” that spurs these ordinances, perhaps because many local citizens conflate all Latinos with undocumented immigrants.

Nor do the lawmakers proposing these ordinances distinguish between Latinos who are citizens, legal immigrants or undocumented. For example, the Mayor of Valley Park, Missouri, which enacted an ordinance like Hazleton’s, expressed concern about “Cousin Puerto Rico” and “Taco Whoever” moving to town. Rigel Oliveri, *Valley Park Needs to Shut Down Its War on Immigrants*, ST. LOUIS POST-DISPATCH, Apr. 2, 2007, at B7 (quoting mayor). Such statements

reflect nothing other than generalized anti-Latino bias. Puerto Ricans, after all, are U.S. citizens by birth.

The failure to distinguish Latinos who are U.S. citizens or legal immigrants from those who are undocumented is a national problem. The FBI reports that, from 2003 to 2006, hate crimes against Latinos rose nationally by almost 35%. See Brentin Mock, *Immigration Backlash: Violence Engulfs Latinos*, Southern Poverty Law Center (2007), available at www.splcenter.org/intel/news/item.jsp?site_area=1&aid=292; see generally Federal Bureau of Investigation, *Hate Crime Statistics, 2006* (2007), available at <http://www.fbi.gov/ucr/hc2006/index.html>. Many attackers wrongly accuse the Latino victim of being an undocumented immigrant. *Id.* In fact, at a rally for the Hazleton ordinances, supporters exhorted a Latino U.S. citizen to “get out of the country” and police had to escort him from the rally for his own safety. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 510 (M.D. Pa. 2007).

Many present day anti-immigration activists do not attempt to hide the racism underlying their positions. Supporters deride Latinos as “third world invaders,” “hordes,” “brown,” “dumb” and “violent,” and describe the need to “take a shower” after attending a rally that resembled “some Mexican village.” Anti-Defamation League, *Immigrants Targeted: Extremist Rhetoric Moves into the Mainstream* 1-4 (2007), available at www.adl.org/civil_rights/anti_immigrant. In

Hazleton, Latino residents received hate mail deriding them as “subhuman spic scum.” *Lozano*, 496 F. Supp. 2d at 510.

Undocumented immigrants, and those who share similar ancestries to them, are easy scapegoats in times of social stress. *See Cervantes et al., supra*, at 3-4. Latinos have been targeted in previous eras. During the Depression, state and local governments “repatriated” to Mexico persons of Mexican ancestry – including U.S. citizens – to reduce competition for jobs and public benefits. *See generally* Francisco E. Balderrama & Raymond Rodriguez, *Decade of Betrayal: Mexican Repatriation in the 1930s* (rev. ed. 2006). In “Operation Wetback” in 1954, the U.S. government rounded up and deported tens of thousands of Mexican immigrants and U.S. citizens of Mexican descent. *See generally* Juan Ramon Garcia, *Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954* (1980).

Today, the economy’s downturn fuels hatred of Latinos again. Anti-immigrant activists spread hate about newcomers taking over the United States.⁴

⁴ In a similar vein ten years earlier, John Tanton spoke of immigrants “defecating and creating garbage and looking for jobs.” *See* Anti-Defamation League, *supra*, at 4-5 (referencing a 1997 Detroit Free Press article). Tanton founded and remains on the Board of Directors of the Federation for American Immigration Reform (FAIR). *Id.* FAIR was also home to Joseph Turner, who served as the organization’s western field representative, *id.*; Turner drafted the San Bernardino ordinance that became the model for Hazleton’s ordinances. Heidi Beirich, *The Teflon Nativists: FAIR Marked by Ties to White Supremacy*, Southern Poverty Law Center 2007, available at

Anti-Defamation League, *supra*, at 5; see also “Anti-Immigrant Spokesman Demonizes Hispanics in Time Magazine,” (Mar. 18, 2008), available at www.truthinimmigration.org (search “Anti-Immigrant Spokesperson Demonizes Hispanics” then follow hyperlink). Others warn that public schools are unduly burdened by the strain of “spend[ing] extra time with some little brat that’s illiterate in two languages.” Anti-Defamation League, *supra* at 6. Other immigrant groups have also felt the sting of these attacks. In 2004, a FAIR representative warned that Muslim immigrants “are not coming here to become Americans” but are “promoting colonization of their own religion, of their own culture in towns and *taking them over.*” Southern Poverty Law Center, *Anti-Hispanic: “Racist” Anti-Immigration Ads Denounce Republicans and Democrats*, (Summer 2004) (emphasis added), available at www.splcenter.org/intel/intelreport/article.jsp?aid=478.

Claims that undocumented immigrants are responsible for social ills are often false or are greatly exaggerated. Overcrowding in schools is often given as a rationale for local anti-immigrant laws, but the evidence does not support this argument. For example, Valley Park, Missouri passed an anti-immigrant

www.splcenter.org/intel/intelreport/article.jsp?aid=846. Late last year FAIR was classified as a hate group by the Southern Poverty Law Center. *New Southern Poverty Law Center Report: Nation’s Most Prominent Anti-Immigration Group Has History of Hate, Extremism* (Dec. 2007) , available at <http://www.splcenter.org/news/item.jsp?aid=295>.

ordinance, which like the Hazleton ordinances, blamed undocumented immigrants for overcrowding in schools. *See* Esbenshade, *supra*, at 11. Yet in Valley Park, school officials denied the existence of overcrowding. *Id.* Similarly, a councilman in Escondido, California, blamed undocumented immigrants for 80 percent of all gang-related crime. *Id.* The Police Chief later contradicted him, noting that more than 90 percent of the city's gang members were citizens. *Id.*

The costs of providing medical care to undocumented immigrants is another exaggerated rationale for anti-immigrant laws. That argument is based on the proposition that undocumented immigrants abuse emergency health care resources because they lack health insurance. In fact, non-citizens, including undocumented residents are "significantly" *less* likely than citizens to use emergency rooms.

Henry J. Kaiser Family Foundation, *Kaiser Commission on Medicaid and the Uninsured: Summary: Five Basic Facts on Immigrants and Their Health Care* (March 2008), available at <http://www.kff.org/medicaid/upload/7761.pdf>.

Changing demographics, economic downturns and fear of others have long translated into anti-immigrant movements in the United States. German, Asian, Irish, Italian, Jewish and Mexican immigrants have all suffered the slings and exclusion of race and national origin discrimination. Just like their more brazen historical predecessors, modern state and local anti-immigration legislation, *i.e.*,

“illegal alien” laws, are a ploy for unconstitutional racial and national origin discrimination.

II. Hazleton’s Ordinances, Grounded in Discrimination, Are Unconstitutional.

In addition to the reasons offered by the district court for invalidating Hazleton’s ordinances, the ordinances violate the Equal Protection Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 2. Amici file this brief to demonstrate that the Hazleton ordinances, and others like them, run afoul of that clause because their enactment was motivated by racial and national origin animus and because they have a disparate impact. In doing so, amici present an additional ground for affirmance of this appeal.

A. The Totality of the Circumstances Determine Whether Improper Animus Motivates Local Anti-Immigrant Ordinances.

The Supreme Court has held that a court must consider the totality of the circumstances when searching for evidence of the discriminatory intent necessary to establish an Equal Protection claim under the Fourteenth Amendment. In this case, the totality of circumstances clearly reveals just such improper animus.

Because “explicit statements of racially discriminatory motivation are decreasing,” *Hallmark Developers, Inc. v. Fulton County, Ga.*, 466 F.3d 1276, 1283 (11th Cir. 2006), the Supreme Court has recognized that courts must look to circumstantial evidence to determine whether a discriminatory intent exists. *See*

Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). The inquiry is a sensitive one into the “totality of the relevant facts.” *Washington v. Davis*, 426 U.S. 229, 242 (1976); see *Pryor v. Nat’l Collegiate Athletic Ass’n*, 288 F.3d 548, 563 (3d Cir. 2002) (“Determining whether invidious discriminatory purpose was a motivating factor in the adoption of a facially neutral policy demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”). Relevant facts in determining whether government officials acted with a discriminatory intent include: (1) the impact of the law; (2) testimony from the decision-maker on the purpose of the law; (3) departures from normal procedures; and (4) the historical background of the legislation. See *Arlington Heights*, 429 U.S. at 266-68. Notably, under the “totality” standard articulated by *Washington v. Davis*, 426 U.S. at 242, no one factor must, on its own, show invidious intent. In this case, the totality of the evidence demonstrates that Hazleton acted with impermissible racial animus in enacting the ordinances.

Hazleton relies on the same justifications – crime, and overcrowded schools and hospitals – used by other towns and states enacting anti-immigrant ordinances. See *supra*, section I, C. A closer look reveals that the alleged reasons for passing the ordinances are directed not toward undocumented immigrants in particular, but toward Latinos in general. The record is clear that many citizens in Hazleton want nothing less than for Latinos to leave town.

B. Hazleton's Ordinances Have a Disparate Impact.

One of the most important factors used to determine discriminatory intent is whether “the law bears more heavily on one race than another.” *Washington v. Davis*, 426 U.S. at 242. A starkly disparate impact suggests a discriminatory intent; decision-makers “usually intend the natural consequences of their actions.” *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997). Accordingly, the impact of the official action is an “important starting point” in the constitutional analysis. *Pryor*, 288 F.3d at 563.

Hazleton's ordinances unquestionably will have an overwhelmingly disparate impact on the town's Latino population. The fact that the actual penalties are imposed on landlords and employers does not lessen the impact on their real target: Latinos, who look to landlords and employers for housing and jobs. Professor Mark Rosenblum testified extensively at trial about the ordinances' negative impact on Latinos. He stated that the ordinances' harsh penalty provisions – fines of \$250 per day and the potential loss of a business license for renting to or employing “illegal aliens” – and lack of adequate process would spur landlords and employers to take “informational shortcuts.” A1543. These shortcuts involve assuming, on the basis of race or language ability, that an individual is in the country unlawfully. *See id.* Dr. Rosenblum based his testimony on the discrimination by employers against U.S. citizens and legal

immigrants that occurred after Congress passed the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a, which provided for sanctions of employers of undocumented immigrants. Evidence gathered after that law's passage showed that landlords and employers used the shortcuts and, in doing so, discriminated against Latinos lawfully in the United States. A1523-29; *see also* United States Gen. Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination* 3-8 (Mar. 1990) (finding that employer sanctions resulted in "widespread discrimination" by employers against U.S. citizens and lawful immigrants who were national origin minorities).

Many U.S. citizens and lawful resident aliens "appear" foreign or lack native-English speaking ability. Employers are likely to use appearance or language ability as shortcuts or proxies for immigration status and people "will err on the side of caution by simply not hiring people who look Latino." A1543. Similarly, "landlords would have the same incentives to avoid renting to somebody who looks or seems foreign born . . . and [the law will] cause landlords to evict legal residents and U.S. citizens defensively." A1535-36. In short, U.S. citizens or legal residents who are Latino and do not speak accent-free English will likely suffer discrimination.

Indeed the ordinances *already* had a negative impact on Hazleton's Latino residents. One plaintiff, awaiting legalization of his immigration status, had to

move after his landlord told him that “he didn’t want to take the risk” of renting to him. *Lozano*, 496 F. Supp. 2d at 496-97. Another plaintiff, a legal resident Latina businesswoman, closed shop because, after the ordinances passed, business fell off severely. *See id.* at 490. Even worse, Hazleton’s Latinos have suffered hate crimes since the ordinances were proposed. *See id.* at 510.

The disparate impact that Hazleton’s ordinances has already had shows that all Latinos, not just undocumented immigrants, will bear the costs imposed by the “informational shortcuts” taken by landlords and employers. As government officials usually intend the natural consequences of their actions, *see Reno*, 520 U.S. at 487, the disparate impact of these ordinances is evidence that they were enacted with an unconstitutional discriminatory intent: an intent to drive Latinos – whatever their immigration status – out of town.

C. Mayor Barletta’s Statements Reveal Hazleton’s Discriminatory Intent.

The Supreme Court has recognized that outright admissions of a discriminatory intent are “infrequent.” *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). Indeed, the infrequency of such statements is the reason that courts look to a totality of the facts in evaluating the intent of a government actor. *See Hallmark Developers*, 466 F.3d at 1283. A close examination of the testimony of Mayor Barletta of Hazleton reveals a discriminatory intent against Latinos.

The Mayor blamed Hazleton's alleged population of undocumented immigrants for increased crime along with the town's fiscal problems. A1646-47. However, as demonstrated below, he had no evidence to support that belief. On closer examination, the Mayor's comments reveal that he intended to drive all Latinos, not just undocumented immigrants, out of town.

One of the primary justifications for the ordinances is that undocumented children impose fiscal burdens on the public schools. The Mayor testified that the schools are overcrowded and the school district is in debt. A1646. Claiming that "it is widely known that most illegal aliens do not speak English," the Mayor blamed the school district's deficit on the cost of providing ESL instruction to undocumented children. A1682. He admitted, however, that it is "impossible" to know how many undocumented children attend Hazleton's schools. A1644-45.

Moreover, there is no evidence that all or even most students in the ESL programs are undocumented – the Mayor himself admitted that it is impossible to know the immigration status of the children in Hazleton's schools. A1644-45. Native-born U.S. citizens predominate in the English-language learner (ELL) student population: 76 percent of elementary school and 56 percent of secondary school ELL students are U.S. citizens, and more than one-half of the ELL students in public secondary schools are second- or third-generation U.S. citizens. *See, e.g.,* Randy Capps et al., *The New Demography of America's Schools: Immigration and*

the No Child Left Behind Act (The Urban Institute) 18 (2005), available at <http://www.urban.org/publications/311230.html>. The stereotype of ELL students (or students who attend ESL programs) as foreign-born immigrants is inaccurate: a child's need for ESL instruction does not mean the child is in the country illegally.

Similarly, the Mayor claimed that undocumented immigrants cause long waits at hospitals. A1646. Mayor Barletta testified that the hospital has spent "millions of dollars in trying to expand the emergency room," and that emergency room waits still can last "five hours, six hours, if not longer." A1682-83. However, he admitted that he did not know how many undocumented immigrants use Hazleton's hospitals each year; he simply asserted that it was "a heck of a lot" because "it is well documented that illegal aliens use the emergency room for primary health care." A1644-46. The truth of the matter is that undocumented immigrants are less likely to use the emergency room than U.S. citizens. See Henry J. Kaiser Family Foundation, *supra*.

Finally, the Mayor's testimony makes clear that he blames Latinos for the rise in crime. In his testimony, the Mayor blames the City's alleged troubles on Latino gangs. He testified, "We are now seeing gangs in the City of Hazleton. . . . We arrested an MS-13 member. Latin Kings. Three Notorios." A1678-79. The Mayor admits, however, that less than 1 percent of Hazleton's crimes (19 out of

2800) were committed by undocumented immigrants. A1726-27. Police records showed that those immigrants were responsible for only 2 or 3 of the 428 (less than 1 percent) violent crimes committed. A1728-29. The Mayor's focus on Latino gangs – not "illegal alien" gangs – is evidence of his unlawful motive and his belief that Latinos in general are responsible for the rise in crime.

In sum, removing all undocumented immigrants from the city would not have a significant effect on Hazleton's fiscal ills. Indeed, the district court recognized that Hazleton had exaggerated the costs it bore from undocumented immigration. *See* 496 F. Supp. 2d at 542 n.68. The educational, health care and social costs identified by the Mayor might be reduced by a significant decrease in the town's *Latino* population, rather than its undocumented immigrant population. If permitted to stand, then, the ordinances might well cause Hazleton's Latino population to decrease. Exactly that happened in Riverside, New Jersey, where the town's Latino population fell by a third after the town proposed an anti-immigrant ordinance. *See* Adam Karczewski, *Coming to America: How States and Municipalities Deal with Undocumented Immigrants*, N.J. Lawyer: THE WEEKLY NEWSPAPER, Nov. 26, 2007, at S8.

D. Hazleton's Deviation in Procedure Suggests a Discriminatory Intent.

The fact that the City Council deviated from standard procedure when it enacted the challenged ordinances also suggests a discriminatory intent. *See*

Arlington Heights, 429 U.S. at 267. The City amended its ordinances *after* litigation commenced and rushed the newly amended ordinance through the City Council. *See Lozano*, 496 F. Supp. 2d at 541 n.67. Although “the mere fact that the defendant, in the face of litigation, amended [the ordinance] outside of the usual procedure” is insufficient to show discriminatory intent, *see id.* at 541, deviation from standard procedures is one relevant factor in analyzing the totality of circumstances. Along with the other evidence presented, the deviations in procedure suggest that the ordinances were rushed through with a discriminatory intent.

Nor does it matter that Hazleton’s deviations in procedure were different than those present in *Arlington Heights*. *Lozano*, 496 F. Supp. 2d at 541 n.67. Restricting *Arlington Heights* in that manner is not supported either by *Arlington Heights* itself, or by courts of appeals that have applied it. *Arlington Heights*, 429 U.S. at 268 (holding that the “foregoing summary” is not exhaustive); *see, e.g., Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357 (6th Cir.), *cert. denied*, 128 S.Ct. 2001 (2007) (applying *Arlington Heights* factors to employment discrimination claim); *Contreras v. City of Chicago.*, 119 F.3d 1286 (7th Cir. 1997) (applying *Arlington Heights* factors to city officials’ attempts to close a restaurant for health code violations); *Patterson v. Masem*, 774 F.2d 251 (8th Cir.

1985) (acknowledging *Arlington Heights* factors in employment discrimination suit).

E. The Historical Background of Hazleton's Ordinances – A Response to Changes in Racial Demographics – Demonstrates Discriminatory Intent.

Hazleton's recent history also supports a finding of discriminatory intent. *See Arlington Heights*, 429 U.S. at 267 (holding that the "specific sequence of events" or "historical background of the decision" can "shed some light on the decisionmaker's purposes"); *Hallmark Developers*, 466 F.3d at 1283 (same); *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 212 (2d Cir. 2006) (same). Like many other towns with similar ordinances, Hazleton has experienced a rapid rise in its Latino population since 2000. *Lozano*, 496 F. Supp. 2d at 484. At the start of the decade, the town's population was 23,000 and it now may be as high as 33,000. *Id.* Many of the new arrivals in town are Latino, including U.S. citizens, legal residents and undocumented immigrants. *Id.* At a minimum, inferences of a discriminatory intent are raised when a law is enacted that disproportionately impacts a new, and rapidly growing, racial, ethnic or national origin minority in the town.

III. Plaintiffs Challenging Hazleton's Ordinances Merit Anonymity.

Amici urge this Court to affirm the district court's decision to allow some plaintiffs to sue anonymously to protect their physical safety. Proceeding

anonymously is necessary to protect them from physical harm, retaliation or deportation. *See Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1071 (9th Cir. 2000); *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992). Use of pseudonyms protects those who would otherwise fear filing suit. *See also Doe v. United States Life Ins. Co.*, 123 F.R.D. 437, 439 (S.D.N.Y. 1988) (collecting cases involving abortion, birth control, mental illness, illegitimate children and transsexuality).

Undocumented children proceeded anonymously in *Plyler v. Doe*, 457 U.S. 202 (1982), as did women seeking access to abortion in *Roe v. Wade*, 410 U.S. 113 (1973). Children and their parents have been allowed to proceed anonymously when they challenged public school Bible classes. *Doe v. Porter*, 370 F.3d 558, 560-61 (6th Cir. 2004). Plaintiffs in these cases all had a reasonable fear that they would be retaliated against for asserting their legal rights. *See, e.g., Advanced Textile*, 214 F.3d at 1068.

This case is no different. The plaintiffs who have been proceeding anonymously are neither U.S. citizens nor lawful permanent residents or are of uncertain immigration status. *See Lozano*, 496 F. Supp. at 505. If identified, they face a great risk of retaliation. The plaintiffs could be reported to the Department of Homeland Security and removed from the United States. The Ninth Circuit has recognized that the risk of deportation is a good reason to allow parties to proceed

anonymously. *See Advanced Textile*, 214 F.3d at 1071; *see also Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004) (noting that undocumented workers seeking relief against their employers are subject to the “harsher reality” of being deported).

The undocumented plaintiffs also run the risk of physical harm if their identities are revealed. Hatred of Latinos is common in Hazleton. *See Lozano*, 496 F. Supp. 2d at 508-10. With the ordinances, the town’s atmosphere has become “very, very tense.” *Id.* at 509. Residents have been literally fighting in the streets. *Id.* Opponents of the ordinances hesitate to attend vigils for fear of retaliation. *Id.* at 508. Hazleton resident Dr. Lopez received hate mail, which threatened him and another Latino resident to “think twice before you speak,” referred to “*subhuman spic scum*,” and advocated “*if it is brown, flush it down.*” *Id.* at 509-10 (emphasis added). Given the vehemence of the attacks on Latinos lawfully in the city and the rise in hate crimes against Latinos documented by the FBI, it is not hard to imagine that the hate directed at *unlawfully* present Latinos would be significantly worse or even violent.

Hazleton today is at the center of a national immigration storm. Identifying the plaintiffs places them at great risk of being reported to immigration authorities and targeted for a nation’s, as well as a town’s, animosity. Thus, the district court properly exercised its discretion in concluding that “The intense public interest in

this case makes the risks from exposing sensitive information about one's identity exponentially more dire . . . and make more persuasive plaintiffs' reasons for seeking to proceed without revealing their true names." *Id.* at 508.

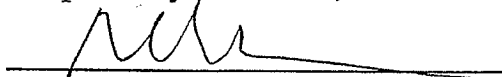
CONCLUSION

U.S. history is replete with instances of racial and national origin-based discrimination in its immigration laws. To square with modern sensibilities, today's anti-immigration laws tend to be facially neutral but can nonetheless be motivated by a racially discriminatory intent. The evidence demonstrates that the ordinances of Hazleton, Pennsylvania, were adopted with such a discriminatory intent – to rid the town of Latinos, citizens and noncitizens alike – and had a disparate impact on Latinos. Amici therefore offer an additional basis for upholding the district court's decision to strike down the ordinances as unconstitutional. Amici also urge this Court to uphold the district court's decision to allow a number of plaintiffs to proceed anonymously.

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