3rd Cir. No. 07-3531, Sup.Ct. No. 10-772

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PEDRO LOZANO, ET AL.,

Appellees,

versus

CITY OF HAZLETON.,

Appellant.

On Remand, in Light of the Supreme Court's Decision
in *Chamber of Commerce v. Whiting*

BRIEF OF *AMICI CURIAE* NATIONAL APARTMENT ASSOCIATION, NATIONAL MULTI HOUSING COUNCIL, THE APARTMENT ASSOCIATION OF CENTRAL PENNSYLVANIA, THE APARTMENT ASSOCIATION OF GREATER PHILADELPHIA, THE WESTERN PENNSYLVANIA APARTMENT ASSOCIATION, AND THE APARTMENT ASSOCIATION OF PENNSYLVANIA IN SUPPORT OF APPELLEES

Parties' counsels of record have consented to filing of this amicus brief, except for Kobach Law, LLC, counsel for the City of Hazleton. This brief was not authored in whole or part by counsel for a party, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to its preparation or submission.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the National Apartment Association, the National Multi Housing Council, the Apartment Association of Central Pennsylvania, the Apartment Association of Greater Philadelphia, the Western Pennsylvania Apartment Association, and the Apartment Association of Pennsylvania state that they are corporations organized under § 501(c)(6) of the Internal Revenue Code. The National Apartment Association, the National Multi Housing Council, Apartment Association of Central Pennsylvania, the Apartment Association of Greater Philadelphia, the Western Pennsylvania Apartment Association, and the Apartment Association of Pennsylvania do not have parent corporations, nor any stock held by a publicly held company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES II

I. INTERESTS OF *AMICI CURIAE* 1

II. INTRODUCTION 3

III. ARGUMENT 4

A. Nothing in the Supreme Court's decision in Chamber of Commerce v. Whiting suggests that Hazleton's regulation of rental housing is not pre-empted by the Supremacy Clause of the U.S. Constitution 4

B. "Harboring" as used in the Hazleton ordinance is more expansive than that term is used by the Federal Government and is properly pre-empted 8

C. The Regulation of Housing and Employment are not Equatable 10

IV. CONCLUSION 15

V. CERTFICATE REGARDING ELECTRONIC SUBMISSION 16

VI. CERTFICATE OF COMPLIANCE 16

VII. CERTFICATE OF SERVICE 17

VIII. CERTFICATE OF BAR MEMBERSHIP 18

TABLE OF AUTHORITIES

Page

Cases

Brandish v. NHP Prop. Mgmt., Inc. 694 A.2d 1106 (Pa. Super. 1997) *12, 13*

Chamber of Commerce v. Whiting, 563 U.S. ___, 131 S. Ct. 1968 (2011). *3, 4, 5, 6, 7, 9, 15.*

De Canas v. Bica, 424 U.S. 35 (1976) *7*

Georgia Latino Alliance for Human Rights v. Nathan Deal; Governor of the State of Georgia, et al., 2011 U.S. Dist. LEXIS 69600 ..... *7*

Jaurbe v. Philadelphia, 288 Pa. Super. 330; 43` A.2d 1073 (1981) *10*

Kelly v. Miller, 249 Pa. 314 (Pa. 1915) *13*

Kohl v. PMC Bank National Association et. al. 590 Pa. 151(Pa. 2006) *13*

Lozano v. City of Hazleton, 620 F.3d 170 (3rd Cir. 2010) *3, 9*

McGeehan v. Teco, Inc., 1993 U.S. Dist. LEXIS 13061 ..... *10, 11*

Payton v. New York, 445 U.S. 573 (1980) *12*

Pugh v. Holmes, 486 Pa. 272; 405 A.2d 897 (1979) *12, 13*

Raker v. G.C. Murphy Co., 358 Pa. 339 (Pa. 1948) *12, 13, 14*

United States of America v. State of Alabama; Governor Robert J. Bentley, 2011 U.S. Dist. LEXIS 112362 ..... *7, 8*

United States of America v. Bautista, 362 F.3d 584 (9th Cir 2004) *12*

United States of America v. Paradis, 351 F.3d 21 (1st Cir. 2003) *12*

Villas at Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835 (N.D. Tex. 2010 ..... *8*

Statutes, Rules and Regulations

8 U.S.C.S.§ 1324 ..... *5, 6*

29 U.S.C.S. § 206 ..... *10*

29 U.S.C.S. § 207 ..... *10*

42 U.S.C. § 2000e *10*

42 U.S.C.S. § 3604 14
43 P.S. § 955 14
Ariz. Rev. Stat. Ann §§ 23-211, 212, 212.01 (2010) 5

Other Authorities

National Apartment Association's Pennsylvania Lease 11

I. INTERESTS OF *AMICI CURIAE*

The National Apartment Association ("NAA") is the leading national advocate for quality rental housing. NAA is a federation of 170 state and local affiliated associations, representing more than 55,000 members responsible for more than 6.2 million apartment units nationwide. Both AAGP and AACP are members of that federation. NAA is the largest broad-based organization dedicated solely to rental housing. In addition to providing professional industry support and education services NAA and its affiliated state and local associations advocate for fair governmental treatment of multi-family residential businesses nationwide.

Based in Washington, DC, the National Multi Housing Council ("NMHC") is a national association representing the interests of the larger and most prominent apartment firms in the U.S. NMHC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management, and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. One-third of American households rent, and over 14 percent of households live in a rental apartment (buildings with five or more units).

The Apartment Association of Central Pennsylvania ("AACP") is a non-profit organization that works to support education and professionalism within the multifamily housing industry so that members are successful in providing quality rental housing in central Pennsylvania in counties including Adams, Bedford, Berks, Blair, Cambria, Carbon, Centre, Clearfield, Clinton, Cumberland, Dauphin, Erie, Franklin, Indiana, Lackawanna, Lancaster, Lehigh, Luzerne, Lycoming, Monroe, Northumberland, Pike, Schuylkill, Snyder, Wayne, Westmoreland, and York.

The Apartment Association of Greater Philadelphia ("AAGP") is a non-profit organization representing multi-family developers, owners and managers in Bucks, Chester, Delaware, Montgomery and Philadelphia counties. AAGP serves the multi-family housing industry by providing a forum to utilize and share the collective strengths of its members to provide educational, public relations and governmental affairs related services that enhance the opportunity for quality rental housing.

The Western Pennsylvania Apartment Association ("WPAA") represents over 15,000 apartment owners, management companies, and industry product and service providers throughout Western Pennsylvania. The purpose of the Western Pennsylvania Apartment Association is to promote professional growth within the multi-family housing industry by encouraging professional development of its

members, by offering diverse networking opportunities and exemplary educational programs, and providing public information on legislative issues that affect the apartment industry.

The Apartment Association of Pennsylvania ("AAPA") is the state legislative advocate for the Apartment Associations of Greater Philadelphia, Central Pennsylvania and Western Pennsylvania. It is an affiliate of the National Apartment Association.

As providers of rental housing, amici's members are directly impacted by state and local legislation that aims to regulate immigration via regulation of the landlord-tenant relationship. Legislation such as that enacted by the City of Hazleton significantly affects rental housing providers' ability to efficiently deliver affordable rental housing. Hazleton's ordinance increases the costs of providing housing, leading to increased rents for all residents, and disincentives investment in both existing and future rental housing. Further, such statutes place rental housing providers in a de facto position of immigration law enforcement, a role which is properly within the purview of federal officials[1].

II. INTRODUCTION

This case is before the Court on remand following the Supreme Court's decision in *Chamber of Commerce v. Whiting,* 563 U.S. ___, 131 S. Ct. 1968

[1] Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, Amici have moved the Court for leave to file this brief.

(2011), which upheld an Arizona regulatory scheme that addressed employment practices in that state.

Amici are organizations who have an interest in preserving this Court's prior ruling that the housing provisions of the Hazleton ordinance are "pre-empted by federal immigration law and unconstitutional under the Supremacy clause." *Lozano v. City of Hazleton,* 620 F.3d 170 (3rd Cir. 2010). Amici will leave the arguments of *Whiting's* impact on employment practices in Hazleton to other parties.

III. ARGUMENT

A. Nothing in the Supreme Court's decision in Chamber of Commerce v. Whiting suggests that Hazleton's regulation of rental housing is not pre-empted by the Supremacy Clause of the U.S. Constitution.

Whiting narrowly focused on issues of state regulation of alien employment permitted under an express Congressional grant of authority. Appellant's claim that *Whiting* stands for the notion that it is permissible for state and local governments to regulate facets of immigration policy outside of the employment arena misconstrues the Court's factual analysis and holding in that case. The determining factor upon which the Supreme Court based its non-preemption decision in *Whiting* was an express Congressional authorization permitting state laws regulating the employment of unauthorized aliens. *Whiting* at 1981, 1984-85.

In its analysis to determine if the Legal Arizona Workers Act of 2007[2] was preempted by federal law, the Supreme Court began by noting "when a federal law contains an express preemption clause, courts focus on the plain wording of the clause because it necessarily contains the best evidence of Congress's preemptive intent." *Whiting* at 1977. Employing this standard, the Court focused its examination on the language of §1324a (h) (2) of the Immigration Reform and Control Act ("IRCA") and found the IRCA preempted some state powers dealing with the employment of unauthorized aliens and expressly preserved others. Specifically, §1324a (h) (2) authorized state and local business license sanctioning regimes for those employers who employ, or recruit or refer for a fee for employment, unauthorized aliens.[3] The Court concluded Arizona's law was a state "licensing" law relating to the employment of "unauthorized aliens," well within the confines of the authority Congress chose to leave to the states and therefore was not expressly preempted. *Whiting* at 1981.

With the foundation of an express Congressional authorization of state regulation of unauthorized alien employment having been established, the Court

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[2] The Legal Arizona Workers Act allows Arizona courts to suspend or revoke licenses necessary to do business in the state if an employer knowingly or intentionally employs an unauthorized alien. Ariz. Rev. Stat. Ann. §§ 23-211, 212, 212.01 (2010).

[3] 8 U.S.C.S. §1324a (h) (2) reads in full: "Preemption. The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."

next simply considered whether the means that Arizona had selected were consistent with Congress's grant of authority. *Id*. at 1981-83. Again, in finding Arizona acted within the authority it had been granted, the Court's analysis explicitly hinged on its finding that Congress expressly allowed states to regulate employers through licensing laws:

> *…Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority. Id.*

Having found that Congress has expressly permitted state regulation of unauthorized alien employment through licensing laws, and that the methods chosen by Arizona to carry out that express grant of power did not exceed the bounds of the Congressional authorization, the Court concluded that Arizona's law is not preempted. *Id.* at 1987.

Insofar as there is no comparable provision in federal law authorizing state or local regulation of immigration in housing, nothing in *Whiting* should lead this Court to disturb its prior decision.

Whiting is inapplicable because the Supreme Court relied upon the §1324a (h) (2) savings clause of the IRCA to find that Congress had expressly authorized state regulation of unauthorized alien employment. In stark contrast, Congress has

not expressly authorized states or localities to regulate the provision of *housing* to undocumented aliens. As such, the most significant parts of the reasoning in *Whiting* have no application to the preemption analysis of the anti-harboring provisions of Hazleton's ordinance before this Court.

Since *Whiting*, federal district courts have distinguished the Supreme Court's preemption analysis in that case when considering "anti-harboring" regimes enacted by states. *See United States of America v. State of Alabama; Governor Robert J. Bentley*, 2011 U.S. Dist. LEXIS 112362 at 122.

> ("Unlike *Whiting, Arizona Contractors Ass'n., Inc.,* and *Gray,* which all concerned the authority of the states to act in areas where Congress specifically has preserved such authority, Congress has not preserved the authority of any state to regulate alien harboring and transportation in the manner provided in [The Alabama anti-harboring statute]. The justification for a departure from homogeneity with federal law in the cases cited by the State Defendants – the specific preservation of state authority to act – is absent in this case.")

See Also Georgia Latino Alliance for Human Rights v. Nathan Deal; Governor of the State of Georgia, et al., 2011 U.S. Dist. LEXIS 69600 at 46 ("Further, whereas the Arizona statute in *Whiting* imposed licensing laws specifically authorized by a statutory savings clause, [The Georgia anti-harboring statute] imposes additional criminal laws on top of a comprehensive federal scheme that includes no such carve out for state regulation.").

The "[p]ower to regulate immigration is unquestionably…a federal power." *Whiting* at 1975, citing *De Canas v. Bica*, 424 U.S. 351 (1976). There is no reason

to conclude that Congress intended to create exceptions with federally mandated uniformity outside the employment arena. *See United States of America v. State of Alabama; Governor Robert J. Bentley*, 2011 U.S. Dist. LEXIS 112362 at 134 ("[The Alabama anti-harboring statute] thus represents a significant departure from homogeneity, which 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"). *See Also Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 855, 857-58 (N.D. Tex. 2010) ("Ordinance stands as obstacle to the uniform application of federal immigration law").[4] Hazleton's attempt to regulate immigration by its licensure of rental housing providers should be viewed in the same context.

B. "Harboring" in Hazleton is more expansive than that term is used by the Federal Government and is properly pre-empted.

"Harboring" in Hazleton is inconsistent with concepts of "harboring" under federal law.

The City of Hazleton provided this definition of harboring:

> SECTION 5. HARBORING ILLEGAL ALIENS
>
> A. It is unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.

[4] Both the anti-harboring laws enacted by Alabama's and Farmers Branch punish landlords for renting housing to unlawfully present aliens.

> (1) For the purposes of this section, to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall be deemed to constitute harboring. To suffer or permit the occupancy of the dwelling unit by an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall also be deemed to constitute harboring.

The City further limited the application of its prescription against harboring illegal aliens as follows:

> SECTION 6. CONSTRUCTION AND SEVERABILITY
>
> A. The requirements and obligations of this section shall be implemented in a manner fully consistent with federal law regarding immigration and protecting the civil rights of all citizens and aliens.
>
> B. If any provision of this Chapter is in conflict or inconsistent with applicable provisions of federal or state statutes, or is otherwise held to be invalid or unenforceable by any court of competent jurisdiction, such part of provision shall be suspended and superseded by such applicable laws or regulations, and the remainder of this Chapter shall not be affected thereby.

According to Section 6 (B), this Court's prior decision that the housing provisions of the IIROA and RO are federally preempted eliminates any need for further analysis, since there is nothing in *Whiting* that would cause this Court to revisit the issues of harboring illegal aliens in housing. "We define harboring" as conduct "tending to substantially facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting an alien's unlawful presence." *Lozano v. City of Hazleton*, 620 F.3d 170 (3rd Cir. 2010).

Hazleton's expansive definition of "harboring" does not meet this Court's more stringent definition.

C. The Regulation of Rental Housing and Employment Are Not Equatable

Hazleton's Regulation of Rental Housing Conflicts with Established Pennsylvania Landlord Tenant Law

A contract for rental housing between a landlord and a tenant is markedly different from the employer-employee relationship. Hazleton's ordinance presumes a degree of control that landlords maintain over their tenants as analogous to the employer employee relationship. That analogy is illusory.

While an employee is granted some protections under the law, such as a minimum wage, overtime pay and protections against discrimination[5], an employer ultimately controls how and when work is performed, what benefits are offered, and when employment ends. *McGeehan v. Teco, Inc.*, 1993 U.S. Dist. Lexis 13061 at4-5. Under Pennsylvania law, employment is presumed to be terminable at will. *Id*. The employer also has responsibility for the actions of the employee while the employee is "on the clock" and performing tasks within the scope of employment. *Jaurbe v. Philadelphia*, 288 Pa. Super. 330, 335; 431 A.2d 1073, 1076 (1981). The equivalent to an implied right to quiet enjoyment under landlord tenant law of

[5] See e.g.: 29 U.S.C.S. §206 (minimum wage), 29 U.S.C.S. §207 (maximum hours), 42 U.S.C. § 2000e, et. seq. (equal employment opportunities)

one's employment does not exist. *McGeehan* at 5. An employee does not have the right to perform a job to her own specifications, with total disregard to the directions of the employer—she serves at the pleasure of the company. *Id.* The employer directs the employee on how to accomplish tasks and the worker may be terminated for failing to comply with company policy or, in the case of at will employment, for any reason not precluded by law. *Id.* Many employment relationships in Pennsylvania are not created by a formal contract but, instead, employees serve "at will." *Id*. In this instance, the employee serves at the pleasure of the employer. *Id.* Employment may be terminated at the whim of the owner or manager of the business enterprise. *Id.* Employers may periodically require employees to provide documentation of their immigration status, without violating an implied covenant or other protection that is granted to a tenant.

The landlord-tenant relationship is created by the lease. Generally, the parties to the contract are the landlord or owner of the property and the tenant(s) who execute the rental agreement. Most residential leases also include provisions allowing "other occupants" to occupy the premises (such as the children of the tenants) without signing or being bound to the obligations of the contract.[6] The lease may limit the use of the premises to the tenants and other occupants listed on

[6] See, e.g., the National Apartment Association's Pennsylvania Lease (approved by the Pennsylvania Attorney General for plain language). Exhibit A, The NAA leasing forms are the most widely used residential leases in the country, with more than 70 million pages executed nationally in 2011.

the lease. Otherwise, "guests" of the tenant may occupy the premises on a more limited basis pursuant to the terms of the rental agreement. If the rental agreement is silent, the tenant's implied right to quiet enjoyment affords her the ability to have guests occupy the premises for the entire term if the tenant so chooses. *Branish v. NHP Prop. Mgmt., Inc.*, 694 A.2d 1106, 1107 (Pa. Super. 1997).

A resident enjoys not only the benefits of the lease but also implied contractual rights and warranties provided by both federal and Pennsylvania statutes and common law protections not given to employees in the labor context. For example, Pennsylvanian tenants enjoy the implied warranty of habitability, which cannot be waived by the rental agreement. *Pugh v. Holmes,* 486 Pa. 272; 405 A.2d 897(1979). Similarly, tenants have Fourth Amendment exceptions of privacy in their (rented) homes. *See United States of America v. Bautista*, 362 F.3d 584,590, (9th Cir. 2004); *United States of America v. Paradis*, 351 F.3d 21, 27 (1st Cir. 2003); *Payton v New York*, 445 U.S. 573 (1980).

Moreover, owners of rental housing do not have the same control in amending or terminating the property rights of tenants that employers have over their workers. While the premises are leased, a resident has the right to the quiet enjoyment of the property. *Raker v. G. C. Murphy Co.*, 358 Pa. 339, 342 (Pa. 1948). Once a tenant enters into a lease, the implied right of quiet enjoyment

means that the landlord cannot interfere with the tenant's possession of the premises. *Pugh v. Holmes* at 296.

The implied right to quiet enjoyment of the premises exists even if the lease is silent or purports to waive it *Raker v. G. C. Murphy Co* at 342. Any wrongful act by the landlord that interferes with a tenant's possession is an eviction which subjects the landlord to liability for damages. *Kohl v. PNC Bank National Association et. al.* 590 Pa. 151, 169-70 (Pa. 2006) citing *Kelly v. Miller*, 249 Pa. 314, 315 (Pa. 1915). If the tenant can show that the utility of the rental property is substantially diminished the covenant of quiet enjoyment is breached. *Branish v. NHP Prop. Mgmt., Inc.* at 1107. In *Branish*, the court found a breach of the tenant's right to quiet enjoyment when the landlord threatened to evict her if the tenant's boyfriend visited the property. *Id.*

Employers have the ability to regulate conditions of employment (including immigration status) much more easily than a landlord, who, once the lease is executed, must allow the tenant the quiet enjoyment of the premises. *Raker v. G. C. Murphy Co* at 342. This is an important distinction between an employer who has almost complete power to monitor the employee while on the job and the landlord who must give the tenant a right to the quiet enjoyment of the premises.

Thus, in the immigration context, if a tenant loses his legal status as a result of an expiring visa or other authorization, the landlord would be prevented from

evicting the tenant or otherwise interfering with the possession of the premises. *Raker v. G. C. Murphy Co* at 343. Moreover, Hazleton's definition of harboring is so broad that the landlord is in violation of the ordinance if occupants or guests of the tenant are illegal aliens, even if the tenant himself is not an illegal alien.. Because the tenant has a right to quiet enjoyment of the premises, it would be impossible for the landlord to determine which guests of the tenant are in Pennsylvania illegally and which are not.

Residential tenants also receive protection from both federal and state fair housing laws. 43 P.S. §955 and 42 USCS § 3604 *et seq.* Landlords may not deny housing to tenants in Pennsylvania because of their national origin. 43 P.S. §955 and 42 USCS § 3604 . While a similar protection for national origin exists in the employment context, landlords do not have the same tools that employers have in determining immigration status, especially in Hazleton where most operators of rental housing are local small business owners or individuals.[7] These small business property owners may not have the necessary expertise, staff, and other resources to effectively check the legal residency status of a tenant. By contrast, employers can utilize the well established United States Citizenship and Immigration Services I-9 process to screen prospective employees.

[7] The National Apartment Association conducts an annual survey of apartment management companies and owners. The survey found no national or regional REITS or multifamily residential apartment companies operating in Hazleton.

IV. CONCLUSION

Amici respectfully submit that there is nothing in *Chamber of Commerce v. Whiting* that should cause the Court to reconsider its holding that the housing provisions in the Hazleton ordinance are preempted by the Supremacy Clause of the United States Constitution.

Dated: November 7, 2011

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CERTIFICATE REGARDING ELECTRONIC SUBMISSION

I hereby certify that (1) required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of the corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,852 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14 point type.

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CERTIFICATE OF SERVICE

I hereby certify that this Amicus Brief by the National Apartment Association, the National Multi Housing Council, the Apartment Association of Central Pennsylvania, the Apartment Association of Greater Philadelphia, the Western Pennsylvania Apartment Association, and the Apartment Association of Pennsylvania has been served by transmission of copies thereof through the Court's electronic filing system on this 7th day of November, 2011, to:

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CERTIFICATE OF BAR MEMBERSHIP

In accordance with Third Circuit LAR 46.1(e) Lawrence H. Fisher certifies that he is a member of the Bar of this Court.

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