

REGULATING IMMIGRATION AT THE STATE LEVEL: A FOCUS ON EMPLOYMENT

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INTRODUCTION	219
I. BRIEF HISTORICAL OVERVIEW OF STATE VERSUS FEDERAL AUTHORITY OVER IMMIGRATION	219
II. OVERVIEW OF EXISTING STATE LAWS SEEKING TO DETER THE EMPLOYMENT OF UNAUTHORIZED IMMIGRANTS	223
III. PREEMPTION OF STATE LAWS UNDER THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION	225
IV. OVERVIEW OF THE CURRENT FEDERAL REGULATORY SCHEME, WORKSITE ENFORCEMENT, AND THE IMPACT OF STATE REGULATION	232
V. THE REACH OF STATE IMMIGRATION LAWS, AND WHAT CAN BE DONE TO STOP THEM	236

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INTRODUCTION

In light of the failure of comprehensive immigration reform at the federal level in recent years and in the face of increasing concern about the impact of illegal immigration on local communities, many state, county, and local lawmakers have enacted their own laws and ordinances aimed at the undocumented population and the entities that employ them. Some laws address the employment of undocumented workers by requiring employers to utilize the federal E-Verify Program¹ to verify the work status of new hires. Others prohibit employers from hiring unauthorized workers and punish noncompliance with the denial of business licenses or contracts for work with a state, county, or municipality. Of course, it is already a violation of federal law to employ undocumented non-citizens, so any penalties for these violations are in addition to penalties already set out under federal law. These state laws raise troubling preemption issues that will only be resolved once the Supreme Court weighs in.

Notwithstanding the Obama Administration's avowed intention to enact legislation to usher in comprehensive immigration reform, there is no sign that the trend toward increased state and local immigration legislation will abate so long as there is a perception that major voids remain in the federal strategy to addressing illegal immigration. Focusing on employment—the major magnet attracting undocumented immigrants across our borders—this article provides an overview of existing state laws that seek to deter the employment of unauthorized immigrants and discusses the current status of federal preemption of such laws. These developments must be viewed in the context of the current federal regulatory scheme and federal worksite enforcement trends, as well as the larger history of federal authority over immigration.

I. BRIEF HISTORICAL OVERVIEW OF STATE VERSUS FEDERAL

¹ E-Verify Program—the federal government's Web-based employment eligibility verification program—was originally authorized under legislation enacted in 1996. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)*, Pub. L. No. 104-208, § 404, 110 Stat. 3009-546, 3009-664 to -655 (codified as amended at *Immigration & Nationality Act (INA)* § 274A, 8 U.S.C. § 1324a (2006)). The system provides an automated link to government databases to help employers determine the eligibility of new hires. Department of Homeland Security, E-Verify, http://www.dhs.gov/files/programs/gc_1185221678150.shtm (last visited Jan. 21, 2010).

AUTHORITY OVER IMMIGRATION

Historically, immigration law and policy were almost exclusively within the domain of Congress and federal agencies. States have attempted to usurp some authority in this area in the past, principally during periods of strong anti-immigrant sentiment. For example, following the Civil War, some states, such as California, passed overt exclusion and deportation laws while other states denied civil or economic rights to foreign nationals.² Following World War I, state and local governments reacted against the influx of immigrants by excluding foreign nationals from state-owned natural resources, public works contracts, game hunting, certain trades, and private employment.³ In subsequent years, states attempted to deny foreign nationals welfare, medical, and education benefits and tried to restrict the ability of foreign nationals to become notaries public or to engage in certain professions such as law, civil engineering, teaching, law enforcement, and civil service.⁴ State efforts to regulate immigrants again gained some momentum in the 1990s, with the most prominent attempt being California's Proposition 187.⁵ This proposition, supported by then-Governor Pete Wilson, attempted to discourage unauthorized immigration into California by using a comprehensive scheme of classification,

² See William B. Wong, Comment, *Iron Curtain Statutes, Communist China, and the Right to Devise*, 32 UCLA L. REV. 643, 645-46 (1985).

³ See, e.g., *Crane v. New York*, 239 U.S. 195, 197-98 (1915) (sustaining a conviction based on a criminal statute prohibiting aliens from entering into public works contracts); *Patsone v. Pennsylvania*, 232 U.S. 138, 143-46 (1914) (upholding a statute prohibiting aliens to possess shotguns or rifles); see also *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 393-94, 397 (1927) (prohibiting aliens from maintaining an inherently dangerous enterprise); *Asakura v. Seattle*, 265 U.S. 332, 339-40, 342-44 (1924) (striking down a municipal ordinance prohibiting the granting of pawnbrokers' licenses to non-citizens); *Truax v. Raich*, 239 U.S. 33, 35-37, 43 (1915) (affirming a decree to enjoin the enforcement of an act relating to the conduct of a private enterprise).

⁴ See *Bernal v. Fainter*, 467 U.S. 216, 218 (1984) (notary public); *Plyler v. Doe*, 457 U.S. 202, 205-06 (1982) (education benefits); *Cabell v. Chavez-Salido*, 454 U.S. 432, 433-34 (1982) (civil service); *Ambach v. Norwick*, 441 U.S. 68, 69-71 (1979) (public school teachers); *Foley v. Connelie*, 435 U.S. 291, 292 (1978) (law enforcement); *Examining Bd. of Eng'rs v. Flores de Otero*, 426 U.S. 572, 575-78 (1976) (civil engineers); *In re Griffiths*, 413 U.S. 717, 717-18 (1973) (admission to state bar); *Sugarman v. Dougall*, 413 U.S. 634, 635-38 (1973) (civil service); *Monmouth Med. Ctr. v. Hau Kwok*, 444 A.2d 610, 611-12 (N.J. Super. Ct. App. Div. 1982) (Medicaid).

⁵ California Proposition 187 (approved Nov. 8, 1994), available at <http://www.americanpatrol.com/REFERENCE/prop187text.html>, invalidated by *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995).

reporting, document control, and denial of public benefits.⁶ Soon after its passage, however, Proposition 187 was challenged in federal court by a number of immigrants' rights organizations and a temporary restraining order prevented the enforcement of the initiative. A federal court eventually found that Proposition 187 was preempted by federal law and subsequent administrations refused to pursue the appeal.⁷

Apart from these efforts, state involvement in immigration policy has been defined and circumscribed by federal regulation, mainly through programs authorized under federal law. These joint federal-state efforts have largely been directed toward identifying and detaining criminal foreign nationals for purposes of removal (formerly called deportation). For example, state and local law enforcement agencies have access to immigration status and identity information on foreign nationals suspected, arrested, or convicted of criminal activity through the Law Enforcement Support Center (LESC).⁸ The local authorities will contact U.S. Immigration and Customs Enforcement (ICE) if adverse information is reported by the LESC.⁹ Local law enforcement officials will also contact the nearest ICE office if they suspect that an individual in custody may be a non-citizen in the United States without Department of Homeland Security authorization.¹⁰ Immigration detainers may be placed on removable individuals to ensure orderly transfers from local and state custody to federal custody at the completion of criminal sentences.¹¹ Legislation enacted in 1988 also allows removal hearings to be conducted at state correctional facilities, prior to the completion of the foreign national's criminal sentence.¹²

Other measures adopted in 1990 require states to provide federal immigration authorities with notice of the convictions of non-citizens within thirty days of the date of conviction and a certified record of conviction within thirty days of an ICE request.¹³ Legislation enacted in 1996 expands the authority of

⁶ *Id.*

⁷ *Wilson*, 908 F. Supp. at 786–87.

⁸ See U.S. Immigration & Customs Enforcement, Law Enforcement Support Center: Factsheet, http://www.ice.gov/partners/lesc/lesc_factsheet.htm (last visited Jan. 21, 2010).

⁹ *Id.*

¹⁰ See *id.*

¹¹ 8 C.F.R. § 287.7(a) (2009).

¹² Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347(a), 102 Stat. 4181, 4471 (codified at INA § 238(a), 8 U.S.C. § 1228(a) (2006)).

¹³ Immigration Act of 1990, Pub. L. No. 101-649, § 507(a), 104 Stat. 4978, 5050–51 (codified as amended at INA § 236, 8 U.S.C. § 1226(d)).

local law enforcement to make arrests for violations of the immigration laws by authorizing local police to arrest and detain individuals “illegally present in the United States” who have been “convicted of a felony in the United States and deported or left the United States after such conviction.”¹⁴ Another provision authorizes agreements between the United States and states or localities that would permit qualified state or local officials to enforce federal immigration laws provided they “receive[] adequate training [in] the enforcement of [such] laws.”¹⁵ This initiative has been aggressively pursued in recent years despite serious concerns about its effectiveness.¹⁶ In short, state and local authorities participate in various joint programs with federal authorities in order to facilitate the identification, detention, and eventual removal of a targeted class of non-citizens, that is, so-called criminal aliens.

Politically, the winds have changed since 1986 when the federal government enacted the Immigration Reform and Control Act (IRCA) and made clear its desire to keep employment-related immigration enforcement in the federal domain.¹⁷ In recent years, by contrast, the federal government has generally been happy to allow states to regulate this area, and states have been busy trying to protect what they see as their own interests in limiting the influx of undocumented immigrants by trying to eliminate the magnet of employment that attracts such immigrants. According to the National Conference of State Legislatures, approximately 1,500 pieces of legislation related to immigrants were introduced among the fifty state legislatures in 2009, with 222 laws and 131 resolutions adopted in forty-eight states, “for a total of 353 laws and resolutions nationwide” as of November 20, 2009.¹⁸ Twenty-one of these related to

¹⁴ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 439, 110 Stat. 1214, 1276 (codified as amended at 8 U.S.C. § 1252c(a)).

¹⁵ INA § 287(g)(1)–(2), 8 U.S.C. § 1357(g)(1)–(2).

¹⁶ See, e.g., RICHARD M. STANA, U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 1–2, 23–24 (2009), <http://www.gao.gov/new.items/d09109.pdf>; N.C. Aizenman, *Report Cites Problems In ICE Training Program; GAO Says Key Controls are Missing*, WASH. POST Mar. 4, 2009, at A02; Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009), available at http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

¹⁷ Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3860–74 (1986) (codified as amended at INA §§ 274A–274B, 8 U.S.C. §§ 1324a–1324b).

¹⁸ National Conference of State Legislatures, 2009 State Immigration Laws,

employment.¹⁹ Overall, over sixty-five laws covering about half the states have been enacted imposing “employment eligibility verification requirements and penalties” for noncompliance with state and federal immigration laws.²⁰ In addition, numerous local governments (towns, cities, and counties) around the country have enacted immigration-related ordinances in recent years; the most prominent of such ordinances which targeted employment were those enacted in Hazleton, Pennsylvania, and Valley Park, Missouri, and are still the subject of federal litigation.²¹ ICE’s current enforcement policy emphasizes well-publicized criminal worksite enforcement investigations that are unlikely to escape the attention of local authorities and will serve as the basis of state enforcement actions.²²

II. OVERVIEW OF EXISTING STATE LAWS SEEKING TO DETER THE EMPLOYMENT OF UNAUTHORIZED IMMIGRANTS

State laws (or executive orders) that seek to deter the employment of unauthorized foreign workers have been enacted in twenty-four states.²³ These state laws may be grouped into three categories: (1) those requiring all employers to undertake additional work authorization verification procedures for all new hires, including using E-Verify; (2) those conditioning the receipt of public monies, through contracts or economic incentives, upon implementation of additional work authorization verification steps or upon certification of compliance with immigration law; and (3) those imposing sanctions on employers for employing unauthorized foreign workers.

Specifically, four states require all employers operating in their jurisdictions to complete additional steps to verify the employment eligibility of new hires: Arizona, Colorado, Mississippi, and South Carolina.²⁴ Sixteen states have laws that fall into the second category, which conditions the receipt of

<http://www.ncsl.org/default.aspx?tabid=19232> (last visited Jan. 28, 2010).

¹⁹ *Id.*

²⁰ *See id.*

²¹ *See infra* Part III (discussing these ordinances further).

²² *See infra* Part IV (discussing the federal government’s current enforcement strategy, and its potential impact on enforcement of the new state laws).

²³ *See infra* notes 24–30 and accompanying text.

²⁴ ARIZ. REV. STAT. ANN. § 23-214 (Supp. 2008); COLO. REV. STAT. § 8-2-122(2)–(4) (2008); MISS. CODE ANN. § 71-11-3(4)(b) (West 2009); S.C. CODE ANN. §§ 8-14-20(A)–(B), 41-8-20(B)–(E) (Supp. 2008).

public monies upon certification of compliance with immigration laws or upon implementation of work verification procedures.²⁵ Seven of these states (Colorado, Georgia, Minnesota, Missouri, Oklahoma, Rhode Island, and Utah) require certain public contractors to use E-Verify,²⁶ or other designated programs, to confirm the employment authorization of their employees.²⁷ The other nine states (Arkansas, Idaho, Iowa, Massachusetts, Nebraska, Pennsylvania, Tennessee, Texas, and Virginia) require public contractors, as a condition of their contracts, to certify that they do not and will not employ unauthorized foreign nationals.²⁸ The key feature of all of these laws is that state contracts or economic incentives may be cancelled and other civil fines may be imposed if state authorities discover that the contractor has employed unauthorized workers (e.g., through an ICE enforcement action).

Apart from those states that impose sanctions on businesses with state contracts (listed above), the following states impose sanctions on all businesses or certain types of businesses that hire or continue to employ undocumented workers: Florida, Louisiana, Nevada, New Hampshire, Oregon (farm labor contractors), Virginia, and West Virginia.²⁹ These penalties are in addition to the numerous civil and criminal penalties that may

²⁵ ARK. CODE ANN. § 19-11-105(b)–(e) (2007 & Supp. 2009); COLO. REV. STAT. § 8-17.5-102; GA. CODE ANN. § 13-10-91(b) (Supp. 2009); MO. ANN. STAT. § 285.530(2) (West Supp. 2009); OKLA. STAT. ANN. tit. 25, § 1313 (West Supp. 2008); 43 PA. STAT. ANN. § 166.3 (West Supp. 2009); TENN. CODE ANN. § 12-4-124 (Supp. 2008); TEX. GOV'T CODE ANN. §§ 2264.051, 2264.052 (Vernon 2008); UTAH CODE ANN. § 63G-11-103(3)(a)–(c) (2008); VA. CODE ANN. § 2.2-4311.1 (2008); 2009 Iowa Legis. Serv. 176 (West); Idaho Exec. Order No. 2009-10 (May 29, 2009); Mass. Exec. Order No. 481 (Feb. 23, 2007); Minn. Exec. Order No. 08-01, 32 Minn. Reg. 1284–85 (Jan. 14, 2008); R.I. Exec. Order No. 08-01 (Mar. 27, 2008).

²⁶ This program is an on-line system that allows employers to verify the employment eligibility of new hires by checking their names and other biographic data against government databases. Department of Homeland Security, *supra* note 1.

²⁷ COLO. REV. STAT. § 8-17.5-102(2)(b); GA. CODE ANN. § 13-10-91(a); MO. ANN. STAT. § 285.530(3)–(4); OKLA. STAT. ANN. tit. 25, § 1313; UTAH CODE ANN. § 63G-11-103; Minn. Exec. Order No. 08-01, 32 Minn. Reg. 1284–85; R.I. Exec. Order No. 08-01.

²⁸ ARK. CODE ANN. § 19-11-105(5)(b)(c); NEB. REV. STAT. § 4-114 (Supp. 2009); 43 PA. STAT. ANN. §§ 166.3–166.5; TENN. CODE ANN. § 12-4-124(a)(3); TEX. GOV'T CODE ANN. § 2264.051; VA. CODE ANN. § 2.2-4311.1; 2009 Iowa Legis. Serv. 176; Idaho Exec. Order No. 2009-10; Mass. Exec. Order No. 481.

²⁹ FLA. STAT. ANN. § 448.09 (West Supp. 2009); LA. REV. STAT. ANN. § 23:996 (2009); NEV. REV. STAT. ANN. § 360.796 (LexisNexis 2007); N.H. REV. STAT. ANN. § 275-A:5 (Supp. 2008); OR. REV. STAT. § 658.453(1)(c) (2007); VA. CODE ANN. § 13.1-753(A) (Supp. 2009); W. VA. CODE ANN. § 21-1B-5 (LexisNexis 2008).

be imposed under federal law for knowingly employing or continuing to employ unauthorized workers.

While all of the above-referenced states have laws designed to deter the employment of undocumented workers, one state, Illinois, has tried to take a different approach altogether by emphasizing employee rights and protections.³⁰

III. PREEMPTION OF STATE LAWS UNDER THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION

The numerous state statutes on immigration enacted in the past three years—the period of greatest activity in this area—have triggered new litigation regarding the supremacy of federal law on issues related to immigration. Most recently, on September 17, 2008, the U.S. Court of Appeals for the Ninth Circuit held that individual states could broadly regulate employment practices as they relate to the nation’s immigration

³⁰ 820 ILL. COMP. STAT. ANN. 55/12 (West 2008). In legislation that was originally slated to take effect on January 1, 2008, Illinois sought to buck the nationwide trend toward requiring employers to use E-Verify and, instead, passed a law that would prohibit employers from enrolling in E-Verify “until the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases are able to make a determination on 99% of the tentative nonconfirmation notices issued to employers within 3 days.” 55/12(a). However, the federal government challenged the legality of the law in federal court, and on March 12, 2009, the U.S. District Court for the District of Illinois invalidated these provisions of the act. *See United States v. Illinois*, No. 07-3261, 2009 WL 662703, at *3 (C.D. Ill. Mar. 12, 2009). Other requirements set out in the act, however, were not challenged in the lawsuit and remain in effect, and they impose detailed restrictions on employers that elect to use E-Verify. *See id.* For example, an employer that enrolls in E-Verify is prohibited from using it “to confirm the employment authorization of new hires unless [it] attests, under penalty of perjury” and on a special form created by the Illinois Department of Labor, that: (1) it has received training materials from the DHS; (2) personnel who will administer the program have completed DHS’ tutorial for use of E-Verify; (3) it has posted the notice from DHS “indicating that the employer is enrolled” in E-Verify; (4) it has posted “the anti-discrimination notice issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices” of the U.S. Department of Justice’s Civil Rights Division; and (5) it has posted “the anti-discrimination notice issued by the Illinois Department of Human Rights (IDHR).” 820 ILL. COMP. STAT. ANN. 55/12. These notices must be displayed “in a prominent place that is clearly visible to prospective employees.” 55/12(c)(1). The employer is also required to “notify all prospective employees at the time of application [for employment that E-Verify] may be used for immigration enforcement purposes.” 55/12(c)(4). Employers must also provide “all employees who receive a tentative nonconfirmation” of their employment eligibility from E-Verify “with a referral letter and contact information for what agency the employee must contact to resolve the discrepancy.” 55/12(c)(5).

laws.³¹ Specifically, as discussed further below, the court ruled that states are free to suspend or revoke business licenses for employing foreign nationals who are not authorized to work in the United States.³² The court also held that states may compel employers to participate in the otherwise voluntary federal electronic work authorization verification program, E-Verify.³³

The Supremacy Clause of the Constitution provides that the laws and treaties enacted by the federal government are the supreme law of the land.³⁴ As a result, if there is a conflict between federal and state law, the federal law controls and the state law is preempted.³⁵ Generally, legislative intent controls in determining whether federal law should preempt conflicting state laws.³⁶ As a result, courts will review specific language in the federal statute expressing congressional intent to preempt state law.³⁷ Absent such language, courts may imply preemption of state or local law when a scheme of federal regulation exists that is sufficiently comprehensive to occupy a given field or to make clear that Congress left no room for supplementary state legislation.³⁸ Partial preemption may also be implied to the extent that a state law actually conflicts with federal law “or when state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”³⁹ While there is a presumption against preemption, this presumption applies only “in a field which the States have traditionally occupied.”⁴⁰ On the other hand, if the state acts in an area where there has been “a history of significant federal presence,” the presumption will not apply.⁴¹ Finally, the

³¹ *Chicanos Por La Causa, Inc. v. Napolitano (Chicanos II)*, 558 F.3d 856, 860–61 (9th Cir. 2008).

³² *Id.*

³³ *Id.* As discussed further below, the plaintiffs have sought Supreme Court review. For details about the E-Verify program, see generally Department of Homeland Security, *supra* note 1.

³⁴ U.S. CONST. art. VI, § 2.

³⁵ *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824).

³⁶ *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992).

³⁷ *Id.* at 90.

³⁸ *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04 (1983) (quoting *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)); see *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

³⁹ *Hillsborough County, Fla. v. Automated Med. Labs. Inc.*, 471 U.S. 707, 713 (1985) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁴⁰ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Rice*, 331 U.S. at 230).

⁴¹ *United States v. Locke*, 529 U.S. 89, 108 (2000).

Supremacy Clause encompasses not only federal statutes, but the federal regulations that implement them as well. As a result, a federal agency acting “within the scope of its constitutionally delegated authority” may preempt contrary state law.⁴²

Preemption analysis is more complex with regard to immigration issues, perhaps because the Supreme Court has long recognized that federal power over immigration is a core attribute of national sovereignty and it has thus granted the federal government expansive and exclusive powers over the nation’s immigration policy.⁴³ Historically, the Supreme Court has invalidated state immigration laws due to federal preemption, even when the state law merely complemented federal immigration law and did not interfere with the federal law or its implementation in any way.⁴⁴ In the leading case, *DeCanas v. Bica*, the Supreme Court articulated three tests to use when determining whether federal immigration law preempts state law.⁴⁵ Federal law preempts state law if: (1) the state law intrudes upon the “regulation of immigration”;⁴⁶ (2) Congress effected a “complete ouster of state power including state power to promulgate laws not in conflict with federal laws”⁴⁷ with respect to the subject matter which the statute attempts to regulate; or (3) the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴⁸ More telling was the Court’s application of the three-part test in the case. The Court ruled that a California law prohibiting the employment of foreign nationals without work authorization was not preempted by federal law.⁴⁹ The Court reasoned that a state law relating to the employment of foreign nationals is not a regulation of immigration because it does not seek to determine who should or should not be admitted into the country.⁵⁰ A primary basis of the Court’s ruling was its finding that the employment of foreign nationals was not a “central aim” of the federal immigration scheme at the time the decision was

⁴² NCNB Tex. Nat’l Bank v. Cowden, 895 F.2d 1488, 1494 (5th Cir. 1990) (citing *City of New York v. F.C.C.*, 486 U.S. 57, 63 (1988)).

⁴³ *Id.*; see, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 732 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 609–10 (1889).

⁴⁴ *DeCanas v. Bica*, 424 U.S. 351 (1976); *Hines*, 312 U.S. at 61–63.

⁴⁵ 424 U.S. at 355–57, 363.

⁴⁶ *Id.* at 355.

⁴⁷ *Id.* at 355, 357.

⁴⁸ *Id.* at 363.

⁴⁹ *Id.* at 355–56, 362.

⁵⁰ *Id.* at 355.

rendered in 1976.⁵¹

Of course, the regulation of the employment of foreign nationals did become a central aim of the Immigration & Nationality Act (INA) after passage of the IRCA.⁵² IRCA introduced federally-imposed civil and criminal penalties against employers who knowingly hire or continue to employ undocumented workers.⁵³ In addition to penalties, IRCA imposed a paperwork requirement on all employers to verify the work eligibility of its employees by completing the federal government's Form I-9 employment eligibility verification during initial hiring,⁵⁴ and a requirement that employees present specific documentation to establish work eligibility. To provide safeguards against discrimination, IRCA limits the extent of an employer's inquiry into a job applicant's immigration status.⁵⁵ IRCA also contains an express preemption clause stating, "[t]he 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."⁵⁶ While Congress clearly meant to prevent states and municipalities from imposing civil and criminal penalties upon employers for hiring unauthorized foreign workers, the parenthetical "other than through licensing and similar laws" apparently affirms the validity of state or local laws which, for example, regulate the issuance of licenses to entities that violate IRCA or that disqualify businesses that violate the federal law from government contracts.⁵⁷ The effect of the parenthetical language on state laws that require employers to utilize the federal E-Verify system is less clear. With some exceptions, the E-Verify program is voluntary under federal law.⁵⁸

The proliferation of state and local laws enacted since 2006 addressing the employment of foreign nationals has set off a new round of litigation on preemption grounds. An early case, *Lozano v. City of Hazleton*, was heard by the U.S. District Court for the

⁵¹ *Id.* at 359.

⁵² See INA § 274A, 8 U.S.C. § 1324a (2006), amended by IRCA, Pub. L. No. 99-603, 100 Stat. 3359.

⁵³ IRCA, § 101, 100 Stat. at 3360 (codified as amended at INA § 274A(f)(1), (g)(2), 8 U.S.C. § 1324a(f)(1), (g)(2) (2006)).

⁵⁴ INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2).

⁵⁵ See *id.*

⁵⁶ *Id.*

⁵⁷ See *id.*

⁵⁸ See Department of Homeland Security, *supra* note 1.

Middle District of Pennsylvania.⁵⁹ In that case, the city of Hazleton had passed an immigration-related municipal ordinance in 2006 called the Illegal Immigration Relief Act.⁶⁰ Among its provisions was a requirement that businesses seeking contracts with the city participate in E-Verify, and another under which a business that employed unauthorized workers could lose its local business licenses.⁶¹ A legal challenge filed by a variety of individual plaintiffs and civil and immigrant rights groups challenged the ordinance before it went into effect. Ultimately, the district court granted a preliminary injunction stopping the ordinance from taking effect, holding that “IRCA expressly preempt[ed]” Hazleton’s attempt to sanction employers for hiring unauthorized workers, and specifically going on to find that the parenthetical, “other than through licensing and similar laws,” in IRCA’s preemption clause could not provide justification for the city’s measure.⁶² The court also held that Congress completely occupied the field with respect to immigration and that IRCA “le[ft] no room for state regulation.”⁶³ The city of Hazleton appealed the decision, and the case is currently awaiting a decision from the Third Circuit Court of Appeals.⁶⁴

In a similar case in Oklahoma, business organizations brought suit challenging aspects of the Oklahoma Taxpayer and Citizen Protection Act of 2007,⁶⁵ which, among other things, requires state contractors to utilize a “Status Verification System,” such as the E-Verify Program or the Social Security Number Verification Service, to verify the immigration status of employees.⁶⁶ Relying on the text of IRCA as well as on traditional notions of federal preemption, the Western District of Oklahoma issued a preliminary injunction postponing the implementation of the employment-related aspects of the Oklahoma law.⁶⁷ The district court found that Oklahoma’s requirement that state contractors participate in the program conflicted with, and was preempted by, IRCA, stating simply that “federal law prohibits use of the

⁵⁹ 496 F. Supp. 2d 477 (M.D. Pa. 2007).

⁶⁰ *Id.* at 484.

⁶¹ *Id.* at 520.

⁶² *Id.* at 519–20, 555 (quoting INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2)).

⁶³ *Id.* at 523.

⁶⁴ Brief of Appellant, *Lozano v. City of Hazleton*, No. 07-3531 (3d Cir. Aug. 30, 2007).

⁶⁵ *Chamber of Commerce v. Henry*, No. CIV-08-109-C, 2008 WL 2329164, at *1, *4 (W.D. Okla. June 4, 2008).

⁶⁶ *Id.* at *1.

⁶⁷ *Id.* at *7–*8, *appeal docketed sub nom. Chamber of Commerce v. Edmondson*, Nos. 08-6127, 08-6128 (10th Cir. June 19, 2008).

Status Verification Systems to verify employment eligibility.”⁶⁸ The State of Oklahoma appealed the imposition of the preliminary injunction, and the case is now before the Tenth Circuit Court of Appeals.⁶⁹

In contrast, a district court in Missouri held that a similar municipal ordinance enacted by the city of Valley Park was explicitly authorized by federal immigration law.⁷⁰ As in *Hazleton*, the city of Valley Park enacted an ordinance that provided for the revocation of an employer’s business license if the employer hired unauthorized foreign workers.⁷¹ In finding no preemption in this case, however, the district court held that Valley Park’s ordinance was simply a “regulation of business licens[ure],” something the states have historically regulated.⁷² As such, the normal “presumption against preemption” applied. The court went further in finding that the parenthetical, “other than through licensing and similar laws,” was unambiguous in authorizing states to “pass licensing laws which touch on the subject of illegal immigration.”⁷³ The district court’s ruling with regard to the Valley Park ordinance was appealed to the Eighth Circuit Court of Appeals, where it was affirmed.⁷⁴

The First Circuit Court decision addressing the authority of states to regulate employment practices as they relate to immigration policy is the Ninth Circuit’s decision in *Chicanos Por La Causa, Inc. v. Napolitano*.⁷⁵ The Arizona law that was the subject of *Napolitano*, at least at the time it was enacted, was the broadest and most ambitious of the recent state efforts. The Legal Arizona Workers Act, signed into law on July 2, 2007, imposes penalties on employers that knowingly or intentionally employ unauthorized foreign workers.⁷⁶ First-time violators who

⁶⁸ *Id.* at *8.

⁶⁹ Brief of Plaintiff-Appellee, *Edmondson*, Nos. 08-6127, 08-6128.

⁷⁰ *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294, at *1, *31 (E.D. Mo. Jan. 31, 2008).

⁷¹ *Id.* at *9.

⁷² *Id.* at *8, *19.

⁷³ *Id.* at *12.

⁷⁴ *Gray v. City of Valley Park*, 567 F.3d 976, 979 (8th Cir. 2009).

⁷⁵ 544 F.3d 976 (9th Cir. 2008).

⁷⁶ See Legal Arizona Workers Act, 2007 Ariz. Sess. Laws ch. 279 (codified at ARIZ. REV. STAT. ANN. §§ 23-211 to 23-214) (amending various sections of, and adding various sections to, the Arizona Code). Arizona made a number of technical changes to the Legal Arizona Workers Act in 2008, primarily to clarify that the law only applied to employees hired after January 1, 2008 and that the potential sanctions apply to actions occurring solely within the State of Arizona. Legal Arizona Workers Act, 2008 Ariz. Sess. Laws ch. 152 § 5(d).

knowingly employ unauthorized workers are subject to a three-year probationary period⁷⁷ and may have their business licenses suspended for up to ten days.⁷⁸ First-time violators who intentionally employ unauthorized workers are subject to a five-year probationary period⁷⁹ and may have their business licenses suspended for a minimum of ten days⁸⁰ and will be ordered to terminate the employment of all unauthorized foreign workers in the state.⁸¹ Subsequent violations during the probationary period lead to a “permanent revocation of an employer’s [Arizona] business license.”⁸² The law also requires all employers doing business in the state to verify the work authorization of all new hires using E-Verify.⁸³

The wide-ranging scope of Arizona’s law and the harshness of its sanctions immediately led to lawsuits challenging its constitutionality. Within two weeks of the law’s enactment, business organizations, such as the Arizona Contractors Association, filed a federal lawsuit arguing that the Arizona law was preempted by federal law, and thus could not be legally enforced. Later, immigrants’ rights groups filed a similar lawsuit. Ultimately, the lawsuits were consolidated into a single legal challenge. The U.S. District Court for Arizona initially dismissed the consolidated case for lack of standing,⁸⁴ but the plaintiffs promptly filed a second suit. In February 2008, the district court again dismissed the challenge, but this time on substantive grounds.⁸⁵ Similar to *City of Valley Park*, the district court in *Candelaria* found that business licensure was traditionally a matter of state authority and, as such, the presumption against preemption applied.⁸⁶ The court also found little ambiguity in the parenthetical “other than through licensing and similar laws,” and ruled that it clearly authorized states to suspend or revoke the business licenses of employers

⁷⁷ ARIZ. REV. STAT. ANN. § 23-212(F)(1)(b) (Supp. 2009).

⁷⁸ § 23-212(F)(1)(d).

⁷⁹ § 23-212.01(F)(1)(b).

⁸⁰ § 23-212.01(F)(1)(c).

⁸¹ § 23-212.01(F)(1)(a), (d).

⁸² *Chicanos Por La Causa, Inc. v. Napolitano (Chicanos I)*, 544 F.3d 976, 981 (9th Cir. 2008), *amended and superseded by Chicenos II*, 558 F.3d 856 (9th Cir. 2009); *see* §§ 23-212(F)(2), 23-212.01(F)(2).

⁸³ § 23-214(A).

⁸⁴ *Ariz. Contractors Ass’n, Inc. v. Napolitano*, 526 F. Supp. 2d 968, 971–72 (D. Ariz. 2007), *aff’d sub nom. Chicenos II*, 558 F.3d 856.

⁸⁵ *Ariz. Contractors Ass’n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036, 1061 (D. Ariz. 2008), *aff’d sub nom. Chicenos II*, 558 F.3d 856.

⁸⁶ *Id.* at 1044, 1046.

who knowingly or intentionally employ unauthorized aliens.⁸⁷

The Ninth Circuit upheld the district court's decision in *Candelaria*, finding that preemption did not apply to the Arizona law.⁸⁸ The court found that the key parenthetical, "other than through licensing and similar laws," was unambiguous in permitting states to enact laws such as Arizona's.⁸⁹ Interestingly, the court also noted that the presumption against preemption applied because the "employment of unauthorized aliens remains within the states' historic police powers."⁹⁰ Therefore, the court found that despite Congress' creation of an extensive scheme regulating the employment of foreign nationals, the legal situation since *DeCanas* had not changed.⁹¹

The Ninth Circuit's decision in *Napolitano* is hardly the final word on the preemption issue; in fact, on July 24, 2009, the plaintiffs in *Napolitano* filed a petition for certiorari with the U.S. Supreme Court,⁹² and the Supreme Court has asked the Solicitor General to weigh in on the preemption issue.⁹³

If the Supreme Court declines to grant certiorari, however, it could be some time before any finality is reached on this issue, unless clearer preemption language is enacted by Congress (e.g., in conjunction with a comprehensive reform bill).⁹⁴

IV. OVERVIEW OF THE CURRENT FEDERAL REGULATORY SCHEME, WORKSITE ENFORCEMENT, AND THE IMPACT OF STATE REGULATION

Under the current federal regulatory scheme established by IRCA's employer sanctions statute, employers must satisfy two related, but different, obligations: (1) the employer must not knowingly hire any person not authorized to work in the United States, and must not knowingly continue to employ any such person after learning he or she is not authorized to work in the

⁸⁷ *Id.* at 1045.

⁸⁸ *Chicanos I*, 544 F.3d 976, 988 (9th Cir. 2008).

⁸⁹ *Id.* at 982.

⁹⁰ *Id.* at 984.

⁹¹ *Id.*

⁹² *Chicanos I*, 544 F.3d 976, *petition for cert. filed*, 70 U.S.L.W. 3065 (U.S. July 24, 2009) (No. 09-115).

⁹³ Invitation to file brief, *Chamber of Commerce v. Candelaria*, 130 S. Ct. 534 (Nov. 2, 2009) (No. 09-115).

⁹⁴ For a comprehensive discussion of the preemption issue in the context of the proliferation of state immigration laws and local ordinances, see Gary Endelman & Cynthia Lange, *The Perils of Preemption: Immigration and the Federalist Paradox*, 13 BENDER'S IMMIGR. BULL. 1217, 1217 (2008).

United States; and (2) the employer must verify the employment eligibility of every person hired by the employer, whether the person hired is a citizen or non-citizen, as evidenced by the completion of Form I-9 on behalf of each new hire.⁹⁵

With regard to the first obligation, employer liability is not limited to those situations in which it has actual knowledge that an employee does not have work authorization. An employer may also be liable if it has “constructive knowledge” that an employee is unauthorized to work, that is, the employer deliberately fails to investigate suspicious circumstances.⁹⁶

The verification requirement applies to every employer, even employers of one employee.⁹⁷ The requirement also applies to agricultural associations engaged in recruiting or referring farm workers for a fee.⁹⁸ The two obligations under IRCA are related. The employment eligibility verification procedure provides a record for government investigators, from which they can determine whether the employer is engaged in the knowing employment of unauthorized alien workers.⁹⁹ The verification procedure, when properly completed, provides the employer with a good-faith defense against charges that it engaged in knowing employment of unauthorized alien workers.¹⁰⁰

Employer sanctions enforcement is within the jurisdiction of ICE. ICE may file complaints (notices of intent to fine or NIFs) against employers it has reason to believe violated IRCA’s requirements.¹⁰¹ If the employer challenges the ICE complaint, an administrative hearing is held.¹⁰² Administrative proceedings may lead to the imposition of civil and criminal penalties against the employer.¹⁰³ Civil penalties range from \$275 to \$16,000 for each unauthorized worker and a “pattern or practice” finding may

⁹⁵ INA § 274A, 8 U.S.C. § 1324a (2006).

⁹⁶ The DHS rules define “knowing” to include not only actual knowledge, but also knowledge which “may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition.” 8 C.F.R. § 274a.1(l)(1) (2009). The definition was derived from the first fully litigated employer sanctions case, *Mester Mfg. Co. v. INS*, 879 F.2d 561, 566–67 (9th Cir. 1989).

⁹⁷ However, an alien who provides “domestic service in a private home that is sporadic, irregular or intermittent” is not considered to be an employee under IRCA and thus is not subjected to the verification process. 8 C.F.R. § 274a.1(h).

⁹⁸ INA § 274A(a)(1)(B), 8 U.S.C. § 1324a(a)(1)(B).

⁹⁹ 8 C.F.R. § 274a.2(b)(2).

¹⁰⁰ INA § 274A(a)(3), 8 U.S.C. § 1324a(a)(3).

¹⁰¹ 8 C.F.R. § 274a.9(b).

¹⁰² § 274a.9(e).

¹⁰³ § 274a.10(a)–(b).

lead to a criminal penalty of up to six months imprisonment.¹⁰⁴ Apart from the civil and criminal penalties for hiring violations established by IRCA, Executive Order 12989, issued in 1996, allows federal agencies to bar employers who violate IRCA's hiring provisions from procuring government contracts for one year.¹⁰⁵ Separate civil penalties may be imposed for paperwork violations, that is, violations for failing to maintain I-9 records or failing to properly complete the forms.¹⁰⁶

As a practical matter, ICE in recent years has pursued a strategy of bringing criminal charges against employers who hire undocumented workers and seizing their illegally derived assets in lieu of pursuing administrative fines under IRCA. While the Bush Administration focused, in its last couple of years, on well-publicized worksite raids and large-scale arrests of undocumented immigrants, the Obama Administration has indicated that it will shift its focus to employers.¹⁰⁷ The net result, however—at least as far as employers are concerned—is essentially the same: federal enforcement efforts will focus on the criminal prosecution of employers who knowingly hire undocumented foreign workers.

In the criminal investigations, ICE will often pursue charges of harboring undocumented workers, “money laundering and/or knowingly hiring undocumented workers.”¹⁰⁸ This strategy has been pursued in the context of criminal worksite enforcement investigations as opposed to the less confrontational I-9 audits conducted in the past.¹⁰⁹ “While worksites with a nexus to national security are priorities for ICE, agents” have also targeted industries with a history of large undocumented workforces, including construction, food processing, restaurant, agricultural production, and hospitality.¹¹⁰ ICE's aggressive enforcement strategy, in turn, facilitates the enforcement of the various state penalties for unlawful employment of undocumented foreign workers, as states rely primarily on

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; Exec. Order No. 12989, 3 Fed. Reg. 6091–92 (Feb. 15, 1996), *amended* by Exec. Order No. 13465, 3 Fed. Reg. 33,285 (June 11, 2008).

¹⁰⁶ 8 C.F.R. §§ 274a.2, 274a.10(b)(2).

¹⁰⁷ See DEP'T OF HOMELAND SEC., FACTSHEET: WORKSITE ENFORCEMENT STRATEGY (2009), http://www.ice.gov/doclib/pi/news/factsheets/worksite_strategy.pdf.

¹⁰⁸ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, WORKSITE ENFORCEMENT (2007), <http://www.ice.gov/doclib/pi/news/factsheets/03-29-07-WSE-Fact-Sheet.pdf>.

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

findings of unlawful employment made in conjunction with ICE criminal enforcement actions—or so-called 287(g) actions¹¹¹ by local law enforcement pursuant to their agreements with ICE—to impose penalties on employers under their local statutes.

The law also prohibits “citizenship-status” discrimination, “national origin” discrimination, and document abuse committed by employers.¹¹² During the debate on IRCA, many in Congress were concerned that requiring employers to verify the employment eligibility status of all employees would lead some employers to engage in discrimination against qualified U.S. workers (including citizens and some work-authorized non-citizens) because they are “foreign looking” or “foreign sounding.”¹¹³ While some employers might use the employment verification procedures as a pretext to engage in intentional discrimination, other employers might engage in discrimination because of an overzealous effort to avoid liability under IRCA. Employer actions that may result in a finding of discrimination under IRCA include: (1) refusing to hire a protected individual because of that individual’s national origin or citizenship status; (2) refusing to recall a protected employee because of that individual’s national origin or citizenship status; (3) discharging a protected individual because of that individual’s national origin or citizenship status; and (4) requesting specific documents in completing the employment eligibility verification procedure or refusing to accept documents during the employment eligibility verification procedure that are acceptable documents under the law, that relate to the individual, and that appear on their face to be genuine (these are known as “document abuse” violations).¹¹⁴ Of course, worker protections beyond those included in IRCA exist under other federal laws including Title VII of the 1964 Civil Rights Act,¹¹⁵ the National Labor Relations Act,¹¹⁶ section

¹¹¹ See U.S. Immigration & Customs Enforcement, *supra* note 8; see also 8 C.F.R. § 287.7(a).

¹¹² INA § 274B(a), 8 U.S.C. § 1324b(a) (2006). Discrimination charges are investigated by the Office of Special Counsel within the Justice Department. INA § 274B(c)(2), 8 U.S.C. § 1324b(c)(2). If the charge is substantiated, that office may file a complaint against the employer initiating an administrative hearing on the discrimination charge. INA § 274B(d)(1), 8 U.S.C. § 1324b(d)(1). Civil penalties may be imposed ranging from \$275 to \$16,000 for each worker involved. 28 C.F.R. § 68.52(c) (2009). The employer may also be ordered to rehire the individual “with or without back pay.” § 68.52(d)(1)(iii).

¹¹³ 132 CONG. REC. 33,208, 33,223 (daily ed. Oct. 17, 1986) (statement of Sen. DeConcini).

¹¹⁴ INA § 274B(a), 8 U.S.C. § 1324b(a) (2006).

¹¹⁵ 42 U.S.C. §§ 2000e to e-3 (2006).

1981 of the Civil Rights Act,¹¹⁷ the Occupational Safety and Health Act,¹¹⁸ the Fair Labor Standards Act,¹¹⁹ and the Employee Retirement Income Security Act.¹²⁰ Individual union contracts may also contain protections for foreign nationals beyond those afforded by IRCA. Individual states may also have their own protections against discrimination in employment.

V. THE REACH OF STATE IMMIGRATION LAWS, AND WHAT CAN BE DONE TO STOP THEM

A key issue—perhaps *the* key issue—that is implicated by the proliferation of state laws is the territorial reach of such laws, that is, whether states may regulate employment activity outside of their boundaries. For example, some states now require a company that enters into a contract with the state to attest that it will verify the work status of all new employees through E-Verify, even for business conducted outside the state boundaries.¹²¹ Such provisions have not yet been challenged in court, but the impact of such a requirement is that an employer entering into a contract with such a state may well have to revise its compliance program in all business locations throughout the United States.

Another issue is the obvious conflict between the states and the federal government when it comes to enforcement. Immigration enforcement is a very new issue to most state legislatures. In crafting state regulation in this area, legislators may not realize that the new requirements may conflict with other employer obligations under state or federal law despite their representations that the new laws merely complement existing requirements under IRCA. For example, state law may now require an employer to make further inquiries of an employee's employment status when such inquiry may not be required and may even violate the provisions of IRCA which bar employers from requiring specific documentation or more documentation than the law requires.¹²²

¹¹⁶ 29 U.S.C. §§ 151–169 (2006).

¹¹⁷ 42 U.S.C. § 1981a.

¹¹⁸ 29 U.S.C. §§ 651–678.

¹¹⁹ 29 U.S.C. §§ 201–219.

¹²⁰ 29 U.S.C. §§ 1001–1461.

¹²¹ Minn. Exec. Order No. 08-01, 32 Minn. Reg. 1284–85 (Jan. 14, 2008).

¹²² See OKLA. STAT. tit. 25, § 1313 (2008) (requiring public employers and private employers contracting with the state to utilize the Status Verification System).

In light of ICE's aggressive enforcement policy and the trend towards more state regulation, many employers have adopted policies tilted towards avoiding charges of unlawful hiring of undocumented workers, notwithstanding the many antidiscrimination laws at the federal, state, and local levels, and under collective bargaining agreements that may protect workers in particular cases. IRCA clearly sought, however, to strike a balance between imposing procedures that would deter the employment of unauthorized workers and establishing worker protections so that the verification procedures would not be utilized to discriminate against lawful workers.¹²³ Congress recognized that an overly aggressive approach to work verification by employers, and threats of sanctions against employers, could lead to widespread discrimination against foreign nationals in lawful status and even U.S. citizens.¹²⁴ The new state laws have threatened the balance established by IRCA.

Perhaps a more important question is: should enforcement of the nation's immigration laws be left to the federal government and to the federal government alone? To avoid ending up with a patchwork of fifty different sets of immigration regulations—with some states potentially serving as safe havens for immigrants fleeing the punitive measures enacted in other states—this author would answer that question with a resounding “yes!” The rationale behind state and local legislation related to immigration is that the states must act because Congress will not. But as attorneys Gary Endelman and Cynthia Lange have expressed it, “[a]t the very essence of [the] confusion” between whether state and local laws, such as those discussed above, impinge on federal authority over immigration, or whether they do not constitute a constitutionally impermissible regulation of immigration, is the lack of clarity surrounding the distinction between regulation of immigration, which only Washington DC can do, and the regulation of immigrants which arguably the States can do. *De Canas* [sic] has pointed out the importance of the difference but how it plays out in practice still remains very much to be determined. It is precisely in these interstices that the constitutional struggle will be conducted.¹²⁵

The Supreme Court “has never held that every state enactment

¹²³ BETSY COOPER & KEVIN O'NEIL, MIGRATION POLICY INST., POLICY BRIEF: LESSONS FROM THE IMMIGRATION REFORM AND CONTROL ACT OF 1986, at 2 (2005), http://www.migrationpolicy.org/pubs/PolicyBrief_No3_Aug05.pdf.

¹²⁴ *Id.*

¹²⁵ Endelman & Lange, *supra* note 94, at 1254.

which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted.”¹²⁶ If purely state or local interests are governed, such laws could arguably be enacted without running afoul of federal preemption authority, “provided they are not subterfuges for replacing or substituting for federal authority.”¹²⁷ For example, the enforcement authority delegated to state and local law enforcement under INA § 287(g)¹²⁸ arguably neither replaces nor substitutes for federal authority. Rather, the section enhances and effectuates federal authority, and with a federal stamp of approval to boot. However, it could be argued—and it seems fairly certain that a number of state legislators and governors might agree—that many of the state and local laws enacted in recent years have not been subterfuges at all but, instead, have actually been rather overt attempts to substitute for a federal authority that has been seen as sorely lacking.

It is no coincidence that it is an employment-related state immigration law that is the subject of the recent certiorari petition asking the Supreme Court to weigh in on the preemption issue.¹²⁹ While many of the other local laws enacted in recent years sought to regulate immigration more broadly, such provisions have largely been beaten back. The case of Hazleton, Pennsylvania, for example, is instructive. First it attempted to apply restrictions to “illegal aliens,” but a legal opinion from attorneys with the Congressional Research Service advised that the term was overly vague as it was not defined anywhere in the federal immigration statute.¹³⁰ A separate Hazleton ordinance¹³¹—like similar measures in Valley Park, Missouri,¹³²

¹²⁶ *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

¹²⁷ Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34 (2007).

¹²⁸ INA § 287(g), 8 U.S.C. § 1357(g) (2006).

¹²⁹ Petition for Writ of Certiorari at *i, *Chamber of Commerce v. Candelaria*, 2009 WL 2331990 (U.S. July 24, 2009) (No. 09-115).

¹³⁰ Memorandum from Jody Feder & Michael Garcia, Cong. Research Serv. on Legal Analysis of Proposed City of Hazelton Illegal Immigration Relief Act Ordinance to Hon. Paul E. Kanjorski (June 29, 2006), <http://www.ailadownloads.org/advo/CRS-HazeltonMemo.pdf>.

¹³¹ Hazleton, Pa., Ordinance 2006-13 § 7 (Aug. 15, 2006), http://www.hazletoncity.org/090806/200613%20_Landlord%20Tenant%20Ordinance.pdf.

¹³² See *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294, at *1 (E.D. Mo. Jan. 31, 2008). While a federal district court upheld the employment provisions of the Valley Park ordinance, it should be noted that two earlier Valley Park ordinances, which attempted to deny housing to undocumented immigrants, were struck down by a Missouri state court.

Riverside, New Jersey,¹³³ and Farmers Branch, Texas¹³⁴—attempted to prevent landlords from renting to undocumented immigrants. In all of these cases, the housing provisions have either been struck down (such as in the Hazleton and Farmers Branch cases) or withdrawn or repealed by lawmakers (as in the Valley Park case), leaving local lawmakers to focus on employment—because the savings clause related to licensing in the IRCA preemption provision appears to have left the door open for states to enact such licensing-specific measures.

Will such laws survive? Professor Nathan G. Cortez has argued:

[I]f there is a place for state and local governments in the legal tug-of-war over immigration, it is in verifying *eligibility* for state or local benefits. State or local actors should not be relied upon to make independent, discretionary determinations of immigration status, even if they are directed to use federal standards.¹³⁵

Arguably, the Arizona law fits the bill: it requires employers within the state to use the *federal* E-Verify program to verify an employee's eligibility for employment within the state. The certiorari petition asks the Supreme Court to determine, among other things, "whether the Arizona statute is impliedly preempted because it undermines the 'comprehensive scheme' that Congress created to regulate the employment" of non-citizens.¹³⁶ Furthermore, it also contends that the Arizona statute relies on a state determination of immigration status.¹³⁷ How, or if, the Supreme Court responds will determine how states proceed, whether or not Congress decides to act.

The simpler solution—and, I would argue, the better one—would be for Congress to close the gap in the current federal regime that has allowed state immigration employment laws to

¹³³ Riverside, N.J., Ordinance 2006-26 § 166-5 (July 26, 2006), <http://clearinghouse.wustl.edu/chDocs/public/IM-NJ-0001-0006.pdf>. The town eventually repealed the ordinance due to the mounting costs associated with defending it against legal challenges.

¹³⁴ Farmers Branch, Tex., Ordinance 2892 § 2 (Nov. 13, 2006), <http://clearinghouse.wustl.edu/chDocs/public/IM-TX-0001-0002.pdf>. A federal district court enjoined the town from enforcing a second iteration of the ordinance in *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 761, 777 (N.D. Tex. 2007).

¹³⁵ Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. REV. 47, 66 (2008).

¹³⁶ Petition for Writ of Certiorari at *i, *Chamber of Commerce v. Candelaria*, 2009 WL 2331990 (U.S. July, 24, 2009) (No. 09-115).

¹³⁷ *Id.* at *4.

proliferate in the first place. The Supreme Court has been asked, in the Arizona case, to rule on the specific preemption language in the federal immigration statute related to the employment of non-citizens.¹³⁸ If the Court strikes down the Ninth Circuit's ruling that the savings clause in IRCA—expressly preempting state or local laws imposing either civil or criminal sanctions on those who employ or recruit unauthorized foreign workers “other than through licensing and similar laws”¹³⁹—allows states to impose such sanctions so long as they wear the mantle of a business license or “similar” garb, it will effectively invalidate all such laws. If it does not, it will, instead, be signaling that it is up to Congress—which has traditionally been vested with plenary power over immigration¹⁴⁰—to decide whether individual states are empowered to regulate the employment of non-citizens within their borders. While both the White House and Congress have announced their intention to fix our broken immigration system, with a new balance of power in both the House and Senate—as well as a bruising fight over health care reform that is likely to leave deep political scars—it is anyone's guess how aggressively Congress will eventually act to restructure existing law.

With immigration reform on the horizon, however, this would be an ideal time to close the gap in the current federal regime that has allowed state laws to proliferate. More importantly, Congress needs to enact meaningful, comprehensive immigration reform that reassures states that they need not act on their own to protect what they perceive—rightly or wrongly—to be assaults on their own economies and on their residents' livelihoods.

¹³⁸ *Id.* at *i.

¹³⁹ INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2006).

¹⁴⁰ *See supra* notes 35–43 and accompanying text.