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# RAIDING THE AMERICAN WORKPLACE: FEDERAL PREEMPTION AND STATES' RIGHTS IN CURBING UNLAWFUL ALIEN EMPLOYMENT

HAJRA I. MALIK\*†

*“Worksite enforcement actions target a key component of the illicit support structure that enables illegal immigration to flourish. No employer, regardless of industry or location is immune from complying with the nation’s laws.”*<sup>1</sup>

## INTRODUCTION

In recent years, the American workplace has become a new battleground for federal and local enforcement of immigration laws. In fiscal year 2008, Immigration and Customs Enforcement (ICE) arrested approximately 6,000 illegal aliens at worksites throughout the United States—over a tenfold increase from just six years earlier.<sup>2</sup> Employers have not remained immune from ICE operations either, with over 135 individuals criminally arrested during workplace raids in fiscal year 2008 for having knowingly hired illegal aliens.<sup>3</sup>

Although federal immigration laws have existed since 1986 to regulate and/or penalize employers for the unlawful employment of illegal aliens, increasingly state legislatures are enacting laws targeting these employers and mandating penalties ranging from criminal sanctions to business license revocation for those who are found to have knowingly hired illegal aliens. These state laws are now facing legal challenges on federal preemption grounds.<sup>4</sup> Employers and immigrant rights advocates are asserting that these state initiatives are preempted by the federal government’s exclusive authority to regulate immigration.<sup>5</sup>

This article addresses the validity of these state initiatives in light of the doctrine of federal preemption. Part I examines the doctrine of federal preemption in the immigration context, with specific regard to an express preemption provision found within federal legislation targeting alien employment that contains a “cryp-

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\* University of New Mexico School of Law, Class of 2010. I would like to thank Professor Michael B. Browde for his insight and mentorship throughout the writing process and my editors, Kevin Pierce and Neil Bell, for their patience and tireless efforts to better this article.

† Shortly before this article went to print, Arizona passed a new immigration measure, in an effort to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); *see also* Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1 (describing national controversy surrounding passage of the Arizona law). The new law gives Arizona law enforcement officials the authority to question and/or detain any individual as to his/her immigration status where the law enforcement official has “reasonable suspicion” that the individual is unlawfully present in the United States. *See* Ariz. S.B. 1070. The Arizona law goes well beyond the scope of this article, which deals with state laws targeting the unlawful employment of unauthorized aliens. It highlights, however, with even greater force the federal–state clash of authority dealt with in this article, and may help stimulate the kind of action by Congress and/or the Supreme Court called for in this piece. *See* John Schwartz & Randal C. Archibold, *A Law Facing a Tough Road Through the Courts*, N.Y. TIMES, Apr. 28, 2010, at A17.

1. Julie L. Myers, Assistant Sec’y for Homeland Sec., U.S. Immigration and Customs Enforcement, [http://www.ice.gov/pi/news/factsheets/worksite\\_cases.htm](http://www.ice.gov/pi/news/factsheets/worksite_cases.htm) (last visited Mar. 13, 2010).

2. U.S. Immigration and Customs Enforcement, <http://www.ice.gov/pi/news/factsheets/worksite.htm> (last visited Mar. 13, 2010).

3. *Id.*

4. *See infra* Part II.B.

5. *See infra* Part II.B.

tic” savings clause.<sup>6</sup> Part II describes the use of this savings clause by states and local municipalities to enact legislation targeting the business licenses of employers who hire unauthorized aliens and examines how courts have variously applied established preemption principles to uphold, or invalidate, these laws. In light of the circuit split on this issue and the absence of clear congressional intent regarding the scope of the savings clause, this article raises in Part III the serious policy and practical consequences of these laws that courts must address, where an important federal interest in immigration control finds itself in tension with a traditional area of state power over the licensing of local businesses.

## I. FEDERAL PREEMPTION DOCTRINE IN THE CONTEXT OF IMMIGRATION

### A. Federal Preemption Doctrine Generally

The doctrine of federal preemption is rooted in the Supremacy Clause of the U.S. Constitution,<sup>7</sup> under which state laws are held invalid if they “interfere with, or are contrary to the laws of Congress, made in pursuance of the [C]onstitution.”<sup>8</sup> Federal preemption applies in the same manner to local ordinances as it does to state laws.<sup>9</sup> In any preemption analysis, courts rely heavily on ascertaining congressional intent.<sup>10</sup> A federal statute typically shows congressional intent to preempt through the scope and detail of the federal statute and/or the legislative history of that statute.<sup>11</sup>

Federal preemption falls into two categories: express or implied.<sup>12</sup> In express preemption, a federal statute explicitly asserts Congress’ intent to preempt certain state laws.<sup>13</sup> In the absence of explicit language within a statute, implied preemption is possible in two ways: field or conflict preemption.<sup>14</sup> Field preemption works to preempt state statutes when a federal statute implicitly shows congressional intent to occupy the entire legislative field—i.e., when the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>15</sup> Field preemption is also found when the federal law touches “a field in which federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”<sup>16</sup> Conflict preemption, on the other hand, applies when compliance with

6. See *infra* Parts I.B, II.A.

7. U.S. CONST. art. VI, cl. 2; see also *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (“[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.” (internal quotation omitted)).

8. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 82 (1824).

9. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (“[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.”).

10. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.” (internal quotation omitted)).

11. *Id.* at 485–86.

12. *Gade*, 505 U.S. at 98.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

both the federal law and state law is not possible, or when the state law is “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>17</sup>

### *B. Preemption Doctrine in the Context of Immigration*

The federal government has exercised broad power in regulating immigration.<sup>18</sup> This plenary power is derived from the express constitutional authority of Congress to create a uniform rule of naturalization<sup>19</sup> and regulate commerce with foreign nations.<sup>20</sup> The Supreme Court has a long history of confirming Congress’ exclusive authority over immigration.<sup>21</sup> The Court has defined “immigration law” as those laws that concern “what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”<sup>22</sup> It is important to note that courts often utilize the distinction between immigration law, as defined by the Supreme Court, and alienage law, i.e., those laws that merely concern matters related to an immigrant’s legal status, to ascertain whether a state law encroaches on the federal government’s exclusive authority to make immigration law.<sup>23</sup> Alienage laws are not *per se* preempted as the Supreme Court explained in the landmark immigration case, *De Canas v. Bica*,<sup>24</sup> that “[not] every state enactment which in any way deals with aliens is a regulation of immigration and thus, *per se* pre-empted by [the federal] constitutional power [to regulate immigration].”<sup>25</sup>

Decided in 1976, *De Canas* involved a challenge to a California statute that prohibited employers from “knowingly employ[ing] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.”<sup>26</sup> In a unanimous decision, the Court upheld the law, after declining to find it unconstitutional either as an attempt to regulate the field of immigration and naturalization or as being preempted under the Supremacy Clause by the Immigration and Nationality Act.<sup>27</sup>

In its preemption analysis,<sup>28</sup> the Court offered three primary reasons for upholding the California law. First, the Court reasoned that the statute was not a regula-

17. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

18. *Truax v. Raich*, 239 U.S. 33, 42 (1915) (“The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government.” (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893))).

19. U.S. CONST. art. I, § 8, cl. 4.

20. U.S. CONST. art. I, § 8, cl. 3.

21. In the late nineteenth century, the Supreme Court described the federal immigration power as part of national sovereignty and a plenary power that is not subject to judicial restraint. *See, e.g.*, *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603–09 (1889); *see also De Canas v. Bica*, 424 U.S. 351, 354 (1976) (indicating that the “[p]ower to regulate immigration is unquestionably exclusively a federal power”).

22. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948).

23. *De Canas*, 424 U.S. at 354–55.

24. 424 U.S. 351 (1976).

25. *Id.* at 355.

26. *Id.* at 352 (quoting CAL. LAB. CODE § 2805 (1971) (repealed 1988)). For statutory violations, employers were assessed civil penalties ranging from \$200 to \$500 per offense. *Id.* at 353 n.1.

27. *Id.* at 352–54; *see also infra* Part II.A (discussing Immigration and Nationality Act).

28. The Court’s preemption analysis in *De Canas* has been referred to as a three-part test in other sources. *See, e.g.*, Kathryne J. Couch, *This Land Is Our Land, A Local Solution to a Local Problem: State Regulation of Immigration through Business Licensing*, 21 GEO. IMMIGR. L.J. 641, 649 (2007). However, the

tion of immigration, an area of exclusive federal control that the Court narrowly defined as “a determination of who should or should not be admitted into the country.”<sup>29</sup> Instead, the Court found the law to be a valid exercise of California’s police power to regulate employment and protect its citizens from the “deleterious effects on its economy resulting from the employment of illegal aliens . . . .”<sup>30</sup> Second, the Court reasoned that because the federal Immigration and Nationality Act, at the time, did not contain any provisions related to alien employment and instead was primarily concerned with the “terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in this country,” it was not Congress’ “clear and manifest purpose” to oust states from regulating the employment of illegal aliens.<sup>31</sup> Finally, the Court referenced other congressional provisions as evidence that Congress, at the time, “intend[ed] that States may, to the extent consistent with federal law, regulate the employment of illegal aliens.”<sup>32</sup>

Despite some concerns about its continued vitality in the context of current immigration law development, *De Canas* remains the law. Some commentators contend that because *De Canas* was followed by federal legislation targeting alien employment,<sup>33</sup> the case would be decided differently today and can no longer stand for the premise that Congress did not intend a complete ouster of state power in the area of alien employment.<sup>34</sup> However, since the *De Canas* court so narrowly limited the field of immigration to those laws involving the entry and removal of aliens from the United States, others consider this to give states “running room” to enact laws involving alien employment under their 10th Amendment<sup>35</sup> authority because these laws are not *per se* “immigration laws” as defined by the *De Canas* court.<sup>36</sup> Furthermore, in later Supreme Court jurisprudence, the Court has relied on *De Canas* as support for the position that despite federal power over immigration, “[s]tates do have some authority to act with respect to illegal aliens, at least

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preemption analysis in *De Canas* merely reflects the Court’s application of the doctrine of federal preemption to the area of immigration. For example, the *De Canas* Court raised the principle of field preemption by indicating that federal law preempts any state attempt to regulate immigration, an area of exclusive federal control and one that the federal government intended to occupy. 424 U.S. at 354–55, 357. Similarly, the Court raised conflict preemption by declaring that state legislation is invalidated under the Supremacy Clause if it “burdens or conflicts in any manner with any federal laws or treaties.” *Id.* at 357 n.5. The Court’s application of these principles is discussed within the text of this article. See *infra* notes 29–32 and accompanying text.

29. *De Canas*, 424 U.S. at 354–56.

30. *Id.* at 357.

31. *Id.* at 358–59. The Immigration and Nationality Act was later amended to include provisions addressing unlawful alien employment. See *infra* Part II.A.

32. *De Canas*, 424 U.S. at 361. As persuasive evidence that Congress did not intend federal exclusivity in the field of alien employment, the Court relied on certain agriculturally related alien employment provisions from the 1974 amendments to the Farm Labor Contractor Registration Act, which stated that they were “intended to supplement State action” and did not excuse “compliance with appropriate State law and regulation.” *Id.* at 362 (emphasis added).

33. See *infra* Part II.A (discussing the Immigration and Reform Control Act which amended the Immigration and Nationality Act).

34. Gary Endelman & Cynthia J. Lange, *State Immigration Legislation and the Preemption Doctrine*, 1698 PRAC. L. INST./CORP. 123, 169–75 (2008) (discussing the debate among the courts and commentators regarding the vitality of *De Canas*).

35. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

36. Indeed, the narrow definition of immigration laid out in *De Canas* has been favorably used by lower courts to find that state laws involving alien employment are not preempted by federal legislation in the area. See *infra* Part II.B.2–3.

where such action mirrors federal objectives and furthers a legitimate state goal.”<sup>37</sup> As discussed in Parts II and III of this article, lower courts are struggling to ascertain the degree to which *De Canas* can be used as support against preemption of state initiatives targeting alien employment. It remains to be seen whether the Supreme Court will change its course in this area. Despite what may happen, it is important to acknowledge that *De Canas* precedes important federal legislation targeting unlawful alien employment, as discussed in the next section, and therefore, should be carefully applied by lower courts in their preemption analyses.

## II. REGULATION OF ALIEN EMPLOYMENT

### A. Federal Legislation

Enacted in 1952, the Immigration and Nationality Act (INA) was the first comprehensive federal statute in the area of immigration.<sup>38</sup> The INA, as enacted, did not contain any provisions related to the unlawful employment of aliens.<sup>39</sup> Many, including the Supreme Court, felt this omission by Congress indicated that the federal government had, at best, only a “peripheral concern” with the employment of illegal aliens.<sup>40</sup> However, in the 1970s, Congress began to focus on sanctioning employers for the unlawful employment of illegal aliens—mostly as a result of its belief that employment was the lure for immigrants to enter the country illegally and therefore, the “principal means of closing the back door [on illegal immigration], or curtailing future illegal immigration, [was] . . . through employer sanctions [for those who hired illegal aliens].”<sup>41</sup>

After years of public debate on the matter, Congress enacted the Immigration Reform and Control Act (IRCA) in 1986.<sup>42</sup> IRCA amended the INA to include regulations for the employment of aliens.<sup>43</sup> Specifically, IRCA made it unlawful “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.”<sup>44</sup> Towards this end, IRCA created the I-9 process, a document-based employment verification system to be used to establish the work eligibility of every prospective employee.<sup>45</sup> IRCA also included a method for determining employer violations and assessing sanctions

37. *Plyler v. Doe*, 457 U.S. 202, 225 (1982). Although *Plyler* was decided entirely on equal protection grounds, the Court, *in dicta*, stated that “[d]espite the exclusive federal control of this Nation’s borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.” *Id.* at 228 n.23.

38. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

39. See H.R. REP. NO. 82-1365 (1952).

40. *De Canas v. Bica*, 424 U.S. 351, 360 n.9 (1976) (“Indeed, Congress’ failure to enact such general sanctions [laws criminalizing the knowing employment of illegal aliens] reinforces the inference that . . . Congress believes this problem does not yet require uniform national rules and is appropriately addressed by the States as a local matter.”).

41. H.R. REP. NO. 99-682, pt. 1, at 46 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5650.

42. *Id.*

43. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

44. 8 U.S.C. § 1324a(a)(1)(A) (2006).

45. *Id.* § 1324a(b).

against them—ranging from civil and criminal penalties to injunctive relief.<sup>46</sup> Congress believed that these penalties would deter employers from hiring unauthorized aliens and that this would, in turn, “deter aliens from entering [the country] illegally or violating their status in search of employment.”<sup>47</sup> In passing IRCA, it became clear to the Supreme Court that “combating the employment of illegal aliens [was now] central to the policy of immigration law.”<sup>48</sup>

To preserve its authority in the area of unlawful employment of aliens, Congress included an express preemption clause within IRCA:

(2) 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.<sup>49</sup>

This provision made clear that Congress expressly intended to prevent states from imposing civil and criminal penalties upon employers who hire unauthorized aliens. Interpretation of the meaning of the savings clause (“other than through licensing or similar laws”), however, has been problematic.<sup>50</sup> A House Report describing IRCA’s passage indicates that IRCA’s preemption clause was not intended to preempt two categories of state activities:

- 1) Lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in [IRCA]
- 2) Licensing or ‘fitness to do business laws,’ such as state farm labor contractor laws or forestry laws, which specifically require [an employer] to refrain from hiring, recruiting or referring undocumented aliens.<sup>51</sup>

With little congressional guidance or legislative history, states and local municipalities are increasingly enacting what they consider “licensing laws” to penalize employers for the unlawful employment of aliens. In doing so, the scope and very meaning behind the savings clause has been subject to interpretation and applied in divergent fashions.<sup>52</sup> As discussed below, there is wide judicial disagreement as to whether IRCA expressly preempts or expressly authorizes these state employer-sanction laws.<sup>53</sup>

46. Civil penalties range from \$250–\$2,000 for each unauthorized alien for a first violation and increase to \$3,000–\$10,000 per unauthorized alien for subsequent violations. *See id.* § 1324a(e)(4)(A). Employers who have a “pattern or practice of violations” are subject to criminal penalties, which include imprisonment for not more than six months. *See id.* § 1324a(f)(1). In addition, U.S. district courts can enjoin employers from engaging in “pattern or practice violations.” *See id.* § 1324a(f)(2).

47. H.R. REP. NO. 99-682, pt. 1, at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

48. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (internal citation omitted).

49. 8 U.S.C. § 1324a(h)(2) (2006).

50. Endelman & Lange, *supra* note 34, at 129–30.

51. H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

52. *See infra* Part II.B.

53. *See infra* Part II.B.

## B. State Legislation

State legislation concerning immigrants, and specifically the employment of unauthorized aliens,<sup>54</sup> has increased rapidly over the last several years. The National Conference of State Legislatures reported that in 2008, forty-one states enacted a total of 206 laws and resolutions relating to immigrants.<sup>55</sup> As recently as August 2008, approximately twenty-three states had adopted legislation involving unlawful alien employment and worksite enforcement.<sup>56</sup> The increase in legislation is largely the result of states' growing frustration with the lack of federal enforcement of penalties against those employers who violate IRCA<sup>57</sup> and the fiscal burden of illegal immigration at the state and local level.<sup>58</sup> State and local discontent in this area is further compounded by general consensus among government officials, the courts, and immigration practitioners that comprehensive immigration reform is needed at the federal level.<sup>59</sup>

Recently, through the use of IRCA's savings clause, state and local municipalities have begun to enact what they consider "licensing laws" to sanction employers who hire unauthorized aliens.<sup>60</sup> Facing constitutional challenges to their validity, courts have reached contrary conclusions as to whether IRCA preempts these laws and what the scope and meaning behind IRCA's savings clause is.

### 1. *Lozano v. City of Hazleton*<sup>61</sup>

In 2006, a group of lawful permanent residents, undocumented immigrants, and Latino organizations filed a lawsuit challenging the validity of the City of Hazleton's Illegal Immigration Relief Act Ordinance (IIRA) and Tenant Registration

54. An unauthorized alien, as defined by IRCA, refers to an alien who is not "lawfully admitted for permanent residence" or not "authorized to be so employed by [IRCA] or by the Attorney General." 8 U.S.C. § 1324a(h)(3) (2006). In addition to the term "unauthorized alien," this article may also refer to these individuals as "illegal aliens," another phrase that is used in federal immigration laws to refer to those individuals who are not lawfully present in the United States.

55. DIRK HEGEN, IMMIGRANT POLICY PROJECT, NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION IN 2008, at 1 (revised Jan. 27, 2009), available at <http://www.ncsl.org/print/immig/StateImmigReportFinal2008.pdf>.

56. Endelman & Lange, *supra* note 34, at 132. In 2008 alone, thirteen states enacted nineteen laws in the area of employment of immigrants, with many of these laws involving employer sanctions. See HEGEN, *supra* note 55, at 5–8.

57. In upholding a state law sanctioning employers for hiring unauthorized aliens, the Ninth Circuit Court of Appeals noted the "[state's] rising frustration with the United States Congress's failure to enact comprehensive immigration reform." *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860 (9th Cir. 2009). Similarly, an Oklahoma law targeting employers was "approved [by the legislature] because of the complete failure of the federal government to enforce existing immigration laws." News Release, Okla. H.R., Johnson: Oklahoma's Immigration Law Moves State in Right Direction (Dec. 4, 2007) available at <http://www.okhouse.gov/OkhouseMedia/ShowStory.aspx?MediaNewsID=1362>.

58. See, e.g., Kris W. Kobach, *Administrative Law: Immigration, Amnesty and the Rule of Law*, 2007 National Lawyers Convention of the Federalist Society, 36 HOFSTRA L. REV. 1323, 1324–25 (2008) (positing that low-skilled aliens, many of whom are illegal, impose a net fiscal cost of \$89.1 billion a year that falls on the shoulders of state and local governments).

59. See, e.g., Janet Napolitano, *The Myth of Amnesty: The Senate Immigration Bill vs. a Disastrous Status Quo*, WASH. POST, June 10, 2007, at B07 ("State measures, however, will never substitute for federal legislation that addresses all aspects of immigration, from border security to employer sanctions to pathways to citizenship. It is fundamentally unfair and unrealistic to suggest that our system remain as it is and ignore the 12 million who ran the gantlet at the border and managed to find work in our country . . . We need comprehensive [federal immigration] reform, and we need it this year.").

60. See *infra* Part II.B.1–4.

61. 496 F. Supp. 2d 477 (M.D. Pa. 2007).



Ordinance (RO).<sup>62</sup> Hazleton's IIRA ordinance penalized any business found to employ illegal aliens by suspending its business permit.<sup>63</sup> Among other things, the plaintiffs alleged that IIRA was unconstitutional on federal preemption grounds.<sup>64</sup>

The city argued that IIRA was a "licensing law" that fell within IRCA's savings clause and as such, was not preempted by federal law.<sup>65</sup> The city interpreted the savings clause to "allow regulation of employers with regard to [the] hiring [of] unauthorized workers as long as instead of a criminal or civil sanction, the sanction that is imposed is the suspension of the employer's business permit."<sup>66</sup> The court rejected this interpretation, finding that forcing an employer out of business by suspending its business license was the "ultimate sanction" and contrary to the plain language of IRCA's express preemption provision.<sup>67</sup> The court stated that "[i]t would not make sense for Congress in limiting the state's authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty. Such an interpretation renders the express preemption clause nearly meaningless."<sup>68</sup>

The court also relied on IRCA's legislative history as further support that the city's IIRA ordinance did not fall within IRCA's savings clause.<sup>69</sup> Finally, despite the city's insistence, the court found that the general presumption against preemption did not apply.<sup>70</sup> Relying on *Medtronic, Inc. v. Lohr*,<sup>71</sup> the court explained that a presumption against preemption applies in areas that the states have "traditionally occupied."<sup>72</sup> The court refused to apply this presumption because it found that IIRA concerned immigration, an area that is a "federal concern [and] not a state or local matter."<sup>73</sup>

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62. *Id.* at 484–86.

63. *Id.* at 519. The other challenged city ordinance, the Tenant Registration Ordinance, required renters to have occupancy permits, which could only be obtained with proof of lawful residence or U.S. citizenship. *Id.* at 484. The court found this ordinance to be preempted by federal laws. *Id.* at 556.

64. *Id.* at 485.

65. *Id.* at 519.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 519–20. In reviewing the legislative history behind IRCA's savings clause (i.e., the House Report discussed earlier), the district court judge found that a *valid* state "licensing law" revokes a business license "for a violation of the federal IRCA sanction provisions." *Id.* at 519. The court found that the Hazleton ordinance did *not* do this because it revokes a business license for a violation of *local* laws (namely IIRA here). *Id.* at 520. As such, the court held that IIRA was not a valid licensing law under IRCA's savings clause. *Id.* It also found that IIRA was not a "fitness to do business" law because the ordinance did not involve an employer's "character as it relates to his or her ability to be engaged in a certain business activity." *Id.*

70. *Id.* at 518 n.41.

71. 518 U.S. 470 (1996).

72. *Hazleton*, 496 F. Supp. 2d at 518 n.41.

73. *Id.*

The court ultimately concluded that the IIRA city ordinance was expressly preempted by federal law.<sup>74</sup> The case is currently on appeal in the Third Circuit Court of Appeals.<sup>75</sup>

## 2. *Chicanos Por La Causa, Inc. v. Napolitano*<sup>76</sup>

In 2007, two plaintiff groups, comprising various business and civil rights organizations similar to the *Hazleton* plaintiffs, filed lawsuits challenging the validity of the Legal Arizona Workers Act (LAWA).<sup>77</sup> Enacted by the Arizona legislature in July 2007, LAWA targets employers who “knowingly or intentionally” hire unauthorized aliens and sanctions them by revoking or suspending their state licenses to do business in Arizona.<sup>78</sup> In signing the law, Arizona’s governor stated that LAWA’s scheme is “the most aggressive . . . in the country” and that revoking licenses is a “business death penalty.”<sup>79</sup>

Similar to the *Hazleton* plaintiffs, the Arizona plaintiffs argued that LAWA was expressly preempted by IRCA because it was not a licensing law that fell within IRCA’s saving clause.<sup>80</sup> However, contrary to the holding in *Hazleton*, the Ninth Circuit affirmed the lower court’s holding that LAWA is not expressly preempted by IRCA because it “is a ‘licensing’ measure that falls within the savings clause of

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74. The court also found that *Hazleton*’s IIRA ordinance was invalid on the basis of implied preemption. *Id.* at 521, 529. In doing so, the court relied upon existing Supreme Court jurisprudence that a finding of express preemption does not preclude an implied preemption analysis. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 288–89 (1995). In *Hazleton*, the court held that IIRA was subject to field preemption because in the context of immigration, “the pervasiveness of the federal regulation precludes supplementation by the States” and the “federal interest in the field is sufficiently dominant.” *Hazleton*, 496 F. Supp. 2d at 521. The court found conflict preemption between IRCA and *Hazleton*’s IIRA ordinance because although they shared similar goals, conflict arose from the means employed to reach the goal. *Id.* at 526–29.

75. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *appeal docketed*, No. 07-3531 (3d Cir. Aug. 3, 2007).

76. *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976 (9th Cir. 2008), *superseded and amended by* 558 F.3d 856, 860 (9th Cir. 2009). The Ninth Circuit case was an appeal of a consolidated action at the district court level: *Ariz. Contractors Ass’n, Inc. v. Napolitano*, 526 F. Supp. 2d 968 (D. Ariz. 2007), and *Ariz. Contractors Ass’n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008).

77. *Chicanos Por La Causa*, 558 F.3d at 860.

78. *Id.* at 862; *see also* ARIZ. REV. STAT. ANN. §§ 23-212, -212.01 (2008). LAWA also requires that employers verify the employment eligibility of their employees through the Basic Pilot Program. *See id.* § 23-214. The Basic Pilot Program (also known as E-Verify) was created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *Chicanos Por La Causa*, 558 F.3d at 861–62. E-Verify is essentially an Internet-based alternative to the I-9 system mandated by IRCA. *Id.* at 862. Although participation in E-Verify remains voluntary at the national level, several states, including Arizona by way of LAWA, are mandating the use of E-Verify. *Id.* However, use of E-Verify remains problematic as noted in a September 2007 congressional evaluation which found among other things, that foreign-born *authorized* employees are *thirty* times more likely than U.S.-born workers to receive erroneous non-confirmations of eligibility for employment. WESTAT, FINDINGS OF THE WEB BASIC PILOT EVALUATION: REPORT TO U.S. DEP’T OF HOMELAND SEC. 97 (2007), available at <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>.

79. *See* Letter from Janet Napolitano, Governor of Ariz., to Jim Weiers, Speaker of the House, Ariz. House of Representatives (July 2, 2007) (on file with author), available at [http://www.azsos.gov/public\\_services/Chapter\\_Laws/2007/48th\\_Legislature\\_1st\\_Regular\\_Session/HB\\_2779\\_Letter.pdf](http://www.azsos.gov/public_services/Chapter_Laws/2007/48th_Legislature_1st_Regular_Session/HB_2779_Letter.pdf).

80. *Chicanos Por La Causa*, 558 F.3d at 863. The plaintiffs also advanced two other arguments: first, that LAWA was impliedly preempted because its mandatory E-Verify use requirement conflicted with federal law and second, that LAWA violated employers’ due process rights because it did not give them an adequate opportunity to dispute violations of LAWA. *Id.* The Ninth Circuit reasoned that there was no implied preemption because rather than conflicting with congressional intent, LAWA’s mandatory E-Verify use requirement actually furthers Congress’ goal of increasing E-Verify use. *Id.* at 867. The Ninth Circuit also held that employers have substantial due process rights to dispute whether an employee is authorized to work. *Id.* at 869.

IRCA's preemption provision."<sup>81</sup> The Ninth Circuit disagreed with the plaintiffs' interpretation of "licensing law" as meaning "licenses to engage in specific professions, such as medicine or law"; instead, it reasoned that LAWA's definition of license does not depart from a traditional understanding of the term.<sup>82</sup>

As further support for its holding, the Ninth Circuit relied upon *De Canas v. Bica* to conclude that a presumption against preemption of LAWA applies "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers."<sup>83</sup> In addition, the Ninth Circuit used IRCA's legislative history as support for Congress' intent that the savings clause permits states to use state licensing regulations to sanction employers.<sup>84</sup> Finally, given LAWA's use of licensing regulations to enforce federal determinations of employee work eligibility, the Ninth Circuit concluded that Arizona's law is not expressly preempted.<sup>85</sup>

### 3. *Gray v. City of Valley Park, Missouri*<sup>86</sup>

In 2007, the City of Valley Park, a small Missouri municipality, enacted a series of ordinances modeled after those of Hazleton, Pennsylvania, to curb what it described as the "nuisance of illegal immigration."<sup>87</sup> Chief among these was Ordinance No. 1722,<sup>88</sup> an employment provision that temporarily suspends the business licenses of those employers who hire unauthorized aliens within city limits.<sup>89</sup> Un-

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81. *Id.* at 866.

82. *Id.* at 865. LAWA defines licenses as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in [Arizona]." See ARIZ. REV. STAT. ANN. § 23-211(9)(a) (2008). The Ninth Circuit expressed that this definition is consistent with the general definition of license as "a permission, usually revocable, to commit some act that would otherwise be unlawful." *Chicanos Por La Causa*, 558 F.3d at 865 (internal citation omitted).

83. *Id.* The Ninth Circuit essentially found that the *De Canas* rationale that "the employment of unauthorized workers is 'within the mainstream' of the state's police powers" was legally binding despite the passage of IRCA after *De Canas*. *Id.* at 864-65. The court found that recent Supreme Court cases stating that IRCA's passage made the "employment of unauthorized workers central to the [t]he policy of [federal] immigration law" does not "affect the continuing vitality of *De Canas*" because the later cases did not involve state laws or the issue of preemption. *Id.* As such, the Ninth Circuit held that reliance on these later cases by the plaintiffs was misplaced. *Id.*

84. *Id.* at 866 (relying on the House Report discussed *supra* note 41).

85. *Id.* The Ninth Circuit reasoned that LAWA is a valid licensing measure within IRCA's savings clause because it, unlike *Hazleton's* IIRA ordinance, "does not attempt to define who is eligible or ineligible to work under our immigration laws" and is "premised on enforcement of federal standards." *Id.*; *contra* *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 519-20 (M.D. Pa. 2007).

86. *Gray v. City of Valley Park, Mo.*, No. 4:07CV0881 ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008), *aff'd on other grounds*, 567 F.3d 976 (8th Cir. 2009).

87. *Gray*, 2008 WL 294294, at \*1; see *City of Valley Park, Mo.*, Ordinance No. 1722 (Feb. 14, 2007), available at <http://www.valleyparkmo.org/docs/Ordinances/Ordinance1722.pdf> (detailing purpose behind the enactment of Ordinance No. 1722).

88. Ordinance No. 1722 has since been amended by Ordinance No. 1736. See *City of Valley Park, Mo.*, Ordinance No. 1736 (Aug. 9, 2007), available at <http://valleyparkmo.org/docs/Ordinances/Ordinance1736.pdf>. However, because the amendment changed only the effective date of the ordinance, this article follows the *Gray* court which chose to cite to Ord. No. 1722 rather than Ord. No. 1736. See *Gray*, 2008 WL 294294, at \*1 n.2.

89. *Gray*, 2008 WL 294294, at \*9-10. In addition to making it unlawful for business entities to employ unauthorized workers, Ordinance No. 1722 required any entity applying for a business license to sign an affidavit, "affirming that they do not knowingly utilize the services or hire any person who is an unlawful worker." *Id.* at \*9. The other ordinance, at issue in *Gray*, was Ordinance No. 1721 which involves leasing to illegal immigrants. *Id.* at \*1.

like its Hazleton counterpart which was invalidated in *Lozano v. City of Hazleton*,<sup>90</sup> Ordinance No. 1722 survived judicial challenges to its validity on federal preemption grounds, with a Missouri district court finding the ordinance to be a licensing law that falls within IRCA's savings clause<sup>91</sup>—a decision recently affirmed by the Eighth Circuit Court of Appeals.<sup>92</sup>

The lower court's rationale for upholding the ordinance was similar to that of the Ninth Circuit decision in Arizona. First, the court applied a presumption against preemption due to its view that the ordinance is "a regulation on business licenses, an area historically occupied by the states."<sup>93</sup> Second, the court found the ordinance to be a licensing law because it "relates to the issuance of business permits, and the denial of business permits."<sup>94</sup> Further, unlike the *Hazleton* court which struck down its employment ordinance partly because it found the revocation of business licenses to be the "ultimate sanction" for a business entity,<sup>95</sup> the *Gray* court found the severity of the penalty to be "irrelevant" to a determination of whether the ordinance is a licensing law within the plain meaning of IRCA's savings clause.<sup>96</sup>

Third, the court found that even when the purpose of a licensing law is to address illegal immigration as Ordinance No. 1722 does, it is valid under IRCA's savings clause because its penalties are limited to the "suspension of a business license."<sup>97</sup> Lastly, the court found "no extraordinary showing of contrary intentions" in the legislative history to overcome the plain meaning of IRCA's savings clause.<sup>98</sup> Therefore, the court concluded that Valley Park's employment ordinance was not expressly preempted by federal law.<sup>99</sup>

90. See *supra* Part II.B.1.

91. *Gray*, 2008 WL 294294, at \*12.

92. The Eighth Circuit Court of Appeals affirmed the lower court decision on all grounds. See *Gray v. City of Valley Park, Mo.*, 567 F.3d 976, 979 (8th Cir. 2009). However, because the *Gray* plaintiffs appealed on standing and preclusion grounds only, the Eighth Circuit did not directly address the district court's findings with respect to federal preemption of Ordinance No. 1722. *Id.* at 980. As such, this article's discussion of the preemption issues related to Ordinance No. 1722 center around the lower court opinion. See *Gray*, 2008 WL 294294.

93. *Id.* at \*8. The court's decision to apply the presumption against preemption was based on its reliance on the *De Canas* definition of immigration. *Id.* The court reasoned that because the ordinance "does not address the question of who may or may not enter the United States," it is not a regulation of immigration, an area within federal control, where courts are unable to apply the presumption against preemption. *Gray*, 2008 WL 294294, at \*8.

94. *Id.* at \*10.

95. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 519 (M.D. Pa. 2007).

96. *Gray*, 2008 WL 294294, at \*10. The court stated that "the question is . . . not whether the sanctions reserved to the state or local government are greater or lesser than those granted to the federal government [i.e., civil or criminal sanctions under IRCA], or whether Congress intended such a result; the question before the court is *solely* whether the ordinance is a licensing or other similar law." *Id.* (emphasis added). In addition, the court further implied that because violations of the ordinance result only in *temporary* suspension of business licenses, it is likely not the "ultimate sanction" of "entirely shuttering a business" as the Plaintiffs alleged. *Id.* at \*10 & n.14.

97. *Id.* at \*11.

98. *Id.* at \*11–12. In the court's view, the plain meaning of IRCA "provides for state and local governments to pass licensing laws which touch on the subject of illegal immigration." *Id.* at \*12.

99. *Id.* The *Gray* court also upheld Ordinance No. 1722's validity on field and conflict preemption grounds. With respect to field preemption, the court found that the inclusion of a savings clause within IRCA was evidence that Congress did not intend to preempt the field of immigration. *Id.* at \*13. The court specifically stated that "[i]ncluding a provision in the statute, as well as comments in the legislative history, allowing some state licensing regulations to exist, clearly conflicts with an intent [by Congress] to preempt the entire

#### 4. *Chamber of Commerce of the United States v. Edmondson*<sup>100</sup>

Shortly after the Ninth Circuit Court of Appeals issued its decision in *Chicanos Por La Causa*,<sup>101</sup> an analogous challenge to an Oklahoma law made its way through to the Tenth Circuit Court of Appeals and concluded with a far different outcome than that of the Ninth Circuit on the issue of employer sanctions for unauthorized alien employment.<sup>102</sup> At issue before the Tenth Circuit were three provisions of the Oklahoma Taxpayer and Citizen Protection Act of 2007, passed largely by the state legislature in an effort to “discourage[e] illegal immigration and prevent[ ] employment of illegal aliens.”<sup>103</sup> Unlike its Arizona counterpart, LAWA, the challenged provisions of the Oklahoma law did not directly target the business licenses of employers. Rather, the first provision, section 7(B), required businesses to participate in the Basic Pilot Program to verify employment eligibility of their employees; the second, section 7(C), made it a “discriminatory practice for an employer to terminate an authorized worker while retaining an employee that the employer knows or reasonably should know is unauthorized to work”; and the third provision, section 9, required employers to verify the employment eligibility of individual independent contractors, a practice not required under federal IRCA requirements.<sup>104</sup>

In 2008, a group of national and local chambers of commerce as well as trade associations challenged the validity of these three provisions, arguing that they imposed civil sanctions in direct contravention of IRCA’s express preemption provision.<sup>105</sup> An Oklahoma federal district court agreed, finding that the challenged provisions fell outside of IRCA’s savings clause, and consequently, it issued a preliminary injunction barring enforcement of the challenged provisions because of the likelihood of success on the express preemption claim.<sup>106</sup>

On interlocutory appeal, the Tenth Circuit Court of Appeals partially upheld the lower court’s holding on express preemption grounds, finding that only one of the three provisions, section 7(C), was expressly preempted by IRCA.<sup>107</sup> At the outset, the Tenth Circuit declined to consider the state’s argument that the challenged provisions were licensing laws falling within IRCA’s saving clause, finding that the state had failed to preserve this argument on appeal.<sup>108</sup> Instead, relying on Webster dictionary’s definition of sanction as a “restrictive measure used to punish

field of immigration regulation.” *Id.* As for conflict preemption, the court found that the ordinance’s goals and procedures do not conflict with federal laws in the area and further, that compliance with both the ordinance and IRCA is possible. *Id.* at \*13–19.

100. Chamber of Commerce of the United States v. Edmondson, 594 F.3d 742 (10th Cir. 2010).

101. See *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009).

102. *Chamber of Commerce of the United States*, 594 F.3d at 742.

103. *Id.* at 753.

104. *Id.* at 753–55, 759. Violation of these provisions resulted in a vast range of penalties for employers including being prohibited from obtaining state contracts (under section 7(B)), becoming subject to state human rights commission investigations and possibly owing back pay and attorneys fees to terminated employees (under section 7(C)), and facing tax penalties at the top marginal income tax rate for failing to verify work eligibility of their independent contractors (under section 9). *Id.* at 753–55.

105. *Id.* at 755.

106. *Id.*; see also *Chamber of Commerce of the United States v. Henry*, No. CIV-08-109-C, 2008 WL 2329164 (W.D. Okla. June 4, 2008), *aff’d in part, rev’d in part sub nom.* *Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742 (10th Cir. 2010).

107. *Chamber of Commerce of the United States*, 594 F.3d at 750.

108. *Id.* at 765 n.25.

a specific action or to prevent some future activity,”<sup>109</sup> the court found that the penalties imposed for section 7(C) violations, which included “cease and desist orders, reinstatement, back pay, costs, and attorneys’ fees,” were all restrictive measures that “[f]ll within the meaning of ‘sanctions’ as used in § 1324a(h)(2) [IRCA’s preemption provision].”<sup>110</sup> As further support for its holding, the court analogized that the section 7(C) penalties were akin to penalties that are squarely considered “sanctions” under federal civil procedure rules—as an example, the court cited to Federal Rule of Civil Procedure 11(b), which subjects attorneys to “sanctions” which include “reasonable attorneys’ fees and other expenses.”<sup>111</sup>

With respect to the remaining two challenged sections of the Oklahoma law, sections 7(B) and 9, the Tenth Circuit concluded that these could not be subject to express preemption under IRCA because neither imposed sanctions on the basis of employment of unauthorized aliens, as required for IRCA’s preemption provision to apply.<sup>112</sup> In the court’s view, these sections were unlike section 7(C), which mandates sanctions only after an employer hires an unauthorized alien at the expense of terminating a legal worker.<sup>113</sup> Because “the actual employment of an unauthorized alien is irrelevant” to determining whether an employer has violated section 7(B) or 9, the court concluded that express preemption principles could not be used to invalidate either of these sections unlike section 7(C).<sup>114</sup> The court ultimately found that section 9 was impliedly preempted by IRCA but it reversed the lower court’s holding with respect to section 7(B), finding that section of the Oklahoma law to be valid and enforceable.<sup>115</sup> Thus, although the Tenth Circuit never directly considered the issue of IRCA’s savings clause, the court’s discussion of what constitutes sanctions under IRCA’s preemption provision and its critique of the Ninth Circuit’s decision in *Chicanos Por La Causa*,<sup>116</sup> reflects an ongoing clash among the appellate courts regarding the meaning and scope of IRCA’s preemption provision.

## 5. The Lower Court Cases Summarized

These cases demonstrate how established preemption principles may be variously applied where there is a reasonably clear express preemption provision, cou-

109. *Id.* at 765. The court relied on this definition after stating that IRCA, itself, does not provide any definition for “sanction.” *Id.*

110. *Id.* As described earlier in this article, IRCA’s preemption provision, § 1324a(h)(2), preempts “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.” 8 U.S.C. § 1324a(h)(2) (2006) (emphasis added).

111. *Chamber of Commerce of the United States*, 594 F.3d at 765–66.

112. *Id.* at 766.

113. *Id.*

114. *Id.* The court found that section 7(B) is “violated not when an unauthorized alien is employed, but when an employer fails to utilize the Basic Pilot Program.” *Id.* Similarly, it found that “[w]hether an independent contractor is an unauthorized alien” has no bearing on section 9’s primary requirement that contracting employers verify work eligibility of their independent contractors. *Id.* The court concluded that “a contracting entity can violate Section 9 even if its independent contractors are fully authorized to work in the United States.” *Id.*

115. *Id.* at 750.

116. Although the Tenth Circuit stated that the Ninth Circuit decision in *Chicanos Por La Causa* was distinguishable because “Oklahoma has waived any argument that its Act is a licensing or other similar law,” the Tenth Circuit nonetheless noted that it was “unpersuaded” by the Ninth Circuit’s reasoning. *See id.* at 770.

pled with a cryptic savings clause in an area where an important federal interest finds itself in tension with an area of traditional state power over the licensing of local businesses. In the absence of clear congressional action in the near future,<sup>117</sup> it will, however, be left to the Supreme Court to resolve the existing conflict by striking the requisite balance between these important federal and state interests—a choice that will have serious policy consequences either way.<sup>118</sup>

### III. THE UNCERTAIN FUTURE OF STATE LICENSING MEASURES TARGETING UNLAWFUL ALIEN EMPLOYMENT

In a 2009 report, the Office of Immigration Statistics at DHS estimated that the number of unauthorized immigrants residing in the United States reached 11.6 million in early 2008—an increase of 37 percent over the time period from 2000–08.<sup>119</sup> This increase was remarkable considering that the same time period included the terrorist attacks of September 11, 2001; a dramatic global climate and depressed global economy; and some of the highest unemployment rates<sup>120</sup> in the history of the United States. Given the current environment, it is not surprising that immigration control in the American workplace has become a focal concern at state and local levels of government. In fact, the various state and local measures discussed in Part II of this article are representative of similar legislation being enacted and/or enforced in various jurisdictions throughout the United States.<sup>121</sup> This final section addresses issues related to the validity and future of these laws, first by raising areas of concern in the preemption methodologies applied by the lower courts in the cases discussed in Part II and second, by suggesting that any reasonable resolution of the circuit split on this issue requires stepping beyond the varying preemption analyses into a careful consideration of the policy and practical implications of these laws.

#### A. *The Preemption Smokescreen*

Although the Supreme Court has not yet decided any preemption cases involving IRCA's savings clause<sup>122</sup> or the larger field of recent state laws targeting unlawful alien employment, the methodologies employed by the lower courts in their

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117. Given the difficult economic circumstances, the intractability of the immigration problem, and the political polarization over the issue, it is unlikely that the current Congress will be quick to resolve this problem.

118. See *infra* Part III.B.

119. MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008 (2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf).

120. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HISTORICAL UNEMPLOYMENT RATE DATA, available at <http://www.bls.gov> (last visited Mar. 13, 2010).

121. Mississippi, West Virginia, Missouri, South Carolina, and Tennessee have enacted laws similar to Arizona's statute, the Legal Arizona Workers Act (LAWA), to punish employers who knowingly hire illegal aliens by permanent or temporary license revocation. See MISS. CODE ANN. 71-11-3(7)(e) (West 2008); MO. ANN. STAT. §§ 285.525 to -.550 (West 2008); S.C. CODE ANN. § 41-8-50 (2008); TENN. CODE ANN. § 50-1-103(e) (West 2008); W. VA. CODE § 21-1B-7 (West 2007).

122. However, it should be noted that the Ninth Circuit Court of Appeals' decision in *Chicanos Por La Causa, Inc. v. Napolitano* is currently being appealed to the Supreme Court. See *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3065 (U.S. July 24, 2009) (No. 09-115).

IRCA preemption analyses may clash with more recent preemption doctrine as developed by the Supreme Court in other non-immigration areas.

A principal example of this is the lower courts' varying use of the presumption against preemption<sup>123</sup> to uphold or invalidate state "licensing" measures targeting unlawful alien employment on express preemption grounds,<sup>124</sup> when the modern Supreme Court's reliance on the presumption against preemption has decreased,<sup>125</sup> particularly in the context of express preemption cases.<sup>126</sup> Indeed, as evidenced by the Supreme Court's preemption cases during the 2008–09 terms, there remains considerable fluctuation in applying the presumption<sup>127</sup> and disagreement among the Justices as to whether the presumption should even be invoked in express preemption cases.<sup>128</sup> Thus, the decision by the Ninth Circuit in *Chicanos Por La Causa* and the Missouri district court in *Gray* to rely heavily on the presumption against preemption in their preemption analyses<sup>129</sup> is somewhat questionable. Without additional conclusive guidance from the Supreme Court, it remains to be seen what, if any, sway the presumption against preemption should hold in a court's determination of the preemptive scope of IRCA's savings clause.

Moreover, beyond the current state of confusion regarding whether the presumption should even be applied, is the inherent question of how a court properly determines whether a state/local law, such as LAWA in *Chicanos Por La Causa* and IIRA in *Hazleton*, involves business licensing—an area historically within a state's police power—rather than an attempt to regulate illegal immigration—an area of exclusive federal control. This is a difficult question and without further elaboration from Congress or the Supreme Court on the proper role of states in immigration matters, courts should reconsider whether to invoke the presumption. Ultimately, the presumption is perhaps an unhelpful "smokescreen" that avoids the recent application of a traditional preemption analysis by the Supreme Court: a weighing of federal and state interests and the underlying policy implications. This is more critical in light of recent overwhelming evidence that Congress rarely enacts legislation overriding Supreme Court preemption decisions.<sup>130</sup>

123. In *Medtronic, Inc. v. Lohr*, the Supreme Court notably described the presumption against preemption as a canon of statutory interpretation used to evince congressional intent to preempt state legislation. See 518 U.S. 470, 485 (1996).

124. See *supra* text accompanying notes 70–73, 83, 93 (discussing the *Hazleton* court's refusal to apply the presumption against preemption in comparison to the *Chicanos Por La Causa* and *Gray* courts' opposite decision to rely on the presumption.)

125. Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604 (2007).

126. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 556 (2008) (Thomas, J., dissenting) (describing the "waning" use of the presumption in express preemption cases since the 1992 Supreme Court decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)).

127. *Compare Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (express preemption case decided without utilizing the presumption against preemption) with *Altria Group, Inc.*, 129 S. Ct. at 543 (relying on the presumption against preemption to find state claims were not expressly preempted by the Federal Cigarette Labeling and Advertising Act).

128. *Compare Riegel*, 552 U.S. at 334 (Ginsburg, J., dissenting) (reiterating that "[f]ederal laws containing a preemption clause do not automatically escape the presumption against preemption") with *Altria Group, Inc.*, 129 S. Ct. at 558 (Thomas, J., dissenting) (emphasizing that "there is no authority for invoking the presumption against pre-emption in express preemption cases").

129. See *supra* Part II.B.2–3.

130. See Note, *supra* note 125. This study examined whether Congress has enacted legislation overriding any preemption decisions made by the Supreme Court during the 1983–2003 terms. *Id.* at 1612. During this



A second cause for concern in the lower court opinions is their failure to delineate in any measurable way what the scope of IRCA's savings clause is. Opponents of these licensing measures argue that savings clauses should be construed as narrowly as possible in circumstances where "a broad reading . . . would threaten to allow state regulation of a particular kind to thwart the purposes of the substantive provisions of the federal statute."<sup>131</sup> In their view, a court's blanket approval of a state licensing law as falling within IRCA's savings clause, without considering whether the practical implications of the law upset Congress' policy goals behind enacting IRCA, effectively provides too broad of a reading to the clause.<sup>132</sup>

### B. Policy Considerations

IRCA established the first national employment verification and sanctions system in the United States.<sup>133</sup> In that law, Congress attempted to balance the deterrence of illegal immigration by imposing employer sanctions for unauthorized employment with a desire to ensure that IRCA's new regulatory regime would not impose burdensome requirements on employers that might lead to undesired consequences for authorized workers.<sup>134</sup> Whatever balance Congress may have struck in enacting IRCA, however, has undoubtedly been impacted by the recent advent of state legislation targeting unlawful alien employment, including the licensing measures that are the subject of this article.<sup>135</sup> Thus, the current preemption debate—involving as it does the practical consequences of these new state and local regulatory provisions—may change the calculus for evaluating the constitutional validity of such measures.

First, an obvious consequence of these state licensing measures is their impact on the federal government's goal of maintaining uniformity in laws involving immigration and immigrants.<sup>136</sup> One primary need for uniformity is due to the sensitive connection between immigration matters and U.S. foreign affairs/policies.<sup>137</sup> State and local measures directed towards immigrants arguably impact foreign affairs, as evidenced by the international outcry following the passage of Proposition 187 in California.<sup>138</sup> There, the inclusion of anti-immigrant provisions in Proposition 187

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twenty-year period, the Supreme Court decided 127 cases involving federal preemption of state laws and found state laws preempted approximately half the time. *Id.* at 1612–13. Of these 127 cases, the study found that Congress had explicitly overridden only *two* decisions and a portion of a third decision. *Id.* The study concluded that this is overwhelming evidence that "Congress has virtually always accepted the Court's preemption decisions." *Id.*

131. Brief for Nat'l Employment Law Project, et al. as Amici Curiae Supporting Petitioners at 8, Chamber of Commerce of the United States v. Candelaria, No. 09-115 (Aug. 27, 2009), 2009 WL 2759754.

132. *Id.* at 8–12.

133. See *supra* Part II.A (discussion of IRCA).

134. See H.R. REP. NO. 99-682, pt. 1, at 56 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5660 (describing Congress' desire to create a national verification system that would be "least disruptive to the American businessman" and that would "minimize the possibility of employment discrimination" against authorized workers).

135. See *supra* Part II.B.1–4.

136. *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (acknowledging the "Nation's need to 'speak with one voice' in immigration matters.").

137. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . .").

138. See Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 37 (2007).

prompted Mexico to publicly oppose the measure and legislate for a boycott of California commercially.<sup>139</sup> Although a similar result has not yet occurred with the state licensing measures discussed in this article, it is nonetheless an important consideration in the impact of these laws.

Moreover, courts must consider the impact that state licensing measures have on the federal government's desire for uniformity in the application of employment laws such as IRCA. In this instance where multiple state licensing laws have arisen on top of the federal statutory immigration scheme already in place to determine employment eligibility, employers are now facing conflicting requirements as to the proper process for determining the employment eligibility of new hires. Not only is this result contrary to Congress' intent to have a uniform employment eligibility system under IRCA, but it has raised serious concerns regarding the fiscal and administrative burdens imposed on employers by these measures. Each new enactment of a state or local law targeting unlawful alien employment has brought new compliance requirements on top of the already-existing federal requirements under IRCA. Opponents of these laws argue that multistate businesses are particularly at-risk. Also, particularly affected by these laws are business franchises, which may be required to close multiple locations solely based on the wrongful hiring decisions made by one branch. In addition, the breadth of these state licensing measures may have a negative impact on a state's economy. LAWA, for example, applies to all businesses, even those serving critical infrastructures such as hospitals, government agencies, and utility companies. A closure of these types of businesses, even on a temporary basis, would likely have a detrimental impact on a state and/or municipality's critical operations.

Another important consideration is the potential for these state licensing laws to foster discriminatory hiring practices on the part of employers seeking to avoid not just the penalties imposed by the state laws but also the added costs associated with defending against any state-led investigations into an employer's hiring practices. Indeed, employers may, in reaction to these state measures, refuse to interview and/or hire individuals who may appear or sound like foreigners out of economic self-interest and a desire to protect one's business license. As much as this practice may prevent unauthorized aliens from gaining employment, it may well also impact foreign-born U.S. citizens and other authorized workers who find themselves on the receiving end of employment-based discriminatory activities and lost work opportunities.<sup>140</sup>

It is this very result that Congress sought to avoid when it enacted IRCA to target unlawful alien employment.<sup>141</sup> From the time that Congress first began considering employer sanctions as a means to curb illegal immigration, it recognized the threat of unintended discrimination against U.S. citizens and other authorized

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139. *Id.*

140. See, e.g., Daniel Gonzáles, *Taunts, Threats as Law Nears*, ARIZ. REPUBLIC, Sept. 30, 2007, at A1 (describing increased hostility and discrimination towards authorized Hispanic workers in the immediate aftermath of the passage of LAWA in Arizona); see also Associated Press, *Profiles of Citizens Detained or Deported*, USA TODAY, Apr. 12, 2009, available at [http://www.usatoday.com/news/nation/states/arizona/2009-04-12-4197206529\\_x.htm](http://www.usatoday.com/news/nation/states/arizona/2009-04-12-4197206529_x.htm) (reporting stories of U.S. citizens and other authorized workers who were either unlawfully detained or deported by Immigration and Customs Enforcement (ICE) during workplace raids).

141. See *supra* Part II.A (discussion of IRCA).

workers that could ensue from employer sanction laws.<sup>142</sup> Thus, when Congress enacted IRCA, it included antidiscrimination provisions<sup>143</sup> in addition to the employer sanction provisions<sup>144</sup> discussed earlier in this article. Moreover, Congress' strong intent to prevent discriminatory practices in immigration-related employment matters was evidenced by the fact that it imposed the same graduated scale of penalties under IRCA for violations of § 1324a (ban on hiring unauthorized workers) as for § 1324b violations (ban on discrimination).<sup>145</sup>

Unlike IRCA, LAWA and other similar state licensing measures do not contain any antidiscrimination provisions designed to protect authorized workers.<sup>146</sup> Proponents of these state licensing measures argue that other laws at the state and federal level, including IRCA, protect against discrimination in the employment arena.<sup>147</sup> However, even IRCA, in spite of its explicit antidiscrimination provisions and penalties, resulted in widespread reports of discrimination against authorized workers following its passage.<sup>148</sup> As such, it remains questionable how much protection these other laws actually offer to buttress the lack of explicit antidiscrimination provisions in LAWA and similar state licensing laws.

Another unsettling aspect of these state licensing measures is their potential to create animus towards immigrants. In restricting the employment of illegal immigrants, states have often advanced reasons such as helping to preserve employment

142. The legislative history of IRCA indicates Congress' concern with discrimination. *See* H.R. REP. NO. 99-682, pt. 1, at 68 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5672 ("Numerous witnesses over the past three Congresses have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members. These witnesses are genuinely concerned that employers, faced with the possibility of civil and criminal penalties, will be extremely reluctant to hire persons because of their linguistic or physical characteristics."); *see also* 132 CONG. REC. H9708-02 (daily ed. Oct. 9, 1986) (statement of Rep. Berman) ("[W]hen an employer, particularly one who does not have elaborate personnel and legal departments, is faced with the potential of civil and criminal penalties, that employer, for totally nonracist reasons, may, when in doubt with respect to the legal status of an applicant, decide to protect himself by excluding that applicant.").

143. 8 U.S.C. § 1324b(a)(1) (2006) (prohibiting discrimination in immigration-related employment practices on the basis of national origin or citizenship status).

144. *See supra* note 46.

145. First violations under either § 1324a or § 1324b result in monetary penalties ranging from \$250–\$2,000. *Compare* 8 U.S.C. § 1324a(e)(4)(A)(i) (2006) *with* 8 U.S.C. § 1324b(g)(2)(B)(iv)(I) (2006). Similar results occur for second and third violations. *Compare id.* § 1324a(e)(4)(A) *with id.* § 1324b(g)(2)(B)(iv).

146. For example, LAWA in Arizona does not contain an antidiscrimination provision or penalty for employers who are found to have engaged in discriminatory hiring practices. *See generally* ARIZ. REV. STAT. ANN. §§ 23-212, -212.01 (2008). However, Arizona does have another statute addressing employment discrimination. *See* ARIZ. REV. STAT. ANN. § 41-1463(B) (2002) (prohibiting employment discrimination that is based on "race, color, religion, sex, age, disability or national origin").

147. *See* González, *supra* note 140 (Arizona House Speaker spokesman stating that because Arizona already has an antidiscrimination bill, there is "no need" to add such a provision to LAWA); *see also* Letter from Janet Napolitano, Governor of Ariz., to Jim Weiers, Speaker of the House, Ariz. House of Representatives (July 2, 2007) (on file with author), *available at* [http://www.azsos.gov/public\\_services/Chapter\\_Laws/2007/48th\\_Legislature\\_1st\\_Regular\\_Session/HB\\_2779\\_Letter.pdf](http://www.azsos.gov/public_services/Chapter_Laws/2007/48th_Legislature_1st_Regular_Session/HB_2779_Letter.pdf) (stating that although LAWA "lacks an antidiscrimination clause . . . Federal and state law preclude employment discrimination against Arizonans on the basis of race or national origin and this bill can and must be enforced in a way to ensure that no lawful worker faces discrimination on these bases.").

148. TEMP. UNIV. INST. FOR SURVEY RESEARCH AND WESTAT, FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION 12 (2002), *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=9cc5d0676988d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=2c039c7755cb9010VgnVCM10000045f3d6a1RCRD> (summarizing a series of General Accounting Office reports following IRCA's passage which found that "the implementation of employer sanctions had resulted in a widespread pattern of discrimination against authorized workers and that a substantial amount of these discriminatory practices had apparently resulted from IRCA").

opportunities for U.S. citizens and authorized workers.<sup>149</sup> However, as evidenced by Hazleton's IIRA ordinance and LAW A in Arizona, state licensing measures may be being used as a pretext for less benign attempts to control immigration—in direct contravention of federal immigration policy and in a manner that is reminiscent of historical antecedents.<sup>150</sup> In enacting IIRA, the Hazleton city council indicated its intent to control the influx of illegal aliens through the ordinance and a desire to be free from the “debilitating effects” that illegal aliens purported to have on their city.<sup>151</sup> City officials claimed that the increased immigrant presence coincided with several emerging problems in its population: a nearly doubled rate of serious crimes in a two-year period, a 60 percent increase in unreimbursed medical expenses for services like emergency room visits, and an increase in the town's budget for teaching English as a second language from \$500 per year to \$875,000 per year.<sup>152</sup>

Similarly, in enacting LAW A, Arizona indicated quite clearly its intent to use the new law to control the large influx of illegal immigrants entering the state.<sup>153</sup> Because the state shares a border with Mexico, Arizona has had a contentious relationship with the federal government on immigration issues, with state officials often voicing their frustration at the lack of federal action.<sup>154</sup> Since the passage of LAW A, numerous complaints have arisen that workplace raids being conducted under the guise of LAW A are unfairly targeting Hispanic workers and subjecting these individuals to imprisonment and other penalties, despite the legal status of some of the workers.<sup>155</sup> Since LAW A's enactment in 2008, only one civil complaint

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149. Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 989–91 (1995).

150. See generally Brief of Amicus Curiae Interfaith Groups Supporting Appellees at 16–27, *Lozano v. City of Hazleton*, No. 07-3531 (3d Cir. Apr. 17, 2008), available at <http://www.aclupa.org/downloads/interfaithamicus.pdf> (describing anti-immigrant sentiments in the United States since the 1700s).

151. Hazleton, Pa., Ordinance 2006-18 § 2(F), *Illegal Immigration Relief Act Ordinance* (Sept. 8, 2006) available at [http://www.aclu.org/files/pdfs/immigrants/hazleton\\_secondordinance.pdf](http://www.aclu.org/files/pdfs/immigrants/hazleton_secondordinance.pdf). One of IIRA's stated purposes was “to secure to those lawfully present in the United States and this City, . . . the right to live in peace free of the threat [of] crime, to enjoy the public services provided by this city without being burdened by the cost of providing goods, support, and services to aliens unlawfully present in the United States, and to be free of the debilitating effects on their economic and social being imposed by the influx of illegal aliens.” *Id.* (emphasis added).

152. Daniel Schorn, *Welcome to Hazleton: One Mayor's Controversial Plan to Deal with Immigration*, CBS NEWS, Nov. 19, 2006, available at <http://www.cbsnews.com/stories/2006/11/17/60minutes/main2195789.shtml>.

153. Upon signing LAW A into law, then-Governor Napolitano stated that “[i]mmigration is a federal responsibility, but I signed House Bill 2779 because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reform our country needs. I signed it, too, out of the realization that the flow of illegal immigration into our state is due to the constant demand of some employers for cheap, undocumented labor.” See Letter from Janet Napolitano, Governor of Ariz., to Jim Weiers, Speaker of the House, Ariz. House of Representatives (July 2, 2007) (on file with author), available at [http://www.azsos.gov/public\\_services/Chapter\\_Laws/2007/48th\\_Legislature\\_1st\\_Regular\\_Session/HB\\_2779\\_Letter.pdf](http://www.azsos.gov/public_services/Chapter_Laws/2007/48th_Legislature_1st_Regular_Session/HB_2779_Letter.pdf).

154. See Ariz. Exec. Order No. 2005-13 (June 3, 2005) (former Arizona Governor Janet Napolitano mandating summit to be held on immigration enforcement strategies, in part, because the “Department of Justice has failed to adequately enforce federal immigration law or reimburse Arizona's actual costs of incarcerating criminal aliens, thereby costing Arizona taxpayers more than \$200 million.”); see also *supra* note 153.

155. Randal C. Archibold, *Lawmakers Want Look at Sheriff in Arizona*, N.Y. TIMES, Feb. 14, 2009, at A12 (describing Dept. of Justice civil rights investigation into the practices of an Arizona sheriff accused of profiling Latino residents during immigration sweeps); see also González, *supra* note 140.

has been filed against an employer for knowingly hiring unauthorized aliens<sup>156</sup> and only three businesses have faced any sort of penalty under the law.<sup>157</sup> At the same time however, over 327 arrests of unauthorized workers have occurred at work-sites throughout Arizona.<sup>158</sup> This incongruent result raises the question of what the real purpose behind LAWA is—penalizing employers for hiring unauthorized workers or finding another method to identify and arrest unauthorized workers to decrease illegal immigration in the state. Therefore, it will be critical that any judicial analysis into the validity of these state licensing measures should include determining the extent to which these laws may frustrate Congress' goal of protecting against discrimination.<sup>159</sup>

### CONCLUSION

This article has explored a number of cases throughout the United States that have diverged on the validity of state and local laws targeting unlawful alien employment through the purported use of “licensing measures” designed to fall within IRCA’s savings clause. As the immigration debate escalates without any foreseeable congressional action in sight, the stage has been set for the Supreme Court to determine the preemptive scope of federal immigration laws, and in particular, to delineate the proper role of states in closing “the back door to immigration” by targeting the business licenses of employers. At this time, the Supreme Court has yet to decide whether to grant review of the Ninth Circuit decision in *Chicanos Por La Causa v. Napolitano*.<sup>160</sup> Until it issues a decision or comprehensive immigration reform occurs at the federal level, it will be left to the judicial system to formulate a framework for analyzing the validity of state licensing laws passed to target unlawful alien employment. As described in this article, any reasonable resolution of this will require moving beyond IRCA’s cryptic savings clause and the use of express preemption methodologies to careful consideration of whether the challenged law upsets the central policy goals behind IRCA’s passage: the need for uniformity in immigration laws; desire for uniformly applied federal criteria in determining employment eligibility; decreasing the burden that employment eligibility verification imposes on employers and businesses; and preventing discrimination.

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156. Maricopa County Attorney News Release, First Employer Sanctions Case Filed (Nov. 18, 2009) available at [http://www.mcaodocuments.com/press/20091118\\_a.pdf](http://www.mcaodocuments.com/press/20091118_a.pdf).

157. JJ Hensley, *Federal Inquiry Led to 1st Closure Under Hiring Law*, ARIZ. REPUBLIC, Mar. 10, 2010, at B1.

158. See Maricopa County Attorney News Release, *supra* note 156.

159. H.R. REP. NO. 99-682, pt. 1, at 68 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5672 (“[T]he Committee does believe that every effort must be taken to minimize the potentiality of discrimination and that a mechanism to remedy any discrimination that does occur must be a part of this legislation [IRCA].”).

160. While the certiorari petition was reviewed in conference on Oct. 30, 2009, the result was to invite the Solicitor General to submit a brief expressing the views of the United States, which the Solicitor General’s office has yet to file. See Chamber of Commerce of the United States v. Candelaria, 130 S. Ct. 534 (U.S. Nov. 2, 2009) (No. 09-115).