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The Legal Arizona Workers Act and Preemption Doctrine

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THE LEGAL ARIZONA WORKERS ACT AND PREEMPTION DOCTRINE

Sandra J. Durkin*

In recent years, a spate of states passed laws regulating the employment of undocumented immigrants. This Note argues that laws that impose civil sanctions on employers that hire undocumented immigrants are preempted by both federal immigration law and federal labor law. The Note focuses specifically on the Legal Arizona Workers Act because it went into effect in 2008 and has amassed more than two years' worth of data on its enforcement, and because it is touted as the harshest state anti-immigration measure to date. This Note examines the law's impacts and argues that practitioners nationwide should challenge the Legal Arizona Workers' Act, as well as the proliferation of similar state laws that threaten civil rights, business and labor interests, and the supremacy of the federal Constitution.

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INTRODUCTION

On May 12, 2008, in the small town of Postville, Iowa, federal authorities arrested nearly 400 employees at a meat processing plant on

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suspected immigration violations.¹ After eight days of detention, federal prosecutors went on to press criminal charges for identity theft against 306 of the primarily Mexican and Guatemalan employees.² The raid drew criticism from human rights organizations,³ religious groups,⁴ politicians, and even the community of Postville.⁵ Department of Homeland Security (“DHS”) officials justified the controversial raid by citing the need to “put pressure on companies with large numbers of illegal immigrant workers,” to reduce the number of undocumented immigrants in U.S. borders.⁶

Although the Iowa raid, which is now referred to as “the largest single-site operation of its kind in American history,” was unusual in magnitude, it was by no means an isolated incident.⁷ Less than one month later, in Phoenix, Arizona, local Sheriff’s deputies arrested nine employees at the Waterworld fun-park after receiving information that the employees used fraudulent identification.⁸ The county attorney’s office ultimately handed down indictments against all nine employees.⁹ The county attorney’s office also indicated that the purpose behind the fun-park raid was to investigate potential violations of the Legal Arizona Workers Act (“LAWA”), a recently-enacted state law which prohibits employers from hiring undocumented immigrant workers.¹⁰ Although conducted on a much smaller scale than the Iowa raid, immigration raids conducted by state and local authorities are increasing in frequency in Arizona,¹¹ and the cumulative results can be just as devastating. Many blame LAWA for increasing the workplace immigration raids that harm many Arizona residents.¹²

1. Spencer S. Hsu, *Immigration Raid Jars a Small Town*, WASH. POST, May 18, 2008, at A1.

2. Erik Camayd-Freixas, *Interpreting after the Largest ICE Raid in US History: A Personal Account*, Jun. 13, 2008, <http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf>.

3. Illinois Coalition for Immigrant and Refugee Rights, *Shocking Raid in Iowa After 66 Die in Detention*, May 12, 2008, <http://icirr.org/node/2455>.

4. Samuel G. Freedman, *Immigrants Find Solace After Storm of Arrests*, N.Y. TIMES, Jul. 12, 2008, at A9.

5. Hsu, *supra* note 1.

6. *Id.*

7. Camayd-Freixas, *supra* note 2.

8. J.J. Hensley et al., *Fun-Park Raids May Test State Hiring Law*, ARIZ. REPUBLIC, Jun. 10, 2008, at A1.

9. Michael Kiefer, *Migrant Sweep at Water Park Leads to Charges*, ARIZ. REPUBLIC, Jun. 24, 2008, at A3.

10. Hensley, *supra* note 8; Legal Arizona Workers Act, ARIZ. REV. STAT. ANN. §§ 23-211 & 212 (2008).

11. *State of Fear: Arizona's Immigration Crackdown* (National Radio Project radio broadcast Nov. 12, 2008), available at <http://www.radioproject.org/archive/2008/4608.html>.

12. See, e.g., Lindsay Butler, *Businesses Feel Early Pinch of Workers Law*, EAST VALLEY TRIB., Dec. 29, 2007, available at <http://www.eastvalleytribune.com/story/105446> (dis-

Another criticism that has been leveled against LAWA is that it is preempted by federal law; that is, it gives state and local officials authority to regulate immigration in a manner that is reserved exclusively to the federal government.¹³ Preemption occurs when state law conflicts with federal law or when state law poses an obstacle to the operation of federal law.¹⁴ State laws that affect immigration, even if they do not purport to dictate who stays and who goes, are frequently preempted because they run the risk of interfering with the vast regulatory scheme that Congress created to control immigration.¹⁵

When state and federal law enforcement approach the problem of undocumented immigrant workers in the same manner, it is difficult to see how the state law could interfere with the operation of the federal law. This is currently the case with LAWA and similar laws in other states (“employer sanctions laws”).¹⁶ After all, the raids in Iowa and Arizona both targeted businesses, rather than undocumented employees. Both were carried out pursuant to statutes prohibiting employers from hiring undocumented workers. Both sought to achieve the overarching goal of reducing illegal immigration by removing opportunities to work. Perhaps

cussing how fear of the “pending crackdown on employers who hire illegal residents” harms Hispanic-oriented businesses and communities); Nathan Newman, *Costs of Anti-Immigrant Legislation*, Grassroots Netroots Alliance, Dec. 20, 2007, http://www.grassrootsnetroots.org/articles/article_9232.cft (noting evidence that economic output would drop 8.2% annually if non-citizen foreign-born workers were removed from the labor force and predicting that the law would stall business growth).

13. See Muzaffar Chishti & Claire Bergeron, *Arizona Employer Sanctions Law Takes Effect*, Migration Information Source, Jan. 16, 2008, <http://www.migrationinformation.org/Sfocus/display.cfm?id=669> (“Opponents of the new law have argued that sanctioning employers of unauthorized workers is an exclusive federal responsibility, thus preempting states from enacting their own employer sanctions laws.”). The Ninth Circuit recently upheld LAWA against a preemption challenge. *Chicanos por la Causa v. Napolitano*, 544 F.3d 976, 980 (2008). *Chicanos* will be discussed at length in Part II of this Note.

14. Gary Endleman, *State Immigration Legislation and the Preemption Doctrine*, 1698 PLI/Corp 123, 154 (2008).

15. See, e.g., *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 520–21 (M.D. Penn. 2007) (holding that a state law regulating the employment of undocumented immigrants was preempted by federal immigration law); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that a state law requiring aliens over eighteen to register once a year, among other things, was preempted).

16. In 2008 alone, nineteen laws regulating the employment of immigrants were enacted in thirteen states. State Laws Related to Immigrants and Immigration in 2008, Immigration Policy Project (Dec. 18, 2008). In 2009, twelve states enacted twenty-one laws regulating the employment of immigrants. State Law Related to Immigrants and Immigration in 2009, Immigration Policy Project (Dec. 1, 2009). Many of these laws impose sanctions on employers that hire unauthorized workers. *Id.* This Note focuses on Arizona’s law because it has been called the harshest of the employer sanctions laws, see, e.g., John Dougherty, *McCain Courts Latino Voters*, THE WASH. INDEP., Sep. 25, 2008, <http://washingtonindependent.com/7855/mccain-courts-latino-vote>, and also because it is enforced in particularly troubling ways, see discussion *infra* Part 1.C, II.A-B.

most significantly, Immigration and Customs Enforcement (“ICE”) officials in Iowa and Sheriff’s deputies in Arizona conducted the raids in the same manner: in the course of collecting evidence against the employers, they arrested the workers, charged them with various identity theft crimes, and initiated deportation proceedings.¹⁷ To many, it appears that LAWVA simply makes the federal government’s tasks of enforcing the immigration laws easier.¹⁸ Nevertheless, federal law can preempt a state law when they share the same purpose.¹⁹ Even if state and federal laws accomplish the same task, if the congenial state law “interferes with the methods by which the federal statute was designed to reach this goal,” the state law must be preempted.²⁰ “In fact, the very fact that state and federal objectives are the same only heightens the chances for trouble: Conflict is imminent, the Supreme Court famously noted when ‘two separate remedies are brought to bear on the same activity.’”²¹

When state and federal authorities are no longer working in a similar manner toward a similar objective, the argument for preemption is more clear. This may soon be the case with LAWVA and other state employer sanctions laws, if President Barack Obama responds to calls for a moratorium on worksite immigration raids such as the one in Postville, Iowa.²² During his campaign, President Obama indicated that he would consider suspending immigration raids,²³ at least until Congress passes new immigration legislation. President Obama has also stated that raids are ineffective and unjustifiably “place[] all the burdens of a broken system

17. See Jens Manual Krogstad, *First group of Postville immigration raid detainees deported to Mexico*, WCF Courier, Jun. 7, 2008, <http://wfcourier.com/articles/2008/06/07/news/metro/10393155.txt>. Although removal is an exclusively federal function, in the course of the Arizona investigation and raids, local officials supplied information to DHS that ultimately led to the initiation of deportation proceedings against workers.

18. See, e.g., Mark Kimble, *The big debate: Marchers Target Joe Arpaio*, TUCSON CITIZEN, Mar. 2, 2009, <http://www.tucsoncitizen.com/ss/border/111296.php>.

19. See Endleman, *supra* note 14, at 155–56 (noting that “[i]t is a common misconception that preemption would not be triggered if both Congress and the state legislature were guided by similar objectives or sought to eradicate the same perceived evil”).

20. *International Paper Co. v. Ouelette*, 479 U.S. 481, 493 (1987).

21. Endleman, *supra* note 14, at 156 (citing *Wisconsin Dep’t. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986)).

22. See N.C. Aizenman, *Immigrant Advocates Reach Out To Obama*, WASH. POST., Nov. 12, 2008, at B5 (reporting that Hispanic groups and immigrant advocates called for a halt to worksite immigration raids); Marisa Treviño, *Sixty-seven percent of the Latino vote should be enough to pay for a moratorium on immigration raids*, LATINLISTA, Nov. 13, 2008, http://www.latinalista.net/palabrafinal/2008/11/sixtyseven_percent_of_the_latino_vote_sh.html (discussing the fact that 67% of the Latino community voted for Obama, and arguing that “should be enough” for Obama to stop the raids); Karen Lee Ziner, *Faith groups urge moratorium on immigration raids*, PROVIDENCE J., Oct. 1, 2008, <http://newsblog.projo.com/2008/10/by-karen-lee-zi-2.html>.

23. Transcript of the CNN Democratic presidential debate in Texas (Feb. 21, 2008), available at <http://www.cnn.com/2008/POLITICS/02/21/debate.transcript.index.html>.

onto immigrant families.”²⁴ Accordingly, it is probable that within the next few years, immigration raids by ICE will be curtailed, while raids by local officials in Arizona and other states will continue to increase. If the federal government determines that raids are ineffective to address the problem of illegal immigration, and chooses to divert its resources toward other methods while the states continue to arrest, prosecute, and deport undocumented immigrants, it is more clear that such action could pose a conflict for the federal enforcement of immigration laws.²⁵

This Note argues that LAWA would not only be preempted under such circumstances, but that it is preempted by current federal immigration law and federal labor law. It examines the law’s impacts and concludes that, even if it withstands legal challenge, federal legislation should be implemented to end state regulation of the employment of undocumented immigrants. Part I explains why this Note focuses on LAWA, as opposed to other state employer sanctions laws, and discusses its relevance to national practitioners and preemption doctrine. Part II discusses whether LAWA is preempted by federal immigration law. It begins with the Federal Immigration Reform and Control Act (“IRCA”), the first major piece of legislation focusing on the employment of undocumented immigrants, and goes on to explain preemption doctrine generally. The discussion then reviews arguments for and against preemption, arguing that Congress intended IRCA to preempt state regulations such as LAWA. In particular, it notes that IRCA’s text, federal court decisions, and the effects of LAWA indicate that LAWA is preempted. Additionally, it makes clear that policy considerations weigh in favor of preemption.

Part III considers the possibility of preemption under federal labor law. After providing some background information on the National Labor Relations Act (“NLRA”), this Note contends that LAWA interferes with federally protected labor rights and is thus preempted under the *Garmon* doctrine. The discussion then turns to *Hoffman Plastics*, a monumental decision affecting the rights of immigrant workers, and argues that LAWA upsets the delicate balance *Hoffman* struck between labor and immigration law. Finally, this Note reviews the policy goals of federal labor law and

24. Barack Obama and Joe Biden’s Plan for Immigration, <http://www.barackobama.com/issues/immigration>.

25. This note does not mean to suggest that immigration raids will completely cease under President Obama. Some degree of immigration enforcement will certainly continue while the new President considers immigration reform options, and even if immigration reform—with a legalization path for undocumented migrants—becomes a reality, some type of workable employer sanction mechanism will be necessary for it to succeed in Congress. The purpose of this Note is to suggest that employer sanctions should be handled by the federal government and not by the states, both because the preemption doctrine requires it, and because federal regulations would likely be more favorable to undocumented immigrants. It is unlikely that the nation would support a law as harsh as LAWA and also unlikely that ICE could enforce a federal law as strictly as state and local officials, for reasons discussed in this Note.

highlights how the practical results of LAWAW suggest that it should be preempted.

I. LAWAW AND THE NATIONAL PRACTITIONER

Although this Note focuses on LAWAW, the analysis is relevant to practitioners nationwide. Both the preemption analysis and the policy-based criticisms apply to employer sanctions laws in states other than Arizona. In 2008 and 2009, various states enacted a total of forty-one laws regulating the employment of immigrants.²⁶ Many of these laws impose sanctions on employers that hire unauthorized workers.²⁷ This Note focuses on Arizona's law because it has been called the harshest of the employer sanctions laws.²⁸ Arizona, however, is not unique. LAWAW is particularly harsh because it permanently strips businesses of their licenses after a few violations, but laws that suspend or revoke business licenses after many violations are still preempted by federal immigration law for the reasons outlined in this Note.

LAWAW is also significant because it will likely serve as a model for other state employer sanctions laws. It is the first law specifically designed to conform to preemption exemptions in federal immigration law. Past state laws have been quickly struck down because they clearly violate preemption doctrine. LAWAW is more carefully crafted and so less obviously in conflict with preemption doctrine. Accordingly, other states will follow Arizona's example and similar provisions. This possibility has become substantially more likely since the Ninth Circuit upheld LAWAW against a preemption challenge. Thus, the preemption analysis here will be useful to national practitioners. In fact, it may be more useful to practitioners in other states that are not bound by the Ninth Circuit's holding.

This Note also focuses on Arizona's law because it is enforced in particularly troubling ways.²⁹ Again, Arizona is not unique. LAWAW enforcement is particularly troublesome because anti-immigration sentiment in Arizona is high, but flourishes also in non-border states across the country. Practitioners in these states may be able to challenge the discriminatory or retaliatory enforcement of employer sanctions laws. Federal immigration raids highlight the danger of employers in states other than Arizona using employer sanctions laws to flout federal labor law. Although these raids were triggered by federal immigration law, as more states adopt their own laws, employers will increasingly contact state

26. State Laws Related to Immigrants and Immigration in 2008, *supra* note 16. State Laws Related to Immigrants and Immigration in 2009, *supra* note 16.

27. *Id.*

28. See, e.g., John Dougherty, *McCain Courts Latino Voters*, THE WASH. INDEP., Sep. 25, 2008, <http://washingtonindependent.com/7855/mccain-courts-latino-vote>.

29. See discussion *infra* Part I.C, II.A–B.

authorities rather than ICE. As this Note argues, this type of enforcement is preempted by federal labor law. Accordingly, this Note's discussion of Arizona's enforcement concerns is relevant to practitioners nationwide.

Previous scholarship discusses the relationship between federal and state employer sanctions laws.³⁰ This Note furthers the scholarship by exploring how preemption doctrine applies to LAWA—the first state law crafted specifically to circumvent federal immigration law's preemption provisions. Preemption of employer sanctions laws by labor law is less well researched.³¹ Michael Duff argues that state regulation of immigration rallies is preempted because immigration rallies are a protected by federal labor law.³² This Note, by contrast, argues that state regulation of immigrant employment is preempted because employers use these regulations as pretext for committing a variety of labor violations against undocumented employees.³³

II. PREEMPTION BY FEDERAL IMMIGRATION LAW: A COMPREHENSIVE SCHEME OF REGULATION

A. Background

Congress first addressed the employment of undocumented immigrants with the Federal Immigration Reform and Control Act of 1986.³⁴ IRCA makes it illegal for employers to knowingly hire or recruit immigrants without lawful work authorization (“undocumented immigrants”).³⁵ IRCA also requires employers to complete an I-9 form for each new hire, verifying that the individual was authorized to work in the United States.³⁶ Before IRCA went into effect, the Immigration and Nationality Act penalized undocumented immigrants for their illegal entry into the U.S., but did not punish employers who hired these

30. See generally Endleman, *supra* note 14 (summarizing preemption doctrine); Adam L. Lounsbury, *A Nationalist Critique of Local Laws Purporting to Regulate the Hiring of Undocumented Workers*, 71 ALB. L. REV. 415 (2008) (arguing for preemption); Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 TULSA J. COMP. & INT'L L. 179 (2008) (arguing against preemption).

31. See, e.g., Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93 (2007).

32. See *id.*

33. Additionally, Lounsbury mentions *San Diego Bldgs. Trade Council v. Garmon*, the primary labor case discussed in this Note, but only in the context of immigration preemption, rather than labor preemption. See Lounsbury, *supra* note 30, at 442.

34. Endleman, *supra* note 14, at 128–29.

35. Pub. L. 99-603, 100 Stat. 3359 (1986).

36. 8 U.S.C. § 1324a(b) (2009).

immigrants.³⁷ Despite wide acceptance that jobs were a magnet for undocumented immigrants, the INA treated the employment of undocumented immigrants as a peripheral concern.³⁸

Before IRCA, states regulated the employment of undocumented immigrants under the authority of their police powers.³⁹ States typically asserted the preservation of employment opportunities for its own citizens as a justification for restricting the employment of undocumented interests.⁴⁰ In *DeCanas v. Bica*, a landmark decision upholding a California state law prohibiting the employment of undocumented immigrants, the Supreme Court found this to be a legitimate state interest.⁴¹ In dicta, the Supreme Court attempted to delineate the bounds of federal authority over immigration: Congress was concerned with “who should or should not be admitted into the country,” and not with the employment of undocumented immigrants.⁴²

Despite this powerful statement, *DeCanas* does not apply similarly to all state immigration regulations. Although LAWA imposes different sanctions than the California statute at issue in *DeCanas*, both laws regulate the same activity—the employment of undocumented immigrants.⁴³ On the question of whether LAWA is preempted by federal immigration law,

37. Endleman, *supra* note 14, at 128.

38. Garrett Kennedy, *Illegal is Not Simply Illegal: The Broad Ramifications of a Pennsylvania Town's Attempt at Immigration Control, and the Inherent Problems of Racial Discrimination*, 10 U. PA. J. BUS. & EMP. L. 1029, 1038 (2008) (“While the INA sought to penalize individuals who immigrated illegally into the United States, it did not take proactive measures of deterrence, as employers could freely hire workers without fear of redress.”).

39. See Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 995–96 (1995).

40. See *id.*

41. See *DeCanas v. Bica*, 424 U.S. 351, 356 (1976) (observing that “[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. . . . California’s attempt . . . to prohibit the knowing employment by California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation.”).

42. See *id.* at 355 (reasoning that the fact that an immigrant is the subject of a state statute does not render it a regulation of immigration, “which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain”); Endleman, *supra* note 14, at 166, 168 (noting that absolute preemption does not arise whenever the challenged state law references immigrants and reminding that, at the time of *Bica*, the Supreme Court did not think immigration law extended to the regulation of immigrant employment).

43. See *DeCanas*, 424 U.S. at 353 n.1 (citing the California statute, which prescribed a fine between \$200 and \$500 each time an employer violated the law). Compare LAWA § 23-212, which sets forth a number of sanctions increasing in severity for each violation. After one violation the employer must terminate all of the undocumented immigrants and is put on probationary status for three years. If a second violation occurs during this probation, the employer loses its business license. The LAWA sanctions are discussed further in Part I.

DeCanas is not dispositive, however, because it was decided prior to the passage of IRCA.⁴⁴ The Supreme Court rested its decision in *DeCanas* on the fact that the INA did not concern the employment of undocumented immigrants.⁴⁵ IRCA, by contrast, directly addresses the employment issue.⁴⁶ The relevant question in determining whether IRCA preempts state employer sanctions laws is Congress's intent.⁴⁷ As we seek to discover Congress's intent regarding preemption and IRCA, we consider the text of the statute, subsequent legislative action, as well as judicial decisions that shed light on the analysis.

B. Immigration Preemption Doctrine Applied to LAWA

1. Text of the Statute

As noted above, IRCA prescribes criminal and civil penalties on employers that knowingly hire or recruit undocumented immigrants.⁴⁸ To prevent employers from taking advantage of the knowingly provision by intentionally failing to look into the status of employees, IRCA also requires employers to complete an I-9 form for each new hire, verifying that the individual was authorized to work in the United States.⁴⁹ Additionally, and most importantly for this Note, IRCA contains a preemption clause:

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, recruit or refer for a fee for employment, unauthorized aliens.⁵⁰

This clause clearly applies to and preempts state and local laws that impose civil or criminal penalties on employers for hiring undocumented immigrants.⁵¹ LAWA, however, does not impose criminal or civil penalties

44. See Endleman, *supra* note 14, at 169 ("It has always been assumed that the Court would decide *DeCanas* differently today").

45. See *DeCanas*, 424 U.S. at 358–59 (concluding that employment of immigrants is not a central concern of the INA).

46. See Endleman, *supra* note 14, at 159 (discussing how IRCA created a "comprehensive scheme" to control employment of undocumented immigrants).

47. See Endleman, *supra* note 14, at 127 (stating that the intent of Congress is the "ultimate touchstone" in every preemption case).

48. 8 U.S.C. § 1324a.

49. *Id.*

50. *Id.*

51. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (reiterating that Congress's purpose "is the ultimate touchstone" in every preemption case) (internal citations omitted).

for violation of its provisions.⁵² Rather, it prescribes license suspensions and probations of increasing length each time the terms of the law are violated.⁵³ Ultimately, it mandates license revocation for an employer who knowingly or intentionally employs an undocumented immigrant while on probation for a previous violation.⁵⁴

On one reading, the exception to the preemption clause that allows “licensing and similar laws” expressly permits LAWA. After all, LAWA is facially a licensing law.⁵⁵ A House Report on IRCA supports the view that Arizona’s decision to suspend and revoke licenses to employers that hire undocumented immigrants is lawful. This report mandates that

[t]he penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent 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 this legislation.⁵⁶

Under this reading, because LAWA mandates the revocation of a business license from an employer who hires undocumented immigrants, it is a licensing law.

Another view is that, although the text of the preemption clause appears to authorize Arizona’s law, a closer look at the circumstances surrounding IRCA and the practical results of LAWA suggests that Congress intended IRCA to preempt laws such as LAWA. First, LAWA operates more like an immigration regulation than a licensing law. Although it imposes conditions a business must satisfy to retain a license, it is unlike any licensing law that existed prior to the implementation of IRCA. Prior to IRCA, licensing law referred to a law about licensing that “sets forth conditions and qualifications governing the issuance of a particular license to a particular type of business,” such as a medical license or a childcare license.⁵⁷ LAWA is not a licensing law that applies to a specific type of business, but a law about immigration and undocumented workers. Rather than setting standards by which the state expects a particular type of business to operate, LAWA imposes a broad rule that business

52. See LAWA § 23-212.

53. *Id.*

54. *Id.*

55. This is the view taken by the U.S. District Court of Arizona. See *Arizona Contractors Ass’n v. Candelaria*, 534 F. Supp. 2d 1036, 1046 (D. Ariz. 2008). In *Candelaria*, Judge Neil Wake concluded that LAWA is a licensing law because it “sets out criteria and a process to suspend or revoke a permission to do business in the state.”

56. H.R. Rep. No. 99-682(I) at 5662.

57. Brief of Plaintiff-Appellant at 28, *Candelaria*, 534 F. Supp. 2d 1036.

cannot hire undocumented immigrants. The purpose of this rule is not to improve the quality of services employers provide to the public, but to discourage immigration into the state. In this way, it functions like an immigration regulation, designed post-IRCA to fit into the preemption savings clause.⁵⁸

Second, LAWA's penal provisions are incompatible with the text and spirit of IRCA's preemption clause. The preemption clause bars states from merely imposing fines against employers that break the law. This is incongruous with an interpretation of IRCA's preemption exception that lets states strip employers of their business licenses—essentially imposing a “death penalty”⁵⁹ by putting employers that break the law out of business. Such an interpretation would render the preemption clause, which prohibits states from imposing criminal or civil sanctions on businesses, meaningless.⁶⁰

Finally, IRCA must be read in conjunction with the larger body of immigration law. It has long been accepted that only Congress has the authority to determine who gets to stay in the U.S. and who has to leave.⁶¹ Since IRCA's preemption clause must be read in light of this general proposition, licensing penalties are permitted only when *the federal government* has determined that an employer violated the law.⁶² The House Report cited above supports this interpretation. “The penalties contained in this legislation . . . are not intended to preempt or prevent 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 *this* legislation.”⁶³ The federal government determines when a person has violated *this* legislation—namely, IRCA. Accordingly, for a state to suspend, revoke, or refuse to reissue a license to a person found in violation of some other law, the federal government must first have found that person in violation of IRCA.

58. See *id.* (noting that title does not refer to licensing and is codified separately from any licensing provisions).

59. See Muzaffar Chishti & Claire Bergeron, *Arizona Employer Sanctions Law Takes Effect*, THE MIGRATION IMMIGRATION SOURCE, Jan. 16, 2008, <http://www.migrationinformation.org/USfocus/display.cfm?id=669>.

60. See *Hazleton*, 496 F. Supp. 2d at 519 (explaining that because suspension of a business permit is the “ultimate sanction”, it would not make sense for Congress to allow states to suspend business permits, but no lesser penalty, and concluding that such an interpretation makes “the express preemption clause nearly meaningless”). See also *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 355 (4th Cir. 2006) (rejecting “reading of [a] preemption clause [that] would . . . turn an exception to a preemption provision into a loophole so broad that it would virtually swallow the preemption clause itself” because to do so “would undermine Congress’ plain intent”).

61. See *DeCanas*, 424 U.S. at 355.

62. Brief for plaintiffs at 12, *Chicanos por la Causa v. Napolitano*, 544 F.3d 976 (9th Cir. 2008) (No. 07-17272).

63. H.R. Rep. No. 99-682(1) at 5662 (emphasis added).

LAWA allows the state to suspend or revoke licenses even if the federal government has not made such a determination.⁶⁴ This violates the maxim that Congress determines who stays in the U.S. by allowing Arizona, pursuant to LAW A, to create a separate state adjudicatory process in which state court judges determine whether an employer has violated federal immigration law. The results of this separate system further suggest that Congress intended to preempt state employer sanctions laws. Allocating such power to state judges undermines federal power to regulate immigration. The scheme also impairs IRCA, which sought to create a comprehensive federal system with procedures for determining which employers knowingly hired unauthorized immigrants by introducing non-uniformity.⁶⁵ The fact that Arizona is not the only state with an employer sanctions law heightens the risk of obstructing federal enforcement of IRCA.⁶⁶ Federal immigration law is sufficiently broad to call into question the notion that there is room for the fifty states to intervene with fifty different immigration laws.⁶⁷ It is doubtful that Congress intended its seven-word preemption clause to give states the opportunity to weaken the newly created regulatory scheme.

2. Judicial Decisions

Since the passage of IRCA, many state immigration regulations have been challenged on the grounds that they are preempted.⁶⁸ Judicial responses to these challenges provide additional guidance as to whether Congress intended to preempt LAW A. Although it was decided before IRCA went into effect, *DeCanas* remains relevant to preemption analysis. *DeCanas* stands for the proposition that “when it comes to preemption, . . . a law that concerns itself with alien employment is not necessarily a

64. See LAW A § 23-212. LAW A does not require a federal determination that an employer has violated IRCA before the state of Arizona may file charges under LAW A.

65. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (“IRCA ‘forcefully’ made combating the employment of illegal aliens central to ‘[t]he policy of immigration law.’” (citing *INS v. Nat’l Ctr. For Immigrants’ Rights*, 502 U.S. 183, 194, and n.8 (1991))).

66. See *supra* note 16 discussing other state immigration laws.

67. See *Endleman, supra* note 14, at 160 (“Though field preemption is neither easily nor quickly inferred, it may be presumed when the federal law is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.”) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Cf. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1998) (field preemption applies if “pervasiveness of the federal regulation precludes supplementation by the States,” or if “the federal interest is sufficiently dominant”). See also *Reno v. Flores*, 507 U.S. 292, 305 (1993) (discussing immigration and noting that “[o]ver no conceivable subject is the legislative power of Congress more complete”); See also *Manheim, supra* note 31 (arguing that since “immigration is plainly a matter of national moment, state interference is not tolerated”).

68. See *supra* note 15 listing immigration preemption cases.

regulation of immigration.”⁶⁹ As discussed above, LAWA regulates immigration by allowing states to sanction employers that violate federal immigration law by deciding whether to sanction an employer that has hired an undocumented immigrant worker, a function that is generally reserved for the federal government. However, *DeCanas* instructs us that this may not be the case. According to the Supreme Court in *DeCanas*, the regulation of immigration is “a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”⁷⁰ Under the logic of *DeCanas*, because a state decision to sanction an employer that hired an undocumented worker is not a decision about who should be admitted into the country, it is not an immigration regulation reserved to the federal government.

The logic of *DeCanas*, however, is not the only factor to consider in determining whether a law regulates immigration. It is important to note that the immigration landscape is vastly different since the implementation of IRCA. It is likely that, under today’s circumstances, *DeCanas* would come out differently. *DeCanas* rested on the claim that the employment of unauthorized immigrants was “a merely peripheral concern” of federal immigration law.⁷¹ This is not the case in a post-IRCA world where congressional comprehensive immigration reform looms on the horizon.⁷² Unlike prior immigration laws, IRCA is a “carefully crafted compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected.”⁷³ In recognition of this, the Supreme Court changed its pre-IRCA stance that the NLRA does not protect undocumented immigrants.⁷⁴ Preemption doctrine, just like the NLRA, also applies differently post-IRCA. Accordingly, although *DeCanas* remains relevant, its application has changed.

69. Endleman, *supra* note 14, at 166.

70. *DeCanas*, 424 U.S. at 358.

71. *Gannon*, 359 U.S. at 243.

72. In 2006 and 2007, Congress attempted to pass comprehensive immigration reform measures that proposed, among other things, to increase security along the U.S.-Mexico border, allow long-time undocumented immigrants a path to citizenship, and to create a new visa program that would increase the number of guest workers in the U.S., as well as increased enforcement measures. Comprehensive Immigration Reform Act, S. 2611, 109th Cong. (2006); Comprehensive Immigration Reform Act of 2007, S. 1348, 100th Cong. (2007). After much debate, the attempted reforms collapsed. See Robert Pear & Carl Hulse, *Immigration Bill Dies in Senate; Defeat for Bush*, N.Y. TIMES, Jun. 28, 2007, at A01. Since then, groups from both ends of the political spectrum have increased the strength of their cries for immigration reform.

73. Nat’l Ctr. for Immigrants’ Rights, Inc. v. INS, 913 F.2d 1350, 1966 (9th Cir. 1966), rev’d on other grounds, 502 U.S. 183 (1991).

74. See Endleman, *supra* note 14, at 199 (noting that the Supreme Court has refined its pre-IRCA decisions before).

The most important case for this analysis is *Chicanos por la Causa v. Napolitano*, the Ninth Circuit decision upholding LAWA against a facial challenge.⁷⁵ The court held that LAWA fell within IRCA's preemption exception and that the provision requiring employers to participate in E-Verify was not impliedly preempted by IRCA.⁷⁶ The decision rested squarely on the *DeCanas* court's conclusion that "the authority to regulate the employment of unauthorized workers is 'within the mainstream' of the state's police powers."⁷⁷ The court cursorily dismissed the plaintiffs' argument that IRCA brought the regulation of undocumented immigrants within the scope of federal immigration law, stating that "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption applies."⁷⁸

The Ninth Circuit's holding rested on its conclusion that *DeCanas* remains good authority for the proposition that the employer sanctions laws are a traditional exercise of a state's police power. This conclusion essentially removes any effect that IRCA might have had from the preemption calculus and, as such, is not persuasive. *Chicanos* was the first and only post-IRCA federal decision to grant *DeCanas* such binding authority.⁷⁹ In fact, at least one federal court reached a contrary conclusion before *Chicanos* was decided.⁸⁰

In *Hazleton*, a Pennsylvania district court confronted a municipal ordinance that prohibited the employment of undocumented immigrants and purported to punish an offending employer by suspending its business permit.⁸¹ Like Arizona in *Chicanos*, the City of Hazleton argued its ordinance had been designed with "exacting precision" so that it would fall within IRCA's licensing exception.⁸² The court rejected this argument, noting that an interpretation of the savings clause which allowed the city to force an offending employer out of business with the "ultimate sanction"—suspension of the business permit—would completely eviscerate the clause.⁸³ With respect to *DeCanas*, the court stated that with the passage of IRCA, the employment of undocumented workers went from being addressed in a portion of a single section of the INA to being the subject of an entire statutory scheme.⁸⁴ The court also stated that since

75. 544 F.3d 976, 988 (2008).

76. *Id.* at 985, 988.

77. *Id.* at 983 (citing *DeCanas*, 424 U.S. at 356).

78. *Id.* at 984.

79. See Endleman, *supra* note 14, at 169–170 (noting the novelty of the *Chicanos* decision).

80. *Hazleton*, 496 F. Supp. at 519–21.

81. *Id.* at 519.

82. *Id.*

83. *Id.*

84. *Id.* at 524.

IRCA, the strong federal interest in immigration⁸⁵ and the pervasiveness of immigration regulations suggest that Congress intended to preempt the entire field of the employment of undocumented immigrants.⁸⁶ According to the court, therefore, any reliance on *DeCanas* for the argument that the power to regulate the employment of unauthorized workers belonged to the states was misplaced.⁸⁷

So which decision is correct? In *Chicanos*, the Ninth Circuit interpreted *DeCanas* as asking whether states' historic police powers included the power to regulate the employment of undocumented immigrants. By contrast, the *Hazleton* court asked whether Congress intended to regulate the employment of undocumented immigrants, and not whether the power to regulate was part of the states' historic police powers. This made the passage of IRCA consequential for the *Hazleton* court, because it indicated that the Congress had evinced an intent to regulate the employment of undocumented immigrants. This also offers the more persuasive reading of the *DeCanas* decision, which, significantly, did not find that the authority to regulate the employment of undocumented immigrants is a power historically or traditionally belonging to the states, but in fact was premised on a finding that Congress intended the INA to preclude state regulation on the subject.⁸⁸ The court's conclusion that the Ninth Circuit's dismissal of decades of post-IRCA regulation in favor of a historic police power appears to have been conjured out of thin air. Accordingly, the *Hazleton* decision offers the better reading.

3. Effects of LAWA

Although the Ninth Circuit held that LAWA fit easily into the category of legislation permitted by IRCA's savings clause,⁸⁹ the court did note that it was only upholding the law against a facial challenge "brought against a blank factual background of enforcement and outside the context of any particular case."⁹⁰ The court stated that its decision would not control other challenges to LAWA as applied in a particular manner.⁹¹ Consequently, it is appropriate to consider the practical results of state or

85. *Id.* (noting that *DeCanas* affirmed that the power to regulate immigration is unquestionably exclusively a federal power) (internal citations omitted).

86. *Id.* at 521–25.

87. *Id.* at 524.

88. *DeCanas*, 424 U.S. at 357–58.

89. See Fischer, *supra* note 58. When asking about IRCA's preemption clause during oral arguments, Judge Wake asked, "[d]oesn't that pretty much say there is no preemption for state licensing sanctions laws" and scoffed at an argument that the clause was more complicated. See *id.*

90. *Chicanos*, 544 F.3d at 980.

91. *Id.*

local enforcement of LAW A in determining the likelihood that it will be preempted.

As discussed above, enforcement of LAW A will necessarily require state judges to make determinations about whether employers knowingly or intentionally hire undocumented workers. There is already confusion over what “knowingly” or “intentionally” means in this context. State and federal courts may adopt different standards of proof or employ different tests to determine whether an employer acted knowingly or intentionally. Applying different standards will add non-uniformity and complexity to immigration law. For example, at the state level, if an employer checked a new hire’s personal information using E-Verify, it has an affirmative defense against a charge of LAW A violation. At the federal level, the use of E-Verify is not mandatory, so it is easier for an employer to rebut a presumption that it knowingly or intentionally hired an undocumented immigrant. The practical result of this is that state and federal courts could come to different conclusions regarding employers that engaged in similar conduct. The fact that IRCA demands a certain threshold of knowledge and does not require employers to investigate the immigration status of each new employee indicates that Congress did not intend the burden on employers to be too great. Accordingly, Arizona’s harsher treatment of employers creates a preemption problem.

LAW A will likely lead to increased state immigration raids. This will prove problematic for a number of reasons. The first is that it increases the compliance risks for employers.⁹² Gary Endleman explains that, while federal immigration law enforcement officials specialize in immigration law, state officials “likely have little to no experience with immigration law” and that businesses in states with employer sanctions laws must “be aware that at any time local authorities may start an investigation of their work force, in some cases based on an anonymous complaint.”⁹³ This has already proven true in Arizona. The Maricopa County Sheriff’s Department runs a hotline that allows callers to anonymously report suspected LAW A violations. This exposes Arizona employers to a risk of investigation by local authorities that far exceeds the chances of federal investigation. Actions by the Maricopa County Sheriff’s Department also highlight the risk that inexperienced local authorities may take their authority to investigate employer sanctions violations too far. For instance, critics of LAW A assert that the Sheriff’s Department engages in discriminatory enforcement and racial profiling.⁹⁴ Others complain that its crime sweeps are impermissible

92. See Endleman, *supra* note 14, at 138.

93. *Id.*

94. See, e.g., Spenser S. Hsu, *Ariz. Sheriff Accused of Racial Profiling*, WASH. POST, Jul 17, 2008, at A02; *Sheriff raising furor with immigration raids*, MSNBC, Apr. 25, 2008, available at <http://www.msnbc.msn.com/id/24314764>. Members of Congress have also asked DHS and the Department of Justice to investigate the accusations that Sheriff Joe Arpaio engaged in racial profiling and other abuses of Latinos in Maricopa County. See Randal C.

breaches of an agreement requiring it to obtain the consent of local authorities before using immigration deputies to operate in their communities.⁹⁵ These effects demonstrate how LAWА interferes with federal immigration law and thus bolster the argument for preemption.

C. Policy Considerations

The above arguments seek to establish that LAWА is preempted by federal immigration law. Given the conflict between federal courts on the validity of employer sanctions laws and the outcry against the enforcement of LAWА in Arizona, it is likely that this issue will ultimately reach the Supreme Court. Once there, the Supreme Court will consider the legal considerations laid out above. Because the argument for employer sanctions laws relies on the idea that they are necessary for states to combat illegal immigration, the Supreme Court should also consider the policy implications of state employer sanctions laws in deciding whether LAWА is preempted. Proponents of these laws contend first that states need the authority to regulate matters of particular concern to their communities. They also argue that states need the authority to regulate immigration when Congress fails to act. A determination that LAWА does not satisfy these stated purposes therefore undermines the very reason for state authority over the employment of undocumented immigrants. While these policy-based criticisms of LAWА do not factor explicitly into the preemption calculus, they provide context for understanding how employer sanctions laws like LAWА operate and underscore the significance of the preemption doctrine and its role in preserving federal authority in the field of immigration.

The first argument provided in support of LAWА is that Arizona, as a border state, must deal with illegal immigration on a larger scale than other states and so needs the ability to develop specialized legislation. This argument is flawed because, despite Arizona's unique position as a border state, the problem of illegal immigration is common to all states. In particular, the specific problem that LAWА seeks to address—the employment of undocumented immigrants—does not respect state boundaries. The fact that Arizona is a point of entry for many undocumented immigrants who eventually make their way to other states does

Archibold, *Lawmakers Want Look at Sheriff in Arizona*, N.Y. TIMES, Feb. 14, 2009, at A12. The order was triggered in part when Sheriff Arpaio's department publicly marched 200 illegal inmates down city streets on their way from one jail to another. *Id.* At the second jail, known as "tent city," they are segregated from other inmates. *Id.* See also Posting to Pro Immigrant, <http://proimmigrant.blogspot.com> (Oct. 3, 2007, 9:53 AM) (noting the possibility that the large number of reports to the hotline could lead to discriminatory enforcement).

95. Barry Hart, *Critics claim Sheriff Joe Arpaio's crime sweep violates rights of cities*, Apr. 25, 2008, <http://www.immigrateusa.us/content/view/1544/48>.

not establish that federal immigration law is insufficient to address Arizona's immigration concerns. Furthermore, while LAWAs might reduce the number of undocumented immigrant workers in Arizona, it is likely that it will actually increase the number of undocumented workers in other states.⁹⁶ Although it can be assumed that immigrants who are arrested in the course of a LAWAs investigation will also be deported, there is evidence that many immigrant workers are not waiting for arrest, but are fleeing Arizona for states with less stringent employment laws.⁹⁷ Furthermore, the majority of undocumented workers who cannot find employment will not be discovered by law enforcement officials, and thus will not be forced to leave the U.S. The argument that a state should be permitted to handle regional problems at a regional level loses force when the state's solution forces its neighbors to share the burden.

It is undeniable that many people are dissatisfied with the federal government's enforcement of the immigration laws. Despite IRCA's attempt to regulate the employment of undocumented immigrants, employers still flagrantly violate the law and there has been a surge of undocumented workers into the U.S.⁹⁸ The widespread consensus that something needs to be done about illegal immigration is what led to the attempts at comprehensive immigration reform in 2006 and 2007. After these reforms failed, states like Arizona concluded that there was still a need for action and passed an onslaught of anti-immigration measures, including LAWAs. They argue that the collapse of the federal immigration reforms emphasized the need for state action. If Congress could not act, the states would.

Proponents of these laws argue that they allow "those states harboring intense anti-alien sentiment to act on those sentiments at the state level, thus diminishing any interest on their part to seek national legislation to similarly restrictionist ends."⁹⁹ The crux of this claim seems to lie not in the premise that some states need to control immigration more than others, but rather that allowing state experimentation will lead to the

96. See, e.g., Sean Batura, *Oklahoma's anti-immigrant law has undocumented moving south*, Feb. 2, 2008, <http://media.www.theaccent.org/media/storage/paper1074/news/2008/02/04/News/Oklahas.AntiImmigration.Law.Has.Undocumented.Moving.South-3186199.shtml> (observing the movement of undocumented immigrants from Oklahoma to Texas after the passage of a harsh immigration law in the former).

97. *Illegal immigrants leaving Arizona*, Dec. 22, 2007, http://www.usatoday.com/news/nation/2007-12-22-immigration-leaving_N.htm (citing evidence that undocumented immigrants fled Arizona for other states in the months before LAWAs went into effect).

98. Jeffrey S. Passel, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISPANIC CENTER, Apr. 14, 2009, <http://pewresearch.org/pubs/1190/portrait-unauthorized-immigrants-states> ("[T]he undocumented immigrant population grew rapidly from 1990 to 2006 but has since stabilized.").

99. See Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997).

development of more immigrant-friendly laws in at least some states.¹⁰⁰ This will encourage undocumented immigrants to relocate to these states with more lenient laws, which in turn will reduce the pressure on states with high undocumented populations. One scholar rebuts this argument, contending that “rather than providing a steam-valve for individual states’ to release their pent up frustration with growing immigration related costs and burdens, [state immigration controls] instead have an incendiary effect setting off a wild-fire of anti-immigrant laws throughout the states and ultimately implicating national immigration policy.”¹⁰¹ The rapid rise of immigration laws in states that are traditionally not burdened with large populations of undocumented immigrants buffets McCormick’s argument, as does the fact that these laws are increasingly severe.¹⁰²

State immigration laws, including employer sanctions laws, are on the rise, despite their negative effect on local communities. Rather than improving the economy and opening up jobs for legal Arizona residents, LAWAs have been partially responsible for an economic decline that is expected to get worse.¹⁰³ Undocumented immigrants are not the only ones fleeing the state since LAWAs went into effect. Unwilling to face sanctions, some businesses have relocated to other states with less punitive employment laws.¹⁰⁴ Still others are moving their operations to Mexico, where they can keep employing foreign workers.¹⁰⁵ Some might argue that this is a positive; less employers breaking the law in Arizona is a good thing. But some of LAWAs’s unintended consequences have harmed innocent parties. For example, documented immigrants—those working or living legally in the U.S.—are also leaving Arizona, either because they want to remain with undocumented family members or because they fear the strong anti-immigrant political climate.¹⁰⁶ In addition, some businesses have been forced to close shop not because they employ undocumented immigrants,

100. See Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT’L L. 121, 174 (1994).

101. See Elizabeth McCormick, *The Oklahoma Taxpayer and Citizenship Protection Act: Blowing Off Steam or Setting Wild-Fires?*, 23 GEO. IMMIGR. L.J. 293, 300 (2009) (attributing this phenomenon to lobbying efforts by national anti-immigrant groups).

102. See Jennifer M. Hansen, *Sanctuary’s Demise: The Unintended Effects of State and Local Enforcement of Immigration Law*, COMMENT, 10 SCHOLAR 289 (2008) (discussing how local enforcement of immigration laws threatens sanctuary cities).

103. See Nathan Newman, *Costs of Anti-Immigrant Legislation*, Dec. 20, 2007, http://www.grassrootsnetroots.org/articles/article_9232.cfm (citing a study that predicted LAWAs would lead to 8.2% drop in economic output in Arizona).

104. See Muzaffar Chishti & Claire Bergeron, *Arizona Employer Sanctions Law Takes Effect*, Jan. 16, 2008, <http://www.migrationinformation.org/USfocus/display.cfm?id=669>.

105. See *id.*

106. Randall C. Archibold, *Arizona Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008.

but because they cater largely to immigrant communities.¹⁰⁷ Finally, lest we forget, Arizona has a large population of documented immigrants and citizens of Hispanic ancestry. Many condemn LAVA for permitting racial profiling and discrimination by local and state authorities.¹⁰⁸

This Note does not contend that the federal government does not also face problems enforcing immigration laws. However, chances of discerning and addressing flaws in a nationwide uniform system of immigration regulation are greater than the chances of repairing hundreds of state laws that conflict not only with each other, but with the federal scheme as well.

III. PREEMPTION BY FEDERAL LABOR LAW: A DELICATE BALANCE

A. Background

The primary federal tool for governing the relationship between employers and workers is the National Labor Relations Act. The NLRA protects the rights of all workers, including undocumented immigrants, to form labor unions and to participate in concerted activity for mutual aid and protection.¹⁰⁹ Like IRCA, the NLRA is a comprehensive scheme of regulations that brought the field of labor law—once the province of the states—under the control of the federal government. This section argues that federal labor law also preempts LAVA and similar employer sanctions laws.

There are two primary labor law preemption doctrines: *Garmon* preemption and *Machinists* preemption. *Machinists* preemption forbids both the NLRB and the states from regulating conduct that Congress intended to leave unregulated.¹¹⁰ It is based on the premise that Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.¹¹¹ *Garmon* preemption is most relevant for our purposes. Unlike *Machinists*, *Garmon* preemption precludes state interference with the National Labor Relations Board's ("NLRB") ability to interpret and enforce the "integrated scheme of regulation" established by the NLRA.¹¹² In order to protect this function of the NLRB, the doctrine forbids states from regulating activity that the NLRA protects, prohibits, or even arguably protects or prohib-

107. Lindsay Butler, *Businesses feel early pinch of immigration law*, EAST VALLEY TRIB., Dec. 29, 2007, <http://www.eastvalleytribune.com/story/105446>.

108. See *supra* note 94.

109. 29 U.S.C. § 157 (2007); See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893–94 (1986).

110. *Int'l Ass'n of Machinists and Aerospace Workers*, 427 U.S. 132, 140–41 (1976).

111. *Id.* at 140 n.4 (citing Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972)).

112. *Garmon*, 359 U.S. at 247.

its.¹¹³ *Garmon* preemption is based on “the expressed congressional desire for uniformity in the nation’s labor policy” and the desire “to make use of the Board’s expertise in the area of labor relations.”¹¹⁴ For example, in *Garmon*, the California Superior Court ordered a labor union to pay damages to an employer for picketing before being certified as the bargaining agent of the employees.¹¹⁵ The Supreme Court held that the state court’s action was preempted because the picketing was arguably protected by the NLRA.¹¹⁶

In the context of state immigration legislation, the relevant question is whether the law seeks to regulate activity that is arguably protected or prohibited by the NLRA. As discussed in the previous section, LAWA regulates the employment of undocumented immigrants. On one hand, the employment of undocumented immigrants violates another federal law—IRCA—and so is arguably not protected. On the other hand, undocumented immigrants fall within the protection of the NLRA, so perhaps it is protected.¹¹⁷ Federal courts have thus far declined to decide that the hiring of undocumented immigrants is a protected or prohibited activity.¹¹⁸ For this reason, it is unlikely that *Garmon* preemption will be found in a facial challenge to LAWA. It is possible, however, for LAWA to give rise to a *Garmon* preemption claim under certain factual circumstances.

B. Labor Preemption Doctrine Applied to LAWA

State enforcement of LAWA will give rise to a preemption claim if it works as a regulation of an activity that is arguably protected or prohibited by the NLRA. Protected activities usually consist of two or more employees acting together to improve working conditions, such as wages and benefits. Examples of protected activities are employees addressing their employer about working conditions or pay, employees discussing work-related issues with each other, or any individual employee engaging in union support or membership.¹¹⁹ Although the NLRA was intended to protect employees’ rights to join labor organizations, an employee does not need to be part of a union to claim the protection of the NLRA.¹²⁰

113. *Id.* at 245.

114. *See Garmon*, 359 U.S. at 241, 246. *See also* *Northwestern Ohio Adm’r, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1027 (6th Cir. 2001) (interpreting *Garmon*).

115. *Garmon*, 359 U.S. at 237–38.

116. *Garmon*, 359 U.S. at 246.

117. *Sure-Tan*, 467 U.S. at 893–94.

118. *Trollinger v. Tyson Foods*, 370 F.3d 602, 611 (2004) (assuming without deciding that hiring undocumented immigrants is protected or prohibited activity).

119. NLRB, Employee Rights, http://www.nlr.gov/workplace_rights/index.aspx.

120. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14–15 (1962).

Additionally, the NLRA protects any employee's right not to engage in union activities.¹²¹

Although LAWA was intended to punish employers who violate the immigration laws, it is possible that, in practice, LAWA could become a mechanism to combat undocumented workers who engage in protected activities. That is, if employees begin to demand that an employer improve working conditions, and the employer suspects that the employees are undocumented, the employer could contact local law enforcement. At first glance, it might seem like an absurd move for an employer to open itself up to investigation for LAWA violations. However, if employers understood LAWA primarily as an excuse for law enforcement officials to prosecute undocumented immigrants and saw that employers were rarely penalized, this could offer an attractive way to deal with problematic employees.

There is evidence to suggest that employers intentionally use federal immigration laws to deter undocumented employees from exercising their rights guaranteed by the NLRA. First, on multiple occasions the federal government conducted worksite immigration raids in the middle of organizing drives by labor unions. At the time of the raid at the meat processing plant in Postville, Iowa, a labor union was attempting to organize the workers.¹²² Not only did the ICE raid disrupt the organizing drive, but it eliminated nearly all of the witnesses to labor violations by the plant, thus reducing the union's chances of bringing successful claims even on behalf of employees who were not arrested.¹²³ Furthermore, the raid occurred shortly after employees filed a class-action lawsuit against the company for wages owed and engaged in a walk-out.¹²⁴ Since the raid, the plant operates with a new illegal immigrant workforce and continues to report the same substandard working conditions.¹²⁵ Although federal prosecutors eventually indicted several plant managers, the maximum penalty is a fine, and the plant will likely stay open.¹²⁶

Because it is easier for authorities to prove that an immigrant is in the country illegally than to prove that an employer knowingly hired an undocumented immigrant, these cases will almost always hit the workers harder than the employers. It is likely that in most cases, even if an investi-

121. NLRB, What are protected concerted activities?, http://www.nlr.gov/workplace_rights/index.aspx. (select "protected concerted activities").

122. See Simone Landon, *Immigration Raid Breaks Up Organizing Drive at Iowa Meat-packing Plant*, Labor Notes, <http://www.labornotes.org/node/1902>.

123. See *id.* (noting that the labor violations, which included employment of children and physical abuses by supervisors, were extensive).

124. See *id.*

125. See *id.*

126. Lynda Waddington, *Agriprocessors, five Postville plant managers indicted by grand jury*, IOWA INDEP., Nov. 21, 2008, <http://iowaindependent.com/8844/agriprocessors-five-postville-plant-managers-indicted-by-grand-jury>.

gation reaches the indictment stage, the state will fail to successfully prosecute the employer. Accordingly, after the arrest and deportation of its employees, an employer will be able to replace its workforce with a new batch of undocumented immigrants.

The Postville, Iowa raid is not the only federal raid that disrupted activities by a labor organization.¹²⁷ A recent raid in Mississippi, which was launched in response to a tip from an employee, also occurred during contract negotiations.¹²⁸ An ICE spokesperson indicated that the employee was a union member who was frustrated by the fact that his undocumented coworkers were resisting union organizing efforts.¹²⁹ It is not clear what the union member's intent was, but workers fear that it "will help the company resist demands for better wages and conditions."¹³⁰

The undocumented workers in both Iowa and Mississippi were engaged in activities protected under the NLRA. In Iowa, employees had the right to approach their employer for better wages and show their support for the union conducting the organizing drive. They also arguably had the right to engage in a walk-out to protest working conditions. In Mississippi, employees had the right to refrain from engaging in union activities.

Although there is not yet any evidence that state and local immigration raids correlate with organizing activity, the state raids are conducted in the same manner and with many of the same effects as the federal raids.¹³¹ This suggests LAWA's power as a potential tool for employers to combat employee organization. For instance, in the year since LAWA went into effect, the Maricopa County Sheriff's Department has raided numerous worksites and arrested many undocumented immigrants, often in response to calls made to the hotline established for people to anonymously report LAWA violations. Despite the frequency of the worksite raids, the county made no mention of using LAWA to prosecute employers until the fun-park raids in June.¹³² Almost two years after the fun-park raids, no employers have been indicted for the LAWA violations, even

127. See David Bacon, *Mississippi Workers Fight Racial Division After the Country's Largest Immigration Raid*, Sep. 24, 2008, <http://dbacon.igc.org/Immigrants/2008mississippiraid.html>.

128. *Id.*

129. *Id.*

130. *Id.*

131. See, e.g., Stewart M. Powell, *ICE raids often spare employers*, HOUS. CHRON., Jun. 30, 2008, at A1; Lornet Turnbull, *UPS crackdown hits workers, spares businesses*, SEATTLE TIMES, Mar. 9, 2008, http://seattletimes.nwsource.com/html/localnews/2004270481_ups09m.html; Posting of chaparral to deletetheborder, *Employer Sanctions or Employee Sanctions*, <http://deletetheborder.org/node/2438> (Dec. 28, 2008, 12:01 PM).

132. See Hensley, *supra* note 8; Paul Giblin, *Immigration Raid in Arizona Could Test New State Law*, N.Y. TIMES, Jun. 12, 2008.

though the arrested workers were indicted and prosecuted within a month of the raid.¹³³

As discussed with respect to the federal raids, the fact that the state must prove an employer knowingly or intentionally broke the law simply makes it much easier to prosecute employees than employers. Another factor that exists at the state level that increases the chances that LAWA will be levied against undocumented workers rather than their employers is the intense anti-immigrant sentiment in Arizona. The continued support of the Maricopa County Sheriff's Department indicates that the electorate that voted for LAWA agrees with the crackdown on undocumented immigrants.¹³⁴ This, combined with the unlimited labor pool of undocumented immigrants ready to replace those who are arrested,¹³⁵ is conducive to an environment where employers can flout labor laws and discourage workers from complaining. If it can be demonstrated that LAWA is used to this effect, it will give rise to a claim for *Garmon* preemption.¹³⁶

C. Policy Considerations

The previous section argues that LAWA is preempted by federal labor law. The NLRA protects the rights of undocumented workers to organize and strive to improve working conditions and LAWA restricts the NLRB's authority to enforce these rights. Proponents of LAWA might rebut this argument by contending that the NLRB's power to protect labor rights becomes less important when it conflicts with federal immigration law. Even if undocumented immigrants are protected by the NLRA, the law prohibits employers from hiring undocumented workers. Enforcement of federal labor law, they argue, should not come at the ex-

133. *Migrant Sweep at Water Park Leads to Charges*, Jun. 24, 2008, <http://www.azcentral.com/news/articles/2008/06/24/20080624indictments0624.html>. One employer was recently indicted as the result of another raid by local authorities. J.J. Hensley & Michael Kiefer, *Employer sanctions law yields first case*, ARIZ. REPUBLIC, Nov. 19, 2009, at A1. This remains the only indictment brought against an employer.

134. See Jana Baybado, *'Toughest sheriff' wins re-election*, Nov. 5, 2008, <http://ktar.com/?sid=985334&nid=6> (discussing Maricopa County Sheriff Joe Arpaio's recent reelection and noting that many residents support his "crime sweeps that target illegal immigration, which result[] in scores of arrests after traffic stops and other minor infractions").

135. See Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 205-07 (2007). The fact that the employment of undocumented workers is on the rise, despite employer's sanctions laws, indicates that positions once occupied by arrested employees are being refilled by other undocumented immigrants.

136. See *id.* at 207-08 (noting that IRCA resulted in increased labor violations). See also Duff, *supra* note 31 (arguing that firing employees for participating in immigration rallies is preempted under *Garmon* doctrine).

pense of enforcement of the immigration laws. The Supreme Court addressed the relationship between immigration and labor in *Hoffman Plastics*.¹³⁷ In *Hoffman*, a chemical company fired an undocumented worker for supporting a union organizing campaign.¹³⁸ Because the firing violated the NLRA, the Board ordered the company to pay the employee for earnings he lost from being fired.¹³⁹ Faced with conflicting federal laws—the NLRA prohibited the company from firing the employee while IRCA prohibited the company from hiring him in the first place—the Court concluded that IRCA, in the circumstances of the case, trumped the NLRA and barred the award of backpay.¹⁴⁰

In balancing the labor and immigration laws, the Court compared their requirements and made two major findings that drove its conclusion: first, granting backpay violated “the core of the immigration law”;¹⁴¹ second, the court could deny backpay while still satisfying the policy goals of the NLRA.¹⁴² In balancing IRCA and the NLRA in the preemption context, the *Hoffman* court’s reasoning does not tip the balance the same way. With respect to the first point, a Supreme Court decision to strike down LAWA as preempted by federal labor law would not violate the core of federal immigration law. It would merely prevent state authorities from enforcing a state immigration law, leaving IRCA intact.¹⁴³ With respect to the second issue, the *Hoffman* court relied on the availability of other remedies under the NLRA, such as cease-and-desist orders, contempt sanctions, public notice requirements, and reinstatement and backpay for legal employees, which were “sufficient to effectuate national labor policy.”¹⁴⁴ One might argue similarly that enforcement of LAWA does not detract from these remedies. In practice, however, LAWA enforcement undermines the force of the labor laws by cutting off undocumented workers’ abilities to bring claims when their rights are violated. As discussed above, LAWA is a tool employers can use to fire employees without facing wrongful discharge claims, and then continue to

137. *Hoffman*, 53 U.S. at 144–52.

138. *Hoffman*, 535 U.S. at 140.

139. *Id.* at 141–42.

140. *Id.* at 151–52. Backpay is a common remedy for labor violations. It is an order that an employer make up the difference between what the employee was paid and the amount the employee should have been paid if not for the labor violation.

141. See *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2224, 2226–27 (2005).

142. See *id.* at 2227–28.

143. By contrast, the backpay award at issue in *Hoffman* would have encouraged employers to retain employees in violation of IRCA or else face risk of liability for backpay. It also would have encouraged the employee to remain in the U.S. in violation of other immigration laws to be eligible for damages. See *Developments in the Law—Jobs and Borders*, *supra* note 139, at 2228.

144. *Hoffman*, 535 U.S. at 152.

violate the labor rights of replacement workers.¹⁴⁵ Although employees not deported as a result of a LAWA investigation might still bring a labor claim, the disclosure implications of such a course effectively “lock workers out of the legal system altogether.”¹⁴⁶

Finally, LAWA is not consistent with the policy goals of the NLRA as defined by *Hoffman* itself. *Hoffman* is commonly understood as striking a balance between protecting the rights of undocumented workers and enforcing immigration laws.¹⁴⁷ Although removing the significant remedy of backpay from the table, *Hoffman* did not strip undocumented workers of their NLRA protections.¹⁴⁸ The policy goal behind *Hoffman* was to remove employer incentives to hire undocumented immigrants.¹⁴⁹ However, when LAWA is not used to penalize employers, but as a mechanism to arrest and deport workers, it upsets *Hoffman*'s careful balance. It encourages employers, who have an endless supply of undocumented workers and no foreseeable penalties, to keep hiring undocumented workers and violating their labor rights. In determining whether LAWA is preempted by federal labor law, requiring labor law to yield to immigration law would tip the balance too far.

CONCLUSION

In more than two years since the LAWA went into effect, a single employer has been indicted for violating the law. Nevertheless, its effects on the state have undoubtedly been far-reaching. In Maricopa County alone, local officials raided a dozen businesses and arrested 160 workers in the name of enforcing the law. Countless more undocumented immigrants and their families have left the state, some because they were unable to find work, and others out of fear of the mounting anti-immigrant sentiment. This has contributed to economic decline, fractured communities, and divisive political conflict. These deleterious consequences extend across the nation.

145. See *Developments in the Law—Jobs and Borders*, *supra* note 139, at 2229–30 (discussing how states have been trespassing on workers' rights since *Hoffman*).

146. See *id.* at 2233–34 (noting that when courts determine that immigration status is relevant to an aspect of a plaintiff's claim, defense attorneys, defendants, and potential defendants can turn worker-protection claims into deportation threats).

147. See, e.g., *id.* at 2225–29.

148. *Hoffman*, 535 U.S. at 152.

149. See *id.* at 150–51 (explaining that if the NLRA did not apply to undocumented immigrants it would encourage employers to hire these people and violate the labor laws, but that backpay awards would encourage employers to retain employees in violation of the immigration laws). *But see id.* at 153–54 (Breyer, J., dissenting) (arguing that upholding the backpay awards would more effectively remove incentives for employers to hire undocumented workers over legal workers).

LAWA and comparable employer sanctions laws are preempted by federal immigration law. State enforcement of LAWA interferes with federal enforcement of immigration laws and imposes a far higher burden on employers than Congress intended with IRCA. Changes in the legal landscape suggest that Congress alone has the authority to regulate the employment of undocumented immigrants. LAWA, as it is currently enforced, is also preempted by federal labor law. State and local officials target employees, using the law to arrest and deport undocumented immigrants while failing to pursue legal action against the employers. This method of enforcement allows employers to commit labor violations against undocumented employees and resist employee efforts to organize and redress those violations. Employer sanctions laws in other states similarly disturb federal enforcement of immigration law, impose enormous burdens on employers, and harm employees' federally guaranteed labor rights.

Immigration and employment, although not immune to state regulation, are increasingly regulated by the federal government. Despite the values of federalism, a Supreme Court decision to uphold LAWA would set a dangerous precedent. In the last year, twelve states enacted laws aimed at regulating the employment of undocumented immigrants. Allowing states to run amok with individual solutions to a national problem reduces the possibility of national immigration reform, leads to discriminatory treatment of individuals, and permits employers to mistreat undocumented workers. Invalidating LAWA—and other employer sanctions laws designed to circumvent federal immigration law—is necessary to prevent other states from adopting similar measures. It is likely that Congress will have an opportunity to implement new immigration legislation before the Supreme Court rules on the legality of LAWA or other employer sanctions laws. If such an opportunity arises, Congress should implement legislation that explicitly makes state employer sanctions regulations unlawful, because the costs they impose at both a local and national level outweigh any benefits they secure in reducing the employment of undocumented immigrants. Until Congress takes advantage of that opportunity, national practitioners—whether they be concerned with business and labor interests, with the treatment of immigrants, or preserving the supremacy of the federal Constitution—should challenge the proliferation of state laws that put these myriad interests at risk.