

# Preemption of Local Regulations beyond *Lozano v. City of Hazleton*: Reconciling Local Enforcement with Federal Immigration Policy

Mark S. Grube

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## NOTE

### PREEMPTION OF LOCAL REGULATIONS BEYOND *LOZANO V. CITY OF HAZLETON*: RECONCILING LOCAL ENFORCEMENT WITH FEDERAL IMMIGRATION POLICY

Mark S. Grubet†

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† J.D. Candidate, Cornell Law School, 2010; Article Editor, *Cornell Law Review*, Volume 95. I would like to thank the editorial staff of the *Cornell Law Review* for their thoughtful suggestions, Professor Stephen Yale-Loehr for his comments on an earlier draft of this paper, and my family and friends for their constant support.

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## INTRODUCTION

In 1986, Congress enacted “a comprehensive scheme prohibiting the employment of illegal aliens in the United States.”<sup>1</sup> Recently, many municipalities have taken matters into their own hands because of dissatisfaction over federal enforcement of these employment regulations.<sup>2</sup> Municipalities across the country have enacted, or considered enacting, ordinances that penalize employers of unauthorized workers as well as property owners who lease property to undocumented immigrants.<sup>3</sup> These ordinances have led to a conflict between federal authority, which traditionally regulates immigration, and local authority, which traditionally regulates employment and housing.

Although advocates of local regulations claim that they are merely assisting the federal government in enforcing immigration laws, detractors view these regulations as discriminatory measures against immigrants and minority residents. Many advocates of local regulation support their efforts with generalized allegations of the harm that undocumented immigrants cause without providing any statistical proof of their claims.<sup>4</sup> Although public officials supporting local ordinances usually couch their terminology to target only undocumented immigrants, this façade occasionally slips. The mayor of Valley Park, Missouri, for example, justified local employer sanc-

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<sup>1</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

<sup>2</sup> See Sean D. Hamill, *Altoona, with No Immigrant Problem, Decides to Solve It*, N.Y. TIMES, Dec. 7, 2006, at A34 (suggesting that “frustration with the federal government’s lack of immigration enforcement” might cause restrictive local regulations); Julia Preston, *Judge Voids Ordinances on Illegal Immigrants: Says Restrictions Violated Due Process*, N.Y. TIMES, July 27, 2007, at A14 (quoting Hazleton’s mayor as saying “I will not sit back because the federal government has refused to do its job.”).

<sup>3</sup> See, e.g., Hazleton, Pa., Ordinance 2006-18 (Sept. 8, 2006), available at [http://www.aclu.org/pdfs/immigrants/hazleton\\_secondordinance.pdf](http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf).

<sup>4</sup> See, e.g., Brief for Amicus Curiae Eagle Forum Education and Legal Defense Fund Filed in Support of Defendant-Appellant for Reversal of the Judgment Below at 3, *Lozano v. City of Hazleton*, No. 07-3531 (3d Cir. Feb. 12, 2008), available at <http://www.aclupa.org/downloads/EagleFmamicusHz.pdf> (“Raised in a vastly different culture and often unable to communicate with their new neighbors, it is not surprising that illegal aliens commit crimes that shock local residents and threaten their way of life.”). Eagle Forum also asserts that undocumented immigrants commit crimes that not “even the worst of American criminals . . . would commit.” *Id.* at 4. Eagle Forum, however, provides no support for the broad generalization that no American would commit such heinous crimes. Furthermore, these arguments raised against undocumented immigrants, premised in part on their being raised in a different culture, would seem to apply equally to lawful immigrants.

tions by expressing concern about “Cousin Puerto Rico and Taco Whoever” coming to town.<sup>5</sup>

To support the proposition that these ordinances are purely discriminatory in intent, individuals opposed to such measures portray them as the latest manifestation of a long wave of anti-immigrant measures and sentiments expressed throughout U.S. history.<sup>6</sup> Although the times have changed, the rhetoric is familiar. In the eighteenth century, Benjamin Franklin called German immigrants “the most ignorant Stupid Sort of their own Nation”; he assumed that “[f]ew of their children in the Country learn English,” and he feared that unless their immigration was stopped “they will soon so out number us, that . . . even our Government will become precarious.”<sup>7</sup> In the nineteenth century, there was a backlash against Roman Catholic and Chinese immigrants.<sup>8</sup> The twentieth century witnessed the internment of Japanese-Americans as well as limited opportunities for Jewish immigration immediately before the Holocaust.<sup>9</sup> Now, local communities have enacted ordinances aimed at keeping out “illegal immigrants” that also have the effect of creating an atmosphere of harassment and intimidation for lawful immigrants and minority residents.<sup>10</sup>

Opponents of local regulations, however, cannot dismiss the measures as purely discriminatory: local governments’ concerns over the failure of federal immigration enforcement are justified. Since 1986, federal employer sanctions have failed to stem the tide of illegal immi-

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<sup>5</sup> See Rigel Oliveri, Editorial, *Valley Park Needs To Shut Down Its War on Immigrants*, ST. LOUIS POST-DISPATCH, Apr. 2, 2007, at B7, LexisNexis Academic. These statements express a naked racial bias: Puerto Ricans are, of course, U.S. citizens at birth. 8 U.S.C. § 1402 (2006).

<sup>6</sup> See generally Brief of Amicus Curiae Interfaith Groups in Support of Appellees and Urging Affirmance 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> (summarizing the history of anti-immigrant sentiment in the United States from the 1700s to the internment of Japanese-Americans during World War II).

<sup>7</sup> *The Support of the Poor*, Letter from Benjamin Franklin to Peter Collinson (May 9, 1753), available at <http://www.teachingamericanhistory.com/library/index.asp?document=472>.

<sup>8</sup> See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 162 (6th ed. 2008) (noting that anti-Catholic sentiments arose from a view that “Catholics . . . [were] unable to become good citizens—that is, independent and self-reliant—since they were subject to orders from the church”); *infra* notes 23–26 and accompanying text (discussing anti-Chinese legislation and litigation challenging it).

<sup>9</sup> See Immigration Act of 1924, ch. 190, 43 Stat. 153 (limiting immigration by use of a national-origin quota system); *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (“[Military authorities] decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily”); Brief of Interfaith Groups, *supra* note 6, at 23 (discussing restrictions on Jewish immigration into the U.S. prior to the outbreak of World War II).

<sup>10</sup> See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 508–10 (M.D. Pa. 2007).

gration.<sup>11</sup> Further, although policy makers generally believe that tax revenues received from unauthorized immigrants exceed their use of government services in the aggregate, research indicates that local and state governments spend more on services for unauthorized immigrants than they receive from those immigrants in state and local tax revenue.<sup>12</sup>

There are no easy solutions to these conflicts, and litigation about a local government's ability to combat the presence of undocumented immigrants is currently ongoing. Courts have disagreed over whether employer and housing sanctions are valid. The federal statutory provision that preempts local ordinances regulating employment of unauthorized workers creates an exemption for "licensing and similar laws" in a savings clause.<sup>13</sup> To define "licensing and similar laws," courts have nothing to turn to but an ambiguous legislative history.<sup>14</sup> In addition to disputing the proper scope of the savings clause, courts and litigants have disputed the ways in which a local ordinance might conflict with federal immigration laws and policies. Moreover, legislators have provided no statutory guidance to courts analyzing the validity of housing ordinances.

Courts (so far) have responded by using the preemption doctrine to reach a desired result rather than conducting a principle-based analysis of the validity of local laws that impose a licensing penalty on employers of unauthorized workers. Where one court found local laws preempted, it did so using every preemption theory available.<sup>15</sup> Likewise, where another court held that an ordinance was valid, the court interpreted the ordinance creatively to find that it did not con-

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<sup>11</sup> See CONG. BUDGET OFFICE, PUB. NO. 2500, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 3-4 (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf> (noting that the Department of Homeland Security estimated that 11.6 million unauthorized immigrants were present in the United States in January 2006).

<sup>12</sup> See *id.* at 1.

<sup>13</sup> Immigration and Nationality Act ("INA") § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2006). For the text of the statute, see *infra* note 33.

<sup>14</sup> See H.R. REP. NO. 99-682(I), at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662 ("The 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. Further, the Committee does not intend to preempt licensing or 'fitness to do business laws,' . . . which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.").

<sup>15</sup> See *Lozano*, 496 F. Supp. 2d at 520, 523, 529 (invalidating Hazleton's ordinance using express preemption, field preemption, and conflict preemption).

flict with federal law in any way.<sup>16</sup> Courts have also used different legal doctrines to hold housing ordinances unconstitutional.<sup>17</sup>

In this Note, I argue that courts should adopt a uniform framework for analyzing local employer sanctions and housing laws that focuses on whether the laws conflict with or would undermine federal immigration policy. Courts should resist the temptation to announce an overly broad preemption doctrine that would undermine local governments' ability to legislate in areas where they have strong interests. Rather, courts should determine whether local ordinances upset the policies central to the 1986 legislation: enforcing immigration laws uniformly, preventing discrimination, and imposing only reasonable costs on businesses. Part I of this Note briefly summarizes the scope of past and current federal and local immigration regulations. Part II discusses the divergent approaches taken by courts faced with the question of whether federal immigration law and policy preempt a local regulation concerning the employment of unauthorized workers. Part III discusses the different approaches that two courts have used to strike down local housing ordinances. Part IV proposes a framework for determining whether federal law preempts local licensing regulations. This framework focuses on whether the challenged regulations conflict with federal laws, procedures, and policies or whether the regulations merely impose an additional sanction for the violation of federal immigration laws. Part V proposes that courts should focus on several conflicts with federal law and policy to hold ordinances that penalize property owners for leasing property to undocumented immigrants unconstitutional *per se*.

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<sup>16</sup> See *Gray v. City of Valley Park, Mo.*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*12, 13, 18–19 (E.D. Mo. Jan. 31, 2008) (holding that federal immigration law did not preempt the City of Valley Park ordinance under any of the three categories of preemption—express, field, or conflict preemption). The court interpreted the ordinance as falling within permissible areas of local regulation. See *id.* at \*16. It reasoned that the language “If the federal government notifies the City of Valley Park that it is unable to verify whether an individual is authorized to work in the United States, the City of Valley Park shall take no further action” triggered the waiting period under the Immigration Reform and Control Act (IRCA). *Id.* at \*16–17. However, from the language of the Valley Park ordinance, it might not be clear to an average small-business owner that every adverse finding by E-Verify triggers IRCA’s waiting period and prevents him from taking negative action against an employee. See *infra* notes 215–16 and accompanying text.

<sup>17</sup> Compare *Lozano*, 496 F. Supp. 2d at 530–33 (invalidating, under a conflict-preemption theory, a housing ordinance requiring each person seeking a rental unit to obtain an “occupancy permit” from Hazleton), with *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 866–74 (N.D. Tex. 2008) (invalidating, as an unlawful regulation of immigration, a housing ordinance requiring tenants to submit evidence of citizenship or eligible immigration status before entering into a lease).

## I

IMMIGRATION REGULATION AT THE FEDERAL  
AND LOCAL LEVELS

The balance of power between the federal and state government has constantly shifted throughout U.S. history. A brief understanding of the shifting power between federal and state governments in the immigration context can help illuminate the current debate. The tension between the need for a uniform national policy and the need for individual communities to be able to respond to their own unique circumstances eliminates the possibility of an easy solution. The power to regulate immigration has shifted from the states—in the infancy of the United States, when local concerns were paramount—to the federal government—when the need for a strong unitary policy became apparent. Now, perhaps due to the federal government's ineffective response to local concerns, localities are attempting to reclaim their earlier, and greater, authority.

## A. The Nineteenth Century

In the first hundred years of U.S. history, the federal government played a limited role in immigration regulation, generally deferring to the states.<sup>18</sup> Professor Gerald L. Neuman noted five categories of “immigration” regulations that states implemented during this period: “regulation of the movement of criminals; public health regulation; regulation of the movement of the poor; regulation of slavery; and other policies of racial subordination.”<sup>19</sup> Neuman criticized the federal exclusivity principle—the idea that the federal government has exclusive control over immigration matters—by invoking this early history.<sup>20</sup>

In the late nineteenth century, the federal government began to exert greater control over immigration. An early federal immigration law, enacted in 1875, excluded prostitutes and convicts.<sup>21</sup> In 1882, Congress added persons likely to be public charges, lunatics, and idiots to the list of those prohibited from immigrating to the United

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<sup>18</sup> See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1835 (1993) (examining the regulation of immigration, primarily at the state level, before 1875 to dispel the widely held view that there was no immigration law until 1875).

<sup>19</sup> *Id.* at 1841.

<sup>20</sup> See *id.* at 1839–40 (“[T]he history of state migration controls exposes the artificiality of . . . [categorizing immigration regulation as inherently federal because of its potential effect on foreign relations]. States retain other powers whose abuse could have international repercussions, such as taxation of foreign corporations and prosecution of aliens for local crimes.”).

<sup>21</sup> Act of Mar. 3, 1875, ch. 141, §§ 3, 5, 18 Stat. 477.

States.<sup>22</sup> Further, Congress enacted restrictions aimed at countries deemed to contain “inferior” races.<sup>23</sup>

Challenges to these racially restrictive laws led the Supreme Court to announce a broad federal power, largely immune from judicial review, to regulate immigration. In *The Chinese Exclusion Case*,<sup>24</sup> the Court held that regulating entry into the United States is an inherent federal power, a product of sovereignty.<sup>25</sup> The Court also distinguished the functions of state and federal government: “For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”<sup>26</sup>

### B. Modern Immigration Legislation

Federal immigration legislation of the last half-century provides the backdrop for the current preemption debate. Congress enacted the Immigration and Nationality Act of 1952 (INA) to recodify existing immigration law.<sup>27</sup> Although Congress has repeatedly amended the INA, it remains the core statute for federal regulation of immigration and nationality.<sup>28</sup>

One amendment to the INA, which is important for preemption analysis, is the Immigration Reform and Control Act (IRCA).<sup>29</sup> Enacted by Congress in 1986, IRCA prohibits, at a federal level, the employment of aliens not lawfully present and authorized to work in the United States.<sup>30</sup> The legislation also provides specific procedures for determining worker eligibility.<sup>31</sup> Further, IRCA supplies civil and

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<sup>22</sup> Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214.

<sup>23</sup> See, e.g., Act of May 6, 1882, ch. 126, 22 Stat. 58 (suspending the immigration of Chinese laborers into the United States for ten years).

<sup>24</sup> *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

<sup>25</sup> See *id.* at 604.

<sup>26</sup> *Id.* at 606. In *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the Court elaborated further on the vast scope of federal power over immigration, holding that “[t]he question whether . . . these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.” *Id.* at 731.

<sup>27</sup> Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

<sup>28</sup> 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.03[1] (rev. ed. 2009).

<sup>29</sup> 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.).

<sup>30</sup> See INA § 274A(a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A) (2006).

<sup>31</sup> See INA § 274A(b)(1)(A), 8 U.S.C. § 1324a(b)(1)(A) (requiring employers to attest under penalty of perjury that they have verified that the individual is eligible by inspecting certain documentation); INA § 274A(b)(1)(B)–(D), 8 U.S.C. § 1324a(b)(1)(B)–(D) (list-



criminal penalties (of increasing severity for repeat offenders) for violations of its provisions.<sup>32</sup> IRCA also expressly preempts states from enacting any civil or criminal employer sanctions, but it excludes “licensing and similar laws” from the prohibition.<sup>33</sup>

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>34</sup> IIRIRA constituted a major change in U.S. immigration law. For example, it provided for removal, without a hearing, of certain noncitizens; created additional grounds of inadmissibility and deportability; reduced judicial review in the immigration context; and redefined basic concepts that determined whether a noncitizen would face an exclusion or deportation hearing.<sup>35</sup> Because of IIRIRA’s expansion of federal power in the area of immigration regulation, it is also relevant to implied preemption analysis of recent local immigration legislation.

### C. Recent Municipal Ordinances

Several municipalities recently enacted ordinances that penalize employers who employ unauthorized workers and landlords who lease property to undocumented noncitizens.<sup>36</sup> Hazleton, Pennsylvania, enacted one such ordinance, which contains provisions typical of most employer-sanctions ordinances. It provides that upon receipt of a written and signed complaint, a city agency will request identity information from an employer and suspend the license of any business that does not comply within three business days.<sup>37</sup> The city will then sub-

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ing permissible forms of documentation to verify identity and employment eligibility); INA § 274A(b)(2), 8 U.S.C. § 1324a(b)(2) (requiring employees to attest under penalty of perjury that they are eligible to work).

<sup>32</sup> See INA § 274A(e)(4)(A), 8 U.S.C. § 1324a(e)(4)(A) (requiring escalating civil penalties for employing unauthorized workers); INA § 274A(f)(1), 8 U.S.C. § 1324a(f)(1) (requiring criminal penalties for employers that “engage[ ] in a pattern or practice of violations”); INA § 274A(f)(2), 8 U.S.C. § 1324a(f)(2) (permitting the Attorney General to seek injunctive relief against employers that have repeatedly employed unauthorized workers).

<sup>33</sup> INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (“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>34</sup> Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C. and 18 U.S.C.).

<sup>35</sup> GORDON ET AL., *supra* note 28, § 2.04[14][c].

<sup>36</sup> See, e.g., Valley Park, Mo., Ordinance 1721, § 2 (Feb. 14, 2007), available at <http://www.valleyparkmo.org/docs/Ordinances/ordinance%201721.pdf> (creating penalties in the housing context); Valley Park, Mo., Ordinance 1722, § 4.A (Feb. 14, 2007), available at <http://www.valleyparkmo.org/docs/Ordinances/Ordinance1722.pdf> (creating penalties in the employment context); Hazleton, Pa., Ordinance 2006-18, § 4.A (Sept. 8, 2006), available at [http://www.aclu.org/pdfs/immigrants/hazleton\\_secondordinance.pdf](http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf) (creating penalties in the employment context); *id.* § 5.A (creating penalties in the housing context).

<sup>37</sup> Hazleton, Pa., Ordinance 2006-18, § 4.B(3).

mit the documentation to the federal government to verify the worker's immigration status.<sup>38</sup> A safe harbor provision provides immunity for businesses that verify a worker's status using the Basic Pilot Program (now called E-Verify).<sup>39</sup> Some ordinances, including Hazleton's, also create a private cause of action for a lawful worker discharged by an employer who employs unauthorized workers and does not participate in the Basic Pilot Program.<sup>40</sup> If a private citizen succeeds in a suit against such an employer, he can recover treble damages, reasonable attorney's fees, and costs.<sup>41</sup>

Municipalities have also enacted ordinances that penalize landlords for leasing a dwelling unit to undocumented immigrants.<sup>42</sup> The ordinances generally prohibit the "harboring" of undocumented immigrants.<sup>43</sup> Hazleton's procedures regarding a landlord suspected of leasing property to an undocumented immigrant are similar to the employer-sanctions procedures: any person may file a written complaint, a city agency will verify the tenant's immigration status with the federal government, and the landlord will have five days to evict a tenant after notification of a violation. If the landlord does not comply, the landlord faces a license suspension during which he may not collect rent from any tenants.<sup>44</sup>

Moreover, there is often a requirement that the landlord verify the immigration status of potential tenants or that tenants register with a local agency. Hazleton has a safe harbor for landlords who verify the immigration status of tenants in advance.<sup>45</sup> A Farmers Branch, Texas, ordinance similarly requires landlords to verify the immigration status before entering into a lease,<sup>46</sup> while a separate Hazleton ordinance requires prospective tenants to apply for a permit and show proof of legal residency.<sup>47</sup> Rather than using the relevant definitions provided by federal immigration law, Farmers Branch uses De-

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* § 4.B(5).

<sup>40</sup> *Id.* § 4.E(1).

<sup>41</sup> *Id.* § 4.E(2).

<sup>42</sup> *See, e.g., id.* § 5; Farmers Branch, Tex., Ordinance 2892, § 2 (Nov. 13, 2006), available at [http://lawprofessors.typepad.com/immigration/files/city\\_of\\_farmers\\_branch\\_ordinance\\_no\\_2892\\_2.pdf](http://lawprofessors.typepad.com/immigration/files/city_of_farmers_branch_ordinance_no_2892_2.pdf).

<sup>43</sup> *See* Hazleton, Pa., Ordinance 2006-18, § 5. The Hazleton ordinance, known as the Illegal Immigration Relief Act (IIRA), defines "harboring" as "to let, lease, or rent a dwelling unit to an illegal alien" or "[t]o suffer or permit the occupancy of the dwelling unit by an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law." *Id.* § 5.A(1).

<sup>44</sup> *Id.* § 5.B.

<sup>45</sup> *Id.* § 5.B(9).

<sup>46</sup> Farmers Branch, Tex., Ordinance 2892, § 2.

<sup>47</sup> *See* Hazleton, Pa., Ordinance 2006-13, § 7.b.1(g) (Aug. 15, 2006), available at [http://www.aclu.org/pdfs/immigrants/hazleton\\_firstordinance.pdf](http://www.aclu.org/pdfs/immigrants/hazleton_firstordinance.pdf) (requiring each tenant to apply for and obtain an occupancy permit by supplying certain information, including proof of legal citizenship and/or residency).

partment of Housing and Urban Development (HUD) regulations to determine tenant eligibility.<sup>48</sup> These employment and housing ordinances have led to several high-profile lawsuits brought by immigrant-advocacy groups challenging the local government's authority to act in these areas.<sup>49</sup>

## II

### CHALLENGES TO LOCAL EMPLOYER-SANCTIONS LAWS

Federal courts derived the preemption doctrine from the Supremacy Clause of the U.S. Constitution.<sup>50</sup> Congress may expressly forbid states from regulating a specified area of law. Through federal immigration legislation, Congress has used this power to expressly preempt states and localities from imposing criminal and civil penalties on employers of unauthorized workers.<sup>51</sup> Congress can also impliedly preempt states and localities from legislating in a particular area. The federal government's intention to occupy an entire field of law can preempt any local legislation in that field, and a conflict between local and federal law and policy will also preempt local legislation.

#### A. *De Canas* and Categories of Preemption

In 1976, the Supreme Court decided *De Canas v. Bica*,<sup>52</sup> a case concerning federal preemption of local immigration regulations. In *De Canas*, the Court decided the validity of a California statute "provid[ing] that '[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident work-

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<sup>48</sup> See Farmers Branch, Tex., Ordinance 2903 (May 22, 2007) (referring to HUD regulations throughout).

<sup>49</sup> See, e.g., *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860 (9th Cir. 2009) (challenging the Legal Arizona Workers Act, which sanctions employers who hire unauthorized workers by revoking the employer's state license to do business in Arizona); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 861-62 (N.D. Tex. 2008) (challenging the constitutionality of Farmers Branch Ordinance 2903, the second iteration of Ordinance 2892, which imposes citizenship and immigration certification requirements on landlords); *Gray v. City of Valley Park, Mo.*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*1 (E.D. Mo. Jan. 31, 2008) (challenging Valley Park ordinances regarding leasing rental units to and employing undocumented immigrants); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484-85 (M.D. Pa. 2007) (challenging Hazleton ordinances regulating the housing and employment of undocumented immigrants).

<sup>50</sup> U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

<sup>51</sup> INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2006).

<sup>52</sup> 424 U.S. 351 (1976).

ers.’<sup>53</sup> The central issue raised by this case was whether the Supremacy Clause and the INA preempted the California statute.<sup>54</sup> Although this decision predates IRCA and courts have questioned its validity on some issues, it continues to provide the framework lower courts follow for implied preemption analysis.<sup>55</sup>

In *De Canas*, the Court undertook a three-step analysis. First, the Court considered whether the California statute regulated immigration.<sup>56</sup> The Court maintained that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.”<sup>57</sup> However, not every regulation that affects immigrants is an immigration regulation.<sup>58</sup> Rather, immigration regulation 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.”<sup>59</sup> The Court held that the California statute did not regulate immigration because it adopted federal standards to impose criminal sanctions on employers, making any indirect impact on immigration purely speculative.<sup>60</sup>

Second, the Court inquired whether the federal government had preempted local regulation in the entire field of regulating the employment of undocumented immigrants.<sup>61</sup> The Court considered whether “‘the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.’”<sup>62</sup> When such preemption occurs, it is a form of implied preemption known as field preemption.<sup>63</sup> Ultimately, the Court held that the INA did not preclude states from regulating the employment of unauthorized workers.<sup>64</sup> In coming to that conclusion, the Court emphasized the plaintiff’s failure to show any congressional intention to bar state regulations concerning the employment of unauthorized workers.<sup>65</sup> Congress’s extensive immigration statute reflected the complex na-

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<sup>53</sup> *Id.* at 352 (quoting CAL. LAB. CODE § 2805 (1971) (repealed 1988)). Migrant farm workers brought the case and alleged that the defendants, farm labor contractors, had refused the migrant workers’ continued employment because, in violation of § 2805, the farm labor contractors knowingly employed unauthorized workers. *See id.* at 353–54.

<sup>54</sup> *Id.* at 352–53.

<sup>55</sup> *See, e.g.,* Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 866–67 (N.D. Tex. 2008) (discussing the three tests derived from *De Canas*).

<sup>56</sup> *De Canas*, 424 U.S. at 354–56.

<sup>57</sup> *Id.* at 354.

<sup>58</sup> *Id.* at 355.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 355–56.

<sup>61</sup> *See id.* at 356–63.

<sup>62</sup> *Id.* at 356 (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)).

<sup>63</sup> Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 521 (M.D. Pa. 2007).

<sup>64</sup> *See De Canas*, 424 U.S. at 356–57 (“States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.”).

<sup>65</sup> *Id.* at 358.

ture of the subject rather than an intention to occupy the entire field.<sup>66</sup>

Third, the Court analyzed whether the California statute conflicted with Congress's purposes and objectives in enacting the INA.<sup>67</sup> To determine whether such a conflict exists, the Court asks whether the local legislation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA."<sup>68</sup> This form of preemption is known as conflict preemption.<sup>69</sup> The Court was unable to reach this question, however, because California courts failed to state how they would construe the statute, making it impossible for the Supreme Court to determine whether the statute impaired the objectives of the INA.<sup>70</sup> On its face, a logical construction of the statute would prohibit the employment of aliens "not entitled to lawful residence in the United States" but permitted to work under federal law; such a construction would unconstitutionally conflict with federal law.<sup>71</sup>

## B. Express Preemption

When litigants challenge a local law as preempted by federal law, a court will look to see whether Congress has enacted a specific preemption provision and determine whether the local law falls within the area proscribed by that provision. On this ground, a district court in the Middle District of Pennsylvania recently struck down as unconstitutional a Hazleton, Pennsylvania, ordinance barring the employment of unauthorized workers in *Lozano v. City of Hazleton*.<sup>72</sup> The ordinance mandated license suspensions for businesses that employ "unlawful worker[s]" and created a private cause of action for lawful workers discharged by such businesses.<sup>73</sup>

The court held that Congress expressly preempted the Hazleton ordinance by enacting 8 U.S.C. § 1324a(h)(2).<sup>74</sup> Hazleton unsuccessfully argued that it complied with federal requirements by sanctioning employers with a license suspension rather than a criminal or civil

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<sup>66</sup> See *id.* at 359–60 ("Given the complexity of the matter addressed by Congress . . . , a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent." (quoting *N.Y. Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973))).

<sup>67</sup> See *id.* at 363–65.

<sup>68</sup> *Id.* at 363 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963)).

<sup>69</sup> *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 525 (M.D. Pa. 2007).

<sup>70</sup> *De Canas*, 424 U.S. at 363–65.

<sup>71</sup> *Id.* at 364 (quoting CAL. LAB. CODE § 2805 (1971) (repealed 1988)).

<sup>72</sup> 496 F. Supp. 2d at 518–21.

<sup>73</sup> Hazleton, Pa., Ordinance 2006-18, §§ 4.B(4), 4.E (Sept. 8, 2006), available at [http://www.aclu.org/pdfs/immigrants/hazleton\\_secondordinance.pdf](http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf).

<sup>74</sup> *Lozano*, 496 F. Supp. 2d at 519–21.

penalty.<sup>75</sup> The court rejected that argument as “at odds with the plain language of the express pre-emption provision” because “[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.”<sup>76</sup> The court relied on legislative history to establish the scope of the savings clause in § 1324a(h)(2): the savings clause permits states and municipalities to suspend business licenses only for violations of IRCA, not local regulations.<sup>77</sup> Thus, although the *Lozano* court stated that the effect of the Hazleton ordinance was contrary to the “plain language” of § 1324a(h)(2), the court looked to congressional intent rather than relying on a strict interpretation of the statute’s plain language.

Less than a year after the *Lozano* decision, a district court in the Eastern District of Missouri considered a challenge to a Valley Park, Missouri ordinance similar to the Hazleton ordinance in *Gray v. City of Valley Park, Missouri*.<sup>78</sup> Despite the similarities between the two statutes, the *Gray* court dismissed the expansive *Lozano* opinion as non-binding, mentioning it only once, in a footnote.<sup>79</sup> As a threshold matter, the court determined that there was a presumption against preemption because the ordinance regulated business licenses, an area historically occupied by the states.<sup>80</sup>

The court proceeded to consider whether 8 U.S.C. § 1324a(h)(2) expressly preempted the Valley Park ordinance—specifically, whether the ordinance fell under the savings clause as a “licensing or similar law.” The court found that the ordinance, on its face, looked like a licensing law: it provided for the issuance or denial of business permits.<sup>81</sup> Although the plaintiffs argued that the court should consider congressional intent like the *Lozano* court,<sup>82</sup> the *Gray* court reasoned that considering congressional intent was not necessary to determine

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<sup>75</sup> *Id.* at 519.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 519–20 (“Therefore, the express pre-emption clause applies generally, except for state or local laws dealing with ‘suspension, revocation or refusal to reissue a license’ to an entity found to have violated the sanction provisions of IRCA.” (quoting H.R. REP. NO. 99-682(1), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662)).

<sup>78</sup> No. 4:07CV00881 ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008).

<sup>79</sup> *See id.* at \*10 n.13 (“The Court respectfully notes that the Pennsylvania decision is not binding, and therefore, the Court will conduct its own thorough analysis of the issues presented.”).

<sup>80</sup> *Id.* at \*8. The *Gray* court decided that the ordinance did not regulate immigration, an area historically occupied by the federal government, because “[t]he Supreme Court in *DeCanas* [ ] defined a regulation of immigration as ‘essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.’” *Id.* (quoting *De Canas v. Bica*, 424 U.S. 351, 355 (1976)).

<sup>81</sup> *Id.* at \*10.

<sup>82</sup> *See id.* (“Plaintiffs dispute that the Ordinance falls within the exception [for licensing or similar laws], arguing that it would violate the intent of congress [sic] to interpret the statute so that a state or local government was forbidden from imposing criminal or

“whether the ordinance is a licensing or other similar law.”<sup>83</sup> The plaintiffs also argued that the ordinance was not a licensing law because it applied to businesses exempt from obtaining a business permit. The court rejected this argument, however, holding that the ordinance was “similar” to a licensing law in that context. In addition, the court reasoned that the ordinance, which exempted certain businesses from licensing requirements, was itself a licensing regulation.<sup>84</sup>

Although the *Gray* court determined that the language of § 1324a(h)(2) was unambiguous, the court proceeded, in dicta, to look at congressional intent. Looking at the same congressional reports as the *Lozano* court, the *Gray* court reached the opposite conclusion. Although conceding that the language of the House Report was ambiguous regarding whether a finding by the federal government of a violation of federal immigration law is necessary to impose a licensing penalty, the court found that the language of the statute was not ambiguous and was controlling.<sup>85</sup> Because the Valley Park ordinance is a licensing law, the court held it valid under § 1324a(h)(2).<sup>86</sup>

In September 2008, the Ninth Circuit Court of Appeals became the first federal appellate court to weigh in on the issue of state and local regulations of the employment of unauthorized workers in *Chicanos Por La Causa, Inc. v. Napolitano*.<sup>87</sup> In *Chicanos Por La Causa*, plaintiffs brought a facial challenge to the Legal Arizona Workers Act (“LAWA”), which—like the Hazleton and Valley Park ordinances—revoked the licenses of employers that hired unauthorized workers.<sup>88</sup> At trial, the district court held that federal law did not preempt LAWA.<sup>89</sup>

The appeal focused primarily on whether LAWA was a “licensing [or] similar law[ ]” under 8 U.S.C. § 1324a(h)(2).<sup>90</sup> The Ninth Circuit held that LAWA was a “licensing law” under § 1324a(h)(2) and therefore not expressly preempted.<sup>91</sup> First, determining that LAWA was an employment regulation, an area of state concern, the court applied a presumption against preemption.<sup>92</sup> Then, using a plain-meaning approach, the court rejected the plaintiff’s argument that

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civil sanctions, but could ‘impose the enormous penalty of entirely shuttering a business.’” (citation omitted); *supra* note 77 and accompanying text.

<sup>83</sup> *Gray*, 2008 WL 294294, at \*10.

<sup>84</sup> *Id.* at \*11.

<sup>85</sup> *Id.* at \*12 (“Therefore the ambiguity in the legislative history is irrelevant. The plain meaning of the statute clearly provides for state and local governments to pass licensing laws which touch on the subject of illegal immigration.” (footnote omitted)).

<sup>86</sup> *Id.*

<sup>87</sup> *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009).

<sup>88</sup> *See id.* at 860.

<sup>89</sup> *See id.* (“The district court held that the law was not preempted.”); *Ariz. Contractors Ass’n v. Napolitano*, 526 F. Supp. 2d 968, 975–76 (D. Ariz. 2007).

<sup>90</sup> *Chicanos Por La Causa*, 558 F.3d at 860.

<sup>91</sup> *Id.* at 864–86.

<sup>92</sup> *Id.* at 864.

“license” applies only to learned professions, not businesses.<sup>93</sup> Like the *Gray* court, the Ninth Circuit found that the legislative history supported upholding local regulations concerning the employment of unauthorized workers. The court reasoned that language in the legislative history—recognizing states’ ability to “condition an employer’s ‘fitness to do business’ on hiring documented workers”—contradicted the plaintiff’s reading requiring a federally adjudicated violation of IRCA to revoke a license.<sup>94</sup> In addition, the court noted that the “hypothetical possibility” of inconsistent state and federal judgments was not a basis for sustaining a facial challenge.<sup>95</sup> Thus, the court held that LAWA was a “licensing” measure within the meaning of § 1324a(h)(2).

### C. Field Preemption

A court may also strike down a local law if the nature of the regulated subject matter or Congress’s legislation in that area inherently leaves no room for local regulation.<sup>96</sup> Using this field-preemption theory, the *Lozano* court held that the Hazleton Illegal Immigration Relief Act (IIRA) Ordinance was invalid. Two factors controlled this outcome: (1) a strong federal interest in the field of immigration and (2) the pervasiveness of federal regulations in the field of immigration.<sup>97</sup> The court emphasized the importance of the history of federal immigration regulations dating back to the end of the nineteenth century, including an elaborate discussion in an appendix.<sup>98</sup> In addition, the court relied on the constitutional grant of power to the federal government in the Naturalization Clause.<sup>99</sup> Moreover, the court pointed to Supreme Court precedent stating that states and municipalities do not have a strong interest in regulating immigration.<sup>100</sup>

After discussing the strong federal interest in the field of immigration, the *Lozano* court considered the pervasiveness of federal regulations in the field of immigration and concluded that “Congress has occupied the field of employment of unauthorized aliens with IRCA.”<sup>101</sup> The court relied on Supreme Court precedent construing

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<sup>93</sup> *Id.*; see also BLACK’S LAW DICTIONARY 1002 (9th ed. 2009) (defining license as “[a] permission, usu[ally] revocable, to commit some act that would otherwise be unlawful”).

<sup>94</sup> *Chicanos Por La Causa*, 558 F.3d at 866 (quoting H.R. REP. NO. 99-682(I), at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662).

<sup>95</sup> *Id.*

<sup>96</sup> See *supra* notes 61–63 and accompanying text.

<sup>97</sup> *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 521 (M.D. Pa. 2007).

<sup>98</sup> See *id.* app. at 556–62 (discussing the history of federal immigration regulation in the United States).

<sup>99</sup> *Id.* at 522; see also U.S. CONST. art. I, § 8, cl. 4 (giving Congress the power “[t]o establish a uniform Rule of Naturalization”).

<sup>100</sup> *Lozano*, 496 F. Supp. 2d at 522 (citing *Plyler v. Doe*, 457 U.S. 202, 225 (1982)).

<sup>101</sup> *Id.* at 523.



IRCA as demonstrating an intention to occupy the field.<sup>102</sup> Further, the court listed specific provisions of IRCA to demonstrate that “[i]t leaves no room for state regulation.”<sup>103</sup> The defendants relied on *De Canas* to argue that federal law did not preempt the Hazleton IIRA.<sup>104</sup> However, the court rejected this argument because Congress’s later enactment of IRCA, which did not exist at the time of *De Canas*, represented an intention to occupy the field of immigration.<sup>105</sup> Thus, because of the strong federal interest and pervasive federal regulation of the field of immigration, the court held that the Hazleton IIRA was an unconstitutional regulation in the exclusively federal field of immigration.

The *Gray* court, as a threshold matter before reaching implied preemption issues, considered the validity of an implied preemption claim after determining that the challenged law complied with an express preemption clause. The court held that valid implied preemption claims may remain despite compliance with an express preemption clause.<sup>106</sup> The language of the clause at issue, however, is the strongest evidence of Congress’s preemptive intent.<sup>107</sup> The Supreme Court previously held that a plaintiff may challenge a state statute—despite its compliance with a preemption clause stating the scope of permissible state legislation—if the state statute conflicts with the purposes and objectives of Congress.<sup>108</sup>

Next, the court turned to the issue of whether field preemption barred the ordinance. Relying on the discussion in *De Canas*, the court found that Congress did not intend to completely occupy the field of regulating employment of unauthorized workers.<sup>109</sup> Moreover, the preemption provision in IRCA supported a finding of no field

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<sup>102</sup> See *id.* (describing IRCA as “a comprehensive scheme prohibiting the employment of illegal aliens in the United States”) (emphasis omitted) (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)).

<sup>103</sup> *Id.* The IRCA provisions referred to by the court include INA § 274A(e)(5), 8 U.S.C. § 1324a(e)(5) (2006) (creating civil fines); INA § 274A(f), 8 U.S.C. § 1324a(f) (creating criminal penalties); INA § 274C, 8 U.S.C. § 1324c (creating penalties for document fraud); and INA § 274B, 8 U.S.C. § 1324b (prohibiting unfair employment practices in the immigration context).

<sup>104</sup> See *Lozano*, 496 F. Supp. 2d at 524 (“Not ‘every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted.’” (quoting *De Canas v. Bica*, 424 U.S. 351, 355 (1976))).

<sup>105</sup> *Id.* at 524–25.

<sup>106</sup> See *Gray v. City of Valley Park, Mo.*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*12–13 (E.D. Mo. Jan. 31, 2008).

<sup>107</sup> *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–63 (2002) (“[O]ur ‘task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.’” (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993))).

<sup>108</sup> See *Gray*, 2008 WL 294294, at \*12 (citing *Sprietsma*, 537 U.S. at 65).

<sup>109</sup> *Id.* at \*13.

preemption because § 1324a(h)(2) permits local licensing regulations.<sup>110</sup>

#### D. Conflict Preemption

The *Lozano* court also held that the Hazleton IIRA was invalid under a conflict preemption theory. The standard for conflict preemption is whether the law “‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’” or whether it is “‘impossible for a . . . party to comply with both state and federal requirements.’”<sup>111</sup> The court noted that although IRCA and the Hazleton IIRA have a similar purpose—penalizing employers of unauthorized workers—they use different means to achieve that purpose.<sup>112</sup> While federal law requires employers to review a worker’s documents and use an I-9 Employment Eligibility Verification Form to establish worker eligibility,<sup>113</sup> the Hazleton IIRA supplemented federal law by also requiring the employer to present the worker’s documents to the local Code Enforcement Office, which determined the status of the worker by contacting the federal government.<sup>114</sup> The Hazleton IIRA also conflicted with IRCA by failing to contain an exception for casual domestic workers and independent contractors.<sup>115</sup> Moreover, the Hazleton IIRA mandated the use of the Basic Pilot Program, while federal law makes use of the Program optional.<sup>116</sup> Finally, the timeframe for employers to respond to alleged violations also varied under the Hazleton IIRA and IRCA.<sup>117</sup>

In addition to these specific conflicts between federal and local law, the court found a conflict in how the United States and Hazleton balanced the interests of preventing illegal employment and protecting the rights of businesses and workers.<sup>118</sup> The Hazleton IIRA placed greater burdens on employers, in the interest of preventing illegal em-

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<sup>110</sup> *Id.*

<sup>111</sup> *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 899 (2000) (Stevens, J., dissenting) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)) (internal quotation marks omitted).

<sup>112</sup> *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 526 (M.D. Pa. 2007).

<sup>113</sup> See 8 C.F.R. § 274a.2(b) (2008); *Lozano*, 496 F. Supp. 2d at 526.

<sup>114</sup> See *Hazleton, Pa., Ordinance 2006-18*, § 4.B(4) (Sept. 8, 2006), available at [http://www.aclu.org/pdfs/immigrants/hazleton\\_secondordinance.pdf](http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf); *Lozano*, 496 F. Supp. 2d at 526.

<sup>115</sup> *Lozano*, 496 F. Supp. 2d at 526.

<sup>116</sup> *Id.* at 527.

<sup>117</sup> See *id.* (noting that under federal law, an employer may not terminate an employee based on his eligibility status for at least ten days if the employee contests the initial finding that he is unauthorized to work; under the Hazleton IIRA, however, an employer must terminate the employee within three business days and the employee has no opportunity to challenge the finding of ineligibility).

<sup>118</sup> See *id.* at 527–29 (“[T]he employment provisions of IIRA differ from and conflict with IRCA.”).

ployment, than IRCA. Based on these and other grounds, the *Lozano* court found that the Hazleton IIRA conflicted with both the letter of IRCA and its policy goals. Therefore, the court held that the Hazleton IIRA was unconstitutional under the Supremacy Clause. The *Lozano* court announced a broad scope to federal preemption of local regulations governing the employment of unauthorized workers. Later decisions have not followed this restricted vision of local authority.

The *Gray* court also considered a conflict-preemption claim but found no conflicts between the Valley Park ordinance and IRCA and rejected the conflicts the *Lozano* court discussed.<sup>119</sup> Valley Park questioned the validity of the federal regulation exempting domestic workers and independent contractors from the definition of the term “employee” by noting that the regulation may not be a reasonable interpretation of the statute.<sup>120</sup> The court agreed but also stated that even if the regulations were valid, there was no conflict because Congress did not express an intention to forbid states from regulating the employment of domestic workers and independent contractors.<sup>121</sup>

Further, the court rejected an argument that the procedures of the Valley Park ordinance and IRCA conflict. Although a preliminary glance indicates a conflict, a closer inspection of the ordinance reveals that a “tentative nonconfirmation” from the Basic Pilot program tolls the procedures of the ordinance and allows for the federal procedures to run their course.<sup>122</sup> Finally, the court found no conflict between the ordinance and IRCA concerning the use of the Basic Pilot program. The Valley Park ordinance mandated participation in the Basic Pilot program only when the federal government confirmed that an employer had hired two or more unauthorized workers.<sup>123</sup> The court found that this provision was consistent with a provision of the IIRIRA.<sup>124</sup> In addition, the court noted that although the federal government chose not to make participation mandatory, a locality may

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<sup>119</sup> *Gray v. City of Valley Park, Mo.*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*14–19 (E.D. Mo. Jan. 31, 2008).

<sup>120</sup> *See id.* at \*14. Compare INA § 274A(a)(1)(B), 8 U.S.C. § 1324a(a)(1)(B) (2006) (providing no exceptions to the prohibition on hiring workers without complying with the eligibility-verification system of § 1324a(b)), with 8 C.F.R. § 274a.1(f) (2008) (defining the term “employee” as “an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors . . . or those engaged in casual domestic employment . . .”).

<sup>121</sup> *Gray*, 2008 WL 294294, at \*14–15.

<sup>122</sup> *Id.* at \*17.

<sup>123</sup> Valley Park, Mo., Ordinance No. 1722, § 4B(6)(b) (Feb. 14, 2007), available at <http://www.valleyparkmo.org/docs/Ordinances/Ordinance1722.pdf>; *Gray*, 2008 WL 294294, at \*17.

<sup>124</sup> *See Gray*, 2008 WL 294294, at \*18; *see also* INA § 274A(e)(4)(B)(ii), 8 U.S.C. § 1324a(e)(4)(B)(ii) (2006) (stating that a cease and desist order for hiring unauthorized workers may require the entity to “take such other remedial action as is appropriate”).

still provide for greater enforcement than the federal government.<sup>125</sup> Thus, *Gray* rejected nearly all of *Lozano*'s findings and found a substantially similar regulation lawful and not preempted by federal immigration law and policy.

The Ninth Circuit considered whether federal law impliedly preempted LAWA's requirement that employers use E-Verify. The court held that this requirement "for which there is no substitute under development in either the state, federal, or private sectors, is not expressly or impliedly preempted by federal policy."<sup>126</sup> The court reasoned that Congress knew how to explicitly preempt state laws mandating the use of E-Verify; however, it did not do so.<sup>127</sup> Moreover, Congress envisioned broader use of E-Verify and showed no intention to restrict its use.<sup>128</sup> Thus, the first appellate court to weigh in on local regulations of employment of unauthorized workers has sided with the *Gray* court and rejected *Lozano*.<sup>129</sup>

### III

#### CHALLENGES TO LOCAL HOUSING-SANCTIONS LAWS

Ordinances penalizing property owners who provide housing to undocumented immigrants have had less success in federal courts than the employer-sanctions ordinances. Federal courts in Pennsylvania and Texas have struck down housing-sanctions ordinances as preempted by federal law.<sup>130</sup> Valley Park, Missouri, chose to repeal its housing ordinance and defend only the employer-sanctions provisions in court.<sup>131</sup> Other communities have also repealed housing ordi-

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<sup>125</sup> *Gray*, 2008 WL 294294, at \*19.

<sup>126</sup> *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860–61 (9th Cir. 2009).

<sup>127</sup> *Id.* at 867.

<sup>128</sup> *Id.* The court distinguished *Chicanos Por La Causa* from *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). In *Geier*, the Court held that a federal law requiring ten percent of a manufacturer's cars to be equipped with a passive restraint preempted a common-law tort action for failure to include airbags. 529 U.S. at 864–65. *Geier* found a conflict between the state law and the federal policy of balancing the interests of consumer safety and encouraging development and competition through the use of alternative safety systems. *Id.* at 881–82. Nevertheless, the Ninth Circuit did not believe that the federal government was "encouraging alternative systems" by making use of E-Verify permissive; rather, "Congress plainly envisioned and endorsed an increase in its usage." *Chicanos Por La Causa*, 558 F.3d at 867. Thus, the court held that there was no conflict.

<sup>129</sup> The Ninth Circuit mentioned *Gray* and *Lozano* each only once after concluding its own analysis. See *Chicanos Por La Causa*, 558 F.3d at 865–66 (noting that it was reaching the same conclusion as *Gray* but not as *Lozano* without explicitly discussing the analysis of either case).

<sup>130</sup> See *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 879 (N.D. Tex. 2008); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 533 (M.D. Pa. 2007).

<sup>131</sup> See *Gray v. City of Valley Park, Mo.*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*1 (E.D. Mo. Jan. 31, 2008).

nances when faced with expensive lawsuits and limited chances of success.<sup>132</sup>

### A. Conflict Preemption

The *Lozano* court held that Hazleton's ordinances penalizing landowners for leasing property to undocumented immigrants conflicted with federal law and were void.<sup>133</sup> First, the court found a conflict because the federal government permits several categories of undocumented immigrants to work and live in the United States.<sup>134</sup> Although the federal government will allow these undocumented immigrants to remain in the United States, Hazleton's ordinance would deny them access to housing.<sup>135</sup> Next, the court noted that changing immigration status is a complex procedure.<sup>136</sup> For example, an individual with a bona fide application for adjustment of status will often have no documents establishing a valid claim to remain in the country until the application is approved—perhaps years later.<sup>137</sup> Moreover, some individuals may be permitted to regularize their status only when they are in removal proceedings.<sup>138</sup> The ordinances assumed that the federal government seeks the removal of all undocumented immigrants; however, federal immigration rules are much more complex, and the use of E-Verify is insufficient to determine whether an alien should be removed.<sup>139</sup> The court noted that the “‘structure of the immigration statuses makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported.’”<sup>140</sup> Thus, the court held that the housing provisions of the IIRA conflicted with federal law because these provisions imposed greater burdens on aliens than did federal law by prohibiting their residence in Hazleton despite their continued permission to remain in the United States.<sup>141</sup>

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<sup>132</sup> See, e.g., Jill P. Capuzzo, *Immigrants Hated Law, and Now It's Repealed*, N.Y. TIMES, Sept. 19, 2007, at B2 (noting that Riverside, New Jersey, population 8000, repealed a housing ordinance in part because it “amassed close to \$100,000 in legal fees in the preliminary preparation for the legal fight”).

<sup>133</sup> See *Lozano*, 496 F. Supp. 2d at 529–33.

<sup>134</sup> *Id.* at 530–31. Some of these categories include aliens who have applied for asylum or suspension of deportation. See *id.* at 531. Moreover, courts may release aliens with final orders of removal “if there is no likelihood of their removal in the foreseeable future.” *Id.* (citing *Zadydas v. Davis*, 533 U.S. 678, 701 (2001)).

<sup>135</sup> *Id.* at 531.

<sup>136</sup> *Id.*

<sup>137</sup> See *id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 531–32.

<sup>140</sup> *Id.* at 532 (quoting *Plyler v. Doe*, 457 U.S. 202, 236 (1982) (Blackmun, J., concurring)).

<sup>141</sup> *Id.*

Additionally, the *Lozano* court held that federal law also preempted the Tenant Registration Ordinance, which required potential tenants to apply for a permit with the Hazleton Code Enforcement Office.<sup>142</sup> This provision directly conflicted with federal law because it required a local agency to determine if a Hazleton resident was properly in the country, a determination that only a federal immigration judge can properly make.<sup>143</sup>

## B. Regulation-of-Immigration Preemption

A federal court in Texas has also invalidated a housing ordinance on preemption grounds in *Villas at Parkside Partners v. City of Farmers Branch*.<sup>144</sup> The court first noted that it was legally irrelevant that the residents of Farmers Branch passed the ordinance by popular vote: “A court that approves an ordinance merely because it is politically popular abdicates its judicial obligation to decide independently and on existing legal precedent whether the ordinance passes constitutional muster.”<sup>145</sup> Also, the court distinguished *Gray* and *Arizona Contractors*—the trial court decision upheld in *Chicanos Por La Causa*—because those cases involved employer sanctions and required the federal government to make the final determination of worker eligibility.<sup>146</sup>

Instead of resting its decision on conflict preemption, like *Lozano*, *Villas at Parkside Partners* held that federal law preempted the Farmers Branch ordinance because it was a regulation of immigration, which meant that it failed the first *De Canas* test.<sup>147</sup> First, the court noted that the Farmers Branch ordinance “limits those with ‘eligible immigration status’ to those noncitizens who are eligible for federal housing subsidies.”<sup>148</sup> Thus, Farmers Branch did not adopt federal

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<sup>142</sup> *Id.* at 530, 533.

<sup>143</sup> *See id.* at 533; *see also* 8 U.S.C. § 1229a(a)(1) (2006) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”); *id.* § 1229a(a)(3) (“[These proceedings are] the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.”).

<sup>144</sup> 577 F. Supp. 2d 858, 874 (N.D. Tex. 2008). This case challenged Ordinance No. 2903, which called for an election on the housing ordinance. *Id.* Ordinance No. 2903 replaced Ordinance No. 2892, which was repealed after a state court issued a temporary restraining order finding that its passage may have violated the Texas Open Meetings Act. *Id.* at 861. The new ordinance (2903) passed easily, by a vote of 4058 to 1941. *Id.* Finally, the court granted a preliminary injunction before the ordinance went into effect. *Id.*

<sup>145</sup> *Id.* at 864.

<sup>146</sup> *Id.* at 865–66.

<sup>147</sup> *Id.* at 869; *see also* *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); *supra* notes 56–60 and accompanying text (describing the *De Canas* court’s analysis of whether the state ordinance was a regulation of immigration).

<sup>148</sup> *Villas at Parkside Partners*, 577 F. Supp. 2d at 869.

immigration requirements but rather used federal housing regulations to determine which noncitizens could rent housing.<sup>149</sup> The court held that this was a regulation of immigration in violation of the Supremacy Clause.<sup>150</sup> Second, the court noted that the Farmers Branch ordinance required owners and property managers to determine the immigration status of potential tenants.<sup>151</sup> Requiring private citizens and city officials to make determinations of immigration status also constitutes a "regulation of immigration" in violation of *De Canas*.<sup>152</sup> The court rejected Farmers Branch's argument that it was supporting the federal government's enforcement efforts because federal law provides a specific mechanism for localities to assist in immigration enforcement—so-called 287(g) agreements.<sup>153</sup> Finally, because the court found the ordinance to be a "regulation of immigration" for the above reasons, the court did not find it necessary to address arguments concerning field and conflict preemption.<sup>154</sup>

#### IV

#### LOCAL EMPLOYER-SANCTIONS LAWS AND FEDERAL IMMIGRATION POLICY

The current state of the law leaves states and municipalities unaware of the extent to which they may enact regulations that touch on immigration matters. This uncertainty can lead to expensive legal fees for a municipality defending an ordinance.<sup>155</sup> Although employment has traditionally been a local concern, the federal government—with the enactment of IRCA—has signaled that the employment of unauthorized workers is a matter of national concern. Nevertheless, courts should be careful to not strike down every law touching on the subject of immigration because an overly expansive view of field preemption could result in localities' losing the ability to regulate in areas where they have a strong interest. In fact, Congress expressly allowed some room for local regulation,<sup>156</sup> leaving it to the

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<sup>149</sup> *Id.* at 871.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 873–74.

<sup>152</sup> *Id.* at 874; *see also* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 770 (C.D. Cal. 1995) ("[D]eterminations of immigration status by state agents amounts to immigration regulation . . . [even when] made . . . for the limited purpose of denying benefits.").

<sup>153</sup> *Villas at Parkside Partners*, 577 F. Supp. 2d at 873 ("[T]he Attorney General may enter into a written agreement with a State, . . . pursuant to which an officer or employee of the State . . . may carry out [an investigation, apprehension, or detention of aliens] . . . at the expense of the State . . . and to the extent consistent with State and local law." (quoting 8 U.S.C. § 1357(g)(1) (2006))).

<sup>154</sup> *See id.* at 874 ("In light of the court's ruling with respect to the first *De Canas* test, it does not consider the parties' arguments regarding the second and third *De Canas* tests.").

<sup>155</sup> *See supra* note 132 and accompanying text.

<sup>156</sup> *See supra* notes 13–14 and accompanying text.

courts to define the boundaries of permissible regulation. Courts should make clear to local governments that any employer-licensing penalties should closely track federal law so as not to conflict with federal immigration policy by imposing broader liability or excessive burdens on businesses.

#### A. Express Preemption Under IRCA

The text of IRCA's preemption clause<sup>157</sup> has led courts to contradictory results even though they claim to rely on the plain meaning of the statute. The *Lozano* court reasoned that permitting the revocation of business licenses was contrary to the plain language of the statute.<sup>158</sup> In *Chicanos Por La Causa*, the Ninth Circuit relied on Black's Law Dictionary to interpret "licensing" but did not consider the meaning of "similar law."<sup>159</sup> The court did not try to reconcile the inconsistency of preempting a \$250 civil fine but permitting a municipality to shut down a business entirely. Finally, the *Gray* court, in construing § 1324a(h)(2), also relied on a plain-meaning approach. It concluded that the application of the Valley Park ordinance to businesses exempt from obtaining a license fell under the "similar laws" language but did not define the scope of that phrase.<sup>160</sup>

The express language of IRCA exempts local licensing regulations from the preemption provision without making clear the scope of this exemption.<sup>161</sup> The legislative history confirms that Congress intended to permit states and localities to suspend or revoke the licenses of businesses that violate the employer-sanctions provisions of IRCA.<sup>162</sup> Courts should look at IRCA in its entirety to interpret the

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<sup>157</sup> See *supra* note 33.

<sup>158</sup> See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 519–20 (M.D. Pa. 2007). That court, however, did not rely exclusively on the plain language of the statute as it also considered congressional intent as derived from legislative history. *Id.* ("In addition to being counterintuitive to the plain language of [IRCA's express preemption clause] . . . , Hazleton's interpretation [that a business license suspension is a "licensing or similar law" such that it falls within the exception to the express preemption clause] is contrary to its legislative history.").

<sup>159</sup> See *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 865 (9th Cir. 2009).

<sup>160</sup> See *Gray v. City of Valley Park, Mo.*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*10–11 (E.D. Mo. Jan. 31, 2008) ("Plaintiffs['] argument fails, firstly, because IRCA states 'licensing or similar law[,]' the law is clearly a similar law as its penalties are limited to the suspension of a business license." (quoting 8 U.S.C. § 1324a(h)(2) (2006))).

<sup>161</sup> See *supra* note 33.

<sup>162</sup> See H.R. REP. NO. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662 ("[IRCA's employer sanctions provisions] 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. Further, the Committee does not intend to preempt licensing or 'fitness to do business laws,' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.").



meaning of the savings clause and the scope of the exemption.<sup>163</sup> Instead of taking such an approach, however, several courts have ended their inquiry with the language of § 1324a(h)(2) without considering the clause in the context of IRCA's comprehensive regulatory scheme.<sup>164</sup> The *Lozano* court correctly considered the effect of the scope of the savings clause on IRCA in its totality, but the court did not suggest an interpretation that would give the words any meaning.<sup>165</sup>

Courts should interpret § 1324a(h)(2) to require a federally adjudicated violation of IRCA before a state or municipality may impose a licensing penalty. The language of the statute and the legislative history have led to varying interpretations of what process IRCA requires before a state may revoke a business license.<sup>166</sup> The legislative history is vague and merely states that a locality may revoke licenses of a "person who has been found to have violated the sanctions provisions in this legislation"; this language makes clear that there must be a violation of IRCA, as opposed to a local regulation, but it does not define what entity must find the violation.<sup>167</sup> However, a court must interpret the savings clause in light of the entire regulatory scheme.<sup>168</sup> Allowing a local determination of whether an employer hired an unauthorized worker would be contrary to Congress's creation of a uniform standard for regulating the employment of unauthorized workers.<sup>169</sup> Further, businesses would have difficulties adjusting to the approach suggested in *Gray*: complying with thousands of potentially conflicting procedures for determining whether a worker is authorized.<sup>170</sup> Adjudication by a federal entity would comply with

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<sup>163</sup> See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) ("[W]e are obliged in interpreting the saving clause to consider . . . the role of the saving clause in ERISA as a whole.").

<sup>164</sup> See *Chicanos Por La Causa*, 558 F.3d at 865-66; *Gray*, 2008 WL 294294, at \*10-11.

<sup>165</sup> See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518-19 (M.D. Pa. 2007) (describing IRCA as a "'comprehensive scheme'" (citation omitted)).

<sup>166</sup> Compare Brief of Appellees at 75, *Lozano v. City of Hazleton*, No. 07-3531 (3d Cir. Apr. 8, 2008), available at [http://www.aclu.org/pdfs/immigrants/lozanovhazleton\\_brief.pdf](http://www.aclu.org/pdfs/immigrants/lozanovhazleton_brief.pdf) ("The House Report underscores what IRCA itself establishes: Congress intended that any sanction, even under a federal licensing law, must await completion of the IRCA sanctions process, and a federal finding that the employer has violated IRCA."), with *Gray*, 2008 WL 294294, at \*12 ("Although the wording in the house report is somewhat ambiguous, the wording of the statute is perfectly clear. . . . There is no requirement in the statute that a finding be made by the federal government that a person has employed . . . unauthorized aliens, only that those are the individuals who are subject to penalty.").

<sup>167</sup> H.R. REP. NO. 99-682(I), at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662.

<sup>168</sup> See *Pilot Life Ins. Co.*, 481 U.S. at 51 (considering the entire regulatory scheme created by ERISA when interpreting that legislation's savings clause).

<sup>169</sup> See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 ("[T]he immigration laws of the United States should be enforced vigorously and uniformly . . ." (emphasis added)).

<sup>170</sup> See *Gray*, 2008 WL 294294, at \*17 ("In the event that the Basic Pilot program reports back a tentative nonconfirmation, then the Ordinance's three day time table is

Congress's goals of achieving uniform enforcement and not overburdening businesses.<sup>171</sup> Because of the statutory ambiguity concerning which entities may find an employer violation, courts should construe § 1324a(h)(2) to require a federally adjudicated decision because such a requirement would be consistent with IRCA's regulatory scheme and policy objectives.

In addition, courts should hold that the express language of § 1324a(h)(2) preempts any local law that creates a private right of action against employers who hire unauthorized workers. The plain language of IRCA bars states and municipalities from imposing criminal and civil sanctions on employers of unauthorized workers.<sup>172</sup> Hazleton has argued that the private right of action is not a "sanction" because the plaintiff has discretion to bring an action and success is not guaranteed.<sup>173</sup> However, the private right of action is a civil sanction because Hazleton has created a civil "penalty . . . that results from failure to comply with a law."<sup>174</sup> It is irrelevant that the potential action is discretionary and success is not guaranteed; the same is true of government actions.

Courts should also interpret the savings clause of § 1324a(h)(2) to include fitness-to-do-business laws in addition to regular licensing laws. Interpreting the savings clause using the plain-meaning approach does not define the scope of the "similar laws" language. The phrase "similar laws" does not carry as clear a meaning as the *Gray*

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toll, pending completion of the federal determination, which allows the employee eight federal government business days to respond to the nonconfirmation." It can be difficult for business to comply with federal immigration law, and in rejecting the Plaintiffs' argument that the Valley Park Ordinance and IRCA's processes conflict, *Gray* suggests that local governments may also require businesses to reconcile complex federal immigration law with vague, yet theoretically compatible, local regulations and procedures. See *id.* at \*16-17; Brief of Amici Curiae The Chamber of Commerce of the United States of America et al. in Support of Appellees at 5-9, *Lozano*, No. 07-3531 (3d Cir. Apr. 17, 2008), available at <http://www.aclupa.org/downloads/USChComamicus.pdf> (discussing federal and local regulations for verifying worker-eligibility status). The administrative costs of such a system would likely be substantial.

<sup>171</sup> See *Collins Foods Int'l, Inc. v. U.S. INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("[T]he legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process.").

<sup>172</sup> See INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2006) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens.").

<sup>173</sup> See Brief of Appellant, City of Hazleton at 47-52, *Lozano v. City of Hazleton*, No. 07-3531 (3d Cir. Feb. 7, 2008), available at <http://www.aclupa.org/downloads/Hzdsbrief3d.pdf>. Additionally, Hazleton argued that the private right of action is a "similar law" within the savings clause of § 1324a(h)(2). *Id.* at 52. It is not a "similar law" under § 1324a(h)(2). For a discussion of the proper construction of the language of "similar law," see *infra* notes 175-78 and accompanying text.

<sup>174</sup> BLACK'S LAW DICTIONARY 1458 (9th ed. 2009) (defining the term "sanction").

court suggests.<sup>175</sup> Because the language of the statute is ambiguous, courts should turn to the legislative history for guidance.<sup>176</sup> After discussing Congress's intent not to interfere with local licensing processes, the legislative history also states that the statute is not intended to preempt fitness-to-do-business laws.<sup>177</sup> Furthermore, Congress has consistently expressed a policy preference against preempting state or local laws licensing businesses that supply labor.<sup>178</sup> Thus, because fitness-to-do-business and licensing laws are the only laws that Congress explicitly mentioned in the legislative history, courts should interpret the phrase "similar laws" to include the fitness-to-do-business laws. There is no indication in the legislative history that Congress intended to give any broader scope to the phrase "similar laws."

## B. Field Preemption

Courts should not rely on field preemption to invalidate local employer-sanctions laws. Congress preempts an entire field of law when its regulations are "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."<sup>179</sup> The express language of IRCA's preemption provision and its legislative history permit some room for states and municipalities to impose licensing penalties on employers who violate IRCA.<sup>180</sup> That is why the *Lozano* court had to go to great lengths to ignore the savings clause of § 1324a(h)(2), which permits some local regulation, in order to find that the Hazleton ordinance was invalid on the basis of field preemption.<sup>181</sup> In *Gray*, the court correctly dismissed the field-preemption

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<sup>175</sup> See *Gray*, 2008 WL 294294, at \*11 ("[T]he law is clearly a similar law as its penalties are limited to the suspension of a business license."). But see MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1161 (11th ed. 2003) (defining "similar" as (1) "having characteristics in common" and (2) "alike in substance or essentials"). Thus, using a plain-meaning approach to interpret 8 U.S.C. § 1324a(h)(2), one can infer that ordinances sharing common characteristics with licensing ordinances are valid. This does little to clarify the scope of permissible regulation for courts and municipalities.

<sup>176</sup> See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 519–20 (M.D. Pa. 2007) (resorting to legislative history to interpret IRCA's preemption clause); cf. *United States v. Gonzales*, 520 U.S. 1, 6 (1997) ("[With a] straightforward statutory command, there is no reason to resort to legislative history.").

<sup>177</sup> See *supra* note 162.

<sup>178</sup> See *De Canas v. Bica*, 424 U.S. 351, 361–62 (1976) (discussing the Farm Labor Registration Act as evidence that Congress did not intend to preempt state laws concerning the licensing of farm-labor contractors).

<sup>179</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>180</sup> See *supra* notes 33, 162 and accompanying text.

<sup>181</sup> See *Lozano*, 496 F. Supp. 2d at 521–25 (analyzing the field-preemption claim without discussing the savings clause of § 1324a(h)(2)).

claim quickly by looking at Congress's intent to permit some level of local regulation.<sup>182</sup>

Professor Cristina M. Rodríguez has recently noted the dangers of an expansive view of field preemption, which could undermine state regulations in areas where there is a legitimate local interest.<sup>183</sup> Rodríguez advocates defining fields narrowly and with specificity.<sup>184</sup> This view is consistent with the language in *De Canas*, where the Court held that “the fact that aliens are the subject of a state statute does not render it a regulation of immigration.”<sup>185</sup> Thus, instead of framing the field as immigration regulation, courts should look at the more narrow question of whether the federal government has occupied the field of licensing sanctions for employers of undocumented immigrants. The language of the statute and legislative history makes clear that Congress's regulations are not “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>186</sup> In fact, Congress expressly left room for local governments to supplement federal efforts.

### C. Conflict Preemption

Courts should focus their preemption analysis on whether a challenged local employer-sanctions law conflicts with the law and policies of the federal government. The Supreme Court has held that the presence of a savings clause does not “create some kind of ‘special burden’ beyond that inherent in ordinary pre-emption principles.”<sup>187</sup> Therefore, courts should inquire whether the law “‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’” or whether it is “‘impossible for a . . . party to comply with both state and federal requirements.’”<sup>188</sup> Advocates of local regulation argue that courts should not find preemption where there is “any slight difference in approach between federal and state

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<sup>182</sup> See *Gray v. City of Valley Park, Mo.*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*13 (E.D. Mo. Jan. 31, 2008) (“Including 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 to preempt the entire field of immigration regulation.”).

<sup>183</sup> See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 623–24 (2008).

<sup>184</sup> See *id.*

<sup>185</sup> *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

<sup>186</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also *supra* notes 33, 162 and accompanying text (discussing permissible forms of state regulations affecting immigrants).

<sup>187</sup> *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000).

<sup>188</sup> *Id.* at 899 (Stevens, J., dissenting) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (internal quotation marks omitted)).

statutes.”<sup>189</sup> However, the areas on which I propose courts focus their analysis are not “slight difference[s]” but have the potential to “stand[ ] as an obstacle to the accomplishment . . . of the full purposes” of federal immigration policy by preventing uniform enforcement of federal immigration law, overburdening businesses, and encouraging discrimination.<sup>190</sup> If local governments draft a regulation that punishes businesses with a licensing penalty for employing illegal workers in a manner consistent with federal law, as outlined below, then courts should allow the local regulation to stand.

### 1. *Employee-Verification Procedures*

First, courts should consider whether the local law mandates the use of an employment-verification system that is inconsistent with federal law. Federal law forbids the government from requiring most employers to participate in E-Verify.<sup>191</sup> The federal employee-verification system reflects a careful balance of burdens on employers, employees, and the goal of deterring illegal immigration.<sup>192</sup> Mandating participation in E-Verify undermines Congress’s careful policy decisions.

Congress’s decision to continue to make participation in E-Verify voluntary reflects important and carefully considered policy decisions.<sup>193</sup> Most importantly, work-authorized workers still frequently receive tentative nonconfirmations from E-Verify resulting in substantial costs to employers, employees, and the federal government.<sup>194</sup> Al-

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<sup>189</sup> See Brief of Appellant, *supra* note 173, at 67 (arguing that the district court erred in finding conflict preemption on the basis of slight variations between federal and local laws).

<sup>190</sup> *Ceier*, 529 U.S. at 899 (Stevens, J., dissenting) (quoting *Freightliner*, 514 U.S. at 287 (internal quotation marks omitted)).

<sup>191</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 402(a), 110 Stat. 3009-546, 3009-656 (“[With limited exceptions] the Attorney General may not require any person or other entity to participate in a pilot program.”). An important exception is that all federal contractors are required to use E-Verify. Exec. Order No. 13,465 § 1(b), 73 Fed. Reg. 33,285, (June 6, 2008), *reprinted in* 2008 U.S.C.C.A.N. B41, B41–B42. However, this does not negate the fact that federal law bars the Attorney General from requiring any entity, not enumerated by federal law, to participate in E-Verify.

<sup>192</sup> See H.R. REP. NO. 99-682(I), at 52–56 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5656–60 (discussing the history of the federal immigration legislation from the 1970s to 1985); see also *Collins Foods Int’l, Inc. v. U.S. INS*, 948 F.2d 549, 554 (9th Cir. 1991) (“[T]he legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process.”).

<sup>193</sup> See generally U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., REPORT TO CONGRESS ON THE BASIC PILOT PROGRAM 1 (2004), available at <http://www.uscis.gov/files/natedocuments/BasicFINALcongress0704.pdf> (“Proponents have argued that automating the process would make employment verification more effective in preventing unauthorized employment and, consequently, would act as a deterrent to illegal immigration to the United States. Opponents have raised concerns about potential negative impacts of automated employment verification on discrimination and privacy.”).

<sup>194</sup> *Id.* at 3–4.

though the error rate is fairly low for all employees, the error rate for foreign-born citizens is significantly higher than the rate for U.S. citizens. Between October 2004 and October 2007 the error rate for foreign-born citizens was approximately ten percent.<sup>195</sup> A report commissioned by the Department of Homeland Security has recognized that E-Verify is not sufficiently accurate to meet the requirements of federal law.<sup>196</sup>

Allowing states and localities to impose their own employee status-verification procedures would impose a burden on businesses that substantially exceeds Congress's intentions.<sup>197</sup> Moreover, a patchwork system of potentially hundreds of different regulatory schemes would defeat Congress's goal of uniform enforcement.<sup>198</sup> For example, a corporation operating in all fifty states would be required to use E-Verify in Arizona<sup>199</sup> and a state-created "Status Verification System" in Utah.<sup>200</sup> In Illinois, however, the employer would be prohibited from using E-Verify,<sup>201</sup> and in Tennessee the employer would have to comply with restrictions on the forms of documentation that the employer could use to verify eligibility.<sup>202</sup> These laws represent a small sample

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<sup>195</sup> WESTAT, FINDINGS OF THE WEB BASIC PILOT EVALUATION: REPORT TO U.S. DEP'T OF HOMELAND SEC. 57 (2007), available at <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>.

<sup>196</sup> See *id.* at xxi ("[T]he database used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification, especially for naturalized citizens. . . . [Manual review] is time consuming and can result in discrimination against work-authorized foreign-born persons . . .").

<sup>197</sup> See generally Brief of Amici Curiae The Chamber of Commerce of the United States, *supra* note 170, at 5–9 (discussing federal and local regulations for verifying worker-eligibility status).

<sup>198</sup> See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 ("[T]he immigration laws of the United States should be enforced vigorously and *uniformly* . . ." (emphasis added)). For a summary of local legislation regulating employment of undocumented workers, see DIRK HEGEN, IMMIGRANT POLICY PROJECT, NAT'L CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 7–10 (2008), available at <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>.

<sup>199</sup> ARIZ. REV. STAT. ANN. § 23-214(A) (2008) ("[E]very employer . . . shall verify the employment eligibility of the employee through the e-verify program.").

<sup>200</sup> UTAH CODE ANN. § 63G-11-103(2)(a) (2008) ("Each public employer shall register with and use a Status Verification System to verify the federal employment authorization status of a new employee.").

<sup>201</sup> 820 ILL. COMP. STAT. ANN. 55/12(a) (2008) ("Employers are prohibited from enrolling in any Employment Eligibility Verification System, including the Basic Pilot program, . . . until the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases are able to make a determination on 99% of the tentative non-confirmation notices issued to employers within 3 days, unless otherwise required by federal law.").

<sup>202</sup> TENN. CODE ANN. § 50-1-106(b) (2008) ("For purposes of an application or offer of employment, no person in this state shall accept an individual taxpayer identification number as a form of identification.").

of the inconsistent procedures that businesses face despite Congress's intention to create a uniform system for employee verification.

Local legislation mandating the use of E-Verify is not protected under the doctrine of concurrent enforcement. The *Gray* court rejected an argument that mandatory use of E-Verify conflicted with federal law because "a state has concurrent jurisdiction with the federal government to enforce federal laws."<sup>203</sup> The City of Hazleton argued that the trial court invented an "excessive enforcement" theory in deciding that mandatory E-Verify was conflict preempted.<sup>204</sup> However, local laws conflict with federal law not because they "excessive[ly]" enforce immigration laws, but rather because they often ignore Congress's goals of avoiding undue burdens on business and preventing discrimination.<sup>205</sup> Further, a conflict in procedures used to reach the same goal can be sufficient for federal law to preempt a local law.<sup>206</sup>

Given local governments' limited resources, the federal government is in a better position than local governments to monitor the effectiveness of the E-Verify program and determine when to make it mandatory on a nationwide basis. In fact, the federal government has not hesitated to escalate use of the program when appropriate.<sup>207</sup> Courts should find that IRCA preempts a local law that mandates participation in E-Verify:

## 2. *Scope of Regulation*

Second, courts should consider whether a local law applies to the same employment activities that Congress intended to regulate. IRCA makes 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 . . . with respect to such employment."<sup>208</sup> Regulations

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<sup>203</sup> *Gray v. City of Valley Park, Mo.*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*19 (E.D. Mo. Jan. 31, 2008) (citing *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983)).

<sup>204</sup> Brief of Appellant, *supra* note 173, at 65–66 ("According to the Court, while Congress would like to see federal law fully enforced at the border, *Congress does not wish to see federal law fully enforced in the interior*. Doing so would result in what the Court termed 'excessive enforcement.'").

<sup>205</sup> See *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941) ("[W]here the federal government . . . has enacted a complete scheme of regulation . . . , states cannot, inconsistently with the purpose of Congress, . . . enforce additional or auxiliary regulations."). For a discussion of Congress's goal of preventing discrimination, see *infra* notes 217–18 and accompanying text.

<sup>206</sup> See *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 287 (1971) ("Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.").

<sup>207</sup> See Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, §§ 2, 3, 117 Stat. 1944 (extending the program from six to eleven years and requiring the submission of a report about expanding the program to all fifty states).

<sup>208</sup> INA § 274A(a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A) (2006).

promulgated pursuant to IRCA exclude independent contractors and casual domestic workers from the definition of the term “employee.”<sup>209</sup> Moreover, Congress expressed an intention that the INS should be flexible in sanctioning certain categories of employers.<sup>210</sup> Finally, the federal government has determined that unions should not face liability under the employer-sanctions provisions of IRCA.<sup>211</sup>

A local regulation that penalizes employers of independent contractors and casual domestic workers would conflict with a federal determination not to impose employer sanctions in this context.<sup>212</sup> Imposing additional liability by regulating employment of independent contractors and casual domestic workers would impose a heavier burden on employers than Congress expressly intended to impose.<sup>213</sup> Although an employer may be liable if he hires an independent contractor knowing that the contractor has no work authorization, there is no affirmative duty to verify an independent contractor’s eligibility.<sup>214</sup> Similarly, courts should inquire whether a local law would apply to unions and organizations that recruit without receiving a fee. A court should hold that IRCA preempts any local employer-sanctions law that deviates from the federal definition of the term “employee.” Requiring federal adjudication of an IRCA violation should result in increased local compliance with the numerous exceptions that Congress has explicitly carved out as well as greater local restraint in those situations where Congress has suggested that the INS should enforce IRCA with greater discretion.

### 3. *Enforcement Procedures*

Third, courts should consider whether the procedures of a local regulation are compatible with the procedures of federal employer-sanctions provisions. For example, an employee has eight days to

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<sup>209</sup> 8 C.F.R. § 274a.1(f) (2008) (“The term *employee* means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors . . . or those engaged in casual domestic employment.”).

<sup>210</sup> See H.R. REP. NO. 99-682(I), at 57 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5661 (“The Committee recognizes the special problems facing professional sports and does not intend that sanctions would be applicable in the case of technical violations caused by exigent circumstances or processing delays.”).

<sup>211</sup> See 8 C.F.R. § 274a.1(d) (“The term *refer for a fee* . . . does not include union hiring halls that refer union members or non-union individuals who pay union membership dues.”); *id.* § 274a.1(e) (excluding union hiring halls from being included in the phrase “recruit for a fee”).

<sup>212</sup> See H.R. REP. NO. 99-682(I), at 57, reprinted in 1986 U.S.C.C.A.N. at 5661 (“It is not the intent of this Committee that sanctions would apply in the case of casual hires . . .”).

<sup>213</sup> See *id.* at 5656–60 (discussing the history of the federal immigration legislation from the 1970s to 1985); see also *Collins Foods Int’l, Inc. v. U.S. INS*, 948 F.2d 549, 554 (9th Cir. 1991) (“[T]he legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process.”).

<sup>214</sup> See INA § 274A(a)(4), 8 U.S.C. § 1324a(a)(4) (2006).



challenge a tentative nonconfirmation from the E-Verify system.<sup>215</sup> Local regulations requiring an employer to discharge an employee before the eight-day period has elapsed conflict with federal procedures and place employers in the precarious position of deciding which law to follow. Although one court has avoided this problem by tortuously reading a local ordinance to harmonize it with federal procedure,<sup>216</sup> such an approach is unrealistic because few employers faced with a tentative nonconfirmation would risk their business license by inferring an extended waiting period from a local ordinance that does not expressly include such an extension. Local ordinances that create varying procedures raise the potential problem of imposing liability on employers regardless of their course of action. Thus, local laws should make clear that employers relying on an E-Verify system may not terminate an employee until after a cure period pursuant to federal law, and courts should hold that federal law preempts a local ordinance that does not explicitly follow federal procedures. Once again, if a local ordinance requires a federally adjudicated decision, this conflict should not occur.

#### 4. *Antidiscrimination Provisions*

Fourth, courts should consider whether a local law upsets IRCA's balance of employer sanctions and antidiscrimination provisions. Congress, when enacting employer-sanctions provisions, also enacted a comprehensive scheme of legislation to prevent discrimination based on national origin or citizenship status against applicants.<sup>217</sup> Congress expressed concern about the potential for discrimination resulting from the employer sanctions and stated that antidiscrimination provisions were essential to IRCA.<sup>218</sup> Thus, local legislators must balance any legislation sanctioning employers with protections for minorities that may face discrimination as a result.

Some local ordinances have upset this careful balance by not only failing to include antidiscrimination provisions, but also by actually fostering discrimination. Discriminatory acts in Hazleton are well documented: Latino residents received mail referring to them as "sub-

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<sup>215</sup> Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. 48,309, 48,312 (Sept. 15, 1997).

<sup>216</sup> See *Gray v. City of Valley Park, Mo.*, No. 4:07CV00881 ERW, 2008 WL 294294, at \*17 (E.D. Mo. Jan. 31, 2008) ("In the event that the Basic Pilot program reports back a tentative nonconfirmation, then the Ordinance's three day time table is tolled, pending completion of the federal determination, which allows the employee eight federal government business days to respond to the nonconfirmation.").

<sup>217</sup> See INA § 274B, 8 U.S.C. § 1324b.

<sup>218</sup> See H.R. REP. NO. 99-682(I), at 68, reprinted in 1986 U.S.C.C.A.N. at 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." (emphasis added)).

human spic scum.”<sup>219</sup> Moreover, the anti-Latino sentiments have hurt businesses in full compliance with the law. For example, a Latina businesswoman in Hazleton was forced to close her store because the ordinance decreased business.<sup>220</sup> In addition, some municipalities appear to have enacted ordinances with a discriminatory intent revealed by the statements of public officials<sup>221</sup> and the statements of advocates of local regulation.<sup>222</sup>

The procedures of local regulations are often more likely to facilitate discrimination than the federal employer-sanction provisions in IRCA. For example, the Hazleton ordinance permits any city resident to file a complaint.<sup>223</sup> Residents could easily use these ordinances as a tool for harassing minorities. Further, the parties enforcing local regulations—employers, citizens, and local police—have less training in immigration law than federal authorities and are more likely to resort to proxies—such as race or ethnicity—to determine an individual’s immigration status. For example, local police picked up residents with a “Mexican appearance” during raids in Chandler, Arizona.<sup>224</sup>

Municipal ordinances must provide proportionate safeguards against discrimination in order not to conflict with federal law prohibiting discrimination. If municipalities choose to impose licensing penalties following the procedures of § 1324a, they should also provide protections to minority employees comparable to those in § 1324b. Further, the municipalities should provide training to local law enforcement in how to enforce the regulations without discriminating against minorities and immigrants. Local governments should also provide employers with guidance on how to comply properly with the regulations without discriminating against lawful workers.

If municipalities enact a licensing ordinance that complies with federal law as outlined above, courts should reject an argument that the imposition of a licensing penalty conflicts with federal law. Challengers might claim that these ordinances conflict with Congress’s intention to create a uniform system of employer sanctions by imposing

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<sup>219</sup> *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 510 (M.D. Pa. 2007).

<sup>220</sup> *Id.* at 490.

<sup>221</sup> *See supra* note 5 and accompanying text.

<sup>222</sup> *See supra* note 4 and accompanying text.

<sup>223</sup> Hazleton, Pa., Ordinance 2006-18, § 4.B(1) (Sept. 8, 2006), available at [http://www.aclu.org/pdfs/immigrants/hazleton\\_secondordinance.pdf](http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf). Although section 4.B(2) provides that any complaint on the basis of race shall be invalid, there is no requirement that the complaint state more than the alleged violator, date, location, and violation. *Id.* A biased complaint would probably not state that it was filed on the basis of race. Thus, section 4.B(2) is not sufficient to prevent discriminatory abuse of the complaint procedures of section 4.B(1).

<sup>224</sup> *See Mary Romero & Marwah Serag, Violation of Latino Civil Rights Resulting from INS and Local Police’s Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75, 83–84 (2005).

inconsistent penalties depending on the jurisdiction. Although such inconsistency might make local employer sanctions bad public policy, it does not make them invalid. The strongest evidence of Congress's preemptive intent is the explicit language of the preemption statute,<sup>225</sup> and Congress chose to exempt local licensing regulations from IRCA's preemption provision. However, when congressional committees return to immigration legislation, they should reconsider whether this provision is sound policy. To truly create a uniform employer-sanctions enforcement mechanism, Congress would have to preempt all local regulations penalizing employers for employing unauthorized workers and provide for effective enforcement of IRCA's provisions.

## V

### LOCAL HOUSING-SANCTIONS LAWS AND FEDERAL IMMIGRATION POLICY

A court's analysis of housing sanctions, like its analysis of employer sanctions, should focus on conflicts with federal law and policy. There is no express preemption provision to rely on in analyzing these ordinances,<sup>226</sup> so courts must focus on implied preemption. As discussed above, courts should not rely on a field-preemption theory to strike down local immigration ordinances: courts could only accomplish this with an overly expansive field definition that would result in localities' losing the ability to regulate in a wide variety of areas in which they have a strong interest.<sup>227</sup> Moreover, courts should not rely on a regulation-of-immigration preemption theory because such a theory is not based on an accurate construction of the first *De Canas* test.<sup>228</sup>

#### A. Regulation-of-Immigration Preemption

Courts should not rely on the first *De Canas* test—whether a local law is a regulation of immigration—to preempt local housing laws. This is, however, the approach a federal court in Texas took to strike down the Farmers Branch ordinance.<sup>229</sup> *De Canas*, in contrast, emphasized the narrow scope of this test, noting that an immigration regulation “is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal

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<sup>225</sup> See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–63 (2002).

<sup>226</sup> See INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2006) (preempting only local employer sanctions).

<sup>227</sup> See *Rodríguez*, *supra* note 183; *supra* Part IV.B.

<sup>228</sup> See *De Canas v. Bica*, 424 U.S. 351, 354–56 (1976).

<sup>229</sup> See *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 869 (N.D. Tex. 2008) (holding that an ordinance is a regulation of immigration because it adopts HUD regulations to determine immigration status).

entrant may remain.”<sup>230</sup> Furthermore, in *De Canas*, the Court considered whether a state law was overinclusive and barred lawful workers from employment under its third test—conflict preemption.<sup>231</sup> Unfortunately, in later cases, the Supreme Court has not been so precise with its language and has indicated some support for the proposition that a local redefinition of immigration standards is preempted as an immigration regulation rather than a conflict.<sup>232</sup> This difference is not merely semantic. Like an overly expansive definition of field preemption, an overly expansive view of what constitutes immigration regulation could lead to the federal immigration power preempting a wide variety of local legislation, such as sanctuary laws and day-labor centers.<sup>233</sup> A conflict-based analysis allows a court to look at the features of specific legislation to determine its viability rather than invalidating a large range of local legislation as regulations of immigration.

### B. Conflict Preemption

Courts should rely on conflicts with federal law and policy to strike down local housing regulations without announcing sweeping doctrines that would excessively impair localities’ regulatory functions. Ordinances that penalize property owners for leasing property to undocumented immigrants might conflict with federal law by denying access to housing to persons lawfully within the United States or by requiring local officials to make decisions outside of their jurisdiction such as determining an individual’s immigration status. Regardless of how well a municipality attempts to draft a housing ordinance, it will conflict with federal law because it serves as a proxy for the federal government’s exclusive power of deportation.

Advocates of local regulation argue that housing ordinances are concurrent enforcement of federal harboring provisions.<sup>234</sup> To support this assertion, Hazleton relied on a Ninth Circuit decision for the proposition that “the provision of an apartment . . . to illegal aliens fits

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<sup>230</sup> 424 U.S. at 355.

<sup>231</sup> See *id.* at 364 (“[O]n its face, § 2805 (a) would apply to such [lawful] aliens and thus unconstitutionally conflict with federal law.”).

<sup>232</sup> See *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (“The States enjoy no power with respect to the classification of aliens. This power is ‘committed to the political branches of the Federal Government.’” (citation omitted) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976))).

<sup>233</sup> See *Rodríguez*, *supra* note 183, at 609.

<sup>234</sup> See Brief of Appellant, *supra* note 173, at 59; see also INA § 274(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(A)(iii) (2006) (imposing criminal penalties on anyone who “knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation”).

squarely within the federal crime of harboring.”<sup>235</sup> However, this conclusory assertion does not withstand careful analysis. The Ninth Circuit decision involved not only the provision of an apartment but also a deliberate attempt to conceal the presence of undocumented immigrants by instructing them to lie to immigration officials and tear up documents from border patrol.<sup>236</sup> In fact, the Ninth Circuit later clarified that harboring requires an intent to violate the law, which can be shown by actions that serve to avoid the alien’s detection by immigration authorities.<sup>237</sup> Even assuming that local governments are seeking the same end as the federal government, they may not claim that they are merely concurrently enforcing federal immigration law if they use significantly different means to reach that end.<sup>238</sup> The doctrine of concurrent enforcement is not a sufficient justification for local ordinances penalizing landlords who lease property to undocumented immigrants.

### 1. *Access to Housing for Lawful Immigrants*

First, courts should analyze whether a local housing ordinance would deny access to housing to immigrants who are lawfully in the United States. Any ordinance that penalizes landlords for leasing property to undocumented immigrants must use federal law to determine an individual’s immigration status. Deviation from federal standards can lead to a situation in which aliens lawfully in the United States are excluded from housing under local law.<sup>239</sup> If an ordinance has the potential to exclude lawful aliens from housing, federal law preempts the ordinance because housing provisions conflict with federal law if they result in excessive burdens to lawful immigrants.<sup>240</sup> For example, a court noted that the Farmers Branch ordinance would exclude alien students, tourists, and diplomats from housing.<sup>241</sup>

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<sup>235</sup> Brief of Appellant, *supra* note 173, at 59 (citing *United States v. Aguilar*, 883 F.2d 662, 669–70 (9th Cir. 1989)).

<sup>236</sup> See *Aguilar*, 883 F.2d at 689.

<sup>237</sup> See *United States v. You*, 382 F.3d 958, 965–66 (9th Cir. 2004); see also *United States v. Varkonyi*, 645 F.2d 453, 456 (5th Cir. 1981) (requiring evidence that the defendant hid the undocumented immigrant from detection for a finding of harboring).

<sup>238</sup> See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 380 (2000) (“[C]onflict is imminent’ when ‘two separate remedies are brought to bear on the same activity.’” (quoting *Wis. Dep’t of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986)) (internal quotation marks omitted)).

<sup>239</sup> See *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 869 (N.D. Tex. 2008).

<sup>240</sup> See *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (“[States] can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the . . . residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.”).

<sup>241</sup> See *Villas at Parkside Partners*, 577 F. Supp. 2d at 870.

Housing provisions that deny legal immigrants access to housing conflict with federal law because they place a “discriminatory burden [ ] upon the . . . residence of aliens lawfully within the United States.”<sup>242</sup>

## 2. *Determination of Immigration Status*

Second, courts should analyze whether a housing ordinance conflicts with federal law by requiring state or local officials to determine a housing applicant’s immigration status. Local officials may not rely on E-Verify or other databases because their function is to determine worker eligibility or other statuses, not whether an immigrant may lawfully remain in the country.<sup>243</sup> Further, local officials lack the jurisdiction to determine whether an immigrant is lawfully in the country or whether the government must remove her.<sup>244</sup> Federal courts have held that federal law preempts legislation that permits local authorities to determine immigration status.<sup>245</sup> One court determined that a local housing ordinance “deputizes . . . private individuals as federal immigration officials and takes a federal function away from the federal government.”<sup>246</sup> Further, an ordinance that imposes a sanction on a property owner for leasing property to an undocumented immigrant has the effect of making the landlord decide the immigration status of a prospective tenant.<sup>247</sup> If local officials desire to assist federal officials, they must follow the procedures laid out in federal law: creating an agreement pursuant to INA § 287(g).<sup>248</sup> Therefore, a federal official must determine immigration status, and if local officials would like to enforce immigration regulations, enforcement must be

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<sup>242</sup> *Takahashi*, 334 U.S. at 419.

<sup>243</sup> *See supra* Part IV.C.1.

<sup>244</sup> *See* 8 U.S.C. § 1229a(a)(1) (2006) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”), *id.* § 1229a(a)(3) (“[These proceedings are] the sole and exclusive procedure for determining whether an alien may be . . . removed from the United States.”).

<sup>245</sup> *See, e.g.,* *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 770 (C.D. Cal. 1995) (“[D]eterminations of immigration status by state agents amounts to immigration regulation . . . [when] made . . . for the limited purpose of denying benefits.”).

<sup>246</sup> *Villas at Parkside Partners*, 577 F. Supp. 2d at 871.

<sup>247</sup> The comprehensive federal employer sanctions in INA § 274A, 8 U.S.C. § 1324a, provide a safe harbor for employers who have complied in good faith with the employee-verification requirements. *See* INA § 274A(a)(3), 8 U.S.C. § 1324a(a)(3) (2006). Without a similar provision, landlords would be responsible for assessing the validity of immigration documents because they would be liable for accepting erroneous documentation. However, states neither have the ability to make immigration status determinations, *League of United Latin Am. Citizens*, 908 F. Supp. at 770, nor the ability to require document collection, *see Takahashi*, 334 U.S. at 419 (holding that states may not impose additional conditions on the residence of aliens).

<sup>248</sup> *See* INA § 287(g), 8 U.S.C. § 1357(g)(1) (2006) (“[T]he Attorney General may enter into a written agreement with a State, . . . pursuant to which an officer or employee of the State . . . may carry out [an investigation, apprehension, or detention of aliens] . . . at the expense of the State . . . and to the extent consistent with State and local law.”).

through an agreement with the Attorney General that is compliant with INA § 287(g).

### 3. *Proxy for Deportation*

Third, housing provisions conflict with federal law when they attempt to deny shelter to undocumented immigrants as a proxy for deportation—an exclusively federal power.<sup>249</sup> The effect of such an ordinance is to exclude undocumented immigrants from a community, to “deport” them to neighboring communities. It often may take years for the federal government to determine whether it should deport an undocumented immigrant. The federal government permits many immigrants who enter the United States unlawfully to stay, and it would conflict with federal policy to attempt to undermine the federal government’s decision by denying housing to immigrants the federal government has not decided to deport.<sup>250</sup>

## CONCLUSION

Well over two years since the Hazleton Council enacted the first ordinance on August 15, 2006,<sup>251</sup> the Third Circuit Court of Appeals heard oral arguments on the validity of Hazleton’s regulations.<sup>252</sup> During this period, the courts have seen extensive litigation on the subject of local ordinances regulating the employment of unauthorized workers and have reached contradictory results. Courts have reacted by using the preemption doctrine to reach their desired result of either upholding or invalidating a local ordinance. There has been less litigation concerning ordinances that regulate housing of undocumented immigrants. Although the courts to consider the issue have struck down these ordinances, they have used different legal theories to invalidate them.

Courts should recognize that Congress expressed an intention to allow states and municipalities to enact licensing regulations and fitness-to-do-business laws that penalize employers found guilty of employing unauthorized workers. Even so, federal law expressly preempts any regulations that impose a monetary or civil penalty. Courts should not rely on the field-preemption theory because Congress has explicitly left some room for local regulation. Rather, courts should carefully inspect an ordinance and focus on whether it under-

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<sup>249</sup> See *supra* note 244.

<sup>250</sup> See *supra* notes 134–40 and accompanying text.

<sup>251</sup> Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006), available at [http://www.aclu.org/pdfs/immigrants/hazleton\\_firstordinance.pdf](http://www.aclu.org/pdfs/immigrants/hazleton_firstordinance.pdf).

<sup>252</sup> Press Release, Am. Civil Liberties Union, Federal Court of Appeals Hears Arguments on Hazleton Anti-Immigrant Law (Oct. 30, 2008), available at <http://www.aclu.org/immigrants/discrim/37597prs20081030.html>.

mines federal immigration policy. If states and localities craft legislation that conforms to federal laws and procedures, they may then choose to impose a licensing penalty in addition to the civil and criminal penalties imposed by IRCA. Furthermore, courts should strike down housing ordinances because they serve as a proxy for deportation and thus conflict with the federal government's exclusive authority to order deportation.



