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PREEMPTING STATE E-VERIFY REGULATIONS: A CASE STUDY OF ARIZONA'S IMPROPER LEGISLATION IN THE FIELD OF "IMMIGRATION-RELATED EMPLOYMENT PRACTICES"

Rachel Feller

Abstract: In 1996, Congress established E-Verify, a program that allows employers to confirm the employment eligibility of new hires by using a federal electronic database. Although the federal government makes the program voluntary for employers, some states and municipalities have enacted legislation requiring the program's use to prevent the employment of undocumented workers. Some of these state laws have been challenged in federal court on the grounds that they are preempted by federal law, particularly the Immigration Reform and Control Act of 1986 (IRCA). Courts have divided on this issue. This Comment explains the boundaries of preemption in the context of E-Verify legislation by using Arizona's E-Verify law and the Ninth Circuit's decision in *Chicanos por la Causa v. Napolitano* as a case study. It argues that state E-Verify provisions may sanction employers for knowingly hiring undocumented workers only if the sanction is based on a federal finding that the employer violated IRCA. Specifically, this Comment argues that the Ninth Circuit erred by classifying Arizona's E-Verify statute as an employment law and by allowing Arizona to revoke business licenses based on a state judge's finding that the employer knowingly hired undocumented workers. This Comment argues that courts should recognize that Congress created and occupied a field of federal regulation: immigration-related employment practices.

INTRODUCTION

The United States is home to approximately twelve million undocumented immigrants.¹ This population has grown in recent years,² and states have filled what they perceive as gaps in federal immigration law by regulating employers' ability to hire undocumented workers.³ In 2007 alone, state legislatures passed 240 immigration-related bills—nearly triple the number passed in 2006—many of which addressed

1. PEW HISPANIC CTR., TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW 1 (2008), available at <http://pewhispanic.org/reports/report.php?ReportID=94>, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev289n1.pdf>.

2. *Id.*

3. IMMIGRANT POLICY PROJECT, NAT'L CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 1 (2008), available at <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev289n3.pdf>.

employment.⁴ In their efforts to curb the employment of undocumented immigrants, many states have turned to E-Verify, a federal program that allows employers to check new hires' employment eligibility automatically, using an electronic database.⁵ Between 2006 and 2008, fourteen states required, encouraged, or limited the use of the E-Verify system,⁶ and six additional states were considering similar legislation as of May 2009.⁷ Arizona lies at one end of the spectrum, requiring every

4. *Id.* at 2 (stating that 29 bills passed in 20 states addressed immigrant employment).

5. *See infra* Part II.B.

6. *See infra* Part IV. Legal Arizona Workers Act, ARIZ. REV. STAT. ANN. §§ 23-211 to 23-215 (West 2007) (requiring E-Verify's use by all employers); COLO. REV. STAT. ANN. § 8-17.5-102 (West 2006) (requiring use by Colorado contractors and subcontractors working on public contracts); GA. CODE ANN., § 48-7-21.1 (2007) (requiring use by all Georgia public employers and their contractors and subcontractors); Idaho Exec. Order No. 2006-40, (Dec. 13, 2006) (mandating use by state agencies and their contractors); Illinois Right to Privacy in the Workplace Act, 820 ILL. COMP. STAT. ANN. 55/12 (West 2007) (prohibiting E-Verify's use until proven 99 percent accurate); Minnesota Exec. Order No. 08-01 (Jan. 7, 2008) (mandating use by state agencies and contractors for public projects over \$50,000); Laws Regarding Illegal Aliens and Immigration Status Verification, H.B. 1549 (Mo. 2008) (requiring Missouri contractors receiving state contracts of more than \$5,000 to use E-Verify); Mississippi Employment Protection Act, MISS. CODE ANN. § 71-11-3 (2008) (requiring participation by all public and private employers through staggered compliance date requirements depending on the size of the business); Technical Corrections Act, 2006 N.C. Sess. Laws 259, §23.1(a) (2006) (mandating participation by North Carolina state agencies); Taxpayer and Citizen Protection Act of 2007, OKLA. STAT. ANN. tit. 25, § 1313 (2007) (requiring participation by all Oklahoma public employers and their contractors and subcontractors); S.C. CODE §§ 8-14-20, 41-8-20 (mandating use by all South Carolina employers); Illegal Immigration Control Order, Rhode Island Exec. Order No. 08-01 (Mar. 27, 2008) (requiring use by state agencies and their contractors and subcontractors); Act Relative to the Employment of Illegal Aliens, TENN. CODE ANN. § 50-1-103 (2007) (encouraging E-Verify's use in Tennessee by not imposing sanctions on employers who check employee status with the program); Identity Documents and Verification Act, UTAH CODE ANN. § 63G-11-103 (2008) (requiring the program's use by all Utah public employers and their contractors and subcontractors). *See also* IMMIGRANT POLICY PROJECT, *supra* note 3, at 8-10; IMMIGRANT POLICY PROJECT, FREQUENTLY ASKED QUESTIONS, <http://www.ncsl.org/programs/immig/EVerifyFAQ.htm>, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev289n6.pdf>.

7. *See* Arkansas Taxpayer and Citizenship Protection Act of 2009, H.B. 1093, 87th Gen. Assem., Reg. Sess. (Ark. 2009), *available at* <http://www.arkleg.state.ar.us/assembly/2009/R/Pages/BillInformation.aspx?measureno=HB1093>; H.B. 1098, 116th Gen. Assem. (Ind. 2009), *available at* <http://www.in.gov/legislative/bills/2009/IN/IN1098.1.html>; H.B. 441, 2009 Gen. Assem., Reg. Sess. (Ky. 2009), *available at* <http://www.lrc.ky.gov/record/09RS/HB441.htm>; Nebraska Fair and Legal Employment Act, Legis. B. 34, 101st Leg. (Neb. 2009), *available at* http://www.nebraskalegislature.gov/bills/view_bill.php?DocumentID=6261; Illegal Immigration, H.B. 0103, 60th Leg., 2009 Gen. Sess. (Wyo. 2009), *available at* <http://legisweb.state.wy.us/2009/Titles/HB0103.htm>; Tex. Att'y Gen. Op. No. GA-0695 (2009), *available at* <http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2009/htm/ga-0695.htm>. Permanent copies of the state bills and Texas attorney general opinion letter are available at <http://www.law.washington.edu/wlr/notes/84washrev289n7.pdf>. *See generally* Austin T. Fragomen, *New Challenges in Complying with State Immigration Employment Laws*, 86 INTERPRETER RELEASES 1037 (2009) (providing an overview of

private employer to use E-Verify or risk losing its business license.⁸ Illinois lies at the other end; the state has virtually prohibited employers from using the system until it is more accurate.⁹ Businesses and immigrant-rights groups have sued to invalidate many of the state laws, arguing in part that federal law preempts state regulation of immigrant employment. The scope of this area of law is changing quickly both in terms of state regulation and court decisions.

In addition to providing an overview of state E-Verify laws and the legal challenges they have faced, this Comment pays particular attention to the Legal Arizona Workers Act. Using the Arizona law as a case study,¹⁰ this Comment closely examines *Chicanos por la Causa v. Napolitano*,¹¹ a Ninth Circuit opinion upholding the law against a facial preemption challenge. This Comment argues that the Ninth Circuit's opinion was in error. States may revoke an employer's business license for knowingly employing undocumented workers, but only *after* a federal finding of wrongdoing. The Ninth Circuit's opinion is to the contrary, and the court erred when it started its preemption analysis by asking whether Arizona's regulation was an employment regulation or an immigration regulation.

Courts need not face the difficult decision of categorizing state regulations as either immigration regulations or employment regulations. As this Comment demonstrates, when Congress passed the Immigration Reform and Control Act (IRCA) in 1986,¹² it created a new regulatory field: immigration-related employment practices.¹³ Part I reviews the

state laws relating to employment verification).

8. Legal Arizona Workers Act, ARIZ. REV. STAT. ANN. §§ 23-211 to 23-215 (West 2007); *see also infra* Part IV.A. The Ninth Circuit upheld the Arizona law against a facial challenge. *Chicanos por la Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *amending on denial of rehearing and rehearing en banc, and superseding* *Chicanos por la Causa v. Napolitano*, 544 F.3d 976 (9th Cir. 2008).

9. Illinois Right to Privacy in the Workplace Act, 820 ILL. COMP. STAT. ANN. 55/12 (West 2007). In March 2009, an Illinois federal district court invalidated the law under the Supremacy Clause. *United States v. Illinois*, No. 07-3261, 2009 WL 662703, at *1 (C.D. Ill. Mar. 12, 2009).

10. ARIZ. REV. STAT. ANN. §§ 23-211 to 23-215.

11. 558 F.3d 856 (9th Cir. 2009), *amending on denial of rehearing and rehearing en banc, and superseding* *Chicanos por la Causa v. Napolitano*, 544 F.3d 976 (9th Cir. 2008).

12. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (relevant sections codified at 8 U.S.C. § 1324a (2006)).

13. In the Immigration Reform and Control Act, Congress used the term "Unfair Immigration-Related Employment Practices" to refer primarily to discriminatory hiring. *Id.* §1324b. This Comment will apply the term to include employer sanctions that result from hiring undocumented workers.

federal government's plenary power over immigration, and shows that federal regulatory control has deepened over time. Part II introduces the federal statutes that regulate the employment of undocumented workers and that provide employers with tools to comply with regulations. It pays particular attention to one of those tools: E-Verify. Part III explains the doctrine of federal preemption, which invalidates state and local laws. Part IV discusses why states have chosen to regulate the hiring of undocumented workers and provides an overview of such state laws, with particular focus on the Legal Arizona Workers Act. Part V examines the Ninth Circuit's decision in *Chicanos por la Causa, Inc. v. Napolitano* and introduces decisions by federal district courts. Finally, Part VI argues that states may sanction employers for knowingly hiring undocumented workers only after a federal finding of wrongdoing. It argues that *Chicanos por la Causa* is in error because the Ninth Circuit incorrectly framed the Arizona law as a licensing regulation and did not consider whether Congress had created and occupied a distinct field: immigration-related employment practices.

I. CONGRESS POSSESSES PLENARY POWER OVER IMMIGRATION AND HAS CREATED AN INCREASINGLY COMPREHENSIVE REGULATORY SCHEME

Federal authority over immigration derives from constitutional grants of power over areas like naturalization¹⁴ and commerce with foreign nations.¹⁵ Relying on these express grants of power, as well as the national government's inherent sovereign power, federal courts have long recognized that the power to regulate immigration and deportation falls squarely within the federal government's powers.¹⁶ Congressional power over immigration lay dormant throughout the nation's early years, as the federal government implemented an open-door policy and did not regulate immigration.¹⁷

Federal regulation of immigration began in 1875,¹⁸ and the Supreme

14. U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power to "establish a uniform Rule of Naturalization").

15. *Id.* cl. 3 (granting Congress the power to "regulate Commerce with foreign Nations").

16. *See, e.g.*, *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *Chae Chan Ping v. United States* [hereinafter *Chinese Exclusion Case*], 130 U.S. 581, 603-04 (1889).

17. IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK* 3 (11th ed. 2008).

18. Act of March 3, 1875, ch. 141, §§ 2-3, 18 Stat. 477, 477 (repealed 1974) (prohibiting the entry of Chinese, Japanese, and "oriental" workers without their consent as well as the entry of

Court soon after recognized Congress’s inherent ability to legislate in this field.¹⁹ In 1882, Congress passed the first comprehensive immigration laws that prohibited entry by specific groups of people, including Chinese laborers.²⁰ In the *Chinese Exclusion Case*,²¹ the Supreme Court held that the federal government could exclude foreigners as an inherent power of sovereignty.²² The Court described immigration as a matter of national concern, saying that “for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”²³ During the early twentieth century, Congress implemented quota systems that limited the entry of foreigners based upon their countries of origin and adopted other measures to control immigration into the country.²⁴

In later years, the Supreme Court reaffirmed the federal government’s plenary power over immigration and invalidated state laws that undermined congressional purpose.²⁵ For example, in *Hines v. Davidowitz*,²⁶ the Court struck down a Pennsylvania law requiring aliens to register with the state government,²⁷ reasoning:

[T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, “the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to

prostitutes).

19. *The Chinese Exclusion Case*, 130 U.S. 581.

20. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943); Immigration Act of 1882, ch. 376, 22 Stat. 214.

21. 130 U.S. 581 (1889). This case, though widely cited as the first instance in which the Court recognized the federal government’s power over immigration matters, has been criticized for its racist tone. See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 858–63 (1987).

22. *The Chinese Exclusion Case*, 130 U.S. at 609 (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”).

23. *Id.* at 606.

24. See, e.g., Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952); Alien Enemies Act of 1918, ch. 55, 40 Stat. 531; Quota Act of 1921, ch. 8, 42 Stat. 5 (repealed 1952); Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952).

25. *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941).

26. 312 U.S. 52 (1941).

27. *Id.* at 73–74.

it.”²⁸

The structure of today’s immigration law was created in 1952, when Congress passed the Immigration and Nationality Act (INA).²⁹ This comprehensive immigration law retained the national-origin quota system, established new preferences for foreigners with special employment-related skills, and created deportation policy and procedures.³⁰ The law did not, however, address the employment of undocumented workers.

In 1976, the Supreme Court decided that in the absence of federal regulations governing the employment of undocumented immigrants, states were free to regulate in the area. In *DeCanas v. Bica*,³¹ California farm workers had filed suit under state law against labor contractors, alleging that they were hiring workers not lawfully admitted to the United States.³² The Supreme Court started its analysis with a strong affirmation of federal supremacy over immigration: “Power to regulate immigration is unquestionably exclusively a federal power.”³³ The Court faced the question of whether Congress intended to preempt state laws regulating the employment of undocumented workers.³⁴ The Court identified the “central concern of the INA” as “the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.”³⁵ The hiring of undocumented workers, on the other hand, was at best a “peripheral concern” of the federal law.³⁶

State laws attempting to determine “who should or should not be admitted into the country, and the conditions under which a legal entrant may remain” were regulations of immigration and therefore ran afoul of the Supremacy Clause,³⁷ but laws regulating only the employment of undocumented workers were valid exercises of state power under the Constitution.³⁸ The Court’s opinion includes the implicit recognition that

28. *Id.* at 66 (citation omitted).

29. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

30. *Id.*

31. 424 U.S. 351 (1976).

32. *Id.* at 353.

33. *Id.* at 354.

34. *Id.* at 353–54.

35. *Id.* at 359.

36. *Id.* at 360.

37. *Id.* at 355.

38. *Id.* at 355–56.

state law would be preempted if Congress were to comprehensively regulate the employment of undocumented workers: “[A]bsent congressional action, [the California law is not] an invalid state incursion on federal power.”³⁹

II. CONGRESS REGULATES THE EMPLOYMENT OF UNDOCUMENTED WORKERS AND PROVIDES OPTIONAL TOOLS FOR COMPLIANCE

A decade after *DeCanas*, Congress first addressed the employment of undocumented workers, passing the Immigration Reform and Control Act (IRCA) of 1986.⁴⁰ IRCA prohibits the employment of undocumented workers, places the responsibility of document verification on employers, and creates a complex system of sanctions for employers that violate the law.⁴¹ The new system created its own problems,⁴² and Congress responded in 1996 by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),⁴³ which, in part, created optional employment-verification programs to help employers comply with federal law.⁴⁴

A. *Congress Enacted IRCA to Prohibit the Employment of Undocumented Immigrants and to Sanction Employers That Knowingly Hire Them*

Congress finally passed immigration reforms in 1985, after political and ideological differences prevented it from responding to growing concerns about immigration during the late 1970s and early 1980s.⁴⁵ In 1978, Congress created the Select Commission on Immigration and Refugee Policy,⁴⁶ which it charged with issuing recommendations about

39. *Id.* at 356 (emphasis added).

40. Pub. L. No. 99-603, 100 Stat. 3359 (relevant sections codified at 8 U.S.C. § 1324a (2006)).

41. *Id.*

42. H.R. REP. NO. 104-269, at 108, 128 (1996).

43. Pub. L. No. 104-208, §§ 401–05, 110 Stat. 3009-655, 3009-655 to 3009-666 (1996) (codified at 8 U.S.C. §1101).

44. *Id.*

45. The House of Representatives passed bills addressing the employment of undocumented workers in the early 1970s, but the bills stalled in the Senate despite support from Presidents Nixon and Ford. NANCY HUMEL MONTWIELER, *THE IMMIGRATION REFORM LAW OF 1986* 4 (1987).

46. Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (1978).

comprehensive immigration reform.⁴⁷ After two years of study and public hearings, the Commission recommended legislation that made it illegal for employers to hire undocumented workers.⁴⁸ Attempts to enact the Commission's proposals faced major political opposition from business, labor, and civil-rights groups,⁴⁹ and nothing came of the Commission's efforts during the early 1980s. Finally, in 1985, two bills were introduced that eventually merged into IRCA.⁵⁰ After more contention and compromise, particularly regarding farm-worker provisions, Congress approved IRCA in 1986.⁵¹ When President Reagan signed the bill into law, he acclaimed it as "the most comprehensive reform of our immigration laws since 1952" and called it the product of "one of the longest and most difficult legislative undertakings of recent memory."⁵²

IRCA makes it unlawful for a "person or other entity 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."⁵³ The law establishes the I-9 system, which checks the employment eligibility of America's work force. The system places burdens on both employees and employers:⁵⁴ New hires must establish their legal work status by presenting specific documentation, such as passports or Social Security cards.⁵⁵ Employers must examine the documents and attest, under penalty of perjury, that the new hire is authorized to work in the United States.⁵⁶ An employer "is considered to have complied . . . if there was a good faith attempt to comply with the requirement."⁵⁷

Congress vested the authority to enforce IRCA in the Office of the Attorney General, and gave it some measure of deference in deciding

47. MONTWIELER, *supra* note 45, at 4.

48. *Id.* at 5.

49. *Id.* at 6–7.

50. *Id.* at 10; Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1324a (2006)).

51. The House approved the conference bill by a vote of 238 to 173, and the Senate 63 to 24. MONTWIELER, *supra* note 45, at 15–18.

52. *Id.* at 539, 543 (Reprint of President Reagan's Signing Statement).

53. Immigration Reform and Control Act, 8 U.S.C. § 1324a(a)(1)(A).

54. *Id.* § 1324a(a)–(b).

55. *Id.* § 1324a(b)(1)(B)–(D).

56. *Id.* § 1324a(b)(1)(A).

57. *Id.* § 1324a(b)(6)(A).

which cases merit attention.⁵⁸ To ensure compliance, IRCA empowers the Attorney General to impose cease-and-desist orders and fines as large as ten thousand dollars on employers.⁵⁹ Before any fine is imposed, a party has the right to be heard before an Administrative Law Judge (ALJ).⁶⁰ The ALJ determines, based upon the preponderance of the evidence, whether the employer knowingly hired an undocumented worker, and this decision is subject to judicial review in the federal circuit courts of appeals.⁶¹

IRCA includes a clause expressly invalidating state law: “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.”⁶² Congress did not clearly define the scope of the licensing exception, and some states have relied on this exception to enact statutes that revoke business licenses of employers who knowingly hire undocumented workers.⁶³

B. To Help Employers Comply with Immigration Law, Congress Created E-Verify in 1996, Which It Has Since Expanded

Ten years after IRCA, Congress still grappled with ways to fix the numerous problems of the federal immigration system.⁶⁴ In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) to address immigration-related issues ranging from border patrol to document fraud to benefits for aliens.⁶⁵ To reduce document fraud under IRCA’s I-9 system,⁶⁶ Congress established

58. *Id.* § 1324a(e)(1).

59. *Id.* § 1324a(e)(4). Paperwork violations carry maximum fines of one thousand dollars. *Id.* § 1324a(e)(5).

60. *Id.* § 1324a(e)(3)(A)–(B).

61. *Id.* § 1324a(e)(3)(C); *id.* § 1324a(e)(8). This has since led to the creation of a body of administrative-law jurisprudence on whether an employer knowingly hires an undocumented worker. *See, e.g.*, 1–8 DEP’T OF JUSTICE, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS, UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES AND CIVIL PENALTY DOCUMENT FRAUD LAWS OF THE UNITED STATES (2000).

62. *Id.* § 1324a(h)(2).

63. *See infra* Part IV.

64. H.R. REP. NO. 104-269, at 108, 128 (1996).

65. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-655, §§ 3009-655 to 3009-745 (1996) (codified in scattered sections of 8 U.S.C. and 18 U.S.C.).

66. H.R. REP. NO. 104-828, pt. 4 at 108, pt. 3 at 128 (1996).

employment-verification pilot programs and limited the number of documents that applicants could use to prove work eligibility.⁶⁷

To facilitate confirmation of workers' employment eligibility in five states with high populations of "aliens who are not lawfully present in the United States,"⁶⁸ IIRIRA established three pilot programs: the Basic Pilot Program,⁶⁹ the Citizen Attestation Pilot Program,⁷⁰ and the Machine Readable Document Pilot Program.⁷¹ Today, the Basic Pilot Program is the only one still in existence. Known as "E-Verify," it allows employers to confirm an employee's employment eligibility via the Internet.⁷²

Congress chose to make use of E-Verify optional. Under IIRIRA, employers voluntarily elect to participate in the program; the Attorney General cannot require participation.⁷³ Employers who choose to participate must enter the document information from an employee's I-9 form into an Internet-based government database within three working days of hiring.⁷⁴ The database crosschecks the information against the databases of the Social Security Administration (SSA) and the Department of Homeland Security (DHS),⁷⁵ and immediately gives a tentative confirmation or non-confirmation of employment eligibility.⁷⁶ An employer cannot terminate an individual because of a tentative non-confirmation.⁷⁷ Instead, it must inform the employee of the E-Verify

67. *Id.*

68. Illegal Immigration Reform and Immigrant Responsibility Act §§ 401(c)(1)–(3).

69. *Id.* § 403(a).

70. *Id.* § 403(b).

71. *Id.* § 403(c).

72. Dep't of Homeland Security, E-Verify, http://www.dhs.gov/xprevprot/programs/gc_1185221678150.shtm (last visited April 26, 2009), *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev289n72.pdf>.

73. Illegal Immigration Reform and Immigrant Responsibility Act § 402(a). Congress decided the federal government would participate by requiring the executive departments and the legislative branch to use pilot programs available in the state where they are hiring. *Id.* § 402(e)(1).

74. *Id.* § 403(a)(3)(A).

75. The database, as currently structured, is an updated version of the original Basic Pilot Program. Today the database is run by DHS, which took over the responsibilities of the INS in 2003. Dep't of Homeland Security, Program Highlights, <http://www.uscis.gov/portal/site/uscis> (follow "Form I-9" hyperlink; then follow "E-Verify" hyperlink; then follow "E-Verify Program Highlights" hyperlink) (last visited April 26, 2009), *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev289n75.pdf>.

76. Illegal Immigration Reform and Immigrant Responsibility Act § 403(a)(4)(A)–(B).

77. *Id.* § 403(a)(4)(B)(iii).

system's tentative conclusion.⁷⁸ If the employee contests a tentative non-confirmation, the federal government investigates and relays a final decision to the employer within ten working days.⁷⁹ If DHS issues a final decision of non-confirmation, the employer must terminate the employee or notify the Attorney General of continued employment, which creates a rebuttable presumption that the employer has violated the law.⁸⁰

E-Verify was originally set to expire four years after it went into effect, but Congress has consistently extended the program and expanded its scope. In 2001, Congress passed the Basic Pilot Extension Act,⁸¹ which extended it until 2003. Just before that extension expired, Congress passed the Basic Pilot Program Extension and Expansion Act,⁸² which required the Secretary of Homeland Security to expand E-Verify to all fifty states by December 2004,⁸³ and extended the program until 2008.⁸⁴ Congress failed to reach an agreement on the program's continued use before the 2008 expiration,⁸⁵ but President Bush signed into law a temporary extension through March 6, 2009.⁸⁶ During recent budget negotiations, Congress tabled an amendment proposing a five-year extension of E-Verify⁸⁷ but then extended the program until September 2009 as part of the Omnibus Appropriations Bill.⁸⁸ None of these extensions altered the core provisions of E-Verify, and the

78. *Id.* §§ 403(a)(4)(B)(i), 404(c).

79. *Id.* § 404(c). In conjunction with § 403(a)(4)(B)(ii), this provision creates a final non-confirmation provided the employee does not object to the non-confirmation within the specified time period.

80. *Id.* § 403(a)(4)(C).

81. Pub. L. 107-128, 115 Stat. 2407 (2001) (codified at 8 U.S.C. § 1101, 1324a).

82. Pub. L. 108-156, 17 Stat. 1944 (2003) (codified in scattered sections of 8 U.S.C.).

83. *Id.* § 3.

84. *Id.* § 2.

85. For a thorough discussion on proposed changes to E-Verify of 2008, see Austin T. Fragomen, *Political Deadlock: Update on Immigration Legislation in the 110th Congress*, in 41ST ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE, at 13 (PLI Corp. Law & Practice, Course Handbook Series No. 13921, 2008).

86. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. 110-329, §§ 106(3), 143, 122 Stat. 3574, 3575, 3580 (2008).

87. 604 CONG. REC. S2643 (daily ed. Mar. 9, 2009) (statement of Sen. Sessions); Amendment 604, CR-S2643 (proposed Mar. 9, 2009).

88. Omnibus Appropriations Act, Pub. L. No. 111-8, § 101, 123 Stat. 524, Division J (2009) (“SEC. 101. Sections 143, 144, and 145 of division A of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Public Law 110-329; 122 Stat. 3580 et seq.) are each amended by striking ‘the date specified in section 106(3) of this joint resolution’ and inserting ‘September 30, 2009’”).

program retains the optional character established in IIRIRA.

E-Verify is now available in all fifty states as well as some territories. DHS estimates that E-Verify covers ten percent of new hires in the United States today,⁸⁹ with more than sixty-six thousand employers making more than three million queries per year.⁹⁰ Proponents of E-Verify argue that it provides an effective screening tool without relying on private employers for enforcement: immigration officials determine the authenticity of an employee's documentation, and employees contest and pursue tentative non-confirmations.⁹¹ Proponents also argue that E-Verify reduces selective enforcement of document review and more easily exposes employers who hire undocumented workers.⁹²

The system has flaws, though, as even the government concedes. A government report confirmed that basic database errors create problems.⁹³ For example, the Social Security Administration estimates that more than four percent of its records, containing information about approximately eighteen million individuals, have errors related to the person's name, birth date, or citizenship status.⁹⁴ These errors make naturalized citizens thirty times more likely to receive a tentative non-confirmation than natural-born citizens.⁹⁵ Critics also note that

89. Stewart Baker, *Debunking the "E-Verify Capacity Problem,"* HOMELAND SEC. LEADERSHIP J., May 21, 2008, <http://www.dhs.gov/journal/leadership/2008/05/debunking-e-verify-capacity-problem.html>, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washlrev289n89.pdf>.

90. *Id.* Data suggest that large employers are the most likely to use the system. Ten percent of new U.S. hires are verified by E-Verify. These new hires, however, work for only one percent of the nation's employers. See Micah Bump, *Immigration, Technology, and the Worksite: The Challenges of Electronic Employment Verification*, 22 GEO. IMMIGR. L.J. 391, 399 (2008).

91. Stephen A. Brown, *Illegal Immigrants in the Workplace: Why Electronic Verification Benefits Employers*, 8 N.C. J.L. & TECH. 349, 384–86 (2007).

92. *Id.* at 387–89.

93. WESTAT REPORT TO THE DEPARTMENT OF HOMELAND SECURITY, FINDINGS OF THE WEB BASIC PILOT EVALUATION 56–58 (2007), available at <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf> ("The accuracy of the USCIS [United States Citizenship and Immigration Services] database used for verification has improved substantially since the start of the Basic Pilot program. However, further improvements are needed, especially if the Web Basic Pilot becomes a mandated national program."), permanent copy available at <http://www.law.washington.edu/wlr/notes/84washlrev289n93a.pdf>; see also NAT'L IMMIGRATION LAW CTR., ERECTING ITS OWN TOMBSTONE: ARIZONA'S MANDATORY E-VERIFY/BASIC PILOT LAW 1 (2008), http://www.nilc.org/immsemplymnt/state_local/AZ_factsheet_2008--04-25.pdf, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washlrev289n93b.pdf>; Bump, *supra* note 90, at 393.

94. Bump, *supra* note 90, at 393–94.

95. WESTAT REPORT TO THE DEPARTMENT OF HOMELAND SECURITY, *supra* note 93, at 97; see also NAT'L IMMIGRATION LAW CTR., *supra* note 93, at 1.

individuals wishing to contest tentative non-confirmations may not be able to do so effectively during the ten-day time limit, due in part to a requirement that employees produce original documents, which must be requested from the country of origin.⁹⁶ The limited operational hours of federal and state agencies also frustrate employee efforts since agency hours often conflict with work schedules.⁹⁷

III. THE SUPREMACY CLAUSE INVALIDATES STATE OR LOCAL LAWS THAT EXPRESSLY OR IMPLIEDLY CONFLICT WITH FEDERAL LAW

The Supremacy Clause of the U.S. Constitution provides that the laws of the United States are “the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁹⁸ This clause is the grounds for the doctrine of federal preemption, which voids state or local laws that run counter to federal law.⁹⁹

Congress’s purpose for enacting the statute “is the ultimate touchstone in every preemption case.”¹⁰⁰ Congress may indicate its intent to preempt state laws “through a statute’s express language or through its structure and purpose.”¹⁰¹ Under the doctrine of implied field preemption, courts infer that federal law has preempted an entire field of regulation, absent an express declaration of congressional intent, if “the nature of the regulated subject matter permits no other conclusion.”¹⁰² Finally, courts will also find that federal law preempts state law when it is physically impossible to simultaneously comply with the state and federal laws,¹⁰³ or where a state law undermines congressional goals.¹⁰⁴

96. NAT’L IMMIGRATION LAW CTR., *supra* note 93, at 1–2.

97. *Id.* at 2.

98. U.S. CONST. art. VI, § 2.

99. *See, e.g.*, Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363 (2000); Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000); United States v. Locke, 529 U.S. 89 (2000); Pennsylvania v. Nelson, 350 U.S. 497 (1956).

100. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)) (internal citations omitted).

101. Altria Group, Inc. v. Good, ___ U.S. ___, 129 S. Ct. 538, 543 (2008) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

102. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

103. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (stating that implied conflict preemption occurs where it is “impossible for a private party to comply with both state and federal requirements” (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990))).

104. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (finding that conflict preemption under the category of frustration of purpose exists when state law “stands as an obstacle to the

Courts begin their preemption analysis “with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”¹⁰⁵ Courts generally interpret a statute to disfavor preemption,¹⁰⁶ and also apply a presumption against preemption “with particular force” if Congress legislates in an area of traditional state power.¹⁰⁷

IV. THE LEGAL ARIZONA WORKERS ACT REQUIRES PRIVATE EMPLOYERS TO USE E-VERIFY

Frustration with recent deadlock on immigration reform has prompted states throughout the country to take matters into their own hands. Three states have passed laws requiring all public and private employers to use E-Verify; eight have required state agencies and public contractors to use the program; and additional states are considering similar legislation.¹⁰⁸ On the other end of the spectrum, one state has prohibited public and private employers from using the program until E-Verify’s accuracy improves.¹⁰⁹

A. *Arizona’s E-Verify Law Requires All Public and Private Employers to Use E-Verify*

In 2007, the Arizona State Legislature grappled with ways to reduce the number of undocumented workers, who represent approximately ten percent of the state’s workforce.¹¹⁰ One solution that emerged was to require all employers to use E-Verify. Debate in the Legislature reflected a wide range of attitudes regarding immigration and Arizona’s role in the federal immigration system. Some representatives argued that immigration is a “federal issue”¹¹¹ and that the proposed solution

accomplishment and execution of the full purposes and objectives of Congress”).

105. *Altria Group*, 129 S. Ct. at 543 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotations omitted; alterations in original).

106. *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 449 (2005).

107. *Altria Group*, 129 S. Ct. at 543 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1995)).

108. *See infra* Part IV.A–B.

109. *See infra* Part IV.C.

110. PEW HISPANIC CTR., ARIZONA: POPULATION AND LABOR FORCE CHARACTERISTICS, 2000–2006, at 1 (2008), available at <http://pewhispanic.org/files/factsheets/37.pdf>, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev289n110.pdf>.

111. *Fair and Legal Employment Act: Hearing on H.B. 2779 Before the S. Comm. on*

represented “unfair” treatment of “individuals that come over [to the United States] without documents.”¹¹² Other representatives bemoaned the impact of immigration on Arizona, with one senator comparing “the impact of illegal immigration [to that of] a nuclear bomb” that devastates the areas it hits.¹¹³

After months of debate and amendments, the Legislature passed the Legal Arizona Workers Act, which prohibits employers from knowingly hiring undocumented workers,¹¹⁴ and requires them to use E-Verify to confirm the employment eligibility of all new hires after December 31, 2007.¹¹⁵ The Act creates a complex system of investigation, adjudication, and sanctions, including revocation of employers’ business licenses.¹¹⁶ It defines “knowingly employ an unauthorized alien” by reference to federal law,¹¹⁷ and allows judges to consider a range of factors when deciding how to sanction an employer.¹¹⁸

When Governor Janet Napolitano¹¹⁹ signed the bill into law, she celebrated Arizona’s actions while simultaneously criticizing Congress’s inaction.¹²⁰ She noted that by enacting this law, Arizona took “the most

Appropriations, 48th Leg., 1st Sess. (Ariz. 2007) (statement of Sen. Aboud, Member, S. Comm. on Appropriations) (“This is a federal issue.”); *id.* (statement of Sen. Hale, Member, S. Comm. on Appropriations) (“This is a federal responsibility.”); *see also* Fair and Legal Employment Act: Minority Report on H.B. 2779, 48th Leg., 1st Sess. (Ariz. 2007) (statement of Rep. Gallardo) (“I stand opposed to HB 2779 (The Fair and Legal Employment Act) because it is a piecemeal, unconstitutional immigration scheme. Only the Federal Government can truly propose a resolution to our broken immigration system.”).

112. Fair and Legal Employment Act: Hearing on H.B. 2779 Before the S. Comm. on Appropriations, 48th Leg., 1st Sess. (Ariz. 2007) (statement of Sen. Garcia, Member, S. Comm. on Appropriations).

113. *Id.* (statement of Sen. Huppenthal).

114. Legal Arizona Workers Act, ARIZ. REV. STAT. ANN. §§ 23-211 to 23-215 (West 2007).

115. *Id.* § 23-214.

116. *Id.* §§ 23-212(C)–(F).

117. *Id.* § 23-211(8) (“‘Knowingly employ an unauthorized alien’ means the actions described in 8 United States Code § 1324a. This term shall be interpreted consistently with 8 United States Code § 1324a and any applicable federal rules and regulations.”).

118. *Id.* § 23-212(F)(1)(d) (“The court . . . shall consider the following factors . . . (i) The number of unauthorized aliens employed by the employer. (ii) Any prior misconduct by the employer. (iii) The degree of harm resulting from the violation. (iv) Whether the employer made good faith efforts to comply with any applicable requirements. (v) The duration of the violation. (vi) The role of the directors, officers or principals of the employer in the violation. (vii) Any other factors the court deems appropriate.”).

119. Janet Napolitano was sworn in as Secretary of the Department of Homeland Security on January 21, 2009.

120. *Governor’s Message to House on H.B. 2779*, 48th Leg., 1st Sess. (Ariz. 2007) (statement of Governor Janet Napolitano).

aggressive action in the country against employers who knowingly or intentionally hire undocumented workers.”¹²¹ Governor Napolitano conceded that immigration is an area of “federal responsibility,”¹²² but insisted that the state had “no choice but to take strong action to discourage the further flow of illegal immigration through [its] borders.”¹²³ Recognizing that other states would likely follow Arizona’s lead because of a national need for “a uniform and uniformly enforced immigration law,” Governor Napolitano urged Congress to “act swiftly and definitively to solve this problem at the national level.”¹²⁴

B. Two States Adopted Arizona’s Approach, While Many Others Require Public Agencies and Contractors to Use E-Verify

Eleven other states have also adopted E-Verify provisions. The Mississippi Employment Protection Act requires all employers to use E-Verify, prohibits the knowing employment of undocumented workers, and punishes non-compliance by revoking business licenses and public contracts.¹²⁵ The law makes Mississippi the first state to make working without proper documentation a felony, with maximum penalties of five years in prison and ten thousand dollars in fines.¹²⁶ Georgia’s Security and Immigration Compliance Act also requires that all employers use E-Verify.¹²⁷

Eight states require public employers or recipients of public contracts, like contractors and sub-contractors, to use E-Verify.¹²⁸ For example, Colorado requires state contractors to use E-Verify, and treats noncompliance as a breach of contract.¹²⁹ Penalties for non-compliance of the various state laws range from loss of contracts and business

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Mississippi Employment Protection Act, MISS. CODE ANN. § 71-11-3 (2008).

126. *Id.* § 71-11-3(8)(c)(i).

127. Georgia Security and Immigration Compliance Act, GA. CODE ANN., § 48-7-21.1 (2007).

128. COLO. REV. STAT. ANN. § 8-17.5-102 (West 2006); GA. CODE ANN., § 48-7-21.1 (2007); Idaho Exec. Order No. 2006-40, (Dec. 13, 2006); Minnesota Exec. Order No. 08-01 (Jan. 7, 2008); Technical Corrections Act, 2006 N.C. Sess. Laws 259, § 23.1(a) (2006); Taxpayer and Citizen Protection Act of 2007, OKLA. STAT. ANN. tit. 25, § 1313 (2007); Illegal Immigration Control Order, Rhode Island Exec. Order No. 08-01 (Mar. 27, 2008); Identity Documents and Verification Act, UTAH CODE ANN. § 63G-11-103 (2008).

129. COLO. REV. STAT. ANN. § 8-17.5-102.

licenses to tax penalties.

C. *Illinois Prohibited E-Verify's Use by Employers Until the Program's Accuracy Improves*

Illinois is the only state to have prohibited employers from participating in E-Verify.¹³⁰ The Right to Privacy in the Workplace Act prohibits employers from using the program “until the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases are able to make a determination on 99 percent of the tentative non-confirmation notices issued to employers within 3 days, unless otherwise required by federal law.”¹³¹ The statute makes an exception for employers who attest, under penalty of perjury, that they have completed E-Verify's training program, posted notices regarding participation and non-discrimination,¹³² and that they recognize special responsibilities under Illinois and federal law.¹³³

V. COURTS ARE DIVIDED ON WHETHER FEDERAL LAW PREEMPTS STATE E-VERIFY LAWS

Several state and local E-Verify laws have prompted lawsuits, and plaintiffs have generally alleged that federal law preempts state and local regulation of undocumented workers. The Ninth Circuit is the only circuit to confront one of these laws, and it upheld the Legal Arizona Workers Act against a facial challenge.

A. *The Ninth Circuit Held that IRCA Does Not Preempt Arizona's E-Verify Statute Because License Revocation Falls Within IRCA's Savings Clause*

In *Chicanos por la Causa v. Napolitano*,¹³⁴ the Ninth Circuit rejected a facial preemption challenge to the Legal Arizona Workers Act brought

130. In March 2009, an Illinois federal district court invalidated the Illinois provision under the Supremacy Clause. *United States v. Illinois*, No. 07-3261, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009).

131. Illinois Right to Privacy in the Workplace Act, 820 ILL. COMP. STAT. ANN. 55 § 12(a) (LexisNexis 2007).

132. 820 ILL. COMP. STAT. ANN. 55 § 12(b).

133. *Id.* § 12(c).

134. 558 F.3d 856 (9th Cir. 2009), *amending on denial of rehearing and rehearing en banc, and superseding* *Chicanos por la Causa v. Napolitano*, 544 F.3d 976 (9th Cir. 2008).

by various civil-rights organizations and businesses. The court applied a strong presumption against preemption. Relying on *DeCanas v. Bica*,¹³⁵ it found that “the authority to regulate unauthorized workers is ‘within the mainstream’ of the state’s police powers.”¹³⁶ The court also distinguished *Hoffman Plastic Compounds, Inc. v. NLRB*,¹³⁷ a more recent Supreme Court case finding that “IRCA ‘forcefully’ made combating the employment of illegal aliens central to [t]he policy of immigration law.”¹³⁸ For the Ninth Circuit panel, the case was not on point, because it did not involve preemption or state regulation.¹³⁹

The court’s express-preemption analysis focused on IRCA’s preemption clause, which expressly invalidates all state “civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ . . . unauthorized aliens.”¹⁴⁰ The state argued that the law fell within the scope of the licensing exception because its potential sanctions only affected business licensing, while the immigrant-rights groups and business coalitions argued that the licensing exception reached only licenses to engage in particular professions, like business or law.¹⁴¹

The court treated the Arizona law as any other state licensing law, concluding that it did “no more than impose conditions on state licenses to do business.”¹⁴² For the court, this alone placed the Arizona regulations squarely within the licensing exception. A study of the legislative history reinforced the court’s conclusion that “states can condition an employer’s ‘fitness to do business’ on hiring documented workers.”¹⁴³ The court acknowledged that state regulation of immigration would have been impermissible but decided that the Act was not an immigration regulation, because “the Act does not attempt to define who is eligible or ineligible to work under our [federal]

135. 424 U.S. 351 (1976).

136. *Chicanos por la Causa*, 558 F.3d at 864 (quoting *DeCanas*, 424 U.S. at 356, 365).

137. 535 U.S. 137 (2002).

138. *Id.* at 147 (quoting *INS v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 194 and n.8 (1991)).

139. *Chicanos por la Causa*, 558 F.3d at 865 (“We conclude that, because the power to regulate the employment of unauthorized aliens remains within the states’ historic police powers, an assumption of non-preemption applies here.”).

140. 8 U.S.C. § 1324a(h)(2) (2006) (emphasis added).

141. *Chicanos por la Causa*, 558 F.3d at 864–67.

142. *Id.* at 864.

143. *Id.* at 866.

immigration laws.”¹⁴⁴

The court also rejected the appellant’s argument that the Arizona law conflicted with IRCA by requiring employers to participate in a program Congress had made voluntary.¹⁴⁵ According to the court, the voluntary nature of the federal program did not indicate that Congress had prohibited states from mandating participation.¹⁴⁶ In fact, the court found that the Arizona law promoted congressional goals: “Though Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage. The Act’s requirement that employers participate in E-Verify is consistent with and furthers this purpose.”¹⁴⁷

In March 2009, the Ninth Circuit amended the opinion and simultaneously rejected a petition to hear the case en banc.¹⁴⁸ The amendment rejected the plaintiff’s implied-preemption argument that federal law preempted state sanctions because they were harsher than federal IRCA sanctions. The court described the argument as “essentially speculative,” noting that Arizona had yet to sanction a business for violating the Legal Arizona Workers Act.¹⁴⁹

B. Other Courts Have Reached Different Conclusions as to Whether a Presumption Against Preemption Applies and Whether Federal Law Preempts State and Local E-Verify Provisions

While the Ninth Circuit became the first federal appellate court to have considered state E-Verify regulations, four federal district courts have also grappled with the issue, and each has reached different results. Their decisions have turned, in large part, on whether they framed E-Verify laws as immigration regulations or employment regulations.

In *Lozano v. City of Hazleton*,¹⁵⁰ the District Court for the Middle

144. *Id.*

145. *Id.* The Ninth Circuit’s initial decision did not address field preemption.

146. *Id.* at 866–67.

147. *Id.* at 986. The court also noted that “[l]icensing generally refers to ‘a governmental body’s process of issuing a license,’ and a ‘license’ is ‘a permission, usually revocable, to commit some act that would otherwise be unlawful.’” *Id.* at 984 (quoting BLACK’S LAW DICTIONARY 940, 938 (8th ed. 2004) (internal citations omitted)).

148. *Chicanos por la Causa*, 558 F.3d 856 (9th Cir. 2009), *amending on denial of rehearing and rehearing en banc, and superseding* *Chicanos por la Causa v. Napolitano*, 544 F.3d 976 (9th Cir. 2008).

149. *Id.* at 860.

150. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 527 (2007), *appeal docketed*, No. 07-3531

District of Pennsylvania overturned a city ordinance making it unlawful for an employer “to knowingly recruit, hire for employment, or continue to employ . . . any person who is an unlawful worker”¹⁵¹ and requiring, among other things, the use of E-Verify.¹⁵² For the court, the ordinance was not a licensing statute; it was an immigration law, which meant that a presumption against preemption did not apply.¹⁵³ The court held that IRCA expressly preempted the local law because this type of license revocation would render “the express preemption clause nearly meaningless”¹⁵⁴ by allowing states to impose the “ultimate,” business-ruining sanction.¹⁵⁵ The court also held that the federal interest and pervasive regulation of the field of immigration impliedly preempted Hazleton’s law.¹⁵⁶ The city ordinance, according to the court, directly conflicted with IRCA because the voluntary nature of the federal provision could not be reconciled with the mandatory nature of the local law.¹⁵⁷ Finally, the ordinance conflicted with congressional purpose by striking a balance between preventing employment of undocumented workers and burdening employers that was different from the balance that Congress had struck.¹⁵⁸

In *Chamber of Commerce of the United States v. Henry*,¹⁵⁹ the District Court for the Western District of Oklahoma issued a preliminary injunction prohibiting Oklahoma from enforcing a state law requiring state agencies and those contractors and sub-contractors receiving public contracts to use E-Verify on new hires. The law punishes violations with tax penalties and contract revocations. The Oklahoma court agreed with

(3d Cir. Aug. 30, 2007). See generally Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1 (2007) (examining the constitutionality of municipal ordinances sanctioning businesses that employ undocumented workers).

151. *Lozano*, 496 F. Supp. 2d at 515 (quoting Ordinance 2006-18 at § 4.A).

152. *Id.* at 527.

153. *Id.* at 518 n.41.

154. *Id.* at 519.

155. *Id.*

156. *Id.* at 521–25.

157. *Id.* at 527. The court also noted that the time frames of the local ordinance directly conflicted with IRCA. *Id.*

158. *Id.* at 528 (stating that both laws seek “to prevent the employment of persons not authorized to work in the United States while not overburdening the employer in determining whether an employee or prospective employee is an authorized worker”).

159. No. Civ-08-109-C, 2008 WL 2329164 (W.D. Okla. Jun. 4, 2008) (order granting preliminary injunction), *appeal docketed*, No. 08-06204 (10th Cir. Jun. 16, 2008).

the *Lozano* court that the employment of undocumented workers is “central to the policy of immigration law” and found that the Oklahoma law would likely operate in an area “typically reserved for congressional action.”¹⁶⁰ The court also found that the plaintiffs would likely show that the tax and contract measures were actually civil sanctions expressly preempted by IRCA.¹⁶¹

The District Court for the Eastern District of Missouri rejected the approach of the *Lozano* and *Henry* courts in *Gray v. City of Valley Park*,¹⁶² upholding a city ordinance that prohibits private employers from hiring undocumented workers and penalizes violations by revoking business licenses. The ordinance provides a safe harbor for businesses that use E-Verify.¹⁶³ The court described the law as a typical state licensing regulation, and, relying on *DeCanas*, the court applied a strong presumption against preemption in what it described as “an area of law traditionally governed by the states, the regulation of business licenses.”¹⁶⁴ Rejecting the argument that federal law impliedly preempted the regulation, the court found that “IRCA does not manifest an intent of Congress to occupy the entire field of immigration law.”¹⁶⁵ Finally, the court found that the city ordinance did not conflict with federal law because it was physically possible to comply with both laws,¹⁶⁶ and because the local ordinance mirrored federal requirements by making E-Verify optional.¹⁶⁷

In March 2009, the District Court for the Central District of Illinois decided the only case in which the federal government challenged a state E-Verify law. In *United States v. Illinois*,¹⁶⁸ the Department of Homeland Security sought to invalidate the Illinois Right to Privacy in the Workplace Act, which prohibits employers’ use of E-Verify until the program becomes more effective, arguing it conflicted with IIRIRA and

160. *Id.* at *6, *8.

161. *Id.* at *7.

162. No. 4:07-cv-00881, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008).

163. *Id.* at *8 (“[T]his Court must determine whether the Ordinance in question involves an area of law traditionally governed by the states, the regulation of business licenses, or an area traditionally governed by the Federal government, immigration.”).

164. *Id.*

165. *Id.* at *13.

166. *Id.* at *13–16.

167. *Id.* at *17–19.

168. No. 07-3261, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009).

was therefore preempted.¹⁶⁹ The court granted summary judgment in favor of the United States, determining that because “Congress intended that any employer should be able to participate in [E-Verify,]” the Illinois law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁷⁰ The court further noted that since Congress made E-Verify available in all fifty states, Illinois may not “say no, or require the federal government to meet Illinois’ standards.”¹⁷¹

E-Verify litigation remains unsettled and continues to grow.¹⁷² Both *Lozano* and *Henry* are on appeal, to the Third Circuit and Tenth Circuit respectively.¹⁷³ Part VI demonstrates that judges facing a state law involving E-Verify should not rely on *Chicanos por la Causa, Inc. v. Napolitano*—the only appellate-court decision yet to address the issue.

VI. THE NINTH CIRCUIT ERRED BY PERMITTING ARIZONA TO SANCTION EMPLOYERS WITHOUT A PRIOR FEDERAL IRCA VIOLATION

Chicanos por la Causa frames the Legal Arizona Workers Act as an employment law that falls within the historic exercise of state police powers. The Ninth Circuit panel said that *DeCanas* made it clear that states can regulate the employment of undocumented workers. Because Congress abrogated the central tenants of *DeCanas* when it passed IRCA in 1986, the court wrongly concluded that state authority over immigrant-employment remains intact today.

A. *Two Decades of Federal Legislation Have Abrogated the Central Tenets of DeCanas v. Bica and Created the Federal Regulatory Field of Immigration-Related Employment Practices*

When the Ninth Circuit found a presumption against preemption by

169. *Id.* at *1.

170. *Id.* at *2 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

171. *Id.*

172. *See, e.g.*, *Chamber of Commerce of the United States v. Chertoff*, No. 8:08-cv-03444-AW (S.D. Md. Dec. 23, 2008) (challenging Executive Order 13,465 as a violation of IIRIRA because it requires federal contractors to participate in E-Verify).

173. *Chamber of Commerce of the United States v. Henry*, No. Civ-08-109-C, 2008 WL 2329164 (W.D. Okla. Jun. 4, 2008) (order granting preliminary injunction), *appeal docketed*, No. 08-06204 (10th Cir. Jun. 16, 2008); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *appeal docketed*, No. 07-3531 (3d Cir. Aug. 30, 2007).

classifying the law as an employment regulation, it misinterpreted the fundamental changes in federal legislation since IRCA's enactment. Specifically, the Ninth Circuit's decision ignored a field of federal regulation: immigration-related employment practices.

Federal law has included the regulation of immigrant employment, specifically undocumented workers, since Congress passed IRCA in 1986. Congress expressly noted that "the immigration laws of the United States should be enforced vigorously and *uniformly*,"¹⁷⁴ and amended existing law to make immigrant employment a central focus of federal immigration policy.¹⁷⁵ Since IRCA, the federal government has occupied the field of immigrant employment for two decades, issuing and amending regulations relating to I-9 forms, establishing and maintaining E-Verify to ensure employer compliance, and creating and amending penalties for non-compliance.¹⁷⁶

The Ninth Circuit was wrong to rely on *DeCanas* because the case was decided ten years before Congress brought employment of immigrants to the forefront and thereby completely reshaped federal immigration law. When the Supreme Court decided *DeCanas* in 1976, the INA did not contain a single provision prohibiting the employment of undocumented workers. For the Court, this absence of regulation meant Congress had expressed only "a peripheral concern with employment of illegal entrants."¹⁷⁷ The *DeCanas* Court's decision relied on this void in federal law to conclude that Congress had intended to allow states to continue to regulate the employment of undocumented workers.¹⁷⁸ In fact, the Court's dictum that the California law could stand only "absent federal regulation"¹⁷⁹ suggested that the Court would come to a different conclusion if Congress were to act. Now, Congress has acted. By passing IRCA ten years later, Congress manifested a clear intent to comprehensively regulate the employment of undocumented workers.

174. Immigration Reform and Control Act, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359 (1986) (emphasis added).

175. The Supreme Court has recognized that "IRCA forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991) (internal markings omitted)).

176. *See supra* Part II.

177. *DeCanas v. Bica*, 424 U.S. 351, 360 (1976).

178. *Id.* ("Congress believes this problem [of hiring undocumented workers] does not yet require uniform national rules and is appropriately addressed by the States as a local matter.").

179. *Id.* at 356.

The way courts frame the issue influences the ultimate holding in E-Verify cases: the court that treated the state law as an employment regulation upheld the law,¹⁸⁰ while courts that treated the state laws as immigration regulations have usually invalidated them.¹⁸¹ Courts need not address E-Verify cases within the absolute categories of either “employment” or “immigration.” Instead, courts should recognize the established federal field of immigration-related employment practices, and examine state and local E-Verify laws by applying this more exact framework.

B. States May Sanction Employers for Knowingly Hiring Undocumented Workers Only if the Federal Government First Determines that the Employer Violated IRCA

IRCA’s preemption clause prohibits a state from revoking business licenses unless the federal government has found that an employer knowingly hired undocumented workers. States may impose their own punishments on offenders, but only after the federal government has found a violation. IRCA’s text and legislative history, the federal government’s ongoing debates about undocumented workers, and the need for uniformity in immigration enforcement all support the conclusion that federal law preempts the Legal Arizona Workers Act. *Chicanos por la Causa* is in error because, by allowing Arizona to leverage state licensing power into state regulations affecting the hiring of undocumented workers, the decision permits Arizona to interfere with important national interests that call for national solutions.

The express-preemption clause states, in its entirety, that “[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment,

180. *Chicanos por la Causa v. Napolitano*, 558 F.3d 856, 865 (9th Cir. 2009), *amending on denial of rehearing and rehearing en banc, and superseding* *Chicanos por la Causa v. Napolitano*, 544 F.3d 976 (9th Cir. 2008).

181. *Chamber of Commerce of the United States v. Henry*, No. Civ-08-109-C, 2008 WL 2329164, at *5–6 (W.D. Okla. Jun. 4, 2008) (order granting preliminary injunction), *appeal docketed*, No. 08-06204 (10th Cir. Jun. 16, 2008); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 527 (2007), *appeal docketed*, No. 07-3531 (3d Cir. Aug. 30, 2007). Because of the procedural posture of *Henry*, it is unclear whether the court will ultimately find the law to be unconstitutional. *But see* *Gray v. City of Valley Park*, No. 4:07-cv-00881, 2008 WL 294294, at *13 (E.D. Mo. Jan. 31, 2008) (relying on *DeCanas* to find that “IRCA does not manifest an intent of Congress to occupy the entire field of immigration law”).

unauthorized aliens.”¹⁸² While the express-preemption clause is silent as to whether states can impose licensing sanctions independent of a finding that an employer violated IRCA, the House Judiciary Committee Report sheds some light on the clause’s meaning:

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 of this legislation.¹⁸³

The Report shows that Congress intended state business-license sanctions to affect only one class of employers: those that had been found to have violated IRCA. The Report says that states may impose licensing sanctions only upon a “person who *has been found to have violated* the sanctions provisions of this legislation.”¹⁸⁴ The language of the Report shows that a finding of a violation must precede any state action, and therefore that the only employers to face state sanctions are those previously found to have violated federal law. Moreover, as “this legislation”¹⁸⁵ refers to IRCA, not to state law, the Report demonstrates that the only violation that qualifies is a violation of federal law. Finally, the Report refers to “state or local *processes*,”¹⁸⁶ which are distinct from the substantive requirements that state or local law might impose. The Report therefore reinforces an interpretation of the statute that allows states to impose their own sanctions after a violation of federal law has

182. Immigration Reform and Control Act, 8 U.S.C. § 1324a(h)(2) (1986). *But see* Gray v. City of Valley Park, No. 4:07-cv-00881, 2008 WL 294294, at *12 (E.D. Mo. Jan. 31, 2008) (determining that “the wording of the statute is perfectly clear” and concluding that “[t]here is no requirement in the statute that a finding be made by the federal government that a person has employed, recruited or referred for a fee for employment, unauthorized aliens, only that those are the individuals who are subject to penalty”).

183. H.R. REP. NO. 99-682, pt. 1 at 58 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. The Report continues: “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.” This clause does not affect the analysis of this Comment: State licensing or fitness-to-business laws that prohibit the employment of undocumented workers are enforceable, but only the federal government has the authority to find that an employer did so.

184. *Id.* (emphasis added).

185. *Id.*

186. *Id.* (emphasis added).

been determined, but that forbids them from issuing substantive regulations affecting immigrant-employment, whether licensing laws or otherwise.

Allowing Arizona to sanction private employers¹⁸⁷ without a prior federal finding of wrongdoing runs contrary to the federal government's increased regulation of undocumented workers and creates the possibility of inconsistent results. If Arizona can revoke business licenses for violations of the Legal Arizona Workers Act, it would be possible for an employer to win its federal hearing but lose in state proceedings, and thus still be sanctioned.¹⁸⁸ If Arizona could impose the "ultimate sanction"¹⁸⁹ of revoking an employer's business license for behavior that does not rise to the level of an IRCA violation, it could upset the enforcement scheme contemplated by Congress, which carefully balances burdens on employers and employees and vests discretionary authority in the Attorney General. The Legal Arizona Workers Act is preempted because it does not rely on a federal violation of IRCA to revoke business licenses. Instead, it establishes its own standards and procedures for determining knowledge, allowing for public complaint and investigations. All of these provisions run contrary to the prerequisite that an employer first be found to have violated IRCA, and these regulations could result in conflicting federal and state enforcement of immigrant-employment laws.

Additionally, the federal government's increased use and continued extension of E-Verify demonstrate a clear federal interest in regulating undocumented workers.¹⁹⁰ Rather than proffering support for state E-Verify-related sanctions,¹⁹¹ the continued endorsement of E-Verify at the

187. It is likely that Arizona, in its capacity as an employer, could require state agencies to use E-Verify on new hires. However, as this use of E-Verify would not include sanctions or license revocation, it is beyond the scope of this Comment.

188. *But see* *Ariz. Contractors Ass'n v. Candelaria*, 534 F. Supp. 2d 1036, 1054 (D. Ariz. 2007) (finding that the "Act's adjudicatory procedures do not conflict with federal law merely because a State Superior Court judge and a federal administrative law judge could disagree about the evidence"), *aff'd*, *Chicanos por la Causa v. Napolitano*, 558 F.3d 856, 865 (9th Cir. 2009), *amending on denial of rehearing and rehearing en banc, and superseding* *Chicanos por la Causa v. Napolitano*, 544 F.3d 976 (9th Cir. 2008).

189. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 519 (2007), *appeal docketed*, No. 07-3531 (3d Cir. Aug. 30, 2007).

190. *See supra* Part II.B; *see also* *United States v. Illinois*, No. 07-3261, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009).

191. *See Chicanos por la Causa*, 558 F.3d at 867 ("Here, E-Verify is a federal government service that Congress has implicitly strongly encouraged by expanding its duration and its availability (to all fifty states) Though Congress did not mandate E-Verify, Congress plainly

federal level evidences the growth of the federal field of immigration-related employment practices. In light of this trend, Congress, not states, set the terms of E-Verify usage and resulting sanctions.¹⁹²

In sum, IRCA and twenty-three years of federal regulation have created a field of law occupied exclusively by the federal government: immigration-related employment practices. The Ninth Circuit erred in *Chicanos por la Causa* in two ways: first, by relying on Supreme Court precedent that predates that regulatory field, and second, by assuming the Arizona law was either an employment regulation or an immigration regulation. Courts facing this issue in the many cases currently working their way through the federal courts, as well as those that will face the issue in litigation sure to come, should reject the Ninth Circuit's approach. Instead, regardless of whether or not a state calls an E-Verify provision a "licensing" regulation, courts should recognize the comprehensive nature of federal immigrant-employment regulation and find that federal law preempts any state law that interferes with the federal scheme.

CONCLUSION

The faulty framework used by the Ninth Circuit to analyze Arizona's E-Verify statute calls attention to important points of analysis that courts should consider when determining whether a state E-Verify regulation falls within IRCA's savings clause or is expressly preempted by federal law. First, courts should think carefully about how they choose to frame E-Verify laws and should explain in detail the rationale for adopting a particular framework. As demonstrated by recent court opinions, the decision to frame E-Verify as an employment or an immigration law is highly predictive of the outcome. For this reason, courts should consider framing these laws as neither "immigration" nor "employment" laws, but as what the laws really are: immigrant-employment laws.

Additionally, courts should examine what a state law actually does, rather than the terminology the regulation employs. That is, if a state law merely stacks consequences on an employer that has already been found by the federal government to have violated IRCA, then it is likely acceptable. If, however, the statute requires a state finding of knowing

envisioned and endorsed an increase in its usage."); *Gray v. City of Valley Park*, No. 4:07-cv-00881, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008).

192. *See Illinois*, 2009 WL 662703, at *2 (noting that Congress, not Illinois, dictates the testing, length of testing, availability, and usage of E-Verify).

employment of an undocumented worker, as in the Legal Arizona Workers Act, courts should tread warily.

Attempts to reform the U.S. immigration system continue at the federal level as states and municipalities independently seek to reduce the employment of undocumented workers. As a result, E-Verify—and the consistency with which courts interpret E-Verify provisions—will remain an important issue for immigrants, employers, legislators, and courts.