COMMENT

Threading the Needle: State Immigration-Related Employment Laws Surviving a Federal Preemption Analysis

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I. INTRODUCTION

A majority of United States citizens believe illegal immigration is a very serious problem.[1] Current studies illustrate there are approximately 11.2 million undocumented immigrants living within our nation's boarders and that a vast majority reside in only a dozen states.[2] These states are fiscally burdened by the

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[1] *Immigration Overhaul*, N.Y. TIMES/CBS NEWS POLL, 8 (Apr. 28, 2010 to May 2, 2010), *available at* http://documents.nytimes.com/new-york-timescbs-news-poll-immigration-overhaul (reporting sixty-five percent of respondents answered "very" and twenty-four percent answered "somewhat" to the question: "What about ILLEGAL immigration, how serious a problem do you think the issue of ILLEGAL immigration is for the country right now—very serious, somewhat serious, not too serious or not serious at all?").

[2] Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW RESEARCH CENTER: PEW HISPANIC CENTER, 1, 14–15 (Feb. 1, 2011), http://pewhispanic.org/files/reports/133.pdf (noting seventy-seven percent of the undocumented

costs arising from their undocumented immigrant populations.[3] Accordingly, due to the negative economic effects of undocumented immigrants, these states have a significant interest in the active and effective enforcement of federal immigration law or a state immigration-related law.[4]

In response to the lack of federal enforcement and negative budgetary effects, many states have chosen to draft various immigration-related laws.[5] Currently, states are focusing on the areas of law enforcement, identification, and employment.[6] In the first half of 2011, thirteen states passed twenty laws focusing on immigration-related employment issues.[7] In general, these laws impose sanctions on employers for hiring undocumented immigrants.[8]

The background of this comment discusses federal preemption and a recent history of immigration law. Traditionally, the power to enact immigration-related law is within the general police power of the state.[9] The United States Supreme

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immigrant population reside in California, Texas, Florida, New York, New Jersey, Illinois, Georgia, Arizona, North Carolina, Maryland, Washington, and Virginia).

[3] *See infra* notes 60–61, 133–57 and accompanying text; *see also* Jack Martin & Eric A. Ruark, *The Fiscal Burden of Illegal Immigration on United States Taxpayers*, FEDERATION FOR AMERICAN IMMIGRATION REFORM, 1 (July 2010, revised Feb. 2011), http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf?docID=4921.pdf ("At the state and local level, an average of less than [five] percent of the public costs associated with illegal immigration is recouped through taxes collected from illegal aliens.").

[4] *See* Letter from Janet Napolitano, Former Governor of Ariz., to Jim Weiers, Former Speaker of the House of Representatives (July 2, 2007), http://www.azsos.gov/public_services/Chapter_Laws/2007/48th_Legislature_1st_Regular_Session/CH_279.pdf ("Because of Congress' failure to act, states like Arizona have no choice but to take strong action to discourage the further flow of illegal immigration through our borders."); *see also* Romano L. Mazzoli & Alan K. Simpson, *Enacting Immigration Reform, Again*, WASH POST (Sept. 15, 2006, 12:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2006/09/14/AR2006091401179.html ("[W]e also believe that the shortcomings of the act are not due to design failure but rather to the failure of both Democratic and Republican administrations since 1986 to execute the law properly.").

[5] *See Immigration Policy Report: 2011 Immigration-Related Laws and Resolutions in the States (January-June)*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 19, 2011), http://www.ncsl.org/default.aspx?tabid=23362. The report states:

> In the first half of 2011, state legislators introduced 1,592 bills and resolutions relating to immigrants and refugees in all 50 states and Puerto Rico. The number of bill introductions is an increase of 16 percent compared to the first half of 2010, when 46 states considered 1,374 bills and resolutions pertaining to immigrants.

Id.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] DeCanas v. Bica, 424 U.S. 351, 356–57 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) (holding that California Labor Code provision was not a regulation of immigration but of employment, and therefore, was within the police power of the state to protect its legal workers).

Court's affirmation of the Legal Arizona Workers Act of 2007 (Arizona Act) stands to preserve this power.[10] The decision upholds the authority of the states to protect the health, safety and welfare of its citizens.[11] The message is clear: states wishing to legislate in the area of immigration-related employment law may do so, as long as state laws fit precisely within the language and the scope of the federal grant of authority.[12]

This comment argues states can legislate in the area of immigration-related law in accordance with broad federal authority.[13] Also, if states choose to regulate, they will survive preemption under current federal law if they adhere to the following four guidelines. First, the law cannot enter into the field of naturalization.[14] Second, the state action must not be expressly prohibited by a statutory provision or must fit within an express grant of federal authority.[15] Third, the provisions of the state law cannot conflict or interfere with the operation or goals of federal law.[16] Last, states may not legislate in an area of law where congressional intent is to preclude state authority.[17]

II. BACKGROUND

A. *Structural Preemption*

Structural preemption is the constitutional prohibition of a state's authority to legislate in a particular area of the law.[18] The Constitution of the United States preempts certain state action by granting Congress sole authority over certain areas of law.[19] Article I section 8, Clause 4, vests the authority over naturalization

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[10] ARIZ. REV. STAT. ANN. §§ 23-211 to -214 (2011); Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1987 (2011) (holding the 2007 Legal Arizona Workers Act was not preempted by Federal Immigration Law).

[11] *See Whiting*, 131 S. Ct. at 1987.

[12] *See id.*

[13] *See infra* notes 85–131 and accompanying text.

[14] *See infra* notes 85–89 and accompanying text.

[15] *See infra* notes 90–103 and accompanying text.

[16] *See infra* notes 104–21 and accompanying text.

[17] *See infra* notes 122–31 and accompanying text.

[18] Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 808–09 (2008).

[19] U.S. CONST. art. VI, cl. 2; *e.g.*, McCulloch v. Maryland, 17 U.S. 316, 405–06 (1819). The Supremacy Clause of the U.S. Constitution provides:

> 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, anything in the constitution or laws of any state to the contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

with Congress, and the United States Supreme Court has confirmed congressional authority over issues of naturalization.[20] Naturalization is defined as "the granting of citizenship to a foreign-born person under statutory authority."[21] Courts and scholars often incorrectly assume the Constitution places the entire field of immigration and naturalization law within the powers of the Federal government.[22] Nevertheless, the true scope of naturalization, or pure immigration law, is limited to the rules and regulations governing who can be admitted into the United States, the terms and length of their stay, their conduct while in the country, the conditions of their naturalization, and who should be removed from the country.[23] Because the Constitution does not delegate all immigration-related authority to Congress or otherwise prohibit immigration-related state action, absent congressional prohibition, this power is reserved to the state.[24]

In addition to authority over naturalization, the Court has recognized structural preemption arising from certain state actions affecting foreign affairs.[25] The Framers viewed naturalization as an area so intertwined with foreign relations that the United States must speak with a unified voice.[26] In this light, the Court

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[20] U.S. CONST. art. I, § 8, cl. 4 ("To establish an uniform Rule of Naturalization . . . ."); Chy Lung v. Freeman, 92 U.S. 275, 280–81 (1875) (holding state law unconstitutional because it legislated in the area of exclusive Congressional authority regarding the admission of foreign nationals into the United States); Henderson v. Mayor of New York, 92 U.S. 259, 274 (1875) (establishing exclusive federal power to set the terms of entry into any port in the United States).

[21] BLACK'S LAW DICTIONARY 1126 (9th ed. 2009).

[22] Huntington, *supra* note 18, at 791 (describing the misunderstanding of federal exclusivity over immigration).

[23] *See* Austin T. Fragomen, Jr., *State Immigration-Related Statutes and Federal Preemption: The Coming Supreme Court Decision*, 87 INTERPRETER RELEASES 2033, 2035 (2010) (explaining the states are precluded by the Constitution and federal law from imposing certain regulations and conditions on immigrants); Huntington, *supra* note 18, at 807 (explaining pure immigration law is limited to the "rules governing the admission and removal of non-citizens").

[24] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[25] *Henderson*, 92 U.S. at 273 (finding restrictions on international commerce concern foreign relations and are the subject of a treaty or federal legislation); *Chy Lung*, 92 U.S. at 280–81 (holding a California statute requiring a bond for certain classes of passengers arriving from a foreign port could incite an international incident for which the United States as a whole would be held accountable because all relations with foreign countries as per the Constitution is a power solely delegated to the federal government).

[26] DeCanas v. Bica, 424 U.S. 351, 359 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) ("[C]omprehensiveness of legislation governing entry and stay of aliens was to be expected in light of the nature and complexity of the subject."); Hines v. Davidowitz, 312 U.S. 52, 62 (1941) (upholding supremacy of the federal government in the general field of foreign affairs, including power over immigration, naturalization and deportation, made clear by the Constitution and noted by authors of The Federalist in 1787, and given continuous recognition by the Court); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130–31 (2004); THE

continues to recognize Congressional authority over certain areas of immigration as requiring broad national authority.[27]

B. *Express Statutory Preemption*

In the absence of a Constitutional grant of authority, and pursuant to the Supremacy Clause, Congress may statutorily preempt state action through an express preemption clause in a federal statute.[28] Express preemption arises when the plain language of a federal law expressly prohibits a state or local government from either enacting a new law or enforcing an existing law.[29] Congress has regularly exercised its authority under the Supremacy Clause, expressly preempting state enforcement of certain immigration-related laws.[30]

The Court, however, recognizes a presumption against preemption—putting restraints and requirements on federal preemption—when Congress legislates in a field of traditional state concern.[31] If a court finds congressional intent to preempt

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FEDERALIST NO. 33 (Alexander Hamilton), THE FEDERALIST NO. 44 (James Madison) (reasoning that without supremacy the power of the federal government would amount to nothing). Commenter Young proposes:

> The whole point of preemption is generally to force national uniformity on a particular issue, stifling state-by-state diversity and experimentation. And preemption removes issues within its scope from the policy agenda of state and local governments, requiring that citizen participation and deliberation with respect to those issues take place at the national level.

Young, *supra* at 130–31.

[27] *Hines*, 312 U.S. at 68 (legislation affecting international relations requires broad national authority); *see, e.g.*, Toll v. Moreno, 458 U.S. 1, 11 (1982) (holding university policy denying G-4 visa non-immigrant aliens in-state status conflicted with Constitutional authority to regulate naturalization and violated the Supremacy Clause); *see also* Fragomen, *supra* note 23, at 2035.

[28] U.S. CONST. art. VI, cl. 2; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("Congress may, if it chooses, take unto itself all regulatory authority . . . ."); *see* Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152–53 (1982) (describing how preemption is either express or implied). For an example of an express preemption clause see section 1324a(h)(2) of the United States Code, which states: "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." 8 U.S.C. § 1324a (h)(2) (2006).

[29] *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996) (stating the court's analysis of express statutory preemption starts with the text to determine whether Congress intended to preclude state law).

[30] *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546; Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359; Immigration and Nationality Act of 1965, Pub. L. No. 89-236; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

[31] *Lohr*, 518 U.S. at 485 (stating preemption does not occur in a vacuum and two inquiries are required: first whether Congress showed a clear and manifest purpose, and second, the scope of the preemptive intent); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 518 (1992) ("[W]e must

is unclear, or its breadth ambiguous, courts will decide in favor of the state's right to regulate.[32] To overcome the presumption against preemption, the plain language of the federal statute must clearly and manifestly define the federal scope of preemption.[33] For example, the Immigration Reform and Control Act of 1986 (IRCA) expressly prohibits states from imposing civil or criminal sanctions on employers for employing undocumented immigrants. In one instance, Oklahoma imposed non-licensing civil sanctions, and the Circuit Court of Appeals for the Tenth Circuit held the statute was improper.[34]

C. Implied Statutory Preemption

Congress may also preempt state legislation under the doctrine of implied preemption. This form of preemption may arise even when federal law and state law ultimately seek the same goal.[35] To determine whether a state law is impliedly preempted, a court must consider the federal law in its entirety and take into consideration its purpose and intended effects.[36] Because there is no

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construe these provisions in light of the presumption against the pre-emption of state police power regulations."); *Santa Fe Elevator Corp.*, 331 U.S. at 231 (starting with the presumption against preemption in the field of historic state police powers unless there is a clear and manifest preemptive purpose). The presumption against preemption also applies in an implied preemption analysis where the court will look for a clear and manifest purpose of Congress prior to preempting state authority in an area of traditional state concern. *See infra* notes 35–49 and accompanying text.

[32] Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U.S. 767, 780 (1947) (Frankfurter, J., separate opinion) (respecting the federalist system of dual authority).

[33] *See, e.g.*, Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011) (holding the Legal Arizona Workers Act of 2007 is purely a licensing law falling within the savings clause, and therefore, was not expressly preempted); Chamber of Commerce of U.S. v. Edmondson, 594 F.3d 742, 766 (10th Cir. 2010) (holding the section of statute creating a cause of action for legal workers terminated while undocumented workers remain employed, calling for reinstatement, back pay, and legal fees is considered a civil sanction and is unrelated to a licensing law thus falls within the plain meaning of and is expressly preempted by IRCA); *see* Altria Grp, Inc. v. Good, 555 U.S. 70, 77 (2008) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005))); *see also* Gary Endelman & Cynthia Juarez Lange, *State Immigration Legislation and the Preemption Doctrine*, 1698 PLI/Corp 123, at 153–54 (2008).

[34] *Edmondson*, 594 F.3d at 765 ("Such impositions are 'restrictive measures' that fall within the meaning of 'sanctions' as used in [section] 1324a(h)(2) [of the United States Code]. This conclusion is consistent with use of the term 'sanction' in other provisions of federal law."). Section 1324a(h)(2) is the preemption provision of IRCA. 8 U.S.C. § 1324a(h)(2) (2006).

[35] Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (noting similar goals of state and federal statute is an insufficient test of preemption, the inquiry must continue as to whether the state law interferes with the methods the federal statute creates to reach the Congressional goal); Fragomen, *supra* note 23, at 2034 ("The fact that a state law has the same objectives as a federal statute will not bar a finding of preemption if the methods of implementing or enforcing the state law conflict with the methods that the federal law establishes for reaching its goal.").

[36] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (examining the federal statute as a whole to identify Congress' purpose and intent); Fragomen, *supra* note 23, at 2034.

widely accepted bright-line test, the court must review federal and state statutes on a case-by-case basis.[37] The Court recognizes two types of implied statutory preemption—conflict preemption and field preemption.[38]

Federal law may impliedly preempt a state or local law where a sub-national law conflicts with a federal law.[39] There are three tests courts apply in a conflict preemption analysis. In the first test, conflict preemption arises "where compliance with both a federal and state regulation is a physical impossibility."[40] This form of preemption requires actual conflict of laws, not the mere possibility of a hypothetical conflict.[41] Second, a state law will be conflict preempted if it frustrates the purpose of the federal law.[42] Finally, a state law may be conflict preempted when it is an obstacle to the execution of the federal law.[43] For example, the court in *Lozano v. City of Hazleton* found a local ordinance frustrated the purpose of IRCA because it disregarded two of IRCA's main goals and upset the statutory balance struck by Congress.[44]

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[37] Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (stating there is no rigid formula determining implied preemption and courts must make a judgment as to the scope of preemptive intent).

[38] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992). The Court held:

> Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. (citations omitted) (internal quotation marks omitted).

[39] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). Sub-national laws include all non-federal laws. Generally, this comment will use the term state law to refer to all non-federal laws.

[40] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

[41] *E.g.*, Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982); *see* Geier v. Am. Honda Motor Co., 529 U.S. 861, 884 (2000) (stating conflict preemption "turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent"). The *Norman Williams Co.* Court stated:

> The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.

Norman Williams Co., 458 U.S. at 659.

[42] *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 176 (analyzing the state and federal statutes and finding the state statute frustrated the congressional purpose of implementing a national system to test for the maturity of avocados).

[43] Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (reasoning that a state statute which "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress" is conflict preempted).

[44] Lozano v. City of Hazelton, 620 F.3d 170, 219 (3d Cir. 2010), *vacated*, City of Hazelton, Pa. v. Lozano, 131 S. Ct. 2958 (2011); *see infra* notes 75–80 and accompanying text.

Field preemption arises when Congress sufficiently legislates in an area of the law to demonstrate its clear intention to prevent states from legislating in that area—whether Congress has occupied the entire field.[45] Courts will review the federal statute to determine if Congress has left room for supplementary state authority.[46] Also, Congress can show its intent to prohibit state authority through the dominance of a federal statute in a particular field of law.[47] Ultimately, courts will require a clear and manifest federal purpose to preclude state action.[48] For example, in *Hines v. Davidowitz*, the Court held the federal law providing for registration of aliens in the United States was sufficiently comprehensive that a supplemental state law was prohibited.[49]

D. A Recent History of Immigration Law

Prior to 1952, both the federal government and a majority of state and local lawmakers refrained from enacting laws sanctioning employers for hiring undocumented immigrants.[50] With a large number of undocumented immigrants receiving employment in the U.S., the Immigration and Nationality Act of 1952 (INA) insufficiently addressed the undocumented immigrant magnet of

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[45] Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 532 (1992) ("[I]nquiring whether Congress has occupied a particular field with the intent to supplant state law . . . .").

[46] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."); *Hines*, 312 U.S. at 66–67 ("[T]he federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.").

[47] *Santa Fe Elevator Corp.*, 331 U.S. at 230 ("Act[s] of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.").

[48] *Id.*; *see supra* notes 31–33 and accompanying text (discussing the presumption against preemption).

[49] 312 U.S. at 74. The Court held:

> Having the constitutional authority so to do, [Congress] has provided a standard for alien registration in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens. When it made this addition to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against. Under these circumstances, the Pennsylvania Act cannot be enforced.

Id.

[50] David Bacon & Bill Ong Hin, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77, 85 (2010) (discussing the rejection of employer sanctions).

gainful employment in the United States.[51] Specifically, the INA did not sanction employers for hiring undocumented immigrants.[52] In response to the lack of employer sanctions, some states passed laws imposing fines on employers for hiring and employing undocumented immigrants.[53] Absent federal legislation, these states chose to regulate undocumented immigrant employment due to the economic cost and societal burdens on traditional state interests—the citizen's health, safety, and welfare.[54]

In 1976, confirming the state's right to regulate in areas of traditional state concern, the Court upheld a California employer sanction law.[55] The Court held the law was not an immigration law but rather an immigration-related law.[56] The distinction is important because the law then fell within the domain of state authority to legislate in order to protect traditional state interests.[57] The Court did not limit state authority at a time when the employment of undocumented immigrants was not a primary concern of federal immigration law.[58] The Court pronounced: "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the [s]tate" and legislation that regulates employment of undocumented workers "is certainly within the mainstream of such police power regulation."[59]

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[51] *See* Patrick S. Cunningham, *The Legal Arizona Worker's Act: A Threat to Federal Supremacy Over Immigration?*, 42 ARIZ. ST. L.J. 411, 414 (2010) (noting inadequacies of the Immigration and Nationality Act of 1952 were addressed by the Immigration Reform and Control Act of 1986).

[52] *Id.*

[53] Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1974 n.1 (2011). The *Whiting* Court noted additional state immigration-related statutes enacted around the same time as the California statute at issue in *DeCanas*:

> CONN. GEN. STAT. § 31–51k (1973) (enacted 1972); DEL. CODE ANN. tit. 19, § 705 (Cum. Supp. 1978) (enacted 1976); FLA. STAT. § 448.09 (1981) (enacted 1977); KAN. STAT. ANN. § 21–4409 (1981) (enacted 1973); 1985 La. Acts 1894; 1977 Me. Acts 171; 1976 Mass. Acts 641; MONT. CODE ANN. § 41–121 (1977 Cum. Supp.); N.H. REV. STAT. ANN. § 275–A:4–a (1986 Cum. Supp.) (enacted 1976); 1977 Vt. Laws 320; 1977 Va. Acts ch. 438.

Id.

[54] *See, e.g.*, DeCanas v. Bica, 424 U.S. 351, 356–57 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) (recognizing employment of unauthorized immigrants during times of high unemployment is detrimental to the interests of the citizens and legal immigrants of the state).

[55] *Id.* at 365 (holding the regulation of employment of undocumented immigrants was not precluded by the INA).

[56] *Id.* at 360.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 356.

Ten years later, Congress passed IRCA, a sweeping piece of Federal immigration legislation, which, in part, directed the enforcement of illegal immigration towards employers.[60] With the congressional enactment of IRCA, employment of undocumented workers became a central focus of national immigration policy.[61] As a part of the strategy combating illegal immigration, IRCA expressly authorizes federal enforcement through civil or criminal sanctions against employers who knowingly employ undocumented immigrants.[62] Additionally, IRCA prohibits states from civilly or criminally punishing employers for knowingly employing undocumented workers.[63] However, IRCA's preemption statement contains a savings clause that carves out an exception to the blanket prohibition on state civil sanctions.[64] The savings clause grants states the authority to sanction an employer for employing undocumented workers through licensing and similar laws.[65]

The Arizona Legislature passed the Arizona Act in response to the problems stemming from its undocumented immigrant population and the under-enforced provisions of federal immigration law.[66] Arizona's legislature structured its law on the authority expressly granted by IRCA's preemption savings clause.[67] Similarly, several states have laws that impose business-licensing sanctions on employers who hire, or continue to employ, undocumented workers.[68]

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[60] *See* 8 U.S.C. § 1324a (2006); H.R. REP. NO. 99-682(I), at 45–46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5649–50 (discussing the choice to battle illegal immigration by restricting the strong magnetic influence of the United States job market, which pulls illegal immigrants across the border, through the imposition of federal civil or criminal sanctions on the employers knowingly employing undocumented immigrants).

[61] Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147 (2002).

[62] 8 U.S.C. § 1324a(a)(1)(A) ("It is 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 . . . .").

[63] *Id.* § 1324a(h)(2) (preempting states from imposing civil or criminal sanctions for violations of the provision).

[64] BLACK'S LAW DICTIONARY 1461 (9th ed. 2009) (defining saving clause as "[a] statutory provision exempting from coverage something that would otherwise be included").

[65] 8 U.S.C. § 1324a(h)(2) (preempting state action other than through licensing and similar laws); Chamber of Commerce of U.S. v. Whiting, 131 S. Ct 1968, 1987 (2011) (holding IRCA expressly allows the states to impose sanctions through licensing and similar laws).

[66] *See generally* Mazzoli & Simpson, *supra* note 4 (noting the "failure of both Democratic and Republican administrations since 1986 to execute the law properly"); Napolitano, *supra* note 4 ("[I]t is abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs.").

[67] *Compare* 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."), *with* ARIZ. REV. STAT. ANN. §§ 23-211 to -214 (2011) (imposing only licensing sanctions on employers for knowingly or intentionally hiring undocumented immigrants).

[68] *E.g.*, MO. REV. STAT. §§ 285.525 to .555 (2011); S.C. CODE ANN. §§ 41-8-10 to -140 (2011); TENN. CODE ANN. § 50-1-103 (2011); VA. CODE ANN. §§ 13.1-753 to -915 (2011); W. VA. CODE §§ 21-1B-1 to -8 (2011). These state-immigration laws (contained in the above list) have yet to been challenged in the courts.

Since promulgation of the Arizona Act, various businesses and civil rights groups have brought suit against Arizona state officials.[69] The groups claim IRCA expressly and impliedly preempts the Arizona Act.[70] The Court upheld the Arizona Act finding it is not expressly or impliedly preempted by IRCA.[71] Specifically, the Court found the Arizona Act is a licensing law fitting within the express savings clause exemption because it only imposes conditions on the license of a business to operate within the state.[72] Additionally, the Court reasoned the Arizona Act would not upset the balance because its mandatory employment verification program is only a *de minimis* additional burden on employers, and compliance with the Arizona Act will not lead to increased discrimination.[73]

In support of state immigration-related legislation, polls have shown a majority of U.S. voters support state and local sanctions enforcing federal immigration law.[74] Nevertheless, despite the widespread popular support for sanctions, courts have found federal law may preempt state immigration-related laws.[75] For example,

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[69] *Whiting*, 131 S. Ct. at 1987 (holding the Legal Arizona Workers Act is a licensing law fitting squarely within IRCA's savings clause); Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 866 (9th Cir. 2009) (holding the Legal Arizona Workers Act is a licensing law expressly permitted by IRCA's savings clause and is, therefore, neither expressly nor impliedly preempted by federal law or policy); Ariz. Contractors Ass'n v. Candelaria (*Ariz. Contractors II*), 534 F. Supp. 2d 1036 (D. Ariz. 2008) (holding IRCA expressly granted States the authority to impose licensing sanctions and found no evidence of preemptive intent); Ariz. Contractors Ass'n v. Napolitano (*Ariz. Contractors I*), 526 F. Supp. 2d 968 (D. Ariz. 2007) (dismissing suit for lack of standing and fact that suit was brought against the wrong defendants).

[70] *Whiting*, 131 S. Ct. at 1977.

[71] *Id.* at 1987.

[72] *Id.*

[73] *Id.* at 1983–85; *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scatted sections of 8, 18, & 42 U.S.C.). IIRARA created the "Basic Pilot Program" now called E-Verify—an internet-based federal program used to verify a worker's eligibility status. *Ariz. Contractors II*, 534 F. Supp. 2d at 1042. "The average cost to set-up E–Verify is $125, with 85% of employers spending $100 or less. The average annual operation cost is $728, with 75% of employers spending $100 or less annually." *Id.* at 1043. The problems and limitations associated with E-Verify and the I-9 identification verification programs are beyond the scope of this comment.

[74] *Let Illegal Immigrants Become Citizens, U.S. Voters Tell Quinnipiac University National Poll; But Do More To Tighten The Borders, Voters Say*, QUINNIPIAC U. POLLING INSTITUTE (Nov. 21, 2006), http://www.quinnipiac.edu/x1295.xml?ReleaseID=988 (polling registered voters regarding sanctions on businesses employing undocumented immigrants—finding that sixty-five percent support sanctions imposed by local or community laws); *Most Voters Say It's Better to Enforce Existing Immigration Laws Then Create New Ones*, RASMUSSEN REPORTS (Feb. 2011), http://www.rasmussenreports.com/public_content/politics/current_events/immigration/most_voters_say_it_s_better_to_enforce_existing_immigration_laws_than_create_new_ones (finding sixty-seven percent of voters support the proposition that states have the right to enforce federal immigration law if the federal government does not).

[75] *See generally* Chamber of Commerce of U.S. v. Edmondson, 594 F.3d 742 (10th Cir. 2010) (analyzing express preemption); Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010), *vacated*, City of Hazelton, Pa. v. Lozano, 131 S. Ct. 2958 (2011) (analyzing conflict preemption).

the United States Court of Appeals for the Third Circuit, in *Lozano v. City of Hazleton*, reasoned the municipal ordinance was not an immigration law—but a law regulating the employment of undocumented immigrants.[76] The court found the employment provision of the ordinance fell within the police power of the city because it was a licensing law not expressly preempted by IRCA.[77] However, the court decided the ordinance stood as an obstacle to the "accomplishment and execution of IRCA."[78] Particularly, the court considered whether the ordinance upset IRCA's carefully calibrated balance of policy objectives: "[E]ffectively deterring employment of undocumented immigrants, minimizing the resulting burden on employers, and protecting authorized immigrants and citizens perceived as 'foreign' from discrimination."[79] Ultimately, the court held IRCA conflict preempted the Hazelton, Pennsylvania municipal ordinance because it was an obstacle to the operation of the federal law.[80]

III. ANALYSIS

This analysis argues that states possess the authority to narrowly regulate employment of undocumented immigrants within the scope of federal immigration law. First, the Constitution does not *per se* preempt state immigration-related laws.[81] Next, IRCA does not expressly preempt all state action—it actually grants the states certain authority.[82] Also, properly drafted state laws will not conflict with IRCA.[83] Finally, Congress did not occupy the entire field of immigration-related laws.[84]

A. The Constitution Does Not Structurally Preempt All State Immigration-Related Laws

The Supreme Court recognized the "power to regulate immigration is unquestionably . . . a federal power."[85] However, regarding immigration-related laws, the Court held "[s]tates possess broad authority under their police powers to regulate the employment relationship in order to protect workers within

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[76] *Lozano*, 620 F.3d at 206.

[77] *Id.* at 209.

[78] *Id.* at 219.

[79] *Id.* at 210–19.

[80] *Id.* at 219.

[81] *See infra* notes 85–89 and accompanying text.

[82] *See infra* notes 90–103 and accompanying text.

[83] *See infra* notes 107–21 and accompanying text.

[84] *See infra* notes 122–31 and accompanying text.

[85] DeCanas v. Bica, 424 U.S. 351, 352 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

the [s]tate."[86] Textually, the Constitution vests sole power over naturalization to Congress.[87] Accordingly, the scope of naturalization or pure immigration law is limited.[88] A state immigration-related employment law is not a law of naturalization if it does not regulate who can be admitted into the United States, the terms and length of their stay, their conduct while in the country, the conditions of their naturalization, or who should be removed from the country.[89] Therefore, if a state law does not place conditions on a person's naturalization it will not be structurally preempted by the Constitution.

B. Escaping IRCA's Express Preemption Clause

Under the Supremacy Clause, the plain language of a federal statute can expressly preempt state law.[90] Express preemption in an area of traditional state concern, however, must be clearly defined.[91] When a federal law contains an express preemption clause, the Court will focus on the plain language of the statute to determine congressional intent.[92] The plain language of IRCA expressly preempts states from enacting or enforcing laws that impose civil or criminal sanctions on businesses employing undocumented immigrants.[93] However, IRCA's savings clause grants particular authority to the states—the power to sanction businesses

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[86] *Id.* at 356.

[87] U.S. CONST. art. I, § 8, cl. 4; Huntington, *supra* note 18, at 807; *see supra* note 21 and accompanying text (offering a definition of naturalization).

[88] *See* Huntington, *supra* note 18, at 807 (explaining the limited scope of pure immigration law).

[89] *See id.*; Fragomen, *supra* note 23, at 2035 (describing certain measures the states are prevented from taking in respect to immigrants); *see, e.g.*, ARIZ. REV. STAT. ANN. § 23-212(B), (H) (2011) (relying only on the federal government's determination of worker status and making no independent determination of such).

[90] *See supra* note 19 and accompanying text (discussing the Supremacy Clause).

[91] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541–42 (2001); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); Fragomen, *supra* note 23, at 2034; *see supra* notes 31–33 and accompanying text (discussing the presumption against preemption in areas of traditional state concern and what courts require to overcome it).

[92] Geier v. Am. Honda Motor Co., 529 U.S. 861, 895 (2000) (focusing on the plain language to determine preemptive intent); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) ("If the statute contains an express pre-emption clause, the 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.").

[93] 8 U.S.C. § 1324a(h)(2) (2006) ("The provisions of this section preempt any [s]tate 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."); *see* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1981 (2011).

through licensing laws.[94] Hence, the plain language of IRCA's savings clause exempts licensing laws from the prohibition of state civil sanctions.[95]

State immigration-related laws can survive an express preemption analysis and fall within the plain language of IRCA's savings clause by limiting available sanctions to suspension or revocation of a business license.[96] For example, the plain language of the Arizona Act shows it is a licensing law because the only sanction for knowingly hiring an undocumented worker is the suspension or revocation of the employer's operating license.[97] Accordingly, states are authorized to draft state laws suspending or revoking the licenses of businesses for employing undocumented immigrants and these laws will survive a court's express preemption analysis.[98]

Since the plain language of IRCA's savings clause does not limit the type of license that a state can sanction, states have broad authority to sanction any business license.[99] Congress expressly allowed state sanctions through "licensing and similar laws."[100] The Arizona Act utilizes the federal grant of authority by imposing sanctions on a business' operating license.[101] IRCA's plain language confirms this authority and the legislative history supports this reading.[102] Because

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[94] 8 U.S.C. § 1324a(h)(2) (statutory language savings clause); *Whiting*, 131 S. Ct. at 1987.

[95] 8 U.S.C. § 1324a(h)(2); *Whiting*, 131 S. Ct. at 1981.

[96] 8 U.S.C. § 1324a(h)(2); *see Whiting*, 131 S. Ct. at 1987 (holding the Legal Arizona Workers Act is not expressly preempted because the Arizona Act is a licensing law).

[97] ARIZ. REV. STAT. ANN. § 23-212(F)(1)(d), (2) (2011) (authorizing suspension or revocation of all licenses upon determination of a violation of the Act); *Whiting*, 131 S. Ct. at 1987.

[98] *Whiting*, 131 S. Ct. at 1981 (stating IRCA expressly preempts certain state action while expressly preserving the right to suspend or revoke a business operating license).

[99] *See id.* at 1980 (finding Congress put no express limitation on the types of licenses the states may sanction).

[100] 8 U.S.C. § 1324a(h)(2); *Whiting*, 131 S. Ct. at 1981. However, there is an argument that Congressional intent was limited to agricultural business licenses. *Whiting*, 131 S. Ct. at 1994–95 (Breyer, J., dissenting) (claiming IRCA's savings clause extends only to agricultural labor contractors, not all licenses to do business). But the majority rejected this argument. *Id.* at 1980 (majority opinion) (stating there was no such limit in the statutory text).

[101] *See* ARIZ. REV. STAT. ANN. § 23-212(F)(1)(d), (2) (authorizing suspension or revocation of all licenses upon determination of a violation of the Act).

[102] *See Whiting*, 131 S. Ct. at 1981; H.R. REP. NO. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. The House Report provided:

> 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," 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.

Id.

Congress used the term licensing without limiting the definition to certain types of licenses in either the statutory text or in the legislative history, a court will likely find the presumption against preemption applies to state immigration-related business licensing laws.[103]

C. IRCA Does Not Impliedly Preempt State Licensing Laws

The express grant of authority in IRCA's savings clause may not completely insulate all state immigration-related employment legislation from federal preemption.[104] A state law may be impliedly preempted. With the first form of implied preemption—conflict preemption—a state law must not conflict with federal law.[105] With the second form—field preemption—a state law may not regulate in a field completely occupied by federal law.[106]

1. Conflict Preemption

Courts look to three factors to determine whether a state law is conflict preempted: (1) whether compliance with the state law violates the federal law; (2) whether the state law frustrates the purpose of the federal law; and (3) whether the state law is an obstacle to the accomplishment of the federal law.[107] State legislators may avoid conflict preemption by ensuring that compliance with the provisions of a state law will not violate federal law. For example, compliance with the Arizona Act does not violate IRCA because the Arizona Act tracks the material provisions of the federal law.[108] Similar to IRCA, the Arizona Act prohibits employers from knowingly or intentionally employing undocumented workers—both laws require a federal determination of status and offer an affirmative defense to an employer for using the I-9 to verify employment status.[109] However, if compliance with a state statute violates a provision of IRCA it will be conflict preempted.[110]

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[103] Medtronic v. Lohr, 518 U.S. 470, 484–85 (1996); Cipolone v. Liggett Grp Inc., 505 U.S. 504, 533 (1992); *see supra* notes 31–33 and accompanying text.

[104] *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 870 (2000) (declining to give broad effect to a savings clause where it would upset a carefully balanced regulatory scheme). *But see Whiting*, 131 S. Ct. at 1981 (2011) ("Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.").

[105] *See infra* notes 107–21 and accompanying text.

[106] *See infra* notes 122–31 and accompanying text.

[107] *See supra* notes 40–43 and accompanying text.

[108] *Whiting*, 131 S. Ct. at 1985 (holding the Legal Arizona Workers Act of 2007 is not conflict preempted).

[109] *Id.* at 1982.

[110] *Contra id.* at 1987.

Courts will also analyze whether compliance with a state law frustrates the purpose of a federal law.[111] Within IRCA's employment provisions, Congress sought to balance three main goals: (1) to prevent undocumented immigrants from working in the United States; (2) to not overly burden employers; and (3) to limit employment discrimination of those appearing foreign.[112] Properly drafted state immigration-related employment laws can successfully co-exist with IRCA and will not upset Congress's threefold balance. For example, the Court found the Arizona Act does not frustrate the purpose of IRCA, because it does not conflict with or obstruct the accomplishment of the three statutory goals.[113] First, the primary purpose of the Arizona Act is to discourage and prevent businesses from employing undocumented workers.[114] Second, there is little evidence the Arizona Act significantly increases burdens on businesses.[115] Third, discrimination will not increase, because it is entirely possible, and expected, for businesses to comply with both the prohibition of employing undocumented immigrants and with anti-discrimination regulations.[116]

A state legislature can prevent its statute from being an obstacle to the execution of federal law by drafting definitions and procedures in line with federal definitions and procedures. To avoid conflict preemption, a state employer sanction law must mirror federal definitions and rely solely on the federal government's

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[111] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

[112] H.R. REP. NO. 99-682(I), at 56, 68, 90 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649 at 5660, 5672, 5694; *see* 8 U.S.C. § 1324a(a)(1) (2006).

[113] *Whiting*, 131 S. Ct. at 1985 (holding Legal Arizona Workers Act of 2007 is not conflict preempted); Fragomen, *supra* note 23, at 2034 (quoting Hines v. Davidowitz, 312 U.S. 52, 62 (1941)); *see* Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982). *But see* Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010), *vacated*, City of Hazelton, Pa. v. Lozano, 131 S. Ct. 2958 (2011) (holding the act did upset the balance by imposing burdens and limiting due process rights).

[114] 8 U.S.C. § 1324a; ARIZ. REV. STAT. ANN. §§ 23-212(A), -212.01(A), (2011).

[115] *See Ariz. Contractors II*, 534 F. Supp. 2d 1036, 1043 (D. Ariz. 2008) (noting the average costs associated with E-Verify are $125 to implement and less than $100 per year to operate); *Ariz. Contractors I*, 526 F. Supp. 2d 968, 974 (D. Ariz. 2007); *see also Whiting*, 131 S. Ct. at 1983 ("There is no similar interference with the federal program in this case; that program operates unimpeded by the state law."). The court noted:

> A 2002 survey and evaluation observed that "an overwhelming majority of employers participating found [E-Verify] to be an effective and reliable tool for employment verification." After the program was implemented, 60% of employers found it "not at all burdensome." Ninety-three percent reported that it was easier than the I-9 process, and 92% reported that it did not overburden their staff. In a 2006 SSA survey of fifty users with a large volume of verification requests, 100% rated the program "Excellent," "Very Good," or "Good."

Ariz. Contractors I, 526 F. Supp. 2d at 974 (citations omitted).

[116] *Whiting*, 131 S. Ct. at 1984 ("The most rational path for employers is to obey the law—both the law barring the employment of unauthorized aliens and the law prohibiting discrimination—and there is no reason to suppose that Arizona employers will choose not to

determination of work authorization status. For example, the Arizona Act adopts the federal definition of undocumented alien.[117] It mirrors IRCA's procedures by requiring the state to verify work authorization with the federal government. [118] The Arizona Act further complies with IRCA by preventing any determination of status independent from the federal government's determination.[119] Moreover, the Arizona Act only allows its state courts to sanction businesses after a federal determination of work authorization status.[120] With these provisions as examples, the Arizona act does not violate IRCA's definitions or procedural requirements.[121]

2. *Field Preemption*

Congress has not completely preempted the states from legislating in the immigration-related field of employment law. Congressional intent to preempt states from legislating in a particular field of law must be clear and manifest.[122] The clear and manifest purpose must be "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[123] Since Congress generally deals with problems in a comprehensive manner by addressing the entire scope of a problem, courts could infer that whenever Congress acts,

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do so."). *But see id.* at 1989 (Breyer, J., dissenting) (stating IRCA sets discrimination penalties equivalent to employment violation penalties and state licensing sanctions, imposing the business death penalty, upset the balance). IRCA's anti-discrimination provision along with federal, state, and any local regulations proscribing employment discrimination based on national origin continue to apply. 8 U.S.C. § 1324b(a)(1), (g)(1)(B) (2006); 42 U.S.C. § 2000e-2(a) (2006), *unconstitutional as applied by* Rweyemau v. Cote, 520 F.3d 198 (2nd Cir. 2008) (holding statute unconstitutional because it does not proscribe discrimination based on employment status, but not unconstitutional for proscription of discrimination based on national origin); ARIZ. REV. STAT. ANN. § 41-1463(B)(1) (2011) (prohibiting employment discrimination based on race, color, or national origin).

[117] *Compare* 8 U.S.C. § 1324a(h)(3) ("As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General."), *with* ARIZ. REV. STAT. ANN. § 23-211(11) ("'Unauthorized alien' means an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 United States Code § 1324a(h)(3).").

[118] ARIZ. REV. STAT. ANN. § 23-212(B) ("An alien's immigration *status or work authorization status shall be verified with the federal government* pursuant to 8 U.S.C. § 1373(c)." (emphasis added)).

[119] *Id.* ("A state, county or local official *shall not attempt to independently make a final determination* on whether an alien is authorized to work in the United States." (emphasis added)).

[120] *Id.* § 23-212(H) ("On determining whether an employee is an unauthorized alien, *the court shall consider only the federal government's determination* pursuant to 8 United States Code § 1373(c)." (emphasis added)).

[121] Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1981–82 (2011).

[122] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Fragomen, *supra* note 23, at 2034.

[123] *Santa Fe Elevator Corp.*, 331 U.S. at 230.

it intends to occupy the field.[124] However, Congress does not always intend to preclude all state authority.[125]

While IRCA is a comprehensive scheme enacting federal immigration policy, the savings clause shows Congressional intent to authorize particular state sanctions.[126] Congress would not expressly grant authority to the states and at the same time intend to preempt states from legislating in the field.[127] Because the savings clause grants states the authority to enforce sanctions through licensing laws, IRCA's plain language has expressly limited and defined the scope of sanctioning authority granted to the states.[128]

To overcome the presumption against preemption, courts require a clear and manifest intent to preempt state law in an area of traditional state concern.[129] Nonetheless, the Court generally declines "to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law."[130] Ultimately, the Court held the Arizona Act did not upset the balance.[131] A state law will avoid implied preemption where it: (1) is not in conflict with the federal law; (2) does not upset a statutory balance struck by Congress; (3) is not an obstacle to the execution of the federal law; and (4) does not regulate in an area where Congress has left room for the states to legislate.[132]

D. The Negative Effect on State & Federal Budgets

The states have an economic interest in legislation that will reduce their undocumented immigrant population, and it has been recognized that reducing

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[124] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 593 (2001) (recognizing Congress adopted a comprehensive federal program for cigarette labeling and advertising that preempted state regulation). *But see Santa Fe Elevator Corp.*, 331 U.S. at 230 ("So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

[125] *See, e.g.*, *Santa Fe Elevator Corp.*, 331 U.S. at 237 ("Congress has not foreclosed state action by adopting a policy of its own on these matters. Into these fields it has not moved. By nothing that it has done has it preempted those areas.").

[126] 8 U.S.C. 1324a(h) (2006); *see Whiting*, 131 S. Ct. at 1981 ("[I]t stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.").

[127] *See Whiting*, 131 S. Ct. at 1984 ("It makes little sense to preserve state authority to impose sanctions through licensing, but not allow States to revoke licenses when appropriate as one of those sanctions.").

[128] 8 U.S.C. § 1324a(h)(2) (2006); *see Whiting*, 131 S. Ct. at 1981.

[129] *See supra* notes 31–33 and accompanying text.

[130] Geier v. Am. Honda Motor Co., 529 U.S. 861, 870 (2000).

[131] *Whiting*, 131 S. Ct. at 1983–85.

[132] *See supra* notes 40–43, 107–31 and accompanying text.

the employment opportunities of undocumented immigrants serves that goal.[133] IRCA and the Arizona Act both protect traditional state interests by discouraging the employment of undocumented immigrants.[134] It is unfair for the federal government to require the states pay for certain services provided to undocumented immigrants without full federal reimbursement, while prohibiting the same population from participating in federal welfare programs.[135] Accordingly, this economic burden is compounded by increased illegal immigration due to weak federal enforcement.[136]

There is a disproportionate economic impact that falls on states with larger undocumented immigrant populations.[137] At the federal level, costs associated with undocumented immigrants are offset to a greater extent by tax revenues collected from undocumented immigrants because they cannot participate in

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[133] *See supra* notes 60–61 and accompanying text (discussing combating illegal immigration by limiting access to employment); *see also* Martin & Ruark, *supra* note 3, at 1. ("With many state budgets in deficit, policymakers have an obligation to look for ways to reduce the fiscal burden of illegal migration.").

[134] *See* Martin & Ruark, *supra* note 3, at 1 (noting that "over time unemployed and underemployed U.S. workers would replace illegal alien workers"). Employment of unauthorized workers can affect the availability of jobs, wages and working conditions. DeCanas v. Bica, 424 U.S. 351, 356–57 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) ("In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, [section] 2805(a) [of the California Labor Code] focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils."). The Court then stated:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.

Id.; *see also* Shelby D. Gerking & John H. Mutti, *Costs And Benefits of Illegal Immigration: Key Issues for Government Policy*, 61 SOC. SCI. Q. 71, 72 (1980) (noting that legal workers whose skills are similar to those of illegal immigrants will suffer a decrease in their wage rate).

[135] *See* CONGRESSIONAL BUDGET OFFICE, PUB NO. 2500, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS, 1 (2007), *available at* http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf (stating that the federal government requires state and local government to provide education, health care and law enforcement services to individuals regardless of their immigration status and that the state and local governments absorb most of the cost of providing these services while undocumented immigrants are unable to participate in many federal assistance programs).

[136] *See* Mazzoli & Simpson, *supra* note 4 ("[W]e also believe that the shortcomings of the act are not due to design failure but rather to the failure of both Democratic and Republican administrations since 1986 to execute the law properly."); Napolitano, *supra* note 4 ("Congress finds itself incapable of coping with the comprehensive immigration reforms our county needs.").

[137] Martin & Ruark, *supra* note 3, at 44 (estimating the undocumented immigrant population costs taxpayers $113 billion per year, $29 billion at the federal level and $84 billion at the state and local level and stating there are differences in the fiscal burdens among the states due to the relative

certain federal programs.[138] The burden on the states, however, is somewhat different.[139] The federal government mandates that states provide certain social services regardless of an individual's immigration status.[140] State tax revenues collected from undocumented immigrants do not offset the total cost of social services provided to them at the state level.[141] As compared to their legal counterparts, undocumented workers generally pay less in income taxes.[142] Undocumented immigrants often make fewer purchases due to the fact they generally receive lower wages or send a portion of their earnings to family members living in their home country.[143] This results in fewer sales tax dollars going to the state and local governments.[144] Additionally, undocumented immigrants often live in multi-family dwellings thus reducing their individual contribution to property taxes.[145]

One of the major services the federal government requires states to provide is public education for the children of undocumented immigrants.[146] The Court held the states may not exclude children from public schools based on their immigration status.[147] Education costs of undocumented immigrant children can be higher as compared to other children because they are often less proficient in

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size of their undocumented immigrant populations); *see* Passel & Cohn, *supra* note 2, at 14–15 (noting that seventy-seven percent of the undocumented immigrant population reside in twelve states); NAT'L RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC AND FISCAL EFFECTS OF IMMIGRATION 16 (James P. Smith & Barry Edmonston eds., 1997) (discussing the uneven distribution of immigrants across the country and the disproportionate benefits and burdens placed on states and localities, however, not distinguishing between the benefits and burdens associated with legal and illegal immigrants).

[138] CONGRESSIONAL BUDGET OFFICE, *supra* note 135, at 1 ("[M]ost unauthorized immigrants are prohibited from receiving many of the benefits that the federal government provides through Social Security and such need-based programs as Food Stamps, Medicaid (other than emergency services), and Temporary Assistance for Needy Families.").

[139] *Id.*

[140] *Id.*

[141] *Id.* (stating estimates show costs of undocumented immigrants exceed what the state collects in taxes from that group); Martin & Ruark, *supra* note 3, at 77 (noting the estimated tax collections from illegal aliens minus the estimated state expenditures on illegal aliens result in a net fiscal burden on the states that is four times larger than that of the federal government's net fiscal burden).

[142] CONGRESSIONAL BUDGET OFFICE, *supra* note 135, at 2 (reasoning that generally citizens and documented immigrants receive more in wages, and therefore, pay more in taxes, while undocumented immigrants pay less in taxes because they are taxed at a lower bracket due to the fact they generally earn less).

[143] *Id.* at 2; Martin & Ruark, *supra* note 3, at 72.

[144] Martin & Ruark, *supra* note 3, at 72.

[145] *Id.*

[146] CONGRESSIONAL BUDGET OFFICE, *supra* note 135, at 1.

[147] Plyler v. Doe, 457 U.S. 202, 253 (1982).

English and require more intensive educational services.[148] Federal funding, while available for language assistance programs, does not cover the costs states must pay for the general education of an undocumented child.[149]

Other major social services also fall disproportionately on the states. State and local governments are required to offer the same level of law enforcement to undocumented immigrants as they would for citizens—both for prosecution and for defense.[150] Undocumented immigrants convicted of crimes, other than immigration-related offenses, are not immediately deported.[151] The costs of prosecution and incarceration then fall on the states, and are only partially offset by federal contributions.[152] The cost of medical care is also largely paid for by the states.[153] Many medical facilities are required to provide care to all individuals regardless of immigration status.[154] Since undocumented immigrants are less likely to carry health insurance, it is more likely they will utilize expensive emergency rooms or clinics for nonemergency health care.[155] The costs of uncompensated care will increase when there is a proliferation in the use of emergency medical services by uninsured undocumented immigrants.[156] The states then are left with a significant financial burden because federal assistance does not fully offset the entire cost of uncompensated emergency care.[157] Therefore, in order to protect traditional state interests, a state can choose to enact immigration-related laws discouraging undocumented immigrants from residing in the state and thus limit the resulting economic burdens.

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[148] CONGRESSIONAL BUDGET OFFICE, *supra* note 135, at 2. ("Analyses from several states indicate that the costs of educating students who did not speak English fluently were [twenty] percent to [forty] percent higher . . . .").

[149] *Id.* at 11–12.

[150] *Id.* at 9 (stating there is only cost data for prosecutions).

[151] *Id.* (explaining the federal government takes custody of undocumented criminals only after they have been fully processed through the local criminal justice system).

[152] *Id.* at 12.

[153] *Id.* at 1–2.

[154] *Id.* at 8.

[155] *Id.* at 1–2.

[156] *Id.* at 8 (stating costs of emergency care in border counties accounted for one-quarter of all uncompensated care); Martin & Ruark, *supra* note 3, at 63 ("Our calculations indicate state and locally borne costs of medical services provided to illegal aliens and their U.S.-born children annually amount to more than $10 billion.").

[157] CONGRESSIONAL BUDGET OFFICE, *supra* note 135, at 10–11 (stating certain federal programs subsidize the costs, but no federal programs pay for emergency care).

IV. CONCLUSION

States may legislate in the area of immigration-related laws.[158] The U.S. Constitution only vests authority over naturalization to Congress and, therefore, all state immigration-related laws are not *per se* preempted.[159] IRCA expressly preempts states from imposing civil or criminal sanctions; however, it expressly grants the states authority to sanction through licensing laws.[160] States may avoid conflict preemption by properly drafting laws that do not conflict with or upset the balance of federal law.[161] States may legislate in the area of immigration-related law because Congress has not clearly and manifestly occupied the entire field.[162] Courts will apply the presumption against preemption in areas of traditional state concern such as employment.[163] The Court has stated the negative economic effects resulting from the employment of undocumented immigrants are a traditional state concern and the states may seek to limit these effects by discouraging the employment of undocumented immigrants.[164] In conclusion, by using the Arizona Act as guidance, states will be able to draft immigration-related legislation that will survive all judicially recognized preemption doctrines.[165]

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[158] *See supra* notes 85–131 and accompanying text.

[159] *See supra* notes 85–89 and accompanying text.

[160] *See supra* notes 90–103 and accompanying text.

[161] *See supra* notes 107–21 and accompanying text.

[162] *See supra* notes 122–31 and accompanying text.

[163] *See supra* notes 31–33 and accompanying text.

[164] *See supra* notes 133–57 and accompanying text.

[165] *See supra* notes 66–73 and accompanying text.