# STATE EMPLOYER SANCTIONS LAWS AND THE FEDERAL PREEMPTION DOCTRINE: THE LEGAL ARIZONA WORKERS ACT REVISITED

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*As the desire to seize upon employment opportunities within the United States persists, illegal immigration continues to rise. Some states are disproportionately affected by this phenomenon, and as a result, frustration continues to mount in response to what is perceived as an ineffective attempt by the federal government to regulate illegal immigration. This frustration often manifests itself in states attempting to enact more stringent immigration laws. This Note discusses Arizona's recently enacted state sanctions law, the Legal Arizona Workers Act, currently considered the toughest state employer sanctions law in the country. The law punishes employers who knowingly or intentionally employ illegal immigrants. The law's focus on the employment of illegal immigrants raises federal preemption concerns as the law potentially infringes upon the federal immigration power. Through its analysis, this Note discusses the federal preemption doctrine and its roots, and how it relates to the litigious challenges to the Arizona statute. While addressing the arguments presented by states for the unilateral enactment of state immigration laws, the Note discusses the historical consensus on the exclusive federal power over immigration legislation. This consensus is expressed in constitutional considerations and precedent, and reinforced by the need for uniform immigration laws. In light of this consensus, through an analysis of the United States Court of Appeals for the Ninth Circuit's recent holding which upheld the validity of the Arizona statute under a federal preemption analysis, this Note concurs that the substantive prohibitions and the penalties imposed for violating the Legal Arizona Workers Act are not preempted on the grounds of either express preemption or implied field preemption. However, this Note argues, contrary to the court's holding, that the required use of E-Verify*

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*under the Legal Arizona Workers Act should have been preempted on the grounds of implied conflict preemption.*



## INTRODUCTION

Following the terrorist attacks of September 11, 2001, "the holes in the United States's immigration system became painfully apparent"[1] when Americans came face to face with terrorist acts perpetrated by foreigners. Fears intensified with isolated regional events such as the Washington, D.C., sniper attacks in 2002, where authorities found one of the attackers to be an illegal alien from Jamaica,[2] and the gang-rape and murder of a woman in New York by illegal aliens in 2004.[3] In response,

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[1] *See* Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1374 (2006).

[2] *See* Susan Kelleher, Judge Orders Deportation Of Malvo's Mother, PITTSBURGH POST-GAZETTE, Nov. 21, 2002, at A8.

[3] James Gordon Meek, *City: Cops Stymied by Feds: Illegal-Alien Arrests Go Nowhere*, DAILY NEWS (N.Y), Feb. 28, 2003, at 14.

the federal government began to make a concerted effort to involve local authorities in the enforcement of federal immigration laws. With a limited force of approximately 2,000 immigration investigators,[4] and the number of illegal immigrants outnumbering federal agents 5,000 to 1,[5] the use of state enforcement was seen as essential to the efficient and effective enforcement of federal immigration laws.[6]

Consequently, federal government agencies and officials expressed the need for state participation in the enforcement of federal immigration laws. Then-United States Attorney General John Ashcroft and other Department of Justice officials encouraged local governments to enforce immigration laws as part of their anti-terrorism mission.[7] Additionally, following the events of September 11th, Congress drafted legislation such as the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act), which would have financially rewarded local governments willing to enforce immigration laws.[8] Although the CLEAR Act did not pass, some of its core provisions continue to resurface in legislation pending in Congress.[9]

The reactions of states to the federal government's efforts can be divided into two camps.[10] In the first camp are states that have adopted non-cooperation laws in response to the more stringent federal immigration laws following September 11th.[11] These non-cooperation laws were prompted by the thought of having to extend limited state resources to include immigration enforcement procedures and by a fear of the effect tighter immigration regulation might have on long-term public development.[12] These laws have taken many forms. For example, some laws prohibit actions by state law enforcement officers that would comply with federal immigration laws,[13] while other state non-cooperation laws

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4 Daniel Booth, Note, *Federalism on Ice: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL'Y 1063, 1065 (2006)

5 *Id.* at 1066 (citing 151 CONG. REC. S7853 (daily ed. June 30, 2005)).

6 *See id.* (citing 151 CONG. REC. S7853 (daily ed. June 30, 2005)).

7 Pham, *supra* note 1, at 1374, 1386.

8 *Id.* at 1387.

9 *Id.*

10 *See id.* at 1374 ("While some local governments enthusiastically embraced the opportunity to enforce immigration laws [at the encouragement of the federal government], others refused to become involved . . . .").

11 *Id.* at 1387–91 (discussing the form and substantive provisions of state non-cooperation laws).

12 *See id.* at 1375.

13 *See, e.g.*, SEATTLE, WASH., MUNICIPAL CODE § 4.18.015 (A) (2003), *available at* http://clerk.ci.seattle.wa.us/~public/code1.htm (search "Code Section Number" for "4.18.015"; then follow "Inquiries into immigration status" hyperlink) ("[U]nless otherwise required by law or by court order, no Seattle City officer or employee shall inquire into the immigration status of any person, or engage in activities designed to ascertain the immigration status of any person.").

prohibit the use of state resources by state agencies to enforce federal immigration laws.[14]

In contrast, in the second camp are states that have seen the alleged involvement of illegal immigrants in criminal acts as an opportunity to advocate for more stringent independent state immigration laws.[15] These states are frustrated by what they perceive to be the ineffective enforcement of immigration laws at the federal level and have seized upon the opportunity to curb illegal immigration within their own states.[16] Some of these states have resorted to the enactment of more stringent immigration laws, employing methods such as employer sanctions.[17] One such state is the state of Arizona.

In 2007, Arizona adopted the Legal Arizona Workers Act (LAWA), which prohibits the knowing or intentional employment of illegal immigrants.[18] LAWA resulted from the state's frustration with ineffective federal attempts to curb illegal immigration.[19] However, the new Arizona sanctions law was strongly opposed by local businessmen and women who filed suit against the state's county attorneys.[20] LAWA's challengers filed suit in federal district court,[21] and subsequently appealed the district court's ruling to the Ninth Circuit.[22] They are cur-

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14 *See, e.g.*, Alaska H.R.J. Res. 22, 23d Legis. (May 2003), *available at* http://www.legis.state.ak.us/basis/get_bill_text.asp?hsid=HJR022D&session=23 (last visited May 22, 2009) ("[A]n agency or instrumentality of the state may not . . . use state resources or institutions for the enforcement of federal immigration matters, which are the responsibility of the federal government . . . .").

15 *See* PBS, *Pennsylvania Town Passes Illegal Immigration Law*, Sept. 1, 2006, http://www.pbs.org/newshour/bb/social_issues/july-dec06/immigration_09-01.html (last visited May 22, 2009) (discussing the mayor of Hazleton, Pennsylvania, Lou Barletta's concern over the involvement of illegal aliens in local criminal activity as a trigger for advocating for Hazleton's immigration ordinance).

16 *See, e.g.,* Randal C. Archibold, *Arizona Governor Signs Tough Bill on Hiring Illegal Immigrants*, N.Y. TIMES, July 3, 2007, at A10.

17 *See, e.g.*, *id.*; Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (overturning an ordinance enacted in the town of Hazleton, Pennsylvania, that regulated the rental of housing to and employment of undocumented aliens, and imposed penalties on violators, including sanctions).

18 *See* 2007 Ariz. Legis. Serv. 279 (West) (codified at ARIZ. REV. STAT. ANN. §§ 23-212-23-214 (2008)); *see also* Maricopa County Attorney's Office, Laws Governing the Legal Arizona Workers Act, http://www.maricopacountyattorney.org/lawa/statutes.html (last visited May 22, 2009).

19 *See* Archibold, *supra* note 16, at A10 (discussing then-Governor of Arizona Janet Napolitano's frustration regarding Congress' attempt to curb illegal immigration as a reason to move forward with the Legal Arizona Workers Act's enactment).

20 *See* Maricopa County Attorney's Office, Chronology of Litigation Challenging the Legal Arizona Workers Act, http://www.maricopacountyattorney.org/lawa/litigation.html (last visited May 22, 2009) (providing a chronology of the litigation challenging LAWA).

21 *See generally* Arizona Contractors Ass'n, Inc. v. Candelaria, 534 F. Supp. 2d 1036, 1043 (D. Ariz. 2008).

22 *See generally* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 866-67 (9th Cir. 2009).

rently seeking the review of the Supreme Court over the Ninth Circuit's holding.[23] In their lawsuit, the plaintiffs alleged that LAWA violated many federal and state constitutional provisions: the Commerce Clause, the Supremacy Clause, and the Fourth Amendment of the United States Constitution; the procedural due process clauses of the federal and Arizona constitutions; and the separation of powers doctrine of the Arizona Constitution.[24] However, the focus of the plaintiffs' suit was the claim that federal immigration law preempted LAWA.[25]

This Note addresses the law's validity under the doctrine of federal preemption. It argues that the substantive prohibitions under LAWA, and the penalties imposed for the violation thereof, are not preempted by federal legislation on the grounds of either express preemption or implied field preemption, as contested by the complainants, because LAWA regulates a field consistently and solely regulated by state governments and not prohibited by the language of current federal immigration legislation. However, this Note argues that federal law does preempt LAWA's required use of E-Verify[26] on the grounds of implied conflict preemption because it conflicts with the congressional intent and objective to make the program voluntary.

In arriving at this conclusion, Part I of this Note discusses the Arizona statute, its roots, and its implications in the context of similar state employer sanctions laws. Part II discusses the doctrine of federal preemption and its sources. An application of this doctrine follows in Parts III and IV. More specifically, Part III applies an express preemption analysis to the substantive prohibitions and the penalties imposed under the statute. Part IV applies an implied field preemption analysis to the substantive prohibitions and penalties imposed under LAWA, and applies an implied conflict preemption analysis to the statute's required use of E-Verify. Upon concluding that the Arizona law is preempted under an implied conflict preemption analysis, Part V discusses the possible state considerations in support of unilateral state immigration laws. The Note

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23 Howard Fischer, *End to Ariz. Employer-Sanction Law Sought: Business Group Takes Up the Issue with the High Court,* ARIZ. BUS. GAZETTE, Aug. 6, 2009, http://www.azcentral.com/business/abg/articles/2009/08/06/20090806abg-sanctions.html (last visited Aug. 16, 2009) (discussing how LAWA's challengers claim that LAWA is preempted by federal law and that other states are following LAWA's path, such that "[i]n the first three months of 2009 alone, over 1,000 immigration-related bills and resolutions were introduced in all 50 states, . . . [a]t least 150 of these bills related specifically to employment, and 40 such bills have been enacted in 28 states since 2007, the year Arizona approved its legislation . . . disrupting the congressional plan to comprehensively and uniformly regulate employment of immigrants") (internal citations omitted).

24 *See* Complaint, Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008) (No. 07 Civ. 02496) [hereinafter *Ariz. Contractors Ass'n* Complaint].

25 *Id.* at 28–38.

26 *See* ARIZ. REV. STAT. ANN. § 23-214(A) (2008).

concludes with a summary of the doctrine of preemption's resulting implications with respect to LAWA's contested provisions.

## I. STATE EMPLOYER SANCTIONS LAWS AND THE CASE OF ARIZONA

As noted, in protest of federal attempts to restrict the flow of immigration, some states have adopted non-cooperation laws.[27] More restrictionist states have used the mounting fear of immigration and its fiscal and national security implications as an opportunity to push forward more stringent state immigration laws.[28] One such state law, the Legal Arizona Workers Act (LAWA), is the focus of this Note.

Arizona has been dealing disproportionately with the problem of illegal immigration—more people cross the border illegally into Arizona than any other state.[29] Expressing frustration with the lax implementation of federal immigration laws, then-Governor Janet Napolitano signed a bill in 2007 regarded as the toughest state employer sanctions law in the country in recent years.[30] The law took effect on January 1, 2008.[31] Despite reservations about the severe penalties under the law, Governor Napolitano stated that she decided to move forward with it "because Congress has failed miserably,"[32] implying that Congress' inaction was forcing states to act in its stead.

LAWA focuses on the employment of illegal immigrants.[33] Through its language, the Arizona state legislature intended "to ensure that no businesses in Arizona knowingly or intentionally hire or employ illegal immigrants."[34] The new law applies to all businesses in the state of Arizona, regardless of size.[35] In the hope of furthering the federal government's aim of preserving a legal work force, the law requires em-

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27 *See supra* notes 11–14 and accompanying text.

28 *See* PBS, *supra* note 15 (discussing the mayor of Hazleton, Pennsylvania, Lou Barletta's concern over the involvement of illegal aliens in local criminal activity as a trigger for advocating for Hazleton's immigration ordinance).

29 Archibold, *supra* note 16, at A10.

30 *Id.*

31 *See* Ronald J. Hansen, *Legal Arizona Workers Act 101: What Is the Law?*, ARIZ. REPUBLIC, Dec. 30, 2007, http://www.azcentral.com/specials/special46/articles/1128biz-sanctions101one.html (last visited May 22, 2009) [hereinafter Hansen, *The Law*].

32 Archibold, *supra* note 16, at A10.

33 First passed in 2007, LAWA was amended in 2008 with the new provisions effective as of May 1, 2008. *See* ARIZ. REV. STAT. ANN. §§ 23-212; 23-212.01 (2008). The constitutionality of the statute, as amended, is the topic of this Note.

34 Hansen, *The Law*, *supra* note 31; *see also* ARIZ. REV. STAT. ANN. § 23-212(A) (2008) ("An employer shall not knowingly employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer knowingly contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.").

35 Hansen, *The Law*, *supra* note 31.

ployers to verify the legal status of new employees.[36] Under the law, employers are also responsible for the verification of the legal status of existing employees.[37] Employers are required to check the legal status of their employees through the use of the federal E-Verify program.[38] E-Verify is a "free online federal program that checks names and identification documents [against a federal database] to ensure that new employees are eligible to work."[39]

The responsibility for enforcing the sanctions prescribed by LAWA falls primarily on the state's county attorneys.[40] The state attorney general can investigate claims in cooperation with the county attorneys; however, the role of prosecuting the claims is assumed entirely by the county attorneys.[41] Unless determined to be frivolous, the county attorneys must investigate any alleged violation of the employer sanctions law by inquiring about the legal status of employees through federal authorities.[42]

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36 *See* ARIZ. REV. STAT. ANN. § 23-214(A) (2008) ("After December 31, 2007, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the [E]-[V]erify program."); Hansen, *The Law*, *supra* note 31.

37 *See* Hansen, *The Law*, *supra* note 31.

38 ARIZ. REV. STAT. ANN. § 23-214(A) (2008); *see* Hansen, *The Law*, *supra* note 31.

39 *See* Hansen, *The Law*, *supra* note 31.

40 Ronald J. Hansen, *Legal Arizona Workers Act 101: Who Enforces It?*, ARIZ. REPUBLIC, Dec. 30, 2007, http://www.azcentral.com/specials/special46/articles/1128biz-sanctions101three.html (last visited May 22, 2009) [hereinafter Hansen, *Enforcement*].

41 *See* Ariz. Rev. Stat. Ann. § 23-212(B) (2008) (discussing the role of the state attorney general and county attorneys in investigating and prosecuting claims); *id.* § 23-212(D) ("An action for a violation of subsection A of this section shall be brought against the employer by the county attorney in the county where the unauthorized alien employee is or was employed by the employer."); Hansen, *Enforcement*, *supra* note 40.

42 *See* ARIZ. REV. STAT. ANN. § 23-212(C) (2008) (noting that "[i]f, after an investigation, the attorney general or county attorney determines that the complaint is not false and frivolous," the attorney general or county attorney must notify the U.S. immigration and customs enforcement, local law enforcement, and the appropriate county attorney about the presence of the unauthorized alien); Hansen, *Enforcement*, *supra* note 40.

Although not addressed in this Note, it is important to mention that the requirement of ascertaining an employee's legal status through federal authorities raises procedural concerns. As local businesses argued against the state county attorneys in *Arizona Contractors Association, Inc. v. Candelaria* (Arizona Contractors Association, Inc. v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008), *rev'd sub nom*. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009)), LAWA does not provide employers or employees with the minimum due process guarantees provided by the Fourteenth Amendment of the U.S. Constitution. (*See Ariz. Contractors Ass'n* Complaint, *supra* note 24, at 17–24.) At the very minimum, the Fourteenth Amendment allows for any person to be provided with (1) notice of the charges at issue (*Id.* at 18.); (2) notice of the time and place of a hearing (*Id.*); (3) the right to produce witnesses at the hearing (*Id.*)—in this case, the right of employers "to call witnesses on their behalf to establish the work authorization of [the individual subject to investigation]" (*Id.* at 21.); (4) the right to examine witnesses—in this case, the right to cross-examine the federal or state government's witnesses on the issue of the validity of the investigated individual's work authorization (*Id.* at 22.); and (5) the right to a full consideration and determination of the issues based on the evidence (*Id.* at 18.). Furthermore, as indicated in the complaint, federal immigration law, which addresses the due process rights of employers, indicates that when an

Under the Arizona employer sanctions law, any member of the community can make a complaint.[43] However, the state has made efforts to curb the potential abuse of LAWA, with authorities stressing that there must be a reasonable and legal basis for filing a complaint.[44] In order to prevent the misuse of the law, the state has classified a frivolous claim made to authorities as a misdemeanor crime that carries the possible sentence of up to thirty days in jail and a fine of $500, upon conviction.[45]

LAWA's distinction between knowingly and intentionally employing illegal immigrants becomes relevant in determining the applicable punishment.[46] Under the statute, first-time offenders of the sanctions law who "knowingly" employ illegal immigrants *may* have their business licenses suspended for up to ten days.[47] In contrast, violators who "intentionally" hire illegal immigrants *must* have their business licenses suspended for at least ten days;[48] but "[t]he law does not specify the maximum suspension for a first offense for intentional violations."[49] In both cases, "Superior Court judges will determine the length of the suspension and base it on a variety of factors."[50] According to LAWA, the factors include:

(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; [and]

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employer is found to have violated the law, an employer is provided with additional due process rights, including the right to an evidentiary hearing, and the right to present evidence and cross-examine witnesses presenting evidence against him or her (*See id.* at 19.).

43 Ronald J. Hansen, *Legal Arizona Workers Act 101: What About Frivolous Complaints?*, ARIZ. REPUBLIC, Dec. 30, 2007, http://www.azcentral.com/specials/special46/articles/1128biz-sanctions101four.html (last visited May 22, 2009).

44 *Id.*

45 *Id.*

46 *See* ARIZ. REV. STAT. §§ 23-212(F); 23-212.01(F) (2008) (explaining the different requirements and penalties for knowingly and intentionally hiring an undocumented alien, respectively); Ronald J. Hansen, *Legal Arizona Workers Act 101: What Are the Penalties?*, ARIZ. REPUBLIC, Dec. 30, 2007, http://www.azcentral.com/specials/special46/articles/1128biz-sanctions101five.html (last visited May 22, 2009) [hereinafter Hansen, *Penalties*].

47 ARIZ. REV. STAT. § 23-212(F)(1)(d) (2008) ("On finding a violation [by the employer, the court] [m]ay order the appropriate agencies to suspend all licenses . . . held by the employer for not to exceed ten business days."); *see* Hansen, *Penalties, supra* note 46.

48 *See* ARIZ. REV. STAT. § 23-212.01(F)(1)(c) (2008).

49 Hansen, *Penalties*, *supra* note 46.

50 *Id.*

(vii) Any other factors the court deems appropriate.[51]

For both violations, employers must terminate all their illegal employees and "file an affidavit within three business days,"[52] swearing that "the employer has terminated the employment of all unauthorized aliens in this state and that the employer will not intentionally or knowingly employ an unauthorized alien in this state [again]."[53] Both knowing and intentional first-time violators are placed on probation, requiring them to file quarterly reports with the county attorney on "each new employee who is hired by the employer at the business location where the unauthorized alien performed work."[54] However, the law further distinguishes the two types of violators by the length of their probation: for those who knowingly violate the sanctions law, probation lasts three years, while those who intentionally violate the law face a probation period of five years.[55] Repeat offenders of the law risk what has been called the "business death penalty"[56]—"permanent revocation of the state business license, effectively preventing a business from operating in the state."[57]

The state of Arizona intends to treat the sanctions law as a law-enforcement priority.[58] Under LAWA, prosecutors are required to review every complaint, and "the superior courts are ordered to put the sanction cases on a fast track."[59] To facilitate the implementation and efficiency of the sanctions law, the attorney general is required to "compile a public database of employers who violate the sanctions law."[60]

The law passed in Arizona echoes the approach taken by local government actors in many states in recent years. For example, in the state of Virginia, Prince William County lawmakers unanimously approved one of the toughest laws on illegal immigration.[61] The law provides for

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51 ARIZ. REV. STAT. ANN. § 23-212(F)(1)(d)(i–vii) (2008) (providing this list of factors for Superior Court judges to determine the length of suspension of the business permits held by employers who knowingly hire an illegal immigrant); *id.* § 23-212.01(F)(1)(c) (providing the same list of factors for Superior Court judges to determine the length of suspension of the business permits held by employers who intentionally hire an illegal immigrant); *see also* Hansen, *Penalties*, *supra* note 46.

52 ARIZ. REV. STAT. ANN. §§ 23-212(F)(1)(a), (F)(1)(c) (2008); *id.* §§ 23-212.01(F)(1)(a), (F)(1)(d); *see also* Hansen, *Penalties*, *supra* note 46.

53 ARIZ. REV. STAT. ANN. § 23-212(F)(1)(c) (2008) (knowingly); *id.* § 23-212.01(F)(1)(d) (intentionally).

54 *Id.* § 23-212(F)(1)(b) (knowingly); *id.* § 23-212.01(F)(1)(b) (intentionally).

55 Hansen, *Penalties*, *supra* note 46.

56 Archibold, *supra* note 16.

57 *Id.*

58 Hansen, *Enforcement*, *supra* note 40.

59 *Id.*

60 *Id.*

61 *See* Nick Miroff, *Pr. William Passes Resolution Targeting Illegal Immigration: Stricter Aspects of Original Plan Are Softened*, WASH. POST, July 11, 2007, at A01.

the denial of certain county services to illegal immigrants.[62] The services include business licenses, drug counseling, housing assistance, and services for the elderly.[63] The law also allows police officers to check the immigration status of anyone accused of breaking the law even if an officer merely suspects that the person is an illegal immigrant.[64]

In the township of Riverside, New Jersey, a coalition of Riverside business owners, landlords, and residents filed a suit in state court challenging a city ordinance adopted in 2006.[65] The ordinance made it unlawful for any property owner to rent, lease, or obtain profit from the use of personal property by illegal immigrants.[66] The ordinance also made it unlawful to hire illegal immigrants.[67] Violations of the ordinance would result in either fines, terms of imprisonment, required community service, or imposed business restrictions, including the denial of business permits.[68] The petitioners argued that the city ordinance violated civil rights under state law.[69] Furthermore, the petitioners contended that the ordinance was too vague and overbroad, thereby unfairly putting local businesses at risk while overstepping the city's authority.[70] Due to public outcry and the effect of fleeing immigrants after the law initially passed, the Riverside Township Committee repealed the ordinance in September of 2007.[71]

Another example of a recent stringent sanctions law comes from the town of Hazleton, Pennsylvania. The town of Hazleton witnessed an influx of Hispanic immigrants following the terrorist attacks of September 11, 2001.[72] Many of the immigrants had allegedly been involved in a

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62 *See id.*

63 *See* Kiran Krishnamurthy, *Prince William Faces Suit; County Ready To Deny Services, But Court Case May Delay Implementation*, RICHMOND TIMES DISPATCH, Oct. 18, 2007, at A1.

64 *See id.*

65 *See* Press Release, American Civil Liberties Union, Businesses Sue Riverside, NJ Over Vague, Discriminatory Anti-Immigrant Ordinance, Oct. 18, 2006, http://www.aclu.org/immigrants/discrim/27107prs20061018.html (last visited May 22, 2009).

66 *See* Riverside Township Illegal Immigration Relief Act, Riverside §§ 4, 5, N.J., Ordinance 2006-16, amended by Riverside, N.J., Ordinance 2006-19, *available at* http://clearinghouse.wustl.edu/chDocs/public/IM-NJ-0001-0004.pdf.

67 *See id.*

68 *See id.*; Amendment to Ordinance 2006-16 § 166-6, Riverside, N.J., Ordinance 2006-19, *available at* http://clearinghouse.wustl.edu/chDocs/public/IM-NJ-0001-0005.pdf; *see also* Verified Complaint at 2, Riverside Coalition of Bus. Persons and Landlords v. Township of Riverside (N.J. Super. Ct. Law Div. 2006), *available at* http://www.aclu-nj.org/downloads/RiversideComplaint.pdf.

69 *See* Press Release, *supra* note 65.

70 *See id.*

71 *See* Press Release, *supra* note 65; *see* Press Release, American Civil Liberties Union, ACLU Applauds Repeal of Anti-Immigrant Ordinance in Riverside, NJ, Sept. 17, 2007, www.aclu.org/immigrants/31856prs20070917.html (last visited May 22, 2009).

72 Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007).

series of local crimes, stirring resentment against the growing immigrant population within the town.[73] In response, the city council passed the Illegal Immigration Relief Act Ordinance, which, among four provisions, suspended the license of any business that employed, retained, aided, or abetted illegal immigrants.[74] Furthermore, the ordinance imposed a fine in excess of $1,000 per day on landlords renting property to illegal immigrants.[75] However, a federal district court overturned the Hazleton ordinance in *Lozano v. Hazleton* on several grounds, including federal preemption.[76]

In Arizona, business groups and ethnically affiliated organizations, who feared that LAWA would result in racial discrimination, challenged the Arizona law.[77] The state of Arizona did acknowledge that Congress delegated the power to regulate immigration to the federal government;[78] however, it argued that a plain reading of the federal statutory scheme gives states the power to take away licenses and permits from companies that knowingly hire illegal workers.[79] The language of the Arizona statute at issue is similar to provisions of the Hazelton ordinance struck down in *Lozano*. As with the Arizona statute, provisions in the Hazleton ordinance threatened to suspend and ultimately revoke licenses of businesses that hired illegal immigrants.[80] The court in *Lozano* held that the ordinance put the city as well as state courts—instead of the federal government, since companies in violation would face trial in state courts—in the position of determining who is legally entitled to work within state boundaries.[81] Therefore, the ordinance was, in effect, regulating who migrated to and from the state. In doing so, the state was encroaching upon the federal government's exclusive right to regulate immigration.[82] With the adverse response in the courts towards emerging stringent state employer sanctions laws, and as LAWA's challengers attempt to appeal

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73 *See* PBS, *supra* note 15.

74 *See Lozano*, 496 F. Supp. 2d at 519.

75 *See* Press Release, America Civil Liberties Union, Hazleton Residents Sue to Halt Harsh Anti-Immigrant Law, Aug. 15, 2006, http://www.aclupa.org/pressroom/hazletonresidentssuetohalt.htm (last visited May 22, 2009).

76 *See Lozano*, 496 F. Supp. 2d. at 554–56.

77 *See Ariz. Contractors Ass'n* Complaint, s*upra* note 24, at 3–4.

78 *See* Letter from Janet Napolitano, Former Governor of Arizona, to Jim Weiers, Former Speaker of the House of Representatives (July 2, 2007) (ARIZ. REV. STAT. § 23-212 (2008) Historical and Statutory Notes (West 2009)).

79 *See* Arizona Contractors Ass'n, Inc. v. Candelaria, 534 F. Supp. 2d 1036, 1043 (D. Ariz. 2008) (discussing how LAWA is an attempt to address the issue of the employment of illegal immigrants through IRCA's licensing exception); Fischer, *supra* note 23 (discussing the reliance of Arizona legislators on the licensing exception in enacting LAWA).

80 *See Lozano*, 496 F. Supp. 2d at 519.

81 *See id.*

82 *Id.* at 520, 523–24 ("[T]he '[p]ower to regulate immigration is unquestionably exclusively a federal power.'") (quoting De Canas v. Bica, 424 U.S. 351, 354–55 (1976)).

the Ninth Circuit court's holding to the Supreme Court,[83] the question is whether the Arizona statute should have prevailed under a federal preemption analysis.

## II. THE FEDERAL PREEMPTION DOCTRINE

The federal Preemption Doctrine stems from the Supremacy Clause of the United States Constitution, which states that, "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 . . . ."[84] Accordingly, the Supremacy Clause invalidates any state law that "'interfere[s] with or [is] contrary to federal law.'"[85] This invalidation of state law is termed "federal preemption."[86]

Courts have recognized preemption in two forms: express preemption and implied preemption.[87] Preemption is express when "a statute explicitly commands that state law be displaced."[88] There are two forms of implied preemption: field preemption and conflict preemption.[89] Implied field preemption occurs "where the scope of the federal law at issue 'indicates that Congress intended federal law to occupy the field exclusively.'"[90] It arises where (1) the federal regulatory scheme is so pervasive that it precludes the supplementation by states;[91] (2) federal interest in the field is so dominant that the subject matter of federal and local laws is bound to either conflict or be duplicative;[92] or (3) "'the object sought to be obtained by the federal law and the character of obligations imposed by it reveal the same purpose.'"[93]

Implied conflict preemption arises where either (1) "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress;'"[94] or where (2) "it is 'impossible for a . . . party to comply with both state and federal law.'"[95] The Supreme Court has held that implied field and implied conflict preemption

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83 Fischer, *supra* note 23.

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

85 *Lozano*, 496 F. Supp. 2d at 518 (quoting New Jersey Payphone Ass'n v. Town of West New York, 299 F.3d 235 (3d Cir. 2002)).

86 *Id.*

87 *See id.*

88 *Id.* (citing Green v. Fund Asset Mgmt., L.P., 245 F.3d 214, 222 (3d Cir. 2001)).

89 *See id.* at 521.

90 *Id.* (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)) (discussing implied preemption generally).

91 *See id.* (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988)).

92 *See id.*

93 *Id.* (quoting Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988)).

94 *Id.* at 525 (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 899 (2000)).

95 *Id.* (quoting *Geier*, 529 U.S. at 899).

are not mutually exclusive, for "'a state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.'"[96]

However, federal preemption must comply with the Tenth Amendment's anti-commandeering principle. The Tenth Amendment states that, "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."[97] The Supreme Court has interpreted the anti-commandeering principle to mean that Congress cannot require a state legislature to "enact a particular kind of law,"[98] or compel states to "'enact or enforce a federal regulatory program.'"[99] Courts have never interpreted the Constitution "'to confer upon Congress the ability to require the States to govern according to Congress' instructions.'"[100]

In *Printz v. United States*, the Supreme Court rejected the balancing of federal and state interests when the object of a federal law was to direct the functioning of the state executive.[101] In *Printz*, the Supreme Court held that a provision of the Brady Handgun Violence Prevention Act, which required officers to conduct a background search, was unconstitutional on Tenth Amendment anti-commandeering grounds.[102] The Court stated that "no comparative assessment of the various interests can overcome [the] fundamental defect" of violating the principle of dual sovereignty.[103] The Court saw the preservation of the balance between federal and state governments as a necessary extension of individual liberty.[104] Thus, the Court drew a bright-line rule, invoking the principle that "laws that commandeered states into enacting or enforcing federal laws are always unconstitutional."[105]

However, federal law remains constitutional in the context of the anti-commandeering doctrine if Congress merely requires local governments to "take some legislative or executive action to comply with" federal regulations.[106] The Court in *Reno v. Condon* noted that such commandeering is "'an inevitable consequence of regulating a state ac-

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96 *Id.* at n.49 (quoting English v. Gen'l Electric Co., 496 U.S. 72, 79 n.5 (1990)).

97 U.S. CONST. amend. X.

98 *See* Reno v. Condon, 528 U.S. 141, 149 (2000) (discussing the holdings in Printz v. United States, 521 U.S. 898 (1997), and New York v. United States, 505 U.S. 144 (1992)).

99 *Id.* (quoting *Printz*, 521 U.S. at 935).

100 *Id*. (quoting *New York*, 505 U.S. at 162).

101 *See Printz*, 521 U.S. at 932.

102 *See id.* at 933-34.

103 *Id.* at 932.

104 *See* Pham, *supra* note 1, at 1406 (discussing the holding in *Printz*).

105 *Id.*

106 *Id.*

tivity,'"[107] for every "'federal regulation demands compliance.'"[108] The Court noted that a "'[s]tate wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity . . . .'"[109] In *Reno*, the Court found that the federal law at issue did not require an affirmative duty on behalf of the state.[110] It did not require the state legislature to enact any laws or regulations, nor did it "require state officials to assist in the enforcement of federal statutes regulating private individuals."[111]

In the context of immigration laws, states are preempted from establishing laws or policies for the sole purpose of regulating immigration.[112] The power to regulate immigration is considered an exclusively federal power.[113] Courts and scholars have understood the immigration power as stemming from two sources: "specific constitutional provisions and the nation's status as a sovereign entity."[114] The constitutional provisions identified as legitimate sources of the immigration power include the Naturalization Clause, the Commerce Clause, and the Foreign Affairs Power.[115] Through the Naturalization Clause, the Constitution grants Congress the power to establish a uniform rule of naturalization.[116] The Commerce Clause grants Congress the right to regulate commerce with foreign nations and between the states.[117] Through the imposition of taxes or other regulations on carriers, Congress has used the Commerce Clause to regulate immigration.[118]

The Foreign Affairs Power is the one source not explicitly referred to in the Constitution. Possibly the more contentious source, it draws

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107 Reno v. Condon, 528 U.S. 141, 150 (2000) (quoting South Carolina v. Baker, 485 U.S. 505, 514–15 (1988)).

108 *Id.* (quoting *Baker*, 485 U.S. at 514–15).

109 *Id.* at 150–51 (quoting *Baker*, 485 U.S. at 514–15).

110 *See id.* at 151

111 *Id.*

112 *See* 8 U.S.C. § 1324 (2006) (illustrating the pervasive nature of federal regulation of illegal immigrants).

113 *See* De Canas v. Bica, 424 U.S. 351, 354 (1976) (stating that the "[p]ower to regulate immigration is unquestionably exclusively a federal power").

114 Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 988 (2004).

115 *See id.*

116 U.S. CONST. art. I, § 8, cl. 4.

117 *Id.* at cl. 3.

118 *See* Thomas A. Aleinkoff et al., Immigration and Citizenship: Process and Policy 200-01 (6th ed. 2008) (discussing how the Supreme Court in *Edye v. Robertson* relied on "Congress' Commerce Clause powers to uphold a federal statute . . . that imposed a tax of fifty cents on every noncitizen arriving in the United States . . . ."); *id.* ("Congress [has] the power to pass a law regulating immigration as a part of commerce of this country with foreign nations.'") (citing Edye v. Robertson, 112 U.S. 580, 600 (1884)); *see also id.* (discussing how the Supreme Court in *Edwards v. California*, 314 U.S. 160 (1941), concluded that migration is commerce).

upon references from which one could infer the intent to embrace relations with other countries as one nation.[119] For example, through the "Congressional powers to declare war, . . . the Senate power to advise and consent to the appointment of ambassadors, . . . and the Presidential power to make treaties, with the advice and consent of the Senate,"[120] courts have held,[121] and history shows,[122] that immigration law reflects foreign policy. Conversely, immigration law has been used as an "instrument[ ] to achieve the nation's foreign policy objectives."[123] For example, the Refugee Act of 1980 "is structured to reflect [American] foreign policy priorities."[124] Under the Act, "[t]he President, in consultation with Congress, decides how many refugees will be admitted each year and . . . how the admissions . . . are allocated."[125] Reflecting foreign policy at the time of its enactment, "Presidents allocated almost all of the refugee admissions to people fleeing communist countries like Vietnam or other United States adversaries [such as] Iran."[126]

Critics of the Foreign Affairs Power justification argue that states are playing an increasingly significant role on the global stage. For example, Peter Spiro argues that "[s]tate officials now have routine dealings with foreign governments" pertaining to "cultural and economic matters."[127] In addition, Spiro states that almost all states have "established trade and tourism offices in various locations abroad."[128] This conceivably has resulted in states "taking on some of the attributes of nationhood."[129] Therefore, he further contends that foreign countries are more inclined to hold states responsible for their potential immigration policies, thus freeing the federal government from the foreign relations implications.[130] However, state interactions with foreign governments appear to be too limited to warrant unilateral immigration laws. Furthermore, this criticism of the Foreign Affairs Power fails to address the

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119 *See, e.g.*, Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 606 (1889) (discussing the federal government's exclusive role in determining relations with foreign states, both in war and peace).

120 Pham, *supra* note 114, at 988 n.117 (internal citations omitted).

121 *See, e.g.*, *Chinese Exclusion Case,* 130 U.S. at 581.

122 *See* Pham, *supra* note 114, at 992 (discussing how political relations between the United States and Mexico reflect immigration policies concerning undocumented Mexican immigrants).

123 *Id.*

124 *See id.* at 993.

125 *Id*; *see also* 8 U.S.C. § 1157 (2006) (Refugee Act) (stating that decisions shall be made with consideration for humanitarian concerns of special interest to the United States and national interests).

126 *See* Pham, *supra* note 114, at 992.

127 Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 161 (1994).

128 *Id.*

129 *Id.* at 163.

130 *See id.* at 162–63.

permeability of state borders as lenient state borders do not restrict illegal immigrants to one state once within U.S. borders. Therefore, one state's immigration policies may not represent all of the affected states.

Despite criticisms of the Foreign Affairs Power justification, the United States' status as a sovereign nation supports the proposition that the immigration power is an exclusively federal power.[131] As a sovereign nation, "the United States must necessarily have the exclusive power to control entry and exit from its borders; otherwise, it would be subject to the control of other nations."[132] The Supreme Court first articulated this notion in the *Chinese Exclusion Case*, which upheld an 1888 federal law that prohibited Chinese laborers from entering the United States after the government had initially granted them the right to return.[133] In its rationale, the Court characterized the government's ability to exclude foreigners as part of the sovereign powers delegated by the Constitution.[134] In its analysis, "[t]he Court compared the immigration power to the power to declare war and make treaties, and reasoned that because they all affect foreign policy, the powers belong exclusively to the federal government and are 'incapable of transfer to any other parties.'"[135] The Court has reiterated this rationale in subsequent immigration cases.[136]

These sources have been the rationale for striking down state laws concerning immigrants. For example, consider the Supreme Court's holdings in *Graham v. Richardson*[137] and *Mathews v. Diaz*.[138] In *Graham v. Richardson*, the Supreme Court held that state laws denying welfare benefits to resident aliens or to aliens who had not resided in the United States for a certain number of years violated the Equal Protection Clause.[139] Furthermore, by creating circumstances that would affect the flow of immigrants into the applicable state, the Supreme Court held that the state was encroaching upon the federal government's exclusive immigration power.[140] In contrast, in *Mathews v. Diaz*, the Supreme Court upheld a similar federal law that limited Medicare eligibility to permanent resident aliens who had continuously resided within the United

131 *See* Pham, *supra* note 114, at 990.

132 *Id.*; *see* Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments . . . .").

133 *See Chinese Exclusion Case,* 130 U.S. 581, 581 (1889).

134 *See id.* at 609.

135 Pham, *supra* note 114, at 990 (quoting *Chinese Exclusion Case*, 130 U.S. at 609).

136 *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 80–82 (1976).

137 403 U.S. 365 (1971).

138 426 U.S. 67 (1976).

139 *See Graham*, 403 U.S. at 376.

140 *See id.* at 379–80 (citing Truax v. Raich, 239 U.S. 33, 42 (1915)).

States for five years or more.[141] As one commentator noted, "[t]he [*Mathews*] Court linked the federal government's immigration power to its foreign policy powers and expressed reluctance to subject the federal government to similar constitutional restrictions in this realm."[142] The Court distinguished the two cases on the grounds of the foreign policy argument; the Court highlighted that "states have no similar foreign policy interests justifying discrimination based on alienage."[143]

Although states may not have similar foreign policy interests, some critics argue that immigration is largely a concern at the state level.[144] For example, Spiro argues that the distribution of illegal immigrants in the United States is uneven.[145] He establishes that this was evident as early as 1980, when the proportion of illegal immigrants located in California was estimated at above forty percent,[146] more than three times the distribution allocated on a national per capita basis.[147] Furthermore, Spiro stated that at that time, Arizona, Florida, and Texas accounted for disproportionately high numbers, and "together with New York, . . . these states [were] . . . home to four out of every five illegal aliens in the United States."[148] Spiro further contends that states that are heavily populated with undocumented aliens also incur disproportionate costs.[149] As a result, the costs of public services that support many illegal immigrants are not equally spread across states.[150] He supports this theory by summarizing a 1994 study commissioned by the Department of Justice, stating the findings as follows:

> [U]ndocumented aliens in California cost the state $368 million in annual incarceration expenses, $1.289 billion for public education, and a minimum of $113 million in emergency medical services, for a total cost . . . of almost $1.8 billion. At the same time, the state collected an estimated $732 million in sales, income, and property taxes from the undocumented alien population. This annual shortfall of more than $1 billion for undocumented alien-related expenses is a significant one against total state expenditures of $63 billion, of which only a fraction remains for discretionary programs.[151]

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141 *See Mathews*, 426 U.S. at 82–84.
142 Pham, *supra* note 114, at 994.
143 *Id.*
144 *See* Spiro, *supra* note 127, at 121.
145 *See id.* at 125.
146 *See id.*
147 *See id.*
148 *Id.*
149 *See id.* at 126.
150 *See id.* at 126–27.
151 *Id.* at 126–27 (citing REBECCA L. CLARK ET AL., URBAN INSTITUTE, FISCAL IMPACTS

Although the disproportionate effects of illegal immigration may warrant a claim for individual state immigration laws, the constitutional sources of the immigration power as well as the Supreme Court's interpretations of this area of law indicate that the framers intended the immigration power to be an exclusively federal power.[152] Furthermore, the constitutional mandate requires uniformity among immigration laws.[153] This can only succeed if such laws are drafted by one uniform governmental body. The constitutional mandate requires both uniform laws as well as uniform enforcement as "nonuniform enforcement has the same negative effect[s] as nonuniform laws and implicates the same foreign policy concerns."[154] Nonuniform enforcement, a likely result of independent state immigration laws, would violate the constitutional mandate. It could result in a variety of enforcement approaches and techniques by state authorities, resulting in different immigration laws, raising the concern of what has been termed the problem of "a thousand borders."[155] These considerations justify the doctrine of federal preemption in the field of immigration.

## III. IS THE LEGAL ARIZONA WORKERS ACT PREEMPTED BY FEDERAL LAW ON THE GROUNDS OF EXPRESS PREEMPTION?

The enactment of LAWA is not preempted on the grounds of express preemption. LAWA can be reconciled with the express preemption of state laws on the matter under Congress' controlling immigration legislation, the Immigration Reform and Control Act of 1986 (IRCA).[156] At the core of this issue is the means by which LAWA regulates the employment of unauthorized aliens. This can be addressed through an analysis of the licensing exception in IRCA's section on preemption, which suggests that the means of regulation articulated under LAWA are not expressly preempted under the licensing exception.

In enacting IRCA, "Congress expressly pre-empted state and local [sanction] laws."[157] The Act states that federal law "pre-empts any state or local law imposing similar criminal sanctions (other than through licensing and similar laws) upon those who employ unauthorized aliens."[158] Under the Act, "[t]he licensing exception was designed and

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OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES 8, 11, 13–14 (1994) (footnotes omitted)).

152 *See* Pham, *supra* note 114, at 987.

153 *See id.*

154 *Id.*

155 *Id.* at 995.

156 Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C .)

157 *Ariz. Contractors Ass'n* Complaint, *supra* note 24, at 28.

158 8 U.S.C. § 1324a(h)(2) (2000).

intended to allow state governments to take action against the business license for employers 'found to have violated the sanctions provision' [of the statute]."[159] The licensing exception addresses methods of punishing employers that illegally employ unauthorized immigrants rather than granting states the right "to pass laws prohibiting the employment of unauthorized aliens."[160]

In light of legislative language and legislative intent, LAWA does not present a problem under the doctrine of express preemption. As previously stated, preemption is express when "a statute explicitly commands that state law be displaced."[161] As the court held in *Lozano*, the licensing clause, occasionally referred to as the savings clause,[162] refers to a state's right to revoke local licenses "for a violation of the federal IRCA sanction provisions, as opposed to revoking a business license for violation of local laws."[163] In supporting this notion, the court cited legislative history which suggests that the penalties imposed under IRCA are designed to preempt "'state or local laws providing civil fines and/or criminal sanctions on hiring, recruitment or referral of undocumented aliens.'"[164] However, legislative history indicates that the penalties imposed 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 [under IRCA].'"[165] In summary, IRCA's preemption clause, in conjunction with its licensing exception, does not expressly preempt "state or local laws dealing with 'suspension, revocation or refusal to reissue a license' to an entity found to have violated the sanction provisions of IRCA."[166]

In distinguishing the Hazleton ordinance in *Lozano* from LAWA, it is apparent that Hazleton's ordinance suspended the business permits of those who violated its local law as opposed to those who violated IRCA.[167] Thus, in the case of Hazleton, the licensing exception does not apply. In contrast, LAWA provides that in investigating a complaint

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159 *Ariz. Contractors Ass'n* Complaint, *supra* note 24, at 28 (quoting 8 U.S.C. § 1324a (2000)).

160 *See id.* at 29.

161 Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 518 (M.D. Pa. 2007) (citing Green v. Fund Asset Mgmt., L.P., 245 F.3d 214, 222 (3d Cir. 2001)).

162 *See* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 861 (9th Cir. 2009).

163 *Lozano*, 496 F. Supp. 2d at 519.

164 *Id.* at 520 (quoting H.R. REP. NO. 99-682(I) (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662).

165 *Id.* (quoting H.R. REP. NO. 99-682(I) (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662).

166 *Id.* (quoting H.R. REP. NO. 99-682(I) (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662).

167 *See id.*

against a person alleged to have violated the law itself, "the attorney general or county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 [U.S.C.] § 1373(c). 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."[168] This requirement within LAWA imposes sanctions upon a determination by the federal government that the employment of an individual has in fact violated federal immigration law as opposed to imposing sanctions pursuant to a violation of local law. By requiring cooperation with the federal government pursuant to legislation, LAWA is acting within the context of federal immigration law. It is acting within the framework of federal determinations of what in fact constitutes an illegal alien under federal law, as opposed to arriving at its own determination on the legal status of aliens. The latter approach would result in the control of immigration, thereby encroaching upon federal domain. Such cooperative consideration can be inferred from legislative history as it indicates that § 1373(c) and IRCA were enacted concurrently with the hope that they be interpreted in conjunction with one another.[169]

## IV. IS THE LEGAL ARIZONA WORKERS ACT PREEMPTED BY FEDERAL LAW ON THE GROUNDS OF IMPLIED PREEMPTION?

### *A. Does the Legal Arizona Workers Act Prevail Under an Implied Field Preemption Analysis?*

The enactment of LAWA is not preempted on the grounds of implied field preemption. As previously stated, implied field preemption occurs "where the scope of the federal law at issue 'indicates that Congress intended federal law to occupy the field exclusively.'"[170] As noted, it arises in three situations: (1) where the federal regulatory scheme is so pervasive that it precludes the supplementation by states;[171] (2) where the federal interest in the field is so dominant that the subject matter of federal and local laws is bound to either conflict or be duplicative;[172] or (3) where "'the object sought to be obtained by the federal law and the character of obligations imposed by it reveal the same purpose.'"[173]

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168 ARIZ. REV. STAT. § 23-212(B); §23-212.01(B) (2008).

169 *See* 8 U.S.C.A. § 1373(c) Historical and Statutory Notes (West 2009) (noting that Section 1373 was enacted as part of IRCA).

170 Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 521 (M.D. Pa. 2007) (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)).

171 *See id.* (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988)).

172 *See id.*

173 *Id.* (quoting *Schneidewind*, 485 U.S. at 300).

In accordance with its exclusive power, the federal government has adopted "a comprehensive system of laws" pertaining to the regulation of immigration, which includes regulations and the use of administrative agencies.[174] Through this system, the federal government regulates "whether and under what conditions individuals may enter, stay in, and work in the U.S. and [provides for] a system of civil and criminal penalties for those violating the law, including employers who knowingly employ unauthorized aliens."[175] Furthermore, federal legislation determines "who is eligible to work in the United States" as well as "the process by which employers must verify the eligibility of job applicants."[176] The federal government has consistently occupied this field of immigration legislation through various laws which include, but are not limited to, the Immigration and Nationality Act (INA),[177] IRCA, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[178] It is clear from the breadth of immigration legislation—and more specifically, legislation that regulates the employment of illegal immigrants—that federal legislation dominates this field so as to render any similar state law, especially one that reveals the same purpose, duplicative. It is also evident from its dominance in the field that federal law is intentionally pervasive.

However, at the heart of the discussion on whether LAWA is preempted on the grounds of implied field preemption is whether the subject matter of the state law is traditionally an area of state or federal responsibility. In *Chicanos Por La Causa, Inc. v. Napolitano*, the United States Court of Appeals for the Ninth Circuit recently upheld LAWA, holding that it was within the state's police powers and thus not preempted by federal law.[179] The court noted that "[w]hen Congress legislates 'in a field which the States have traditionally occupied . . . 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.'"[180] In arriving at its conclusion, the Ninth Circuit court cited the Supreme Court's holding in *De Canas v. Bica*, which upheld a "state law prohibiting the employment of unauthorized aliens against a preemption challenge because it concluded that the authority to regulate the employment of unauthorized workers is 'within the main-

174 *See Ariz. Contractors Ass'n* Complaint, *supra* note 24, at 28.

175 *Id.*

176 *Id.* at 29.

177 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (2006)).

178 Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.)

179 *See* 558 F.3d 856, 864-65 (9th Cir. 2009).

180 *Id.* at 864 (quoting United States v. Locke, 529 U.S. 89, 108 (2000)).

stream' of the state's police powers."[181] According to *De Canas*, the fact that aliens are the subject of state regulation does not automatically render it an immigration regulation that requires the determination of, and control over, those who are admitted and remain within the country.[182] Relying on *De Canas*, the court concluded that "the power to regulate the employment of unauthorized aliens remains within the states' historic police powers" and that therefore "an assumption of non-preemption applied in this case."[183] Accordingly, the court concluded that LAWA, which in effect regulates the employment of unauthorized aliens within Arizona, is not federally preempted on the grounds of implied field preemption.[184]

In considering *De Canas*, it is important to note that the Supreme Court's focus in determining the state's right to regulate employment concerned the California statute's purpose, which was aimed at protecting California's fiscal interests and limiting the impact the employment of unauthorized aliens had on these interests.[185] The Court found that the statute focused on essential local problems and was therefore "tailored to combat effectively the perceived evils."[186] In contrast, the statutory language in the case of LAWA does not indicate a purpose of protecting fiscal interests, and neither did the Ninth Circuit court address a "tailoring" of the statute to combat threats to these interests.[187] These considerations raise questions regarding the conclusive applicability of the Supreme Court's analysis in *De Canas* to LAWA, an issue that was not addressed by the Ninth Circuit court.

### *B. Is the Required Use of E-Verify Under the Legal Arizona Workers Act Preempted by Federal Law on the Grounds of Implied Conflict Preemption?*

#### 1. Background Information on the Establishment and Use of E-Verify

The employment eligibility verification program (E-Verify) is a product of the federal government's desire to curb the employment of

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[181] *Id.* (quoting De Canas v. Bica, 424 U.S. 351, 356 (1976)); *see also De Canas*, 424 U.S. at 356 (discussing each state's "broad authority under their police powers to regulate . . . employment relationship[s] to protect workers within the [s]tate").

[182] *See De Canas*, 424 U.S. at 355 ("[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised.").

[183] Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 865 (9th Cir. 2009).

[184] *See id.*

[185] *See De Canas*, 424 U.S. at 356–57.

[186] *Id.* at 357.

[187] *See generally* ARIZ. REV. STAT. ANN. § 23-212 (2008); *id.*§ 23-212.01; Chicanos Por La Causa, Inc. v. Napolitano 558 F.3d 856 (9th Cir. 2009).

illegal immigrants. The employment of unauthorized aliens by U.S. employers remains a substantial problem as the desire to obtain employment within the U.S. remains one of the primary causes of illegal immigration.[188] The employment of illegal aliens occurs despite efforts on the part of federal immigration legislation, such as 8 U.S.C. § 1324a, which prohibits the employment of unauthorized aliens.[189] Under this legislation, the federal government attempts to prevent the employment of illegal aliens by making it illegal "to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien."[190] The statute reinforces this attempt through the implementation of civil and criminal penalties on employers that choose to employ unauthorized aliens.[191] The statute also requires employers to verify the identity and work eligibility of all employees on an I-9 form.[192] Violations of employer requirements can result in fines for first-time offenders and can amount to criminal sanctions for repeat offenders.[193]

In an effort to more effectively enforce the statute's employment restrictions and eliminate the use of fraudulent documents on the part of illegal aliens, Congress authorized the creation of three pilot programs.[194] These pilot programs were intended to allow "an employer to confirm a new hire's employment eligibility with more accuracy."[195] Initially, employment verifications were conducted through a "toll-free telephone line or other toll-free electronic media."[196] The first of these programs, and the only one still in operation and at issue in the case challenging LAWA, was referred to as the "Basic Pilot Program."[197] The Basic Pilot Program is currently referred to as E-Verify.[198]

E-Verify outlines procedures whereby employers participating in the program submit certain information pertaining to their new employees to the federal government for confirmation of their identity and employment eligibility.[199] The employers "receive a response from the verification system as to whether the [new employee] is authorized to work in the United States and whether he or she has presented a valid

188 *See* Complaint at 2, United States v. State of Illinois, No. 07 Civ. 3261 (C.D. Ill. Sept. 24, 2007) [hereinafter *Illinois* Complaint].
189 *Id.* (citing 8 U.S.C. § 1324a (2006)).
190 *See* 8 U.S.C. § 1324a(a)(1)(A) (2006).
191 *Id.* §§ 1324a(f)(1), 1324a(g)(2).
192 *See Illinois* Complaint, *supra* note 188, at 3.
193 *See* 8 U.S.C. §§ 1324a(f)(1); 1324a(g)(2) (2006).
194 *See Illinois* Complaint, *supra* note 188, at 3.
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *See id.* at 3–4.

Social Security Number."[200] A valid Social Security Number matches the individual's name and date of birth as indicated in the Social Security Administration's records.[201]

Congress provided that employers may elect to participate in the Basic Pilot Program, except for specified government entities and certain entities subject to statutory orders whose participation in the program is mandatory.[202] Initially, Congress intended to terminate the program four years after its implementation.[203] However, as part of a "desire to further evaluate the efficacy of the Basic Pilot Program," Congress amended and extended its initial authorization to "eleven years following [the] initial implementation of the program."[204] Furthermore, Congress extended the program to all fifty states on December 1, 2004, as it sought to encourage a wider use of the program.[205] In addition to announcing the expansion of the program to all fifty states, on December 20, 2004, the United States Citizenship and Immigration Services announced the introduction of an internet-based verification system.[206] The voluntary participatory nature of the program was not affected by the extension of the program.[207]

The current employment eligibility verification system is intended to prove the identity and eligibility to work of each employee and operates as follows: "Once an applicant accepts a job offer, he or she presents certain documents to the participating employer and completes [his or her] part of the Form I-9."[208] The required documents are divided into three lists (A, B, and C) on the employment verification form.[209] Either one document from list A or one document each from both lists B and C is required.[210] List A provides documents that evidence both identity and eligibility to work.[211] Such documents include, but are not limited to, (1) an expired or unexpired U.S. passport, (2) a Permanent Resident Card or Alien Registration Receipt Card, (3) an unexpired foreign passport with an endorsement that shows eligibility for employment, and (4) an unexpired Employment Authorization Document that contains a pho-

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200 *Id.* at 4.
201 *See id.*
202 *See id.*
203 *See id.*
204 *Id.* at 5.
205 *See id.*
206 *See d.*
207 *See id.*
208 *Id.* at 5–6.
209 *See* Stanley Mailman & Stephen Yale-Loehr, *The Complexity of Verifying Work Authorization*, 2 BENDER'S IMMIG. BULL. 944 (1997).
210 *See id.*
211 Department of Homeland Security, U.S. Citizenship and Immigration Services, OMB. No. 1615-0047, Form I-9: Employment Eligibility Verification (2007).

tograph.[212] List B specifies acceptable documents establishing identity, which include, but are not limited to, (1) a driver's license, (2) a federal ID card provided it contains a photograph or physical characteristics, (3) a school ID card provided it contains a photograph, and (4) alternative documents for individuals under the age of eighteen.[213] List C specifies acceptable documents establishing work eligibility, which include, but are not limited to, (1) a Social Security card, (2) an original U.S. birth certificate, and (3) a U.S. citizen ID card.[214]

Within three days of hiring the employee, the employer must examine the documents provided by the new employee to determine whether they appear to be genuine on their face, and if they do appear genuine, the employer may then proceed to complete the employer's portion of the Form I-9.[215] In completing the Form I-9, the employer attests to the examination of the employee documents provided.[216] The employer must submit these documents and any other required information to the verification system within three days of hiring the employee.[217] The system then compares the information submitted by the employer with the Social Security Administration's records and, if necessary, also with the Department of Homeland Security's (DHS) records.[218]

Although the Immigration and Nationality Act (INA) provides for three days, 92 percent of the time the employer is notified within seconds whether the new hire is authorized to work.[219] If the system cannot confirm an employee's work eligibility, the verification system issues a "tentative nonconfirmation" notice.[220] These notices are often referred to as "no-match" letters.[221] If the tentative nonconfirmation notice is not contested by the new hire, it is considered a final nonconfirmation.[222] In the event the new hire does contest the tentative nonconfirmation notice, the employee is provided with instructions on how to pursue a secondary verification, which must be pursued within eight working days.[223] Congress prohibits employers from taking "an adverse employment action against a new hire based upon a pending [tentative nonconfirmation no-

212 *See id.*
213 *See id.*
214 *See id.*
215 *See Illinois* Complaint, *supra* note 188, at 6.
216 *See id.*
217 *See id.*
218 *See id.*
219 *See id.*
220 *Id.*
221 *See, e.g.*, Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 116, n.253 (2009) (citing 20 C.F.R. § 422.120(a) (2008)).
222 *See Illinois* Complaint, *supra* note 188, at 6.
223 *See id.*

tice], unless and until it is resolved with a final confirmation."[224] After the secondary verification process is completed, the verification system issues a "final confirmation or final nonconfirmation of employment eligibility."[225] If the secondary confirmation results in a final nonconfirmation determination, an employer faces two options: (1) it can dismiss the new employee or (2) it can continue to employ the new hire.[226] If the employer chooses to continue to employ the new hire, it must notify DHS.[227] DHS may subsequently bring an enforcement action against the employer.[228]

2. An Implied Conflict Preemption Analysis of the Legal Arizona Workers Act's Required Use of E-Verify

The primary preemption concern with the required use of the E-Verify program under LAWA is that it presents a case of implied conflict preemption. The required use of E-Verify under LAWA should have been preempted on the grounds of implied conflict preemption. As previously stated, implied conflict preemption arises where a state law "'stands as an obstacle to the accomplishment and execution'" of a federal law's objectives, or where a state law renders it "'impossible for a . . . party to comply with both state and federal law.'"[229] The latter example of implied conflict preemption is easier to identify. However, in identifying when a state law frustrates a federal law's objectives and purpose, the courts have looked to the congressional intent in enacting the federal law;[230] congressional intent may either be explicit or implicit in the statute's structure and purpose.[231] In determining the congressional intent and objectives, courts look to the statutory language and history of the statute.[232] Furthermore, the Supreme Court has held that "all that is necessary to demonstrate congressional intent to preempt state law is the presence of an actual conflict between state and federal law."[233]

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224 *Id.* (citing IIRIRA, *supra* note 178, § 403(a)(4)(B)(iii)).

225 *Id.*

226 *See id.* at 6–7.

227 *See id.* at 7.

228 *See id.*

229 Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 525 (M.D. Pa. 2007) (quoting Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 899 (2000)).

230 *See, e.g.*, *id.* at 519-21.

231 *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996); *see also* NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION §§ 48:1-48:4 (7th ed. 2009).

232 *See* SINGER & SINGER, *supra* note 231, at §§ 48:1-48:4.

233 Memorandum of Points and Authorities in Support of the United States' Motion for Summary Judgment at 7, United States of America v. State of Illinois (C.D. Ill. Nov. 16, 2007) (No. 07 Civ. 3261) (discussing the Supreme Court's holding in *Geier*, 529 U.S. at 884–85).

The first example of implied conflict preemption, as previously defined, which relates to the objectives of a congressional statute, is applicable in this case. In its holding on the appeal raised by challengers of LAWA, the Ninth Circuit found that Arizona's mandatory use of E-Verify was not preempted on the grounds of implied conflict preemption by the voluntary nature of the use of E-Verify, as legislated at the national level.[234] The court stated that if Congress had intended to forbid states from requiring E-Verify's use, it would have done so as it has done with other legislation.[235] However, from the history of the statute that resulted in the implementation of the E-Verify program, it is clear that Congress intended for the program to be voluntary. LAWA conflicts with federal law and information provided to employers by the federal government regarding the voluntary nature of their participation in E-Verify.[236] Although the federal government's repeated extensions and expansion of the use of E-Verify may lend support to the Ninth Circuit's holding on the issue, it is notable that throughout these extensions and expansions, the use of E-Verify has remained voluntary under federal legislation. If it so intended, the federal government could have required the use of E-Verify under federal legislation as it is not state-administered, therefore requiring its use would not constitute state commandeering.[237] In conclusion, the required use of the E-Verify program under LAWA runs contrary to the congressional intent, and makes it impossible for an individual to comply with both the voluntary nature of the E-Verify program and the sanctions law of Arizona. Therefore, the required use of E-Verify under LAWA should have been preempted on the grounds of implied conflict preemption.

### 3. Further Considerations Regarding the Required Use of E-Verify Under the Legal Arizona Workers Act

The required use of E-Verify raises several additional concerns. For example, it presents problems for companies that are located in multiple states, requiring them, against their "voluntary" right, to comply with E-Verify if they want to conduct business affairs in the state of Arizona.[238]

Furthermore, the law presents some logistical problems in terms of implementing the use of E-Verify in local businesses. One complaint concerns the inaccuracies associated with the E-Verify program. A con-

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234 *See* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 866-67 (9th Cir. 2009).

235 *See id.* at 867.

236 *See Ariz. Contractors Ass'n* Complaint, *supra* note 24, at 23.

237 *See* IIRIRA, *supra* note 178, § 402(a); *see generally* U.S. Citizenship and Immigration Services: E-Verify, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD (last visited Aug. 15, 2009).

238 *See Ariz. Contractors Ass'n* Complaint, *supra* note 24, at 23–24.

gressional audit from 2006 indicated that "4 percent of the time E-Verify . . . initially labeled workers ineligible for employment when in fact they had work authorization. That means that [1] in 25 times a name is wrongly rejected by the program."[239] One reported survey stated that the rate for errors was higher among naturalized citizens.[240] "Nearly 10 percent of naturalized citizens are deemed ineligible to work at first, when in fact they are eligible . . . ."[241] Errors can be attributed to common factors, for example, "a person's name change can dramatically skew results of the online verification."[242] As a result, authorized workers may be characterized as illegal. Furthermore, the number of reported inaccuracies among social security records increases with delays in updating the records and the occasional accidental distribution of duplicate numbers.[243]

On a local level, as some of the plaintiffs have confirmed, there are some small businesses that do not own computers and do not have internet access which would enable them to use E-Verify at their respective business locations.[244] Providing computers and the relevant software required to use E-Verify, and thus comply with the Arizona sanctions law, could result in additional expenses for many businesses.[245] Small businesses would also incur expenses in training employees to use E-Verify and in providing them with the necessary training equipment.[246]

Another concern arising from the use of E-Verify, in order to comply with the Arizona law, is E-Verify's expiration date.[247] Originally set to expire on November 30, 2008,[248] Congress extended the program to September 30, 2009.[249] Although there are bills pending in Congress on the issue, there are no immediate plans on behalf of the federal govern-

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239 Daniel González, *Sanctions Law Begins: Many Ariz. Businesses Are Still Unprepared*, ARIZ. REPUBLIC, Jan. 2, 2007, http://www.azcentral.com/specials/special46/articles/1230sanctionsstart.html (last visited May 22, 2009).

240 *Id.*

241 *Id.*

242 Tara Malone, *Justice Department Sues State on Immigrant Workers Protection*, DAILY HERALD, Sept. 25, 2007, http://www.dailyherald.com/story/print/?id=44735 (last visited May 22, 2009).

243 *See* KATHLEEN M. SULLIVAN, RACING TOWARD "BIG BROTHER": COMPUTER VERIFICATION, NATIONAL ID CARDS, AND IMMIGRANT CONTROL ii–iii (National Council of LA Raza 1995).

244 *See Ariz. Contractors Ass'n* Complaint, *supra* note 24, at 13.

245 *See id.* at 13-14.

246 *See id.*

247 *See id.* at 33.

248 *See id.*

249 *See* Pub. L. No. 110-329, § 143, 122 Stat. 3580 (2008), *amended by* Pub. L. No. 111-8, § 101, Stat. 988 (2009) (amending the expiration date of the Basic Pilot Program as initially laid out in the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996).

ment to extend the program beyond that date.[250] The Arizona sanctions law does not provide for the use of other verification methods upon the expiration of E-Verify, which raises questions about the longevity and efficiency of the law itself.[251]

There are also concerns that arise regarding the potential discriminatory implications of applying the Arizona sanctions law. For example, under LAWA, complaints may be initiated by any person

> without any standards, without any requirements for the identification of the person[ ] who is accused of not being authorized to work in this country, without any disclosure or identification of the basis for the allegation that an employee is not authorized to work, and without any requirement that any basis for the allegation must exist before an investigation must be initiated.[252]

The fact that members of the public can initiate complaints raises concerns about the use of discriminatory practices and malicious intent in making such complaints. The Maricopa County Attorney and Sheriff have specifically stated that they will mostly rely on complaints from the public "about employers thought to be hiring illegal workers, including those made anonymously."[253] Such complaints may be initiated solely on the basis of race or language abilities, accents, and other racially targeted and unlawful characteristic determinations.[254] Furthermore, these discriminatory practices have the potential to evolve into the classification of certain groups as suspect members of the communities. Therefore, the law may potentially be inconsistently or inappropriately applied. The lax requirements under the law for filing complaints may result in complaints "initiated for reasons unrelated to the enforcement of immigration laws."[255] This is of special concern in a state such as Arizona where anti-immigrant sentiment is already prevalent and high.

Furthermore, the aforementioned plausible consequences of this approach to receiving complaints potentially raises legal concerns when complaints are presented to the federal government for investigative purposes. The approach may run counter to federal immigration law, which requires that the federal government investigate "only those complaints 'which, on their face have a substantial probability of validity.' "[256]

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250 National Conference of State Legislature, Immigrant Policy Project: E-Verify Frequently Asked Questions, http://www.ncsl.org/?tabid=13127#When_expire (last visited Aug. 9, 2009).

251 *See* ARIZ. REV. STAT. §§ 23-212 - 23-214 (2008).

252 *See Ariz. Contractors Ass'n* Complaint, *supra* note 24, at 20.

253 González, *supra* note 239.

254 *See Ariz. Contractors Ass'n* Complaint, *supra* note 24, at 20.

255 *Id.*

256 *Id.* at 19 (quoting 8 U.S.C. § 1324a(c)(1)(B) (2006)).

## V. CONSIDERATIONS FOR THE ENACTMENT OF UNILATERAL STATE IMMIGRATION LAWS

There are multiple factors that drive states to enact individual immigration regulatory statutes. Among the states that prefer less stringent laws relative to federal immigration laws, non-cooperative states enact their laws in an attempt to circumvent the potential burden imposed upon state governments while implementing federal immigration laws. As may be the case with other federal laws, the enforcement of immigration laws may divert even more of a state's limited resources from a state's typical law enforcement functions.[257]

Another consideration among non-cooperative states is the impact that the enforcement of federal immigration laws may have on beneficial relationships with immigrant communities, which in turn affects the local community. States worry that the enforcement of federal laws may destroy existing relationships with immigrant communities.[258] These relationships often assist law enforcement officers in enforcing the law and solving local crimes, thus, the destruction of these relationships would interfere with the state's police power to protect public safety.[259]

Non-cooperative states are also concerned about the impact federal immigration laws may have on public safety and public health. Many states are concerned that without non-cooperation laws, some illegal immigrants may shun essential government services, such as emergency healthcare, for fear of detection and possible deportation.[260] This raises public safety and health concerns. For example, a health risk may result where a health concern is contagious and the affected illegal immigrant refuses to seek medical attention for fear of detection.[261]

Furthermore, non-cooperative states are concerned about the development of an underprivileged subclass of illegal immigrants. As illegal immigrants shun public schools and government agencies for fear of detection and possible deportation, the likelihood of an underprivileged subclass developing is significant.[262] This could also result in a rise in criminal activity and an increased dependence on public benefits.[263] The Supreme Court addressed the development of an underprivileged subclass in *Plyler v. Doe*.[264] Although the rationale in *Plyler* dealt specifically with illegal immigrant children, it can conceivably be extended to

257 *See id.* at 35, 39-40.
258 *See* Pham, *supra* note 1, at 1399.
259 *See id.*
260 *See id.* at 1400.
261 *See id.*
262 *See id.*
263 *See id.*
264 457 U.S. 202 (1982) (holding unconstitutional a Texas statute that excluded illegal immigrant children from enrolling in public schools).

illegal immigrants as a whole. In doing so, it is appropriate to conclude that it is in a state's best interest to prevent the development of an underprivileged subclass, as many illegal immigrants will remain in the United States and some may eventually become lawful residents or citizens.[265] Therefore, the development of such a social class would only perpetuate problems such as illiteracy, inevitably "adding to the problems and costs of unemployment, welfare, and crime."[266] As a result, the perceived savings that may be attributed to stringent immigration laws are arguably insubstantial in light of the potential long-term costs involved.[267]

Many states also fear that local cooperation with federal immigration laws could result in illegal acts such as racial profiling.[268] Federal Immigration Officers receive substantial training, including courses in immigration and nationality law—training that far exceeds that of local officers when it comes to immigration procedures.[269] A "lack of training, coupled with [a] lack of hands-on enforcement experience, may tempt local authorities to rely on racial profiling and other prohibited practices in enforcing immigration laws."[270] Such effects could be worsened in communities where anti-immigrant sentiments exist. Under such circumstances, these sentiments are more likely to be expressed by local authorities.[271]

Some states argue that required cooperation may interfere with the state and local government's ability to conduct state functions.[272] In the immigration context, the use of confidential material such as passports, permanent resident cards, birth certificates, driver's licenses, ID cards, and other forms of private documentation, is required.[273] The use of confidential government information is not provided to local government employees in their capacities as private citizens, but in their capacities as local government officials.[274] Therefore, federal immigration laws may intrude upon local government sovereignty, by inserting the federal government between local governments and their employees, requiring them to obtain otherwise confidential and pertinent information, and by controlling its use.[275] As the Second Circuit recognized in *City of New York v. United States*, "'[t]he obtaining of pertinent information, which is essential to the performance of a wide variety of state and local govern-

265 *See id.* at 230.
266 *Id.*
267 *See id.*
268 *See* Pham, *supra* note 114, at 997.
269 *See id.*
270 *Id.*
271 *See id.*
272 *See* Pham, *supra* note 1, at 1403.
273 *See supra* notes 209-214 and accompanying text.
274 *See* Pham, *supra* note 1, at 1403.
275 *See id.*

ment functions, may in some cases be difficult or impossible if some expectation of confidentiality is not preserved.'"[276] The various proposed policy considerations reflect the conflicts of interests presented to states when confronted with the enforcement of federal immigration laws.

On the other hand, more restrictive states, such as the state of Arizona, reference other policy considerations. They argue on the grounds of the unequal economic effects of illegal immigration. As this Note has illustrated, illegal immigration has disparate effects across the nation, with states such as Arizona experiencing a larger number of undocumented aliens crossing their borders.[277] These numbers result in disproportionate state-wide costs for public services which are not absorbed by federal programs.[278] Although both sides of the spectrum present convincing policy arguments in support of the unilateral enactment of state immigration laws, these arguments are substantially outweighed by constitutional considerations, precedent, and the need for uniformity in immigration laws.

## CONCLUSION

Through the enactment of LAWA, the state of Arizona is attempting to address its concerns over the federal government's seemingly ineffective approach to curbing illegal immigration. However, its attempt to regulate illegal immigration through LAWA exceeds its scope of authority. Supreme Court precedent and constitutional provisions have undeniably delegated the exclusive power to control immigration to the federal government. Therefore, a state law, such as LAWA, to the extent that it conflicts with federal immigration regulations, should be preempted by federal law.

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276 *Id.* (quoting City of New York v. United States, 179 F.3d 29, 36 (2d Cir. 1999)).
277 *See* Spiro, *supra* note 127, at 125.
278 *See id.* at 125–27.