The “Arizonification” of Immigration Law: Implications of Chamber of Commerce v. Whiting for State and Local Immigration Laws

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THE “ARIZONIFICATION” OF IMMIGRATION LAW: IMPLICATIONS OF CHAMBER OF COMMERCE V. WHITING FOR STATE AND LOCAL IMMIGRATION LEGISLATION

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Abstract: This article explores the validity of state and local immigration-related legislation through the lens of the recent Supreme Court decision in Chamber of Commerce of the United States v. Whiting. Whiting upheld the Legal Arizona Workers Act of 2007, a state law governing through licensing provisions the employment of unauthorized alien workers. The article examines the implications that this decision will have for state and local immigration-related laws, primarily the Hazleton, Pennsylvania Illegal Immigration Reform Act Ordinance of 2006 and the Support Our Law Enforcement and Safe Neighborhoods Act of Arizona of 2010, otherwise known as S.B. 1070. Both of these laws are the subject of pending litigation in federal courts. In June 2011, the Supreme Court granted certiorari in the Hazleton litigation, remanding the case to the U.S. Court of Appeals for the Third Circuit – which had upheld a district court decision to enjoin portions of the Hazleton ordinance – with instructions to reconsider the case in light of the Whiting decision. In August 2011, Arizona filed a petition for writ of certiorari with the U.S. Supreme Court after the U.S. Court of Appeals for the Ninth Circuit upheld a district court decision enjoining portions of S.B. 1070. This article predicts that Whiting may have significant implications for the Arizona and Hazleton laws as well as for similar laws passed by numerous states in recent years. On the one hand, because Whiting upholds the Legal Arizona Workers Act, it may encourage additional states to pass immigration-related laws. On the other hand, the narrowness of the decision, which dealt only with a state’s ability to penalize the hiring of unauthorized alien workers through licensing provisions allowed by federal law, may signal that state and local lawmakers may only pass immigration-related legislation specifically permitted by federal law. This article ultimately concludes that the Supreme Court stayed true to preemption doctrine and that Whiting limits rather than expands state and local government authority to pass immigration-related laws.

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I. Introduction

As the first decade of the twenty-first century has drawn to a close, the high incidence of illegal immigration has prompted states and municipalities to pass legislation targeting undocumented immigrants, businesses who employ them, and others who do business with them. It is not the first time that U.S. states and municipalities have sought to curtail the number of undocumented immigrants living and working in their communities. This time, however, the surrounding circumstances represent a perfect storm of social and economic challenges: high numbers of undocumented immigrants, a severe economic recession, and increased drug-related violence at the U.S.-Mexico border. The fear these factors evoke in Americans is evident in the rhetoric surrounding state and local immigration-related laws:

- “The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public...”

II. Legal Challenges to State and Local Immigration Laws
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IV. Analysis: How will Whiting affect state and local initiatives to control immigration?
A. Hazleton Ordinance
B. Arizona S.B. 1070

VI. Conclusion

As the first decade of the twenty-first century has drawn to a close, the high incidence of illegal immigration has prompted states and municipalities to pass legislation targeting undocumented immigrants, businesses who employ them, and others who do business with them. It is not the first time that U.S. states and municipalities have sought to curtail the number of undocumented immigrants living and working in their communities. This time, however, the surrounding circumstances represent a perfect storm of social and economic challenges: high numbers of undocumented immigrants, a severe economic recession, and increased drug-related violence at the U.S.-Mexico border. The fear these factors evoke in Americans is evident in the rhetoric surrounding state and local immigration-related laws:

- “The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public...”
agencies within this state provide public benefits without verifying immigration status.”¹

- “Border-related violence and crime due to illegal immigration are critically important issues to the people of [Arizona]…. There is no higher priority than protecting the citizens of Arizona. We cannot sacrifice our safety to the murderous greed of drug cartels. We cannot stand idly by as drop houses, kidnappings and violence compromise our quality of life. We cannot delay while the destruction happening south of our international border creeps its way north….”²

- “…[I]llegal immigration continues to absorb [Georgia’s] limited resources. We must deliver a comprehensive, statewide solution that addresses illegal immigration and the burden it is creating on our correctional, educational and healthcare assets.”³

- “[T]he state of Indiana spends roughly $10 million per year to incarcerate aliens in our prison system. [The Indiana Department of Correction Commissioner] characterized them as some of the most violent inmates under his care. There is also the cost of educating children of illegal immigrants, providing healthcare, and other living expenses that get shifted to taxpayers.”⁴

- “[U]nlawful employment, the harboring of illegal aliens in dwelling units in the City of Hazleton [Pennsylvania], and crime committed by illegal aliens harm the health, safety and welfare of authorized US workers and legal residents in the City of Hazleton. Illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life.”⁵

- “Illegal immigration is a serious problem for [South Carolina]…. People who break the law to come here must be held accountable. We can’t allow them to continue to disregard our laws, weaken our culture, and threaten our liberty.”⁶

- “We must relieve the burden on taxpayers. There are significant societal costs associated with illegal immigration that simply must be addressed. Our Utah communities, and our taxpayers, cannot be expected [to] bear this financial burden.”⁷

The rhetoric indicates that illegal immigration has come to be seen in many communities as an invasion: a threat against U.S. sovereignty and control over its borders, a threat to culture, an economic disaster, and a failure in leadership.

The perceived lack of federal leadership stems from two principal sources. First, the federal government failed to stem the tide of illegal immigration, and previous federal legislation is blamed for having encouraged illegal immigration. Second, Congress is locked in a stalemate over immigration reform, with no end in sight. With states and municipalities often bearing the

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⁵ City of Hazleton Illegal Immigration Relief Act Ordinance § 2(C).
⁷ Statement of the Hon. Gary R. Herbert, Gov. of Utah (July 20, 2010).
fiscal and social consequences of illegal immigration, the motivation to send a message to the federal government is strong. 

One state and one locality in particular have garnered significant national attention. First, the town of Hazleton, Pennsylvania passed an ordinance in 2006 designed “to abate the nuisance of illegal immigration by diligently prohibiting the acts and policies that facilitate illegal immigration in a manner consistent with federal law and the objectives of Congress.” To that end, the ordinance penalizes employers who hire unauthorized immigrants as well as property owners who rent to or otherwise “harbor” undocumented immigrants. Arizona followed with two immigration-related laws. The first one, the Legal Arizona Workers Act of 2007 (LAWA), penalizes employers who hired unauthorized immigrants and requires businesses to participate in the federal system for verifying employment authorization known as E-Verify. Undeterred by ongoing legal action against that statute, and perhaps encouraged by federal court wins in that litigation, Arizona passed the infamous S.B. 1070 in 2010. Intending “to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States,” S.B. 1070 criminalizes failure to carry proof of alien registration, criminalizes unauthorized employment, requires police to investigate the immigration status of any person with whom they lawfully stop, detain or arrest if there is reasonable suspicion that the person is unlawfully present in the United States, and permits warrantless arrests of persons suspected of having committed a deportable offense. A number of states have followed Hazleton and Arizona’s example and passed immigration-related laws.

On May 26, 2011, the U.S. Supreme Court upheld the lower courts’ decision not to enjoin the enforcement of LAWA on the basis that the plaintiffs had failed to establish that the state law was preempted by federal law. In a 5-3 decision, the Court held that federal law, specifically the Immigration Reform and Control Act of 1986 (IRCA), expressly allows for the type of state law that Arizona passed with LAWA: one that seeks to curtail the employment of unauthorized immigrants through the revocation of business licenses for lack of compliance. Since then, several states have enacted or are considering laws similar to the Legal Arizona Workers Act, S.B. 1070, and the Hazleton Ordinance.

This article examines the implications of that decision, Chamber of Commerce of the United States v. Whiting, for the ongoing litigation over the Hazleton Ordinance and S.B. 1070 as well as for other state and local laws pertaining to undocumented immigrants. Part II examines the conditions motivating the passage of such laws: the perceived negative consequences of unauthorized immigration and the failure of Congress to pass meaningful immigration reform. Part III sets out the relevant provisions of Hazleton’s ordinance, LAWA, S.B. 1070 and other immigration laws passed in Arizona and other states.

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8 Hazleton § 2(D).
9 See infra Part III.A.
10 See infra Part III.B.
11 See infra Part III.C.
12 Alabama, Georgia, Indiana, Oklahoma, South Carolina, Utah have all passed laws targeting undocumented immigrants. See
14 Louisiana updated its law against hiring undocumented workers by adding a licensing provision (LA HB 646). New Hampshire is considering a law penalizing employers who hire unauthorized workers (NH LSR 2127) and requiring employers to participate in E-Verify (NH LSR 2518). Ohio is considering a law penalizing the hiring of undocumented workers and requiring employers to participate in E-Verify (OH HB 286). Texas is considering a bill that would make it a felony punishable by incarceration in state jail to hire an undocumented immigrant (TX HB 58A) and making unlawful presence a trespass misdemeanor (TX HB 57A). Wisconsin is considering a bill penalizing businesses that hire undocumented immigrants (WI SB 37).
II. Sources of State and Local Dissatisfaction with the Current Status of Immigration Law Enforcement

A. Perceived Negative Consequences of Illegal Immigration

Undocumented immigrants have become a lightning rod for debate in the United States. The sheer numbers generate concern about capacity and economic security: estimates place the unauthorized population at eleven million.\(^\text{15}\) The manner of entry raises concerns about national security and ability to control the borders: the Pew Hispanic Center estimated in 2006 that 50 to 60 percent of undocumented immigrants arrived by evading inspection by U.S. border officials.\(^\text{16}\) The debate centers on the effects that illegal immigration has on the United States. As discussed below, the main concerns are that undocumented immigrants are a fiscal drain on the economy; unauthorized immigration present national security concerns; and undocumented immigrants dilute the culture of the United States.

1. Undocumented Immigrants are a Fiscal Drain

Studies on the economic consequences of unauthorized immigration conflict with each other and differ based on whether state, local, or national impact is at issue. On the national level, sources range in their estimation from fiscal loss to an economic windfall. The Migration Policy Institute concluded that nationally, illegal immigration has a negligible negative 0.07 percent impact on the economy. The Center for Immigration Studies reports that unauthorized immigration costs the United States $19 billion annually.\(^\text{17}\) Professor Francine Lipman cites numerous reports in her 2006 article, “The Taxation of Undocumented Immigrants: Separate, Unequal and Without Representation,” demonstrating that undocumented immigrants actually create a fiscal windfall for the United States.\(^\text{18}\)

States, on the other hand, tend not to experience an economic windfall from unauthorized immigration. In 2007, the Congressional Budget Office (CBO) issued a report on the state impact of unauthorized immigration. The CBO attributed the difference between state and national economic impact to the diverse types of expenditures resulting from unauthorized immigration and the overall economic impact of such spending.\(^\text{19}\) States and localities rather than the federal government bear the burden of providing certain services that undocumented immigrants use.

\(^\text{16}\) Pew Hispanic Center, Fact Sheet: Modes of Entry for the Unauthorized Migrant Population (2006) at 1.
\(^\text{17}\) Jack Martin & Erick Ruark, The Fiscal Burden of Illegal Immigration on United States Taxpayers (Federation for American Immigration Reform, 2011) at 79.
\(^\text{19}\) Congressional Budget Office, The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments (2007) at 1.
immigrants and their children access, such as education, state emergency assistance, and emergency medical care. The CBO, after examining a number of reports of fiscal impact on individual states, came to the following conclusions:

- “State and local governments incur costs for providing services to unauthorized immigrants and have limited options for avoiding or minimizing those costs.”
- “The tax revenues that unauthorized immigrants generate for state and local governments do not offset the total cost of services provided to those immigrants.”
- “Federal aid programs offer resources to state and local governments that provide services to unauthorized immigrants, but those funds do not fully cover the costs incurred by those governments.”
- “The amount that state and local governments spend on services for unauthorized immigrants represents a small percentage of the total amount spent by those governments to provide such services to residents in their jurisdictions.”

Despite these conclusions, the overall fiscal impact of unauthorized immigration figures prominently in the debate over immigration reform. Moreover, the economy is only one area of concern related to unauthorized immigration. National security concerns heighten the scrutiny given to undocumented immigrants and further inflame the debate.

2. Undocumented Immigrants Present National Security Concerns

The U.S.-Mexico border has become synonymous with illegal entry into the United States. The call to “secure our borders” echoes among legislators, pundits and the public, even among those who favor less draconian approaches to immigration. Spending on immigration enforcement grew from $1 billion in 1985 to $4.9 billion in 2002 and the budget for border patrol has increased on average by $300 million annually.

Undocumented immigrants living within the borders of the United States number approximately 11.2 million, representing approximately 3.7 percent of the U.S. population. This number has tripled from the 3.5 million undocumented immigrants in the country in 1990. As the number has increased, so have concerns about national security.

In the wake of the terrorist attacks of September 11, 2001, knowing who was living in and coming to the United States became more important than ever. The federal government had already been restricting the issuance of social security cards based on immigration status for several years. After September 11, driver’s licenses became the new target. States had issued

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20 Id. at 7-9. [CBO 2007]
21 Id. at 3. [CBO 2007]
22 Id. [CBO 2007 at 3.]
23 Id. [CBO 2007 at 3.]
24 Id. [CBO 2007 at 3.]
25 Migration Policy Institute, Immigration Enforcement since IRCA (2005) at 1.
26 National Immigration Forum, Immigration Enforcement Fiscal Overview: Where are We and Where are We Going? (2011) at 1.
28 Id. at 15. [Hispanic Center, Unauthorized Immigrant Population 2010, supra note 15]
29 Id. at 2. [Hispanic Center, Unauthorized Immigrant Population 2010, supra note 15]
driver’s licenses and state identification cards without regard for immigration status before September 11,30 but most implemented immigration status-based requirements after the attacks.31 The impetus presumably was the fact that several of the hijackers had obtained state identification cards using fraudulent means.32 Nevertheless, the new restrictions arguably had the most impact on the millions of unauthorized laborers and their families living in the United States.33

One impact of the federal ban on social security numbers and state bans on driver’s licenses has been to push undocumented immigrants further out of mainstream U.S. society, a result that seems at odds with national security. The more fearful undocumented immigrants are of deportation, the more likely they are to take measures to conceal their identity and evade law enforcement officials. Dean Kevin Johnson noted that “the denial of driver’s licenses to undocumented [immigrants] exacerbates fear of deportation, limits access to jobs, and increases immigrant vulnerability to workplace exploitation.”34 Moreover, unauthorized workers not able to obtain their own social security numbers use fake or stolen numbers, a practice that raises concerns about identity theft.

The shadowy existence of undocumented immigrants, their relegation to the outskirts of society, and their use of fraudulent documents to work in the United States are emblems of a population with little motivation or opportunity to assimilate into mainstream U.S. society. This has contributed to a perception that illegal immigration threatens the cultural integrity of the United States.

3. Uncontrolled Immigration Threatens Cultural Identity

In 1995, Kevin Johnson articulated the images conjured by the term “illegal alien”: “a poor, brown, unskilled, young male” from Mexico “who has snuck into the United States in the dark of night,”35 predatory criminals,36 and the welfare mother seeking to take advantage of public benefits.37 Those images have not changed much in the last fifteen years. The Federation for American Immigration Reform claims that the U.S. immigration system “imports poverty”;38 posits that high numbers of immigrants are failing to assimilate, thus “exacerbating ethnic separatism and related problems”;39 and maintains a list of crimes committed by undocumented

31 See Yilu Zhao, A Nervous State Looks to Limit Licenses, N.Y. TIMES, Apr. 6, 2003 at CN14 (reporting that “[a]lmost every state has taken measures large and small to toughen the rules” for obtaining a driver’s license in the aftermath of September 11).
33 See Johnson, Driver’s Licenses, supra note 30, at 222: “Between five and fifteen million undocumented immigrants live and work in the United States. The lack of driver’s licenses thus facilitates the exploitation of undocumented immigrants in the secondary labor market.” (Internal citations omitted).
36 Id. at 1533. [Johnson 42 UCLA LR 1509].
37 Id. at 1531-1534. [Johnson 42 UCLA LR 1509]
immigrants. Similarly, the Center for Immigration Studies reported a 146 percent increase in immigrant incarceration between 2000 and 2007, estimated that 71 percent of undocumented immigrant families with children used at least one form of welfare in 2009; and warned that U.S. “elites [have lost] the cultural self-confidence necessary to induce newcomers to be more like [them] rather than the reverse.”

Other reports challenge the assertion that undocumented immigrants are fraying the fabric of U.S. society. The Immigration Policy Center reported that “data from the census and other sources show that for every ethnic group, without exception, incarceration rates among young men are lowest for immigrants, even those who are the least educated and the least acculturated.” Undocumented immigrants do not qualify for most forms of federal means-tested public assistance, and the rate of use of those forms for which they do qualify is low. The Pew Hispanic Center conducted a study demonstrating that as immigrants form closer ties to

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42 Steven A. Camarota, Welfare Use by Immigrant Households with Children: A Look at Cash, Medicaid, Housing and Food Programs (Center for Immigration Studies, 2011) at 1.
45 Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193 §§ 400-451, 110 Stat. 2105 (Aug. 22, 1996). See also, House Ways and Means Greenbook 2003 at J-19 (stating that “[t]he 1996 welfare reform law denies most Federal benefits, regardless of whether they are means tested, to illegal aliens. The class of benefits denied is broad and covers grants, contracts, loans, and licenses as well as retirement, welfare, health, disability, housing, food, unemployment, postsecondary education, and similar benefits”). See also, id. at J-22:

Despite the federally imposed bar and the State flexibility provided by the 1996 law, States still may be required to expend a significant amount of State funds for illegal aliens. Public elementary and secondary education for illegal aliens remains compelled by judicial decision, and payment for emergency medical services for illegal aliens remains compelled by Federal law.
the United States, “the long-term trend…is toward a steadily deepening commitment to the U.S.”

Beliefs about the impact of undocumented immigrants on the economy, the security of the United States, and the cultural integrity of the United States have a tremendous impact on legislative action. Immigration restrictionists, those who subscribe to the belief that unauthorized immigration has an overall negative impact on the United States, support measures that emphasize border security, deportation of undocumented immigrants, and curtailment of immigration. Immigration advocates, those who believe that unauthorized immigration has an overall positive impact on the United States, support legalization measures and more opportunities for immigration while criticizing efforts to increase deportation and border enforcement. Immigration moderates prefer a hybrid approach that emphasizes border security as well as legalization of undocumented immigrants present in the United States. Ambivalence over immigration is nowhere more apparent than in Congress, where immigration reform measures have failed consistently.

B. Failure at the Federal Level

The most recent immigration reform legislation of any significance occurred in 1996 with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Since then, several laws affecting immigration have been enacted, but none with the far-reaching consequences of IIRIRA. This Part discusses various federal attempts to curb unauthorized immigration, from the 1986 passage of the Immigration Reform and Control Act (IRCA), to recent failed attempts to enact comprehensive immigration reform.


   a. Immigration Reform and Control Act of 1986

   Congress passed IRCA in response to what the House Judiciary Committee termed “a large-scale influx of undocumented aliens.” According to the Committee, “[t]he principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions.” To that end, Congress implemented a four-part plan through IRCA. First, IRCA made it unlawful knowingly to hire undocumented immigrants and imposed civil and criminal penalties for failure to comply with the law. Second, the law increased appropriations for border security and implemented other enforcement measures. Third, it established a system for verifying employment authorization and opened the door for the creation of what would...
eventually become today’s E-Verify, an online system for verifying employment authorization.\textsuperscript{53} Finally, IRCA provided for the legalization of undocumented immigrants who had been continuously unlawfully present in the United States since 1982.\textsuperscript{54}

The initial results of IRCA’s four-part plan were positive: the undocumented population dropped from 3.5 million to 1.9 million\textsuperscript{55} (which is perhaps explained by the fact that many previously undocumented immigrants were able to legalize their status). By 1992, however, the undocumented population was back to the pre-IRCA figure of 3.4 million.\textsuperscript{56} By 1996, that figure had grown to 5 million,\textsuperscript{57} at which point Congress again attempted to effect comprehensive immigration reform.

b. 1996 Acts

Congress made sweeping changes to U.S. immigration law in 1996, most of them punitive and restrictive in nature. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was passed in 1996 in part as a response to perceived abuses of the U.S. immigration system.\textsuperscript{58} IIRIRA implemented a number of restrictive reforms, including mandatory detention for certain criminal aliens,\textsuperscript{59} a one-year deadline for filing an application for asylum,\textsuperscript{60} a system of expedited removal,\textsuperscript{61} and restrictions on judicial review of immigration court decisions.\textsuperscript{62} That same year Congress also passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),\textsuperscript{63} which rendered undocumented immigrants (as well as legally present immigrants) ineligible for federal means-tested benefits,\textsuperscript{64} and the

\textsuperscript{53} Pub. L. 99-603 § 121. \textit{See also} Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208 § 401 (requiring the federal government to establish pilot programs to verify the employment eligibility of new hires). The Department of Homeland Security describes E-Verify as “an Internet-based system that allows an employer, using information reported on an employee’s Form I-9, Employment Eligibility Verification, to determine the eligibility of that employee to work in the United States.” \url{http://www.dhs.gov/files/programs/gc_1185221678150.shtm}.

\textsuperscript{54} Pub. L. 99-603 § 201.


\textsuperscript{56} \textit{Id.} (citing Karen Woodrow and Jeffrey Passel, \textit{Post-IRCA Undocumented Immigration to the United States: An Analysis Based on the June 1988 CPS, in UNDOCUMENTED MIGRATION TO THE UNITED STATES} (1990).) [CRS at 3]


\textsuperscript{59} Pub. L. 104-208 § 302, 8 USC § 1225 (b)(1)(B)(iii)(IV) (mandatory detention of certain asylum seekers); Pub. L. 104-208 § 305, 8 USC § 1231(a)(2) (mandating detention of criminal and other aliens ordered removed)

\textsuperscript{60} Pub. L. 104-208 § 306, 8 USC § 1158(a)(2)(B).

\textsuperscript{61} Pub. L. 104-208 § 302, 8 USC § 1225(b)(1)(A).

\textsuperscript{62} Pub. L. 104-208 § 303(a), 8 USC § 1226(e); Pub. L. 104-208 § 304(a), 8 USC § 1229(b)(5)(D); Pub. L. 104-208 § 8 USC § 1229(c)(f); Pub. L. 104-208 § 306, 8 USC § 1252.


\textsuperscript{64} PRWORA ended eligibility for Temporary Assistance for Needy Families, Medicaid, Supplemental Security Income and Food Stamps for all undocumented immigrants and many legal immigrants, as well. 8 USC §§ 1611, 1641; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 401, 431, 1110 Stat. 2105. Undocumented immigrants continue to be eligible for public health benefits, emergency medical
Antiterrorism and Effective Death Penalty Act (AEDPA),\textsuperscript{65} which expanded the range of deportable crimes. The 1996 acts sought to deter and curtail illegal immigration, which had increased exponentially since IRCA was passed in 1986, by increasing enforcement measures against undocumented immigrants and restricting the benefits available to them.

If IRCA’s legalization provisions can legitimately be blamed for an increase in illegal immigration, then the 1996 acts’ more punitive measures were arguably even less effective in curbing illegal immigration. At the time of IRCA’s enactment, there were between three million and five million undocumented immigrants living in the United States.\textsuperscript{66} In 1996, there were 4.6 million to 5.4 million undocumented immigrants.\textsuperscript{67} By 2000, the undocumented population had grown to between 7.8 million and 8.7 million.\textsuperscript{68} According to Pew Hispanic Center estimates, the population grew to nearly 12 million by 2007.\textsuperscript{69} Since then, it has held fairly steady at 11.2 million.\textsuperscript{70}

2. The Stalemate Over Comprehensive Immigration Reform

The large number of undocumented immigrants in the United States has alarmed immigration restrictionists, advocates and moderates alike. Congress, however, has been unable to pass any meaningful reform or create a viable solution to the problem of ongoing unauthorized immigration. Two types of reform – one addressing young undocumented immigrants who have lived in the United States since they were children, and the other proposing a system of earned legalization – have repeatedly and unsuccessfully made their way through Congress over the last ten years.

a. DREAM Acts

In 2001, Republican Senator Orrin Hatch introduced the Development, Relief and Education for Alien Minors Act (“DREAM Act”).\textsuperscript{71} The 2001 DREAM Act would have granted lawful permanent residency to children who were at least twelve years old prior to the date of enactment, filed a DREAM Act application for lawful permanent residency before turning 21, received a high school diploma or its equivalent prior to filing the application, maintained continuous residence in the United States for five years prior to the date of enactment, and demonstrated good moral character.\textsuperscript{72} The bill had a bipartisan coalition of eighteen cosponsors but never came to the floor for a vote.\textsuperscript{73}

\textsuperscript{66} B. Lindsay Lowell & Roberto Suro, \textit{How many undocumented: The numbers behind the U.S.-Mexico migration talks} (Pew Hispanic Center, 2002) at 4 [hereinafter Pew Hispanic Center, \textit{How many undocumented}].
\textsuperscript{67} DHS, \texttt{http://www.dhs.gov/xlibrary/assets/statistics/illegal.pdf}
\textsuperscript{68} Pew Hispanic Center, \textit{How many undocumented, supra} note 66, at 4.
\textsuperscript{69} Pew Hispanic Center, \textit{Unauthorized Immigrant Population 2010, supra} note 15, at 1.
\textsuperscript{70} Id. [Pew Hispanic Center, \textit{Unauthorized Immigrant Population 2010, supra} note 15 at 1].
\textsuperscript{71} Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001).
\textsuperscript{72} S. 1291, 107th Cong. §3(a)(1)
\textsuperscript{73} Thomas.gov \texttt{http://thomas.loc.gov/cgi-bin/bdquery/D?d107:95.:/temp/~bdrq3M:@@@Xl/home/Legislativedata.php?n=BSS;c=107l} (indicating that last Congressional action was the placing of the bill on the “Senate Legislative Calendar under General Orders”).
The DREAM Act has been introduced in various forms more than twenty times since 2001. Each time it has failed, most recently in 2010. The DREAM Act was introduced again in May 2011, and for the first time, on June 28, 2011, a hearing was held on the bill. If the DREAM Act is passed in its current form, it would be available to a limited group of undocumented immigrants: those who are thirty-five years old or younger, initially entered the United States at the age of fifteen or younger, maintained continuous physical presence in the United States for five years prior to the enactment of the legislation, have demonstrated good moral character since entering the United States, have not committed certain disqualifying offenses, and have been admitted to an institution of higher learning in the United States or obtained a high school diploma or its equivalent in the United States.

The DREAM Act, even if it passes, would not regularize the status of most undocumented immigrants. The Migration Policy Institute estimates that “roughly 2.1 million individuals overall meet the legislation’s basic age upon enactment, length of residence, and age of arrival requirements,” (about nineteen percent of the undocumented immigrant population) but cautions that “it is much harder to estimate with any precision the number of individuals who would be likely to progress to permanent resident status due to the many factors that could affect their success.” The number of eligible immigrants that the Migration Policy Institute predicts would be eligible for lawful permanent residence is 825,000, or about 7.4 percent of the
undocumented immigrant population. Measures to legalize a larger portion of the undocumented immigrant population, however, have also failed.

b. Earned Legalization

Several proposals for an “earned legalization” program have made their way through Congress in the last several years. Earned legalization generally requires continuous presence in the United States for a period of time, payment of a fine, and eventual English language proficiency in order to qualify for lawful permanent resident status.82 None of the bills have passed.83

The most recent earned legalization bill was introduced in the Senate on June 22, 2011.84 Like many of the others, it proposes a gradual path towards legalization, a DREAM Act, and a guest worker visa system with a possibility for lawful permanent resident status. The bill, also like many of the others, was referred to the Judiciary Committee and there has languished.85

In the fractious and seemingly endless debate over illegal immigration, one common thread has emerged: frustration with the lack of federal action on immigration. Plenary power over immigration resides with Congress,86 but the states – particularly states with large immigrant populations such as California, Texas, Florida, and New York87 – are left to contend with the results of large numbers of undocumented immigrants living within their borders. Reacting in part to the federal stalemate on immigration reform, state and local governments have begun to pass their own immigration-related statutes. The following section discusses recent state and local responses to illegal immigration and undocumented immigrants.

III. Arizona, et al.: State and Local Legislative Responses to Illegal Immigration

83 See, e.g., Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006) (proposing (1) the granting of lawful permanent resident status to unauthorized immigrants who meet certain continuous presence and admissibility criteria; and (2) establishment of a “blue card” earned legalization program for agricultural workers who meet certain requirements); Security Through Regularized Immigration and a Vibrant Economy Act of 2007, H.R. 1645, 110th Cong. (2007) (proposing (1) the granting of conditional residency to unauthorized immigrant workers who meet certain requirements, with a possibility of adjusting to permanent resident status; and (2) establishment of a “blue card” earned legalization program for agricultural workers who meet certain requirements); AgJOBS Act of 2007, S. 1639, 110th Cong. (2007) (proposing the granting of four-year indefinitely renewable visas to unauthorized immigrant workers who meet certain requirements); Comprehensive Immigration Reform Act, S. 1348, 110th Cong. (2007) (proposing (1) the granting of lawful permanent resident status to unauthorized immigrants who meet certain requirements; and (2) establishment of a “blue card” earned legalization program for agricultural workers who meet certain requirements); Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. (2010) (Karel still going through this bill).
85 http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01258:@@@X.
Arizona made national headlines and fanned the flames of the immigration debate when it passed the now infamous S.B. 1070, or Support Our Law Enforcement and Safe Neighborhoods Act, a law intended to “deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” It was the state version of the equally infamous Hazleton, Pennsylvania ordinance passed in 2006 and, like S.B. 1070, the subject of an ongoing federal lawsuit. Other states have followed in Arizona’s footsteps, passing laws that forbid undocumented immigrants from living or working in the state, denying state citizenship to the U.S.-born children of undocumented immigrants, penalizing employers who hire undocumented immigrants, and extending immigration enforcement authority to state law enforcement officials. Each state or locality that has enacted an enforcement-model law has cited economic hardship to taxpayers, prevention of crime, preservation of culture, and/or burden on state resources as motivating factors. This Article will focus on the Hazleton and Arizona laws, as these have been subject to the most visible and potentially significant litigation.

A. Illegal Immigration Reform Act Ordinance, Hazleton, Pennsylvania, 2006

The City Council of Hazleton, Pennsylvania enacted the Illegal Immigration Reform Act Ordinance on September 21, 2006. The stated goals of the Hazleton Ordinance were to enforce compliance with federal immigration law, to “abate the nuisance of illegal immigration,” and to liberate U.S. citizens and lawfully present immigrants from “the debilitating effects on their economic and social well being imposed by the influx of illegal aliens.” To those ends, the Ordinance penalizes businesses that employ undocumented immigrants and prohibits landlords from renting to undocumented immigrants.

1. Prohibition on Employing Unauthorized Immigrants

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89 Ariz. S.B. 1070 § 1 (2010).


91 Alabama, Georgia, Indiana, South Carolina and Utah are among the states and localities that have passed legislation restricting the activities of unauthorized immigrants living within their borders. Working, renting an apartment, buying or driving a car, and even being present in the state are criminal offenses under these statutes. See, e.g., Ala. S.B. 56 § 10 (2011) (unauthorized immigrants present in Alabama without proof of lawful status are guilty of a misdemeanor); Ala. S.B. 56 § 11 (unauthorized immigrants who work or apply for work are guilty of a misdemeanor) Ala. S.B. 56 § 13(a person who transports unauthorized immigrants within the state or who rents to unauthorized immigrants if the person knows or recklessly disregards the fact that the immigrant is unauthorized is guilty of a misdemeanor); Ala. S.B. 56 § 30 (unauthorized immigrants who engage in a business transaction with the state, including applying for or renewing a driver’s license or vehicle registration, are guilty of a felony).

92 Ordinance 2006-18 [hereinafter “Hazleton Ordinance” or “Ordinance”]. Hazleton passed an earlier version of the ordinance, Ordinance 2006-10, on July 13, 2006. See Hazleton Amended Complaint at 2. The ACLU filed suit to enjoin Ordinance 2006-10, and, pursuant to a stipulated agreement, Hazleton agreed not to enforce the ordinance. Id.

93 Hazleton §§ 2(A), (B), (D), (E).

94 Id. at § 2(D). [Hazleton]

95 Id. at § 2(F). [Hazleton]
The Ordinance makes it “unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City.”\textsuperscript{96} Any Hazleton official, business, or resident may file a complaint against an employer who allegedly violates this provision,\textsuperscript{97} but such complaints will be deemed invalid if they “allege[] a violation solely or primarily on the basis of national origin, ethnicity, or race.”\textsuperscript{98} The Ordinance gives the alleged violator three business days to respond to an official request to provide the investigating agency with “identity information” for any allegedly unauthorized workers. Failure to produce such information within the three days shall result in the suspension of the employer’s business license.\textsuperscript{99} Failure to correct a confirmed violation within three business days also results in the suspension of the business license until the employer submits an affidavit via a legal representative swearing that the violation has been corrected, and provides the “name, address and other adequate identifying information of the unauthorized workers related to the complaint.”\textsuperscript{100} Subsequent violations shall result in a twenty-day license suspension, which shall continue if the employer does not comply with the corrective measures.\textsuperscript{101}

In addition to prohibitions on employing unauthorized immigrants, the Hazleton Ordinance provides a private right of action for lawful workers who are discharged by a business employing unauthorized aliens and not participating in the federal E-Verify program.\textsuperscript{102} Regardless of the reason for discharge, the lawful worker may sue the employer for treble damages and attorney fees.\textsuperscript{103}

2. Penalties for Renting Dwellings to Undocumented Immigrants

The Hazleton Ordinance contains a “harboring” provision that penalizes those who “let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law.”\textsuperscript{104} The Ordinance also punishes homeowners who allow undocumented immigrants to live with them, with no exception for mixed-status families.\textsuperscript{105} The complaint and enforcement process is similar to that for the employment of unauthorized immigrants. Any Hazleton official, business or resident may file a complaint against a resident or landlord who allegedly violates this provision,\textsuperscript{106} but such complaints will be deemed invalid if they “allege[] a violation solely or primarily on the basis of national origin, ethnicity, or race.”\textsuperscript{107} The Ordinance gives the alleged violator five business days to correct a

\begin{itemize}
  \item \textsuperscript{96} Id. at § 4(A). [Hazleton]
  \item \textsuperscript{97} Id. at § 4(B)(1). [Hazleton]
  \item \textsuperscript{98} Id. at § 4(B)(2). [Hazleton]
  \item \textsuperscript{99} Id. at § 4(B)(3). [Hazleton]
  \item \textsuperscript{100} Id. at §§ 4(B)(4), (6). [Hazleton] Businesses that are found to be employing unauthorized immigrants but that checked the identity of their workers using the federal E-Verify system are not subject to suspension under the Ordinance. Id. at § 4(B)(5). [Hazleton]
  \item \textsuperscript{101} Id. at § 4(B)(7). [Hazleton]
  \item \textsuperscript{102} Id. at § 4(E)(1). [Hazleton]
  \item \textsuperscript{103} Id. at § 4(E)(2). [Hazleton]
  \item \textsuperscript{104} Id. at § 5(A)(1). [Hazleton]
  \item \textsuperscript{105} Id. at § 5(A)(1)
  \item \textsuperscript{106} Id. at § 5(B)(1). [Hazleton]
  \item \textsuperscript{107} Id. at § 5(B)(2). [Hazleton]
\end{itemize}
confirmed violation. Failure to do so results in the denial or suspension of the rental license until the employer submits an affidavit via a legal representative swearing that the violation has been corrected, and provides the “name, address and other adequate identifying information of the illegal aliens who were the subject of the complaint.” During the period of suspension, “the owner of the dwelling unit shall not be permitted to collect any rent, payment, fee, or any other form of compensation from, or on behalf of, any tenant or occupant in the dwelling unit.” These penalties as well as a $250 fine apply to subsequent violations.

The American Civil Liberties Union filed suit against Hazleton on October 30, 2006, seeking a permanent injunction against the Ordinance as well as money damages and costs. The lawsuit is discussed in Section IV.A., infra.

B. The Legal Arizona Workers Act, 2007

Former Arizona Governor Janet Napolitano signed into law the Legal Arizona Workers Act (LAWA) on July 2, 2007. Unlike the Hazleton Ordinance and Arizona’s subsequent Support Our Law Enforcement and Safe Neighborhood Act (discussed in Section C., infra), LAWA focuses exclusively on the employment of undocumented workers. The law creates a system similar to Hazleton’s for penalizing employers who hire unauthorized immigrant workers. The LAWA process begins with a complaint of knowingly or intentionally hiring an unauthorized worker that the Attorney General or County Attorney investigates. The investigating entity must obtain verification of authorization or lack thereof from the federal government. If the investigating entity determines that the complaint is not frivolous, the following will occur: (1) the investigating agency shall notify U.S. Immigration and Customs Enforcement and local law enforcement officials of the unauthorized immigrant and (2) the county attorney shall file a lawsuit against the offending employer.

The penalties for violations of LAWA are harsher than those in the Hazleton Ordinance. Like Hazleton violators, Arizona violators must terminate the employment of all unauthorized immigrants and file an affidavit stating the employer will not hire unauthorized workers. In addition, an employer found to have knowingly employed an unauthorized worker shall be subject to a three-year probationary period during which time “the employer shall file quarterly reports with the County Attorney of each new employee who is hired by the employer at the specific location where the unauthorized alien performed work.” The court that hears the action may order that the business license of an employer in knowing violation of LAWA be suspended for a maximum of ten days. If the violation is deemed intentional, the court must impose a probationary period and quarterly reports for five years and must suspend the

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108 Id. at § 5(B)(4). [Hazleton]
109 Id. at §§ 5(B)(5). [Hazleton]
110 Id. at §§ 5(B)(6). [Hazleton]
111 Id. at §§ 5(B)(8). [Hazleton]
112 Hazleton Amended Complaint at 5. The Amended Complaint also challenged Ordinance 2006-13, Establishing a Registration Program for Residential Rental Properties and the Official English Ordinance, Ordinance 2006-19.
113 LAWA, HB 2779.
114 Id. at §§ 2(F)(1)(a), 2(F)(2)(a). [LAWA]
115 Id. at §§ 2(F)(1)(c), 2(F)(2)(d). [LAWA]
116 Id. at § 2(F)(1)(b). [LAWA]
117 Id. at § 2(F)(1)(c). [LAWA]
118 Id. at § 2(F)(1)(d). [LAWA]
119 Id. at §§ 2(F)(2)(b),(d). [LAWA]
business license for a minimum of ten days. A second offense during the probationary period, whether knowing or intentional, results in the permanent revocation of the employer’s business license.

In addition to the provisions targeting employers, LAWA also contains a provision targeting unauthorized workers who use false documentation to secure employment. LAWA amends the crime “aggravated taking the identity of another person,” a felony, to include a person who “knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information or entity identifying information of…another person, including a real or fictitious person, with the intent to obtain employment.”

The U.S. Chamber of Commerce and various businesses filed suit against Arizona on August 29, 2007, seeking declaratory and injunctive relief against LAWA. The lawsuit, Chamber of Commerce of the United States v. Whiting, is discussed in section IV.B.2., infra.

C. S.B. 1070: Support Our Law Enforcement and Safe Neighborhoods Act of Arizona, 2010

Arizona passed another immigration law in 2010, the Support Our Law Enforcement and Safe Neighborhoods Act. Known by its bill number, S.B. 1070, its intent is “to make attrition through enforcement the policy of all state and local government agencies in Arizona.” The law attempts to accomplish this goal through various provisions aimed at identifying unauthorized immigrants and turning them over to federal immigration authorities.

Section 2 of S.B. 1070 contains a number of provisions requiring state and local authorities to cooperate with “federal immigration laws to the full extent permitted by federal law.” The law grants a private right of action allowing any person to sue a “state or a county, city, town, or other political subdivision of [Arizona] that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law.” It also contains one of the most controversial provisions of the law:

For any lawful stop, detention or arrest made by a [state or local] law enforcement official or agency…where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person.

Section 3 of S.B. 1070 criminalizes being present in the state as an undocumented immigrant. Noncitizens present on public or private land who do not carry alien registration documents on their person in accordance with 8 USC § 1304(e) or register as a resident alien

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120 Id. at § 2(F)(2)(c). [LAWA]
121 Id. at § 2(F)(3). [LAWA]
122 Id. at § 1(A)(3). [LAWA].
123 Ariz. S.B. 1070 § 1.
124 Id. at § 11-1051. [S.B. 1070]
125 Id. at § 11-1051(G). If the court finds that there was a violation, it may impose a penalty of between $1,000 and $5,000 for each day that the policy remained in effect since the action was filed. Id. at § 11-1051(G)(2). [S.B. 1070]
126 Id. at § 11-1051(B). [S.B. 1070]
pursuant to 8 USC § 1306(a) are guilty of a misdemeanor and may be fined at least $500.\textsuperscript{127} Subsequent offenders will be fined twice that amount.\textsuperscript{128}

Section 4 of S.B. 1070 criminalizes the smuggling of human beings. The definition of smuggling is broad:

the transportation, procurement of transportation or use of property or real property by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state or have attempted to enter, entered or remained in the United States in violation of law.\textsuperscript{129}

This portion of the law applies to those transporting undocumented immigrants “for profit or commercial purpose,”\textsuperscript{130} which, according to the statutory definition of smuggling, would subject providers of public transportation to prosecution for smuggling.

Section 5 of S.B. 1070 criminalizes working and seeking employment in the state without federal employment authorization.\textsuperscript{131} Businesses who hire unauthorized immigrants may be fined and lose their business license, but the workers will face class 1 misdemeanor criminal charges.\textsuperscript{132} Employers attempting to hire unauthorized immigrant laborers will only face criminal charges if they do so from a motor vehicle that is impeding traffic.\textsuperscript{133}

Section 6 of S.B. 1070 provides that “a peace officer may, without a warrant, arrest a person if the officer has probable cause to believe…the person to be arrested has committed any public offense that makes the person removable from the United States.”\textsuperscript{134}

The United States sued Arizona on July 6, 2010, seeking declaratory and injunctive relief prohibiting enforcement of sections 1 through 6 of S.B. 1070. The lawsuit is discussed in section IV.B., infra.

IV. Legal Challenges to State and Local Immigration Laws

Every state that has passed immigration legislation in recent years has had to defend the laws in court. The U.S. government, business groups, and civil rights organizations have filed suits seeking injunctions prohibiting the implementation of the laws and seeking findings that the laws are unconstitutional on the basis of federal preemption, equal protection, due process, and the Fair Housing Act.\textsuperscript{135} A recent Supreme Court decision, Chamber of Commerce of the United States v. Whiting, rejects the preemption argument but does not address the others. Its implications for further challenges to state immigration laws are unclear.

A. \emph{Lozano v. City of Hazleton}

\textsuperscript{127} \textit{Id.} at § 13-1509(H), as amended by H.B. 2160.
\textsuperscript{128} \textit{Id.} at § 13-1509(D)(2). [S.B. 1070]
\textsuperscript{129} \textit{Id.} at § 13-2319(F)(3). [S.B. 1070]
\textsuperscript{130} \textit{Id.} at § 13-2319(A). [S.B. 1070]
\textsuperscript{131} \textit{Id.} at § 13-2928(C). [S.B. 1070]
\textsuperscript{132} \textit{Id.} at § 13-2928(D). [S.B. 1070]
\textsuperscript{133} \textit{Id.} at § 13-2928(A). [S.B. 1070]
\textsuperscript{134} \textit{Id.} at 13-3883(A)(5). [S.B. 1070]
\textsuperscript{135} Parlow
Hazleton’s Illegal Immigration Reform Act Ordinance became the subject of a federal lawsuit after its passage in July 2006. The American Civil Liberties Union filed a complaint alleging that the Hazleton Ordinance violates the Supremacy Clause, the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1981, the Fair Housing Act, restrictions on the city’s power to legislate, and the privacy rights of the plaintiffs. The U.S. District Court for the Middle District of Pennsylvania found that the Hazleton Ordinance does not violate the Equal Protection Clause or the Fair Housing Act. The district court found that the Hazleton ordinance does violate the Supremacy Clause, 42 U.S.C § 1981, and principles of legitimate police powers. Accordingly, the district court entered an injunction prohibiting enforcement of Hazleton Ordinance.

The U.S. Court of Appeals for the Third Circuit agreed that the Hazleton ordinance was “preempted by federal immigration law and unconstitutional under the Supremacy Clause” and upheld the injunction without discussing the Due Process or Section 1981 issues. Addressing the business licensing provisions of the ordinance first, the Third Circuit held that the district court should have applied the “rebuttable presumption that federal legislation does not preempt [state] police powers absent ‘clear and manifest’ congressional intent to the contrary.” The Third Circuit proceeded to find that the licensing provisions of the Hazleton ordinance are not expressly preempted by federal immigration law. Turning to the issue of conflict preemption, which applies when a state or local statute “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” the Third Circuit found that the Hazleton licensing provisions conflict with and are thus preempted by federal immigration law.

136 Hazleton First Amended Complaint at ¶¶ 111-135.
137 Id. at ¶¶ 136-144. [Hazleton Complaint]
138 Id. at ¶¶ 145-156, 160, 226-228. [Hazleton Complaint]
139 Id. at ¶¶ 176-183. [Hazleton Complaint]
140 Id. at ¶¶ 163-175. [Hazleton Complaint]
141 Id. at ¶¶ 184-197. [Hazleton Complaint]
142 Id. at ¶¶ 212-225. [Hazleton Complaint]
143 Id. at 156. [M.D. Pa.]
144 Id. at 164. [M.D. Pa.]
145 M.D. Pa. at 100, 107, 120-122, 131.
146 Id. at ¶¶ 145-146. [M.D. Pa.]
147 Id. at 170. [M.D. Pa.]
148 Id. at 186. [M.D. Pa.]
149 Id. at 190. [M.D. Pa.]
150 3d Cir. at 66.
152 Id. at 97-104. [3d Cir.]
154 Id. at 106 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941). [3d Cir.]
federal law by “increas[ing] employer burden by creating a separate and independent adjudicative system for determining whether an employer is guilty of employing unauthorized aliens”; 155 “altering the employment verification scheme created by” federal law; 156 “coerc[ing] employers to verify the work authorization of independent contractors, even though Congress purposely excluded independent contractors from IRCA’s verification requirements”; 157 and “fail[ing] to balance its sanctions with antidiscrimination protections.” 158 The Third Circuit declined to presume non-preemption with respect to the Ordinance’s housing provisions, and found that they are preempted by federal law because they “regulate which aliens may live there.” 159

The Supreme Court granted certiorari in the case on June 6, 2011 and summarily remanded the case to the Third Circuit “for further consideration in light of Chamber of Commerce of the United States v. Whiting,” 160 discussed in Section B.2, infra.

B. The United States v. Arizona Challenge to S.B. 1070

The United States filed suit against Arizona seeking (1) a declaration that S.B. 1070 is invalid and (2) an injunction against its enforcement. 161 The complaint alleged that S.B. 1070 violates the Supremacy Clause 162 and the Commerce Clause 163 and is preempted by federal law. 164 The district court preliminarily enjoined a portion of Section 2, Section 3, a portion of Section 5, and Section 6. 165 A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the injunctions in a divided opinion. 166 Arizona filed a petition for certiorari with the Supreme Court on August 10, 2011. 167

1. District Court

Judge Susan R. Bolton of the United States District Court for the District of Arizona issued a preliminary injunction against most of the provisions of S.B. 1070. To find preliminary injunctions proper, the court had to determine that the United States was likely to succeed on the

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155 Id. at 112. [3d Cir.]
156 Id. at 116. [3d Cir.]
157 Id. at 123. [3d Cir.]
158 Id. at 125. [3d Cir.]
159 Id. at 134. See also, id. at 135 (holding that the housing provisions are field preempted because “[t]he ‘comprehensiveness of the INA scheme for regulation of immigration and naturalization,’ plainly precludes state efforts, whether harmonious or conflicting, to regulate residence in this country based on immigration status”) (internal citations omitted); id. at 137 (holding that the housing provisions are also conflict preempted because they “attempt to effectively ‘remove’ persons from Hazleton based on a snapshot of their current immigration status, rather than based on a federal order of removal”). [3d Cir.]
161 AZ complaint at ¶ 1.
162 Id. at ¶¶ 61-63. [Arizona Complaint]
163 Id. at ¶¶ 66-68. [Arizona Complaint]
164 Id. at ¶¶ 64-65. [Arizona Complaint]
165 U.S. v. AZ at 1008. The district court found that Section 4, dealing with human smuggling, was likely not preempted by federal law and did not enjoin it. Id. at 999-1000, 1008. [US v. AZ]. The court found that “Section 4 makes a minor change to Arizona’s preexisting human smuggling statute, which is not specifically challenged by the United States.” Id. at 1000.
166 U.S. v. Arizona, 641 F.3d 339 (9th Cir. 2011).
167 US v. AZ petition for certiorari.
The court acknowledged that Arizona passed the law "[a]gainst a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety issues." Nevertheless, the court found that the United States is likely to prevail in its argument that Sections 2(B), 3, 5(C), and 7 are preempted by federal law.

The United States argued that Section 2(B), requiring that “[a]ny person who is arrested shall have the person’s immigration status determined before the person is released” and requiring police to ascertain the immigration status of an individual based on a reasonable suspicion that the person is an undocumented immigrant, is preempted by federal law on two grounds: (1) it “impose[s] burdens on lawful immigrants and U.S. citizens alike who are stopped, questioned, or detained and cannot readily prove their immigration or citizenship status” and (2) its “[m]andatory state alien inspection scheme[] and attendant federal verification requirements” interfere with and impair federal priorities by imposing burdens on federal resources, thus constituting a violation of the Supremacy Clause. Conceding that this portion of “the statute might well have been more artfully worded,” Arizona nonetheless argued that the proper interpretation of the law is that “only where a reasonable suspicion exists that a person arrested is an alien and is unlawfully present in the United States must the person’s immigration status be determined before the person is released.” Arizona also argued that the law merely puts into practice a codified “federal policy of encouraging cooperation among federal, state, and local authorities in the enforcement of federal immigration laws.” Relying in part on Hines v. Davidowitz, the district court found that the United States was likely to prevail on the arguments that the provision is burdensome to lawfully present individuals and burdensome to the federal government and thus preempted by federal law.

The United States argued that Section 3, which makes failure to carry proof of lawful immigration status a misdemeanor punishable by fine and/or jail, is preempted by federal law as an “obstacle to the full purposes and objectives of Congress in creating a uniform and singular federal alien registration scheme.” The United States further argued that Section 3 intrudes on exclusive federal authority because it “seeks to control the conditions of an alien’s entry and presence in the United States without serving any traditional state police interest.” Arizona countered that Congress “has never expressly preempted concurrent state regulation” of alien registration. Arizona further argued that S.B. 1070 does not impose additional alien registration requirements but merely “permits Arizona to impose the same penalties that federal law may impose for violations of the exact same federal registration requirements.” The district court found that the United States was likely to prevail on its argument that Section 3 is

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168 U.S. v. AZ at 987. The court also had to find that the United States would suffer irreparable harm, and that the “balance of equities tips in the United States’ favor considering the public interest.” Id.
169 U.S. v. AZ at 985.
170 S.B. 1070 at 2(B).
171 AZ Complaint at ¶ 43.
172 AZ Complaint at ¶ 44.
173 AZ Response at 10.
174 Id. [AZ Response at 10]
175 Id. at 17. [AZ Response]
176 U.S. v. AZ at 996-998.
177 Id. at 993-996. [US v. AZ]
178 AZ Complaint at ¶ 47.
179 Id. at ¶ 49. [AZ Compl.]
180 AZ Response at 21.
181 Id. [AZ Response at 21].
preempted by federal law, noting that it impermissibly “attempts to supplement or complement the uniform, national registration scheme by making it a state crime to violate the federal alien registration requirements.”\textsuperscript{182}

The United States alleged that the portion of Section 5 that criminalizes working without authorization is preempted because it “stands as an obstacle to the full purposes and objectives of Congress’s considered approach to regulating employment practices concerning unauthorized aliens, and it conflicts with Congress’s decision not to criminalize such conduct for humanitarian and other reasons.”\textsuperscript{183} The United States also argued that this provision “interferes with the comprehensive system of civil consequences for aliens undocumented in the United States by attaching criminal sanctions on the conditions of unlawful presence, despite an affirmative choice by Congress not to criminalize unlawful presence.”\textsuperscript{184} Arizona again argued that because Congress did not specifically preempt states from legislating in this area, the law is not preempted: “Plaintiff’s argument that Congress considered and rejected adopting criminal sanctions against the employee…only underscores this point because it demonstrates that Congress recognized the potential for such regulations, yet chose not to expressly preclude them at the state level.”\textsuperscript{185} Finding that the United States was likely to prevail on these arguments, the district court enjoined the portion of Section 5 that criminalizes working without authorization.\textsuperscript{186}

With respect to Section 5’s harboring and transporting provisions, the United States made another preemption argument: that the law is an impermissible attempt to regulate unlawful entry into the United States.\textsuperscript{187} Arizona argued that the statute is permissible as a legitimate exercise of state police power because it “applies only to persons who [harbor and transport] while committing some other criminal offense [thus demonstrating] that it is designed to deter criminals from using illegal aliens to assist in their criminal conduct or enterprise.” The United States also alleged that the law violated the Commerce Clause “because the purpose of this law is to deter and prevent the movement of certain aliens into Arizona.”\textsuperscript{188} Arizona argued that the law “does not discriminate against out-of-state interests or burden interstate commerce[,]…creates no barriers against interstate commerce,…nor does it prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market.”\textsuperscript{189} The court found that Section 5’s transporting and harboring provisions were neither an impermissible regulation of immigration nor a violation of the Commerce Clause and refused to enjoin them.\textsuperscript{190}

Finally, the United States challenged Section 6 of S.B. 1070, which permits a warrantless arrest where there is probable cause to believe that the individual “has committed any public offense that makes the person removable from the United States.”\textsuperscript{191} The United States made the same preemption argument that it applied to S.B. 1070 Section 2: that it “interferes with the federal government’s enforcement prerogatives and will necessarily impose burdens on lawful

\begin{footnotesize}
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\item[\textsuperscript{182}]\textit{Id.} at 999.  [US v. AZ]
\item[\textsuperscript{183}]\textit{AZ Complaint} at ¶ 54.
\item[\textsuperscript{184}]\textit{Id.} at 1000-1002.  [US v. AZ]
\item[\textsuperscript{185}]\textit{AZ Response} at 17.
\item[\textsuperscript{186}]\textit{Id.} at 1002-1004.  [US v. AZ]
\item[\textsuperscript{187}]\textit{AZ Complaint} at ¶ 56.
\item[\textsuperscript{188}]\textit{AZ Complaint} at ¶ 56.
\item[\textsuperscript{189}]\textit{AZ response} at 17.
\item[\textsuperscript{190}]\textit{Id.} at 1000-1002.  [US v. AZ]
\item[\textsuperscript{191}]S.B. 1070 at § 13-3883.
\end{itemize}
\end{footnotesize}
aliens in a manner that conflicts with the purposes and practices of the federal immigration laws." Specifically, this provision of the law will “necessarily result in the arrest of aliens based on out-of-state crimes, even if the criminal and immigration consequences of the out-of-state crime have already been definitively resolved.” Arizona countered that it relied on a Department of Justice Office of Legal Counsel memorandum which “concluded that federal law does not ‘preclude[] state police from arresting aliens on the basis of civil deportability.’” Arizona also noted that its law enforcement officers are not authorized to make actual determinations about whether a person is removable. Siding with the plaintiffs, the district court enjoined Section 6 on the basis that it “impose[s] a ‘distinct, unusual and extraordinary’ burden on legal resident aliens that only the federal government has the authority to impose.”

Arizona appealed to the U.S. Court of Appeals for the Ninth Circuit, which, in a divided opinion, upheld the district court’s preliminary injunctions.

2. 9th Circuit

The Ninth Circuit appeal focused on the likelihood of the United States’ success on the merits. Judge Richard A. Paez and Judge John T. Noonan (concurring) held that the district court had not abused its discretion in finding that the United States was likely to prevail on the merits with respect to the enjoined provisions of S.B. 1070. Dissenting Judge Carlos Bea concurred in the judgment with respect to Sections 3 and 5(C) but disagreed that Sections 2 and 6 are preempted by federal law.

All three of the Ninth Circuit judges agreed that Section 3 of S.B. 1070 (failure to carry proof of lawful immigration status is a misdemeanor punishable by fine and/or jail) is preempted. Arizona renewed its argument on appeal that “[b]ecause section 3 mandates compliance with federal law, it cannot stand as an obstacle to congressional objectives” and is therefore not preempted. Arizona also challenged the district court’s Hines analysis, arguing that the law at issue in Hines burdened lawful as well as undocumented immigrants, whereas S.B. 1070 burdens only undocumented immigrants. Finding Hines on point, the Ninth Circuit agreed with the district court that “[n]othing in the text of the [Immigration and Nationality Act’s] registration

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192 AZ Complaint at ¶ 59.
193 Id. [AZ Compl. at ¶ 59]
194 AZ response.
195 US v. AZ at 1006.
196 US v. AZ 9th at 4811.
197 Id. [US v. AZ 9th at 4811]
198 US v. AZ 9th at 4859.
199 AZ Appellate Brief at 43.
200 Id. at 43. [AZ App. Br.]
201 See US v. AZ 9th at 4831 (internal references omitted):

S.B. 1070 Section 3 plainly stands in opposition to the Supreme Court’s direction: “where the 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.” Hines, 312 U.S. at 66-67. In Hines, the Court considered the preemptive effect of a precursor to the INA, but the Court’s language speaks in general terms about “a complete scheme of regulation,”—as to registration, documentation, and possession of proof thereof—which the INA certainly contains. Section 3’s state punishment for federal registration violations fits within the Supreme Court’s very broad description of proscribed state action in this area—which includes “complement[ing]” and “enforc[ing] additional or auxiliary regulations.” Id.
provisions indicates that Congress intended for states to participate in the enforcement or punishment of federal immigration registration rules. At 4831.

Arizona was also unsuccessful in its renewed argument that Section 5(C) (criminalizing working without authorization) is not preempted by federal law because IRCA does not expressly preempt state sanctions against unauthorized workers. Arizona challenged the district court’s reasoning that because Congress could have chosen to impose criminal sanctions on unauthorized workers but chose not to do so, state criminal sanctions necessarily conflict with federal law. The Ninth Circuit, again relying in part on Hines, disagreed:

In the context of unauthorized immigrant employment, Congress has deliberately crafted a very particular calibration of force which does not include the criminalization of work. By criminalizing work, S.B. 1070 Section 5(C) constitutes a substantial departure from the approach Congress has chosen to battle this particular problem. Therefore, Arizona’s assertion that this provision “furthers the strong federal policy” does not advance its argument against preemption. Sharing a goal with the United States does not permit Arizona to “pull[ ] levers of influence that the federal Act does not reach.” By pulling the lever of criminalizing work—which Congress specifically chose not to pull in the INA—Section 5(C) “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

Section 2(B) proved more contentious among the Ninth Circuit judges. Arizona reiterated three principal arguments with respect to Section 2(B)’s requirement that law enforcement officials determine the immigration status of any person who is stopped, detained or arrested: (1) that “[e]nforcing section 2(B) will not impose an unconstitutional burden on lawfully-present aliens”; (2) it was Congress’s intent for state and local officials to have the ability to inquire about an individual’s immigration status; and (3) that the proper interpretation of Section 2(B) only requires a determination of immigration status where there is reasonable suspicion to believe the person is undocumented. The Ninth Circuit majority found that Arizona’s argument that the federal government anticipates and encourages states to cooperate in the enforcement of immigration law to be misstated. The Ninth Circuit found that federal law encourages such cooperation only when it is “under the Attorney General’s close supervision.” The dissent argued that the majority erred in interpreting the provision of the

202 US v. AZ 9th at 4831.
203 AZ App. Br. at 48.
204 Id. at 50. [AZ App. Br.]
205 US v. AZ 9th at 4839 (internal citations omitted). Accord H.R. REP. 99-682(I) P.L. 99–603, IMMIGRATION REFORM AND CONTROL ACT OF 1986 HOUSE REPORT NO. 99–682(I) at 5649, 5650: [The Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens. While there is no doubt that many who enter illegally do so for the best of motives—to seek a better life for themselves and their families—immigration must proceed in a legal, orderly and regulated fashion.

207 Id. at 33–39. [AZ App. Br.]
208 Id. at 39–43. [AZ App. Br.]
209 Id. at 4819 [US v. AZ 9th]. The concurrence also noted that the intent of the Section 2(B) is not for information-gathering purposes only, but to comply with the stated “attrition through enforcement” goal of S.B. 1070: Section 2 might, in isolation from Section 1, be read as requiring information only. Such a reading would ignore the intent established in Section 1, to secure attrition through enforcement. As the United States
Immigration and Nationality Act “which provides the precise conditions under which the Attorney General may enter into written agreements to ‘deputize’ officers, as the exclusive authority which Congress intended state officials to have in the field of immigration enforcement.”

The majority and dissent also disagreed over the impact of Section 2(B). The majority included in its preemption analysis its belief that Section 2(B) interferes with the federal government’s prerogative to conduct foreign relations and opens the door for each state to have its own immigration statute. The dissent argued that even if Section 2(B) has some impact on foreign relations, it does not “conflict[] with federally established foreign relations goals.”

The dissent interpreted the statute’s requirement that federal immigration authorities respond to all immigration status inquiries as evidence of Congress’s desire to have “all 50 states enacting laws for inquiring into the immigration status of suspected illegal aliens.”

Section 6, which authorizes law enforcement officers to make warrantless arrests if the officer believes that the suspect has committed a deportable offense, was also a point of contention between the majority and dissent. The majority shared the United States’ belief that Section 6 exceeds the authority of state law enforcement officials to arrest individuals in violation of federal immigration law. Section 1252c of the federal immigration statute only permits state law enforcement officers to arrest previously deported aliens who have committed a felony, whereas the S.B. 1070 allows Arizona police to arrest suspects who have committed any removable offense, which includes misdemeanors. The dissent argued that 1252c does not constitute such a limitation because “state police officers have the inherent authority to enforce the civil provisions of federal immigration law.”

The dissent also argued that Section 1357(g)(10) of the federal immigration statute, by not requiring a formal agreement in order for a state to cooperate with the federal government in enforcing immigration law, allows for the warrantless arrest power conferred by S.B. 1070 Section 6.

observes, Arizona already had the capability of obtaining information on immigrants by consulting the federal database maintained by the federal government. Section 2 of the statute provides for more — for the detention of immigrants to achieve the purpose of the statute. Section 2 is not intended as a means of acquiring information. It is intended to work with the other provisions of the act to achieve enforcement.

Id. at 4851. [US v. AZ 9th]

Id. at 4865 (J. Bea, dissenting). [US v. AZ 9th]

Id. at 4825-4828. [US v. AZ 9th]

Id. at 4828 [US v. AZ 9th]

Id. at 4877 (J. Bea, dissenting) (emphasis in original). Although concurring with the preemption analysis with respect to Sections 3 and 5(C), Judge Bea again challenged that portion of the majority’s analysis that raised foreign policy concerns, arguing that “a foreign nation may not cause a state law to be preempted simply by complaining about the law’s effect on foreign relations generally.” Id. at 4880. [US v AZ 9th]

Id. at 4878-4879 (J. Bea, dissenting). [US v AZ 9th]

See 8 USC § 1252c(a):

[T]o the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who –

(1) is an alien illegally present in the United States; and

(2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction,

but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody.

See 8 USC § 1357(g)(10):
Arizona filed a petition for writ of certiorari to the Supreme Court on August 10, 2011. In May 2011, the U.S. Supreme Court reviewed and upheld the predecessor to S.B. 1070, the Legal Arizona Workers Act, and shortly thereafter remanded *Lozano v. City of Hazleton* to the Third Circuit. The LAWA decision indicates that five of the Supreme Court justices may be sympathetic to S.B. 1070 and other state and local attempts to regulate immigration, but only if the regulations fall within certain narrow parameters.

C. The *Chamber of Commerce of the United States v. Whiting* Challenge to LAWA

Chamber of Commerce of the United States v. Whiting is the Supreme Court culmination of a lawsuit that began with the Arizona district court and the Ninth Circuit Court of Appeals upholding the Legal Arizona Workers Act. Various entities doing business in Arizona sued to enjoin LAWA on the basis that two of the provisions were preempted by federal law: (1) the suspension or revocation of business licenses of state employers that knowingly or intentionally employ unauthorized immigrants and (2) the requirement that all Arizona employers use the federal E-Verify system to confirm that their employees are legally authorized workers. A divided Supreme Court voted 5-3 to uphold these provisions, finding that LAWA “fits within the confines of IRCA’s savings clause and does not conflict with federal immigration law” and thus is not preempted.

1. Suspension and Revocation of Business Licenses

The Whiting plaintiffs argued that LAWA’s provision ordering the suspension or revocation of the license of a business found to have knowingly employed an authorized worker is preempted by IRCA. The plaintiffs further argued that the IRCA provision exempting “licensing and similar laws” from preemption only applies in cases where the federal government had already found the employer to be in violation of federal law.

The Arizona District Court rejected the plaintiffs’ arguments in toto. The court found that the plain language of 8 U.S.C. § 1324a(h)(2) specifically exempts state licensing laws from

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219 *US v. AZ* 9th at 4885-4887 (J. Bea, dissenting).
220 *US v. AZ* petition for certiorari.
222 Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009).
223 Whiting complaint at ¶¶ 169-236. The plaintiffs also alleged violation of due process, interference with interstate commerce, violation of the separation of powers doctrine of the Arizona Constitution, and violation of the Fourth Amendment. See Whiting complaint at ¶¶ 124-149 (violation of due process), ¶¶ 150-168 (interference with interstate commerce), ¶¶ 237-251 (violation of the separation of powers doctrine of the Arizona Constitution), and ¶¶ 252-259 (violation of Fourth Amendment).
224 Whiting at 26.
225 Whiting Complaint at ¶ 172.
226 *Id.* at ¶ 173. [Whiting complaint]
preemption\textsuperscript{227} and that LAWA’s “employer sanctions provisions are employment regulations that are squarely within the police power of the State and that mirror those of IRCA in every significant respect.”\textsuperscript{228} With respect to the argument that the federal government must first find an employer to be in violation of the federal statute in order for the state to sanction the employer, the court stated that “Plaintiffs’ interpretation would reduce the express authorization of state ‘licensing and similar laws’ almost to nothing, in contravention of the plain language of the statute.”\textsuperscript{229} Notably, the court also made the following observation:

Although the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State’s economy generally, or the State’s ability to provide some important service. Despite the exclusive federal control of this Nation’s borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.\textsuperscript{230}

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit unanimously upheld the district court’s decision. The court held that IRCA does not expressly preempt LAWA because the licensing provision falls squarely within IRCA’s savings clause.\textsuperscript{231} The court reaffirmed the district court’s De Canas-based holding that “the power to regulate the employment of unauthorized aliens remains within the states’ historic police powers.”\textsuperscript{232}

A five-justice majority of the Supreme Court agreed with the lower courts that LAWA’s licensing provision is not expressly preempted.\textsuperscript{233} The majority dismissed Justice Breyer’s assertion, shared by the plaintiffs, that the licensing provision was too broad and that IRCA’s savings clause was not meant to apply to “ordinary corporate charters, certificates of partnership, and the like.”\textsuperscript{234} The majority also dismissed Justice Sotomayor’s support of the plaintiffs’ argument that a state may impose sanctions only after the federal government has determined that a violation has occurred.\textsuperscript{235} The majority concluded that “Arizona’s licensing law falls well within the confines of the authority Congress chose to leave to the States and is therefore not expressly preempted.”\textsuperscript{236}

2. Requirement That All Employers Use E-Verify System

The Whiting plaintiffs alleged that LAWA’s mandate that businesses use E-Verify to ascertain the employment authorization of their employees was impliedly preempted because it conflicts with federal law by “requir[ing] employers to use the federal E-Verify system, which is

\textsuperscript{227} 534 F. Supp. 2d at 1045.
\textsuperscript{228} id. at 1055 [534 F. Supp. 2d]
\textsuperscript{229} id. at 1047. [534 F. Supp. 2d]
\textsuperscript{230} id. at 1049. [534 F. Supp. 2d]
\textsuperscript{231} 558 F.3d at 864.
\textsuperscript{232} id. at 865 (citing De Canas at 360). [558 F.3d]
\textsuperscript{233} Chief Justice Roberts and three other justices also found that the licensing provision was not impliedly preempted. id. at 15-22.
\textsuperscript{234} Breyer dissent at 2.
\textsuperscript{235} Sotomayor dissent at 1.
\textsuperscript{236} Whiting at 15.
a voluntary program under federal law.” The Arizona district court found that the requirement to use E-Verify does not conflict with federal policy since federal policy actually “encourages the utmost use of E-Verify.”

The Ninth Circuit upheld the district court’s holding that “while Congress made participation in E–Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory.”

The Supreme Court upheld these findings. The Court quoted the following from the U.S. government’s reply memorandum in separate litigation, in which the government referenced LAWA as an example of permissible state action: “[T]he State of Arizona has required all public and private employers in that State to use E-Verify . . . . This is permissible because the State of Arizona is not the Secretary of Homeland Security.” Furthermore, the Court found that there was no implied preemption because LAWA’s consequences for failing to use E-Verify are identical to those in the federal statute: the loss of a rebuttable presumption that the employer complied with the law.

The Supreme Court’s decision in Whiting seems to pave the way for increased state enforcement of immigration law. If states may impose a requirement to use a program that the federal government has no power to mandate, may they impose other immigration-related laws so long as the language of the state law mirrors that of the federal law? What, if any, impact will the Whiting decision have on the pending cases against Hazleton’s immigration law and Arizona’s S.B. 1070?

V. Analysis: How will Whiting affect state and local initiatives to control immigration?

The Supreme Court’s decision in Whiting will likely impact only those state immigration laws that regulate employment and do so within the confines of existing federal law. Neither the Ninth Circuit nor the Supreme Court has endorsed the view of the district court in Arizona Contractors Ass’n, Inc. v. Candelaria that “States are without any power to deter the influx of persons entering the United States against federal law.” The opinions of the Ninth Circuit and the Supreme Court do not focus on a state’s right to deter immigration, but rather rely almost entirely on preemption analysis.

The Supreme Court relied on two principle concepts of preemption analysis in Whiting. First, the Court reaffirmed the DeCanas holding that states are recognized as having certain police powers that cannot be considered impliedly preempted by federal law. Second, the Court examined whether the state law, if outside the traditional police powers of the state, conflicts with either the plain language of the federal law or with the “federal scheme” advanced by the law.

237 Whiting Plaintiffs’ Brief at 17. The plaintiffs also alleged that the federal government does “not have the resources to successfully absorb, support, monitor and enforce the compliance of 139,500 new Arizona users of E-Verify.” Whiting Complaint at ¶ 219.
238 Id. at 1057. [534 F. Supp. 2d]
239 558 F.3d at 866-867.
240 Id. at 23 (internal quotation marks omitted).
241 Id. at 24. (Whiting). Chief Justice Roberts and Justices Alito, Kennedy and Scalia, relying on an amicus brief filed by the Department of Homeland Security asserting that “the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create,” also found that LAWA’s requirement that employers use E-Verify in no way obstructs achieving the aims of the federal program. Id. at 24-25.
242 Whiting at 3 (quoting DeCanas at 365).
243 Whiting at 9.
244 Whiting at 24.
This article proposes that, in order to survive post-Whiting judicial review, state immigration laws will have to satisfy two prongs. First, they must address an issue that is recognized to be within the state’s “historic police powers” and thus not impliedly preempted by federal law. Second, they must not otherwise be expressly preempted via plain language of the federal law or impliedly preempted by conflicting with a federal scheme. Under this rubric, the portion of Hazleton’s and Arizona’s laws that prohibit the employment of unauthorized immigrants will likely be found permissible. The portions of those laws designed solely to deter immigration and enforce immigration laws – matters not recognized as within a state’s historic police powers – will remain invalid.

A. Hazleton Ordinance

The Supreme Court has already signaled that the Hazleton Ordinance’s business licensing provision may be valid under federal preemption analysis. On June 6, 2011, the Court granted Hazleton’s petition for a writ of certiorari, vacated the judgment of the Third Circuit, and remanded the case for “further consideration in light of” Whiting. The Third Circuit should limit any reconsideration to the section on business licensing, affirm its findings on the other provisions, and ultimately conclude that Hazleton’s licensing provision falls short notwithstanding the Whiting decision.

1. Hazleton Licensing Provision

The Hazleton Ordinance’s business licensing provision renders it “unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City.” Failure to correct a violation in the specified period of time results in the denial or suspension of the rental license until the employer submits an affidavit via a legal representative swearing that the violation has been corrected, and provides the “name, address and other adequate identifying information of the illegal aliens who were the subject of the complaint.”

Applying the first prong of the two-part test derived from Whiting, Hazleton’s licensing provision is within the historic police powers of the state because it regulates employment. Moreover, the Whiting decision requires the Third Circuit to revisit the portion of its decision in which it found that the Hazleton licensing provision conflicts with and is thus preempted by federal law because it “contrave[n] Congressional objectives by altering the employment verification scheme created by” federal law.

However, the Third Circuit found other flaws with the licensing provision that may result in a finding that the law is unconstitutional notwithstanding the Whiting decision: (1) that the provision “coerces employers to verify the work authorization of independent contractors, even though Congress purposely excluded independent contractors from IRCA’s verification requirements”; and (2) that the provision “fail[s] to balance its sanctions with

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245 De Canas at 360.
246 SCOTUS Hazleton.
247 Id. at § 4(A). [Hazleton]
248 Id. at §§ 5(B)(6). [Hazleton]
249 Hazleton 3d Cir. at 116.
250 Id. at 123. [Hazleton 3d Cir.]
The failure to carve out an exception for independent contractors places the licensing provision outside of IRCA’s savings clause, thereby rendering it inconsistent with and preempted by federal law. Thus, the Hazleton Ordinance licensing provision may prove to have a fatal flaw that *Whiting* does not cure.

2. Hazleton Harboring Provision

The Hazleton Ordinance’s “harboring” provision penalizing those who “let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law” does not withstand the two-part *Whiting* test. Housing quality is a concern within the historic police powers of the state. However, the harboring provision is preempted because it does not regulate housing conditions, but rather who may live in Hazleton. Unlike employment, which Congress explicitly regulated in IRCA and for which Congress arguably sought state cooperation through E-Verify, no similar regulation or solicitation of state cooperation exists with respect to housing. This provision can therefore only be seen as an impermissible state attempt to deter unlawful immigration – a concern that remains squarely and exclusively within the domain of the federal government.

B. Arizona S.B. 1070

The Ninth Circuit’s decision striking down certain provisions of S.B. 1070 is likely to withstand Supreme Court review. Like the Hazleton Ordinance’s housing provision, most of the S.B. 1070 provisions that the Ninth Circuit enjoined fall outside the permissible scope of state action and are preempted by federal immigration law.

1. S.B. 1070 § 2(B): Determination of Immigration Status of Individuals Stopped, Detained or Arrested

S.B. 1070 § 2(B) states the following:

For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency…in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person…. Any person who is arrested shall have the person’s immigration status determined before the person is released. The person’s immigration status shall be verified with the federal government pursuant to 8 United States code section 1373(c).

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251 *Id.* at 125. [Hazleton 3d Cir.]
252 *Id.* at § 5(A)(1). [Hazleton]
253 See Hazleton 3d Cir. at 133 (finding that Hazleton “has attempted to usurp authority that the Constitution has placed beyond the vicissitudes of local governments”).
254 See Hazleton 3d Cir. at 133 (affirming that “[d]eciding which aliens may live in the United States has always been the prerogative of the federal government”).
255 S.B. 1070 at 2(B).
The Ninth Circuit enjoined both the requirement to determine immigration status of individuals stopped, detained or arrested and the requirement to determine immigration status before releasing the individual. Based on its decision in *Whiting*, the Supreme Court is likely to uphold the Ninth Circuit with respect to the former but overturn the Ninth Circuit with respect to the latter.

The first portion of Section 2(B) is, like Hazleton’s rental provision, an impermissible usurpation of federal authority. As the Third Circuit stated in the Hazleton litigation, “[d]eciding which aliens may live in the United States has always been the prerogative of the federal government.” Thus, the first portion of Section 2(B) does not meet the first prong of the *Whiting*-based test because it purports to authorize state and local officials to perform duties exclusively reserved to the federal government: investigating the immigration status of anyone with whom such officials may lawfully stop or detain. Federal immigration law does allow state officials to engage in the “investigation, apprehension, or detention” of undocumented immigrants, but only in conjunction with and under the supervision of the federal government. Federal law also stipulates that an official relationship is not required “to communicate with the Attorney General regarding the immigration status of any individual,” but the preceding provisions of the statute make it clear that Congress did not intend to deputize state officials to perform immigration functions absent an official relationship with federal immigration officials.

The second portion of Section 2(B) is distinguishable. This section applies when an arrest has already taken place pursuant to the state’s lawful police power. Thus, any request for immigration status information is related to the lawful exercise of state police power. It is not otherwise preempted because federal law specifically allows for states to share and request information pertaining to immigration status and requires the federal government to respond to state inquiries regarding immigration status. Like E-Verify, such sharing of information is not required, but there is a mechanism in place should states wish to share or request information. Thus, based on the Supreme Court’s reasoning in *Whiting*, this provision will likely be deemed permissible.

2. S.B. 1070 § 3: Failure to Carry Proof of Lawful Immigration Status

S.B. 1070 § 3, which makes failure to carry proof of alien registration a misdemeanor punishable by fine and/or jail, does not meet the *Whiting*-based test. Arizona may believe that this provision is permissible because, like its E-Verify provisions, it closely tracks the federal law making it a misdemeanor punishable by fine and/or jail to fail to carry proof of alien status. However, the federal law only makes it a misdemeanor punishable by fine and/or jail to fail to carry proof of alien status if the alien is stopped, detained, or arrested. Therefore, the federal law does not authorize the state to require proof of alien status before releasing the individual.

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256 Hazleton 3d Cir. at 133
257 See 8 USC § 1357(g)(1) (authorizing the federal government to allow a state or local law enforcement officer “who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States” to perform certain immigration functions); 8 USC § 1357(g)(2) (requiring federal training as a prerequisite to entering into an agreement to perform immigration functions); 8 USC § 1357(g)(3) (stipulating that state and local officials performing immigration functions “shall be subject to the direction and supervision of the Attorney General”).
258 8 USC § 1357(10)(A).
259 8 USC § 1357(g)(2) (requiring federal training as a prerequisite to entering into an agreement to perform immigration functions); 8 USC § 1357(g)(3) (stipulating that state and local officials performing immigration functions “shall be subject to the direction and supervision of the Attorney General”).
260 8 USC § 1373.
261 8 USC § 1373(c).
registration.\textsuperscript{262} However, unlike the E-Verify provisions, which pertain to employment, this provision, which pertains to immigration enforcement, is not within a state’s traditional police powers. As the United States noted in its complaint before the district court, immigration enforcement does “not fall within the state’s traditional police powers and remain[s] the exclusive province of the federal government.”\textsuperscript{263} Section 3 thus does not meet the first prong of the test.

Section 3 is also preempted:

\begin{quote}
[W]here the 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.\textsuperscript{264}
\end{quote}

Thus, absent an official agreement with federal immigration officials, pursuant to which federal immigration authorities are required to direct and supervise state and local officials performing immigration functions, state and local police may not usurp the power of federal officials to enforce the federal immigration provisions pertaining to alien registration and documentation.\textsuperscript{265}


S.B. 1070 § 5(C)’s criminalization of working without authorization does not meet the \textit{Whiting}-based test. Employment does fall within traditional state police powers, but imposing criminal sanctions on noncitizens working without federal employment authorization is both conflict and field preempted.

The savings clause in IRCA, which allows states to use licensing laws to enforce the prohibition on employing unauthorized immigrants, does not extend to the sanctioning of employees. There is no express preemption as there is with respect to sanctioning employers, but preemption can be implied. First, as the district court noted in its decision to enjoin Section 5, field preemption exists because “Congress has comprehensively regulated in the field of employment of unauthorized aliens.”\textsuperscript{266} Second, conflict preemption exists because the criminal sanctioning of employees conflicts with the legislative history of IRCA and Congress’s decision to penalize employers rather than employees (except for some actions by employees, such as using fraudulent documents).\textsuperscript{267} As the Ninth Circuit held in a 1990 case and reiterated in U.S. v. Arizona:

\begin{quote}
[w]hile Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the \textit{employee}, it ultimately rejected all such proposals . . . Congress
\end{quote}

\textsuperscript{262} 8 USC § 1304(e).
\textsuperscript{263} US v AZ complaint at ¶ 32.
\textsuperscript{264} US v AZ 9th at 4831 (quoting \textit{Hines}, 312 U.S. at 66-67).
\textsuperscript{265} See 8 USC § 1306(a) (start here) 8 USC § 1304(e) (requiring that “[e]very alien, eighteen years of age and over, shall at all times carry with him [sic] and have in his [sic] personal possession any certificate of alien registration”).
\textsuperscript{266} US v AZ District at 1002.
\textsuperscript{267} US v. AZ District at 1001. See also, US v AZ 9th at 4834 (“We have previously reviewed IRCA’s legislative history and found
quite clearly was willing to deter illegal immigration by making jobs less available to illegal aliens but not by incarcerating or fining aliens who succeeded in obtaining work.\textsuperscript{268}

Thus, Section 5’s criminalization of working without authorization is preempted as a field of exclusive federal concern and because it conflicts with Congress’s intent to impose sanctions on employers but not employees.\textsuperscript{269}

4. S.B. 1070 § 6: Warrantless Arrest for Commission of Removable Offense

Finally, S.B. 1070 § 6, which permits law enforcement officers to make a warrantless arrest if “the person to be arrested has committed any public offense that makes the person removable from the United States,”\textsuperscript{270} does not meet the requirements of the \textit{Whiting}-based test. Determining whether a crime is a removable offense is a complex process over which the federal government has exclusive control. There is no basis for a claim that this uniquely immigration function is within traditional state police powers.

The dissenting Ninth Circuit judge believes that Section 6 is not preempted but rather encouraged by federal law. According to the dissent, 8 U.S.C. § 1357(g)(10) “envisions state cooperation in the enforcement of federal immigration law outside the context of a specific agreement with the Attorney General by ‘identification, apprehension, detention, or removal’ \textit{in cooperation with federal immigration authorities}.” It is the latter phrase that renders the dissent’s reasoning incorrect.

As discussed in section V.B.1, \textit{supra}, section 1357(g) cannot be clearer that state forays into immigration enforcement may not occur absent close federal oversight. First, sections 1357(a) through 1357(f) all apply exclusively to federal immigration authorities. Section 1357(g) sets out the procedure and guidelines for when state officials may perform immigration officer functions. The statute requires that in order for a state officer to act as an immigration officer, a written agreement between the Attorney General and the state or locality must exist. State and local officials acting pursuant to such an agreement must be “determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.”\textsuperscript{271} The statute requires that state and local officials acting pursuant to the agreement receive “adequate training regarding the enforcement of relevant Federal immigration laws.”\textsuperscript{272} The statute also stipulates that state and local officials performing immigration functions “shall be subject to the direction and supervision of the Attorney General.”\textsuperscript{273}

Section 1357(g)(10) merely allows for such federally supervised cooperation in the absence of a formal agreement. The preceding components of Section 1357 do not allow for the dissent’s interpretation, which amounts to Congress giving carte blanche to states to usurp

\textsuperscript{268} US v AZ 9th at 4834 (quoting Nat’l Ctr. for Immigrants’ Rights, Inc. v. I.N.S., 913 F.2d 1350 (9th Cir. 1990), rev’d on other grounds, 502 U.S. 183 (1991)).

\textsuperscript{269} US v AZ 9th at 4835.

\textsuperscript{270} Ariz. Stat. 13-3883(A)(5)

\textsuperscript{271} 8 USC § 1357(g)(1).

\textsuperscript{272} 8 USC § 1357(g)(2).

\textsuperscript{273} 8 USC § 1357(g)(3).
federal immigration authority. It is unlikely that Congress would have sought to ensure federal training and federal supervision if it intended such a result.

S.B. 1070 § 6 therefore fails to meet the first prong of the Whiting-based test. It is outside the scope of traditional state police powers. Moreover, it does not require a 1357(g) agreement to be in place and therefore conflicts with federal law.

VI. Conclusion

The debate over whether and how to curb illegal immigration and how to treat undocumented immigrants is fraught with concerns ranging from the emotional to the purely political. The Supreme Court, however, seems to have made a decision in Whiting based entirely on the relatively unemotional doctrine of federal preemption. The statutory provisions at issue in Whiting were very narrow in that they dealt only with the employment of undocumented immigrants in a way that was arguably consistent with federal law. The Hazleton Ordinance and S.B. 1070 are distinguishable in that they go far beyond the sanctioning of employers and focus on detecting, punishing and deterring undocumented immigrants.

If the Supreme Court grants Arizona’s petition for certiorari and ultimately decides in favor of Arizona, it will have to depart from preemption doctrine and adopt a policy-based argument similar to the one of the district judge who advocated in favor of a state’s right to encroach upon federal territory when the federal government’s policy or lack thereof “might impair the State’s economy generally, or the State’s ability to provide some important service.” Such an approach would open the door to a wide variety of situations in which states and municipalities might usurp the authority of the federal government.

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274 See 534 F.Supp. 2d at 1049, supra note 230.