

1-1-2008

# Preemption of State and Local Enactments in View of the IRCA Preemption Savings Clause

Vito Ciaravino

*Michigan State University College of Law*

Follow this and additional works at: <http://digitalcommons.law.msu.edu/king>

---

## Recommended Citation

Vito Ciaravino, *Preemption of State and Local Enactments in View of the IRCA Preemption Savings Clause* (2008),  
Available at: <http://digitalcommons.law.msu.edu/king/110>

This Article is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Student Scholarship by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact [domannbr@law.msu.edu](mailto:domannbr@law.msu.edu).

PREEMPTION OF STATE AND LOCAL ENACTMENTS  
IN VIEW OF THE IRCA PREEMPTION SAVINGS CLAUSE

by

Vito Ciaravino

Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
Michigan State University College of Law  
Under the direction of  
Professor Susan H. Bitensky  
Spring, 2008

# PREEMPTION OF STATE AND LOCAL ENACTMENTS IN VIEW OF THE IRCA PREEMPTION SAVINGS CLAUSE

## INTRODUCTION

In recent years, state and local governments have, in increasing measure, enacted legislation that directly or indirectly affects aliens working or living in the United States. In 2007, 1562 bills introduced in state legislatures directly or indirectly regulating aliens, representing a three-fold increase over the prior year.<sup>1</sup> Of these proposals, 240 have become law, and a further 12 bills passed but were defeated by a governor's veto.<sup>2</sup> Added to this volume of state activity are an increasing number of local enactments.<sup>3</sup>

Those recent state statutes that have touched on employment have in large part had a harmful effect on unauthorized alien employees and their employers. A total of twelve state enactments in 2007 either prohibited employers from employing aliens unauthorized for work under federal standards, limited tax right-offs where illegal aliens are employed, eliminated the award of unemployment compensation to illegal aliens, or conditioned the award of public subsidies on an employee's lawful immigrant status.<sup>4</sup>

Most prominent among recently enacted state or local laws are the Legal Arizona Workers Act<sup>5</sup> ('Arizona Act') and the Illegal Immigration Relief Act Ordinance<sup>6</sup> ('Hazleton Ordinance'), the latter being promulgated by the municipality of Hazleton in northeastern Pennsylvania. These enactments

have several similarities: both were promulgated pursuant to a savings clause in the federal Immigration Reform and Control Act of 1986,<sup>7</sup> and both enactments purport to revoke the business license of an employer who hires an immigrant worker with knowledge that the immigrant is not authorized for employment in the United States.<sup>8</sup> Additionally, both the Arizona Act and the Hazleton Ordinance were challenged in federal court as an unconstitutional regulation of immigration and preempted by federal law.<sup>9</sup>

Specifically, in *Arizona Contractors Ass'n v. Candelaria*, private employers sued to enjoin the enforcement of the Arizona Act, arguing the Arizona Act is both an impermissible regulation of immigration and it is preempted by the Immigration Reform and Control Act (IRCA).<sup>10</sup> Similarly, in *Lozano v. City of Hazleton*, private employers sued to enjoin enforcement of the Hazleton Ordinance, arguing that it too was an impermissible regulation of immigration and preempted by federal law (again, the IRCA). Despite the similarities between the Arizona Act and the Hazleton Ordinance, however, the presiding federal district judges in *Arizona Contractors* and *Lozano* arrived at differing conclusions as to the preemptive scope of the IRCA. It is the purpose of this article to survey the reasoning in *Arizona Contractors* and *Lozano* for congruence with Supreme Court preemption jurisprudence.<sup>11</sup>

In Part I of this paper, I will describe the development of the Supreme Court's modern preemption jurisprudence. In Part II, I will describe the Supreme Court's preemption analysis of state laws affecting immigration in the seminal 1976 decision *DeCanas v. Bica*.<sup>12</sup> Before proceeding with a discussion of the recent decisions in *Arizona Contractors* and *Lozano*, in Part III, I will briefly survey the relevant provisions of the federal IRCA. In Part IV examines the provisions

of the Arizona Act and Hazleton Ordinance, followed by a discussion of *Arizona Contractors and Lozano* in Part V.<sup>13</sup>

## I. FEDERAL SUPREMACY AND THE PREEMPTION OF STATE LAW

It is axiomatic in our constitutional framework that a state statute yields to its federal counterpart when the state law interferes with the “accomplishment and execution of the full purposes and objectives of an Act of Congress.”<sup>14</sup> The subordination of state and local law to a statute lawfully enacted by Congress is a direct application of the Supremacy Clause of the federal Constitution.<sup>15</sup> Worded somewhat differently, the *preemption* of state law reflects the states’ relinquishment of authority over those matters ceded to the Congress in Article I of the Constitution.

Beginning in the 1930’s, the Supreme Court dealt with preemption challenges to state laws with a restrained hand, often forgiving minor conflicts between state and federal law in order to accommodate an arguably important state interest.<sup>16</sup> For example, in *Mintz v. Baldwin*, the Supreme Court upheld a New York law which limited the importation of out-of-state beef based on fears of disease, even where the federal Cattle Contagious Disease Act permitted the interstate transport of the very same livestock.<sup>17</sup> In *Mintz*, the Court noted “the purpose of Congress to supersede or exclude state action against the ravages of [] disease is not lightly to be inferred. The intention to do so must definitely and clearly appear.”<sup>18</sup> According to one commentator, *Mintz* “marked a renewed recognition of state power,” recognizing a “presumption against preemption” in areas of “intimate concern” to states.<sup>19</sup> Others have opined that *Mintz* was part of an evolving concept of preemption

to avoid the preemption of vast areas of state regulation in the face of expansive Commerce Clause legislation.<sup>20</sup>

Additionally, in *H.P. Welch Co. v. New Hampshire*, a New Hampshire law was challenged as being preempted by the federal Motor Carrier Act.<sup>21</sup> The Supreme Court upheld the New Hampshire law, which limited the driving day of a commercial motorist to no more than 12 hours, despite the federal Motor Carrier Act delegating such regulatory authority to the Interstate Commerce Commission.<sup>22</sup> The Court in *H.P. Welch* articulated a preference for a clearly manifested preemptive reach, noting:

In construing federal statutes . . . it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where it may be done, unless, and except so far as, its purpose to do so is clearly manifested.<sup>23</sup>

In *Hines v. Davidowitz*, however, the Court signaled a departure from a prevailing sense of accommodation toward state interests.<sup>24</sup> The issue in *Hines* was whether a state's Alien Registration Act was preempted by a subsequent federal act of the same name.<sup>25</sup> The Court declined to recognize the importance of the state interest, and instead it adopted a presumption of preemption because "the regulation of aliens" belongs to a "class of laws which concern the exterior relation of this whole nation with other nations and governments."<sup>26</sup>

*Hines* also opened the door to a series of decisions embodying a judicial preference in favor of federal control, particularly in cases dealing with interstate commerce, labor relations, banking, and aviation.<sup>27</sup> The gradual end of a "presumption against preemption"<sup>28</sup> in *Mintz* and *H.P. Welch* was

forcefully noted by Chief Justice Warren in *Free v. Bland*, stating that “the relative importance to the State of its own law is not material when there is a conflict with federal law.”<sup>29</sup>

Commentators have noted that the development of preemption case law since *Hines* has varied depending on the composition of the Court. For example, the Warren Court embodied a strong preference for federal regulation, the Burger Court was increasingly tolerant of complementary state regulation, and the Rehnquist court had an inconsistent approach toward preemption with a distinctly pro-business stance.<sup>30</sup> Throughout its compositional evolution since *Hines*, however, the Court has maintained a subject matter presumption *against* preemption where “federal law is said to bar state action in fields of traditional state regulation.”<sup>31</sup> At the opposite end, “an ‘assumption’ of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.”<sup>32</sup>

Additionally, over time the Court has structured preemption into two distinct categories: express preemption and implied preemption. Express preemption is said to occur where there is “language in the federal statute that reveals an explicit congressional intent to pre-empt state law.”<sup>33</sup> In the absence of express preemption, the question of preemption requires a consideration of whether Congress has somehow impliedly precluded the state or local enactment in question. Implied preemption may be achieved where (i) a federal statute creates a scheme of regulation “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it;”<sup>34</sup> (ii) compliance with both the state and federal statute is a physical impossibility;<sup>35</sup> or (iii) where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>36</sup>

In view of the Supreme Court's preemption jurisprudence, the application of preemption principles to the Arizona Act or Hazleton Ordinance, as current examples, depend on how the Court characterizes the underlying state enactment.<sup>37</sup> Additionally, the application of preemption principles to the Arizona Act or Hazleton Ordinance also requires an understanding of the federal Immigration Reform and Control Act.

For a more detailed analysis of preemption principles and immigration, we turn to a discussion of the 1976 decision of the Supreme Court in *DeCanas v. Bica*.

## II. PREEMPTION PRINCIPLES AND STATE OR LOCAL 'IMMIGRATION' LAW

The Burger Court in *DeCanas* addressed for the first time the extent to which a state's labor regulations are constitutional<sup>38</sup> though they in some way affect immigrants.<sup>39</sup> At issue was a California labor law that made it unlawful to "knowingly employ an alien who is not entitled to lawful residence in the United States."<sup>40</sup> An employer found to have violated this statute could be subject to criminal sanctions, and the statute also created a civil cause of action against the employer.<sup>41</sup>

The plaintiffs in *DeCanas* were lawful migrant farmworkers who brought a private action against their employer, as authorized under the California law in question.<sup>42</sup> The farmworkers alleged they were denied "continued employment due to a surplus in labor resulting from the defendants' knowing employment of illegal aliens."<sup>43</sup> The California trial court dismissed the complaint, holding the California law unconstitutional as an impermissible regulation of immigration.<sup>44</sup> The California Court of Appeal affirmed.<sup>45</sup>



Relying on *Hines*, the California Court of Appeal held that the California law was an “attempt to regulate the conditions for admission of foreign nationals,”<sup>46</sup> and therefore unconstitutional because “in the area of immigration and naturalization, congressional power is exclusive.”<sup>47</sup> The Court of Appeal additionally indicated that state regulation over this subject matter was preempted when “Congress ‘as an incident of national sovereignty’ enacted the [Immigration and Nationality Act of 1952] as a comprehensive scheme covering all aspects of immigration and naturalization, including the employment of aliens.”<sup>48</sup>

However, the U.S. Supreme Court rejected this holding and reversed the decision of the California Court of Appeal.<sup>49</sup> Speaking for a unanimous court, Justice Brennan began with the proposition that “the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration” and thus *per se* unconstitutional.<sup>50</sup> He characterized the California law as having a “purely speculative and indirect impact on immigration.”<sup>51</sup> Justice Brennan also emphasized that a state regulation of aliens was not *ipso facto* a regulation of immigration:

[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.<sup>52</sup>

After holding that the California statute was not a regulation of immigration, the focus of the court’s opinion in *DeCanas* turned to one of preemption in light of the federal Immigration and Nationality Act.

Justice Brennan articulated two means by which state and local enactments affecting immigrants would be preempted by federal law.<sup>53</sup> First, a state or local law may be preempted by a demonstration that it was the “clear and manifest purpose of Congress” to effect a complete ouster of state power in a given field.<sup>54</sup> In order to achieve this form of preemption – preemption by occupation of the field – Brennan suggested a need for references in the statutory language of the federal law or its legislative history for some indication of Congressional intent to “preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.”<sup>55</sup>

Second, Justice Brennan explained that a state or local enactment “touching on aliens” would be preempted where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” or stands as an actual conflict to federal law – both forms of implied conflict preemption.<sup>56</sup> Without deciding whether the California law was in conflict with the INA, the court suggested that the California law would conflict if it penalized the employment of aliens who were otherwise permitted to work under federal standards.<sup>57</sup>

In view of *DeCanas*, which affirmed the application of the Supreme Court’s preemption jurisprudence in the realm of immigration law,<sup>58</sup> a state or local enactment touching on aliens is unconstitutional if any of the following are true: (i) the state or local enactment is a regulation of immigration, that is, a limitation on who may enter the United States and the terms upon which an alien may remain;<sup>59</sup> (ii) Congress has expressly preempted the state or local enactment at issue;<sup>60</sup> (iii) Congress intended a complete ouster of state and local regulation in a given field;<sup>61</sup> or (iv)

where it is either impossible to comply with the federal statute and the local enactment or where the local enactment impedes the achievement of some federal objective.<sup>62</sup>

The principles in *DeCanas* survive today in their current form,<sup>63</sup> but they have never been applied by the Supreme Court to invalidate an immigrant-affecting state or local enactment under a theory of federal preemption.<sup>64</sup> Since 1976, however, Congress has extensively regulated the employment relationship in the immigration context with the passage of the Immigrant Reform and Control Act of 1986.<sup>65</sup> Before we turn to a *DeCanas* preemption analysis of the recent Arizona and Hazleton enactments, and because the question of preemption is necessarily a question of statutory interpretation, we briefly discuss the relevant provisions and legislative history of the Immigration Reform and Control Act.<sup>66</sup>

### III. IMMIGRATION REFORM AND CONTROL ACT

#### *A. Employment Verification System*

Prior to 1986, the Supreme Court in *De Canas* had ruled that the federal Immigration and Nationality Act did not preempt state or local measures that impose civil or even criminal sanctions on employers of undocumented aliens.<sup>67</sup> At that time, at least twelve states had sanctions in place for employers who knowingly employed aliens contrary to federal standards.<sup>68</sup> In 1986, however, as part of a broader package of immigration reform, Congress created a system of *federal* sanctions for employers of unauthorized aliens in the Immigration Reform and Control Act (IRCA).<sup>69</sup>

The IRCA mandates a federal system whereby employers are required to verify an employee's authorization to work, or face the risk of civil and criminal penalties.<sup>70</sup> Specifically, the IRCA

stipulates that it is unlawful for an employer “to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien [] with respect to such employment.”<sup>71</sup> An “unauthorized alien” is defined by the IRCA as an alien not “lawfully admitted for permanent residence” or “authorized to be so employed by [the IRCA] or by the Attorney General.”<sup>72</sup> Congress required every covered employer to verify each prospective employee is not an “unauthorized alien” by examining documents tendered by the prospective employee.<sup>73</sup> The employer is permitted to accept a U.S. passport or a resident alien card as proof of identification and employment eligibility.<sup>74</sup> In the absence of these documents, an employer may instead accept a “social security account number card” in conjunction with a “driver’s license or similar document issued for purposes of identification by a State.”<sup>75</sup> The employer is not required to verify the authenticity of documents tendered, but must merely make a good faith effort at compliance.<sup>76</sup> The employer is required to retain a copy of these documents for a period of time, to be made available upon request by officials of the Department of Labor or the U.S. Citizenship and Immigration Service .<sup>77</sup>

Employers who find themselves in violation of these provisions are subject to civil penalties of as much as \$2000 per violation.<sup>78</sup> Additionally, an employer found to have engaged in a pattern of violations may be subject to a criminal fine of up to \$3000 and imprisonment for up to six months for each violation.<sup>79</sup> An administrative law judge has authority to adjudicate whether an employer knowingly employed an ‘unauthorized’ alien, and any such decision is subject to judicial review.<sup>80</sup>

The Supreme Court has on repeated occasions acknowledged that the IRCA is a “comprehensive [federal] scheme prohibiting the employment of illegal aliens in the United States”

that resulted in a “legal landscape now significantly changed.”<sup>81</sup> Adding to this changed landscape, Congress in 1990 amended the IRCA to provide for sanctions to be imposed directly on undocumented workers who seek employment in the United States.<sup>82</sup> Currently,

it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA’s enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contravention of its IRCA obligations.<sup>83</sup>

### *B. Express Preemption and Savings Clause: Legislative History*

A key component of the Immigration Reform and Control Act is its express preemption and savings clause, providing:

The provisions of [the IRCA] preempt any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.<sup>84</sup>

In 1985, the Senate Judiciary Committee included this savings clause in a bill that would later be enacted as the IRCA.<sup>85</sup> The Senate bill left committee without any reference to the savings clause in the committee report, however.<sup>86</sup> The Senate version would pass on September 19, 1985.<sup>87</sup>

The House of Representatives later adopted the Senate bill, and included four House Committee Reports, only one of which commented on the preemption and savings clause.<sup>88</sup> That report (“House Report”), from the House Judiciary Committee, stated:

The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and / or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are

not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or “fitness to do business laws,” such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.<sup>89</sup>

The joint conference committee report, however, was silent as to preemption.<sup>90</sup>

### *C. E-Verify Pilot Program*

Despite the comprehensive nature of the IRCA verification system, it is one that has been thoroughly defeated through identity theft and fraud.<sup>91</sup> In anticipation of a need for improvement of the IRCA verification system, Congress in 1986 authorized the evaluation and improvement of employment verification systems:

To the extent that the [employment eligibility verification] system . . . is found to not be a secure system to determine eligibility in the United States, the President shall . . . implement such changes . . . as may be necessary to establish a secure system to determine employment eligibility in the United States.<sup>92</sup>

No meaningful improvements were instituted to the verification system, however, until the 104th Congress in 1996 required the Attorney General to conduct three pilot programs to improve the employment verification system. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) specified that “any person or entity that conducts any hiring (or recruitment or referral) in a State in which a [federal] pilot program is operating *may elect* to participate in that pilot program.”<sup>93</sup> At the same time, the Attorney General was prohibited from requiring any employer from participating in the federal pilot program.<sup>94</sup>

Pursuant to IIRIRA, the U.S. Attorney General in 1997 instituted the “Basic Pilot/Employment Eligibility Verification Program,” along with two other pilot programs aimed at improving employment verification.<sup>95</sup> The Basic Pilot Program is a voluntary employment eligibility program administered by the U.S. Citizenship and Immigration Service (USCIS) in partnership with the Social Security Administration (SSA).<sup>96</sup> The Basic Pilot Program, more commonly known as E-Verify,<sup>97</sup> has grown into an internet-based system that verifies the employment eligibility of newly hired employees based on the social security number provided to the employer:

When the [E-Verify] system provides a tentative nonconfirmation, the employee has an opportunity to contact SSA or USCIS, using instructions provided by the employer, to clear up his records. If the employee is successful, the E-Verify databases are updated. If the employee fails to contest the nonconfirmation or is unsuccessful in doing so, E-Verify issues a final nonconfirmation to the employer, who must then terminate the employee or face a presumption that it violated the IRCA.<sup>98</sup>

Several state legislatures have mandated the use of E-Verify to ensure newly hired state employees or contractors are authorized for employment under federal standards.<sup>99</sup> For example, Colorado, Arkansas and West Virginia enacted legislation in 2007 requiring state employers to verify the employment eligibility of contractors in connection with public contracts for services.<sup>100</sup> Arizona requires both state and private employers to verify employee eligibility using E-Verify.<sup>101</sup> As of this writing, the South Carolina legislature is considering legislation requiring both state and private employers to verify employment status using E-Verify.<sup>102</sup> Additionally, at least one municipality – Halzeton – has required the use of E-Verify to ensure newly hired employees are authorized for employment.<sup>103</sup>

#### IV. THE LEGAL ARIZONA WORKERS ACT AND THE HAZLETON ILLEGAL IMMIGRATION REFORM ACT ORDINANCE

As was mentioned earlier, the Arizona legislature enacted the Legal Arizona Workers Act within the permissive grant of authority contained in the IRCA's preemption savings clause.<sup>104</sup> The Act provides that "an employer shall not intentionally employ an unauthorized alien or knowingly employ an unauthorized alien."<sup>105</sup> It further commands that "every employer, after hiring an employee, shall verify the employment eligibility of the employee through the basic pilot program."<sup>106</sup>

The Act imposes no fines or criminal sanctions for violating these provisions. Rather, an employer found by a state superior court to have knowingly employed an unauthorized alien, contrary to federal guidelines, is subject to a three year probationary period.<sup>107</sup> Any further violations within that probationary period can result in the revocation of "all licenses that are held by the employer and that are necessary to operate the employer's business at the employer's business location where the unauthorized alien performed work."<sup>108</sup> This is limited, of course, to those licenses granted by the State of Arizona or its political subdivisions.<sup>109</sup>

The use of the E-Verify system operates as an affirmative defense to an employer found to have hired an unauthorized worker.<sup>110</sup> Additionally, in an effort to curtail false and harassing reports, the Act makes it a misdemeanor to "knowingly file[] a false and frivolous complaint."<sup>111</sup>

The Hazleton Ordinance, by comparison, is more ambitious, in that it also includes a prohibition on renting housing to illegal aliens.<sup>112</sup> Limiting ourselves to the portion pertaining to employment, the Ordinance states as follows:



It is 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 in part within the City.<sup>113</sup>

The Ordinance defines “unlawful worker” as “a person who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law.”<sup>114</sup> A violation of the employment provisions of the Hazleton Ordinance can result in the temporary suspension of a business permit previously granted to the employer.<sup>115</sup> Employers are exempt from the penalties of the Ordinance if, prior to the date of the violation, the employer “verified the work authorization of the alleged unlawful worker(s) using the Basic Pilot Program.”<sup>116</sup>

The Ordinance also requires “all agencies of the City to participate in the Basic Pilot Program.”<sup>117</sup> Additionally, the Ordinance stipulates that city contracts may not be awarded to employers who fail to “provide documentation confirming its enrollment and participation in the Basic Pilot Program.”<sup>118</sup>

#### V. COMPARATIVE ANALYSIS: *ARIZONA CONTRACTORS* AND *LOZANO*

In response to the July 2, 2007 enactment of the Legal Arizona Workers Act, several non-profit organizations brought a legal challenge to the validity of the Arizona enactment in *Arizona Contractors Ass’n, Inc. v. Candelaria*.<sup>119</sup> Eight months earlier, employers and lawful immigrants in Hazleton, Pennsylvania filed suit to enjoin the enforcement of the Hazleton Ordinance in *Lozano v. City of Hazleton*.<sup>120</sup> Both enactments were challenged as an unconstitutional regulation of

immigration and, alternatively, preempted by the IRCA. Each allegation, and each court's conclusion, is discussed herein.

#### *A. Unconstitutional Regulation of Immigration*

The Supreme Court in *DeCanas* reiterated the axiomatic point that the “power to regulate immigration is unquestionably exclusively a federal power.”<sup>121</sup> However, as explained in *DeCanas*, not every state or local enactment “which in any way deals with aliens is a regulation of immigration.”<sup>122</sup> The Burger Court in *DeCanas* narrowly interpreted “regulation of immigration” to mean those regulations that determine “who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”<sup>123</sup>

In *Arizona Contractors* and *Lozano*, both district courts concluded that the state and local enactments in question were not unconstitutional regulations of immigration.<sup>124</sup> The district court in *Arizona Contractors* explained that the Arizona statute is comparable to the California statute in *DeCanas*, in that both the Arizona statute and the California statute in *DeCanas* “adopt federal standards in imposing . . . sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country.”<sup>125</sup> Specifically, the Arizona legislature adopted the federal government's classification of aliens, borrowing from the definition of “unauthorized alien” in the IRCA.<sup>126</sup> Additionally, the district court in *Arizona Contractors* observed that the Arizona statute “regulate[s] only licensing and employment,”<sup>127</sup> and not “who should or should not be admitted into the country, [or] the conditions under which a legal entrant may remain.”<sup>128</sup>

Similarly, the *Lozano* court concluded that the Hazleton Ordinance was not an unconstitutional regulation of immigration.<sup>129</sup> Succinctly stating its conclusion in a footnote, the *Lozano* court concluded that the Hazleton Ordinance “do[es] not regulate who can or cannot be admitted to the country or the conditions under which a legal entrant may remain.”<sup>130</sup> This signifies the only point of agreement between the decisions in *Arizona Contractors* and *Lozano*.

### *B. Express Preemption Under the IRCA*

The provisions of this section [8 U.S.C. § 1324a] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.<sup>131</sup>

The plaintiffs in *Arizona Contractors* next challenged the Arizona Act as being expressly preempted by the IRCA’s preemption clause.<sup>132</sup> Plaintiffs’ counsel argued for a narrow interpretation of the savings clause language – “licensing and similar laws” – thereby excluding the Arizona Act from the savings clause.<sup>133</sup> Similarly, the plaintiffs in *Lozano* challenged the Hazleton Ordinance as being expressly preempted by the IRCA.<sup>134</sup> The *Lozano* plaintiffs argued that the IRCA’s savings clause was limited to a specific type of licensing law, to the exclusion of laws and ordinances of the kind employed by the city of Hazleton.<sup>135</sup>

In addressing this argument, the district court in *Arizona Contractors* acknowledged that the IRCA does not define “license” or “licensing laws.”<sup>136</sup> The district court proceeded with a dictionary definition: “permission, usually revocable, to commit some act that would otherwise be unlawful.”<sup>137</sup> It determined that the Arizona Act constitutes a “licensing law” because the Arizona

Act “sets out criteria and a process to suspend or revoke a permission to do business in the state.”<sup>138</sup>

Because “[t]he Act’s definition of a license does not depart from common sense or traditional understandings of what is a license,” the court in *Arizona Contractors* concluded that the Arizona Act “falls within the plain meaning of the IRCA’s savings clause.”<sup>139</sup> Thus, the court did not find express preemption of the Arizona Act; to the contrary, it found that the IRCA expressly authorizes the Arizona Act.<sup>140</sup>

Additionally, the district court in *Arizona Contractors* acknowledged the disproportionate severity of rescinding a business license when compared to other civil sanctions administered by the federal government under the IRCA.<sup>141</sup> The district court addressed this disparity, reasoning “[i]f the authorized state and federal sanctions are disproportional in severity, that is because Congress recognized the disproportional harm to core state and federal responsibilities from unauthorized alien labor.”<sup>142</sup>

By contrast, the district court in *Lozano* determined the IRCA expressly preempted the Hazleton Ordinance.<sup>143</sup> The court in *Lozano* arrived at a narrow definition of “licensing and similar laws.”<sup>144</sup> In support of its conclusion, the district court assumed the revocation of a business license was the “ultimate sanction,” at least when compared to civil and criminal fines.<sup>145</sup> By this understanding, it would strain reason for Congress to allow states to provide the ‘ultimate sanction,’ but not a lesser penalty.<sup>146</sup> Thus, the *Lozano* court construed “licensing and similar laws” to exclude those licensing laws that threaten to revoke business licenses.<sup>147</sup>

The *Lozano* court also offered a narrowed interpretation of “licensing and similar laws” by relying on text of the following House Report, which made reference to the preemption clause in the IRCA:

The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation, or refusal to reissue a license to any person who has been *found to have violated the sanctions provisions in this legislation* [the IRCA].<sup>148</sup>

According to the district court’s interpretation of this House Report, “licensing or similar laws” are those laws that sanction employers who have violated the IRCA – not those employers who have violated some other ordinance.<sup>149</sup> Because the Hazleton Ordinance is a law that “suspends the business permit of those who violate its Ordinance, not those who violate the IRCA,” the district court reasoned the Hazleton Ordinance is not a “licensing [or] similar law.”<sup>150</sup>

Additionally, the House Report recited forestry and labor laws as among those that are not preempted:

Further, the Committee does not intend to preempt licensing or “fitness to do business laws,” such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.<sup>151</sup>

From the foregoing quote, the *Lozano* court determined that “licensing and similar laws” may also include farm labor contractor laws and forestry laws.<sup>152</sup> Quite clearly, the Hazleton Ordinance is not

a “state farm labor contractor law or forestry law,” and this exception to preemption does not apply.<sup>153</sup>

In sum, the district court in *Lozano* interpreted the savings clause to “save” from the preemptive reach of the IRCA (i) forestry and farm labor contractor laws and (ii) any other state or local law that does not disproportionately punish employers with the ‘ultimate sanction’ (revoking a business license), provided the state or local law does not punish employers for any violations of law other than the IRCA.<sup>154</sup> Because the Hazleton Ordinance did not fit the district court’s construction of “licensing and similar laws,” it was expressly preempted by the IRCA.<sup>155</sup>

Here, as the reader might appreciate, the *Lozano* court and *Arizona Contractors* court differed sharply in their understanding of the IRCA preemption savings clause. The *Lozano* court favored a narrow construction of the savings clause, while the *Arizona Contractors* court adhered to a ‘plain language’ interpretation of “licensing and similar laws.”<sup>156</sup> Both opinions acknowledge that a ‘plain language’ interpretation of “licensing and similar laws” may result in a disproportionately severe state penalty (revocation of a business license) when compared to a federal sanction (civil or criminal fines).<sup>157</sup> Yet only the *Lozano* court was persuaded that this disparity required a narrowing interpretation of “licensing and other laws.”<sup>158</sup>

Additionally, the *Lozano* and *Arizona Contractors* courts differed in their treatment of the House Report.<sup>159</sup> The *Lozano* court interpreted the House Report to limit the meaning of “licensing and other laws” to farm labor and forestry laws, and those licensing laws punishing violations of the federal IRCA.<sup>160</sup> The *Arizona Contractors* court, by contrast, did not share this interpretation. The *Arizona Contractors* court construed the House Report as merely giving examples of “licensing or

similar laws” that are saved from the preemptive reach of the IRCA.<sup>161</sup> It found no support in the House Report for the notion that the “example given in [the House Report] exhausts the entire meaning of the licensing sanction authorization.”<sup>162</sup>

### *C. Implied Conflict Preemption*

In the absence of express preemption, implied conflict preemption exists where “compliance with both State and federal law is impossible, or when the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>163</sup> In both *Arizona Contractors* and *Lozano*, the district courts proceeded with an analysis of implied conflict preemption – undoubtedly to guard against reversal on appeal and “for purposes of completeness”<sup>164</sup> and “thoroughness.”<sup>165</sup> Moreover, the Supreme Court has on multiple occasions suggested that implied preemption might exist despite the presence of an express preemption clause – though the presumption is that “Congress did not intend to preempt other matters.”<sup>166</sup> Thus, it is provident to consider an implied preemption analysis of the Arizona Act and Hazleton Ordinance consistent with the teachings of *DeCanas*.

In *Arizona Contractors*, the district court looked to comparable language of the Arizona Act and the IRCA in determining whether there is a conflict between the Arizona Act and the IRCA.<sup>167</sup> It noted that both acts share the same scienter requirement, in that the “[Arizona] Act and the IRCA prohibit employers from ‘knowingly’ employing an unauthorized alien.”<sup>168</sup> It also noted that both the IRCA and the Arizona Act contain procedures “for weeding out frivolous complaints,”<sup>169</sup> and both laws afford an affirmative defense to “employers who have ‘complied in good faith’” with the requirements of the IRCA.<sup>170</sup> In light of these similarities, the *Arizona Contractors* court noted the

Arizona Act’s “employer sanctions provisions . . . mirror those of the IRCA in every significant respect. They do not conflict with the purposes and objectives of Congress.”<sup>171</sup>

The district court in *Lozano*, by contrast, identified at least three conflicts between the Hazleton Ordinance and the IRCA: (i) “under federal law, the employer has the responsibility to review the documents, and in the Hazleton Ordinance, the employer is required to present the documents to the Code Enforcement Office for verification of eligibility [using E-Verify];”<sup>172</sup> (ii) the Hazleton Ordinance provides a civil cause of action for lawful workers terminated by employers of unlawful employees<sup>173</sup> (similar to the California law at issue in *DeCanas*), while the IRCA does not; and (iii) the Hazleton Ordinance requires mandatory use of E-Verify (through the City Code Enforcement Office), whereas the IRCA provides for the voluntary use of E-Verify.<sup>174</sup>

Additionally, the *Lozano* court characterized the Hazleton Ordinance and the IRCA as “strik[ing] a different balance” with regard to the burdens on employers and the goal of preventing the employment of unauthorized persons.<sup>175</sup> In explaining the effect of a “different balance,” the court stated:

IRCA and [the Hazleton Ordinance] share a similar purpose: to prevent the employment of persons not authorized to work in the United States while not overburdening the employer in determining whether an employee or perspective [sic] employee is an authorized worker. The two laws, however, strike a different balance between these interests. The laws, therefore, conflict.<sup>176</sup>

In sum, the *Lozano* court reasoned that the Hazleton Ordinance was in actual conflict with the IRCA on at least three levels, and that the Ordinance “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” because it adopts a different balance



of interests.<sup>177</sup> By contrast, the *Arizona Contractors* court did not perceive either an actual conflict between the Arizona Act and the IRCA, or a conflict with the purposes and objectives behind the IRCA.<sup>178</sup>

To the extent that the Arizona Act and the Hazleton Ordinance differ, we need not expect the same outcome for both the Arizona Act and the Hazleton Ordinance in an implied conflict preemption analysis.<sup>179</sup> Here, the Arizona Act and the Hazleton Ordinance are different in one meaningful respect: only the Hazleton Ordinance provides for a private right of action.<sup>180</sup> The Hazleton Ordinance, as mentioned above, provides a cause of action to a discharged employee against his former employer, provided the former employer employed unauthorized workers in contravention of federal work authorization standards.<sup>181</sup> The Ordinance does not stipulate a scienter requirement in the cause of action; that is, a cause of action may be brought against an employer who unknowingly and in good faith employed an unauthorized worker.<sup>182</sup> Under the Arizona Act, by contrast, the county attorney is required to initiate a hearing before a state superior court to determine if the employer, as alleged, has knowingly employed unauthorized workers.<sup>183</sup>

In light of this difference between the Arizona Act and the Hazleton Ordinance, it is possible that the implied conflict preemption analysis in both *Arizona Contractors* and the *Lozano* are consistent with *DeCanas*. The Supreme Court in *DeCanas* Court remanded to the district court the question of implied conflict preemption, suggesting in *dicta* that if the California law penalized the employment of aliens who were otherwise permitted to work under federal standards, it would conflict with federal law.<sup>184</sup> Here, to the extent that the Hazleton Ordinance provides a private right

of action against employers who are merely negligent in hiring an unauthorized worker, the Ordinance penalizes employers who are not otherwise violating the IRCA.<sup>185</sup>

Therefore, to the extent that the Hazleton Ordinance penalizes individuals and conduct that Congress has exempted or excluded from federal sanctions, the *Lozano* court was consistent with *DeCanas* in finding the Ordinance to be preempted by the IRCA as an obstacle to the accomplishment and execution of Congress' full purpose and objectives underlying the IRCA.<sup>186</sup> But because the Arizona Act differs by not introducing a private right of action against employers of unauthorized workers, the district court in *Arizona Contractors* was correct to conclude there was no finding of implied conflict preemption.<sup>187</sup>

#### *D. Preemption by Occupation of the Field*

From *DeCanas*, even absent a conflict, a state law must yield to a federal law where Congress intended the federal law to “occupy the field.”<sup>188</sup> “Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was ‘the clear and manifest purpose of Congress’ would justify this conclusion.”<sup>189</sup> References in the statutory language or the legislative history may demonstrate some indication of Congressional intent to “preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.”<sup>190</sup>

In *Arizona Contractors*, the district court construed the Arizona Act's statutory authority to revoke a business license as a component of the state's police power, and “within the mainstream of

such police power regulation.”<sup>191</sup> The district court relied on *DeCanas* to formulate a presumption *against* preemption of state law:

[where] federal law is said to bar state action in fields of traditional state regulation, . . . [courts proceed] on the assumption that the historic police powers of the States were not . . . superseded by the [IRCA] unless that was the *clear and manifest* purpose of Congress.<sup>192</sup>

In view of the demanding showing required, it is perhaps no surprise that the plaintiffs were unable to illustrate that “Congress impliedly so cabined the states’ residual police powers in [an] area of great and pervasive local import.”<sup>193</sup> The *Arizona Contractors* court therefore concluded that the IRCA did not preempt the Arizona Act by occupation of the field.<sup>194</sup>

By contrast, the district court in *Lozano* relied on *Hoffman Plastic Compounds* (which was not a preemption decision) to create a presumption in favor of preemption.<sup>195</sup> The Supreme Court in *Hoffman Plastic Compounds* characterized the IRCA as a “comprehensive scheme prohibiting the employment of illegal aliens in the United States,” through which Congress “‘forcefully’ made combating the employment of illegal aliens central to the ‘policy of immigration law.’”<sup>196</sup> This statement buttressed the conclusion in *Lozano* that the IRCA preempted, by occupation of the field, all state and local laws relating to “the employment of unauthorized aliens.”<sup>197</sup> After thoroughly reiterating the federal government’s interest in immigration and noting the comprehensive nature of the IRCA, the *Lozano* court concluded the IRCA “leaves no room for state regulation,” and thus preempts the entire field of state law touching on the employment of illegal aliens.<sup>198</sup>

In view of the diverging conclusions in *Arizona Contractors* and *Lozano*, one might inquire if either opinion ‘correctly’ determined the extent to which the IRCA preempts state and local laws by

occupation of the field. However, in light of uncertainty surrounding the preemptive scope of the IRCA, both conclusions are arguably reasonable interpretations of the IRCA. Commentators and jurists have complained of the existing uncertainty surrounding the extent to which the IRCA displaces state and local law by occupation of the field; some calling for “a more extensive review of the Supreme Court’s Supremacy Clause jurisprudence to fully understand the relationship between federal immigration policy and state labor and employment law in the IRCA preemption context.”<sup>199</sup>

One commentator noted that “although the Supreme Court has held that the IRCA is a comprehensive scheme to combat the employment of undocumented aliens [in *Hoffman Plastic Compounds*], subsequent lower court decisions have found [the] IRCA not so comprehensive as to prevent undocumented aliens from receiving state unemployment benefits.”<sup>200</sup> It is arguably smarter social policy if the IRCA does *not* completely displace the field of state employment laws regulating alien employment, for fear that state laws that provide employment benefits and medical benefits to aliens, such as back pay and workers’ compensation, could be preempted by the IRCA.<sup>201</sup>

#### CONCLUSION

In view of the recent explosion of state and local lawmaking touching on the employment of unauthorized immigrant workers, *Arizona Contractors* and *Lozano* are prominent examples of future legal challenges to laws which make mandatory the use of the federal E-Verify program. Parties in both lawsuits have filed notices of appeal, and as of this writing, a third state, South Carolina, is considering similar mandatory use of E-Verify – a further example of state lawmaking commensurate with Congressional silence on immigration reform.

As undesirable as these state and local laws may be however, an understanding of preemption principles will likely enable state and local lawmakers to draft statutes that successfully navigate the strictures of *DeCanas*. As long as *DeCanas* remains good law, some degree of state and local lawmaking affecting immigrants is permissible. In the present, Arizona's initial success in *Arizona Contractors* is at least encouraging to those legislators who would seize upon the freedoms in the IRCA preemption savings clause. *Lozano*, by contrast, is perhaps best understood as a facial challenge to an ordinance plainly hostile to immigrants, adjudicated by a court equally resentful of the nefarious efforts of the Hazleton City Council.

Together, *Lozano* and *Arizona Contractors* are valuable illustrations of the scrutinizing review awaiting state and local laws that purport to require private employers to participate in E-Verify. To the extent that state and local legislation can rigidly adhere to the federal standards of the IRCA, courts may be more willing to view such state or local laws as a complementary regulation of employment well within the mainstream of state police powers. However, as state and local enactments grow more extravagant with added restrictions and sanctions, the state or local enactment in question is increasingly likely to be deemed preempted by the IRCA.

---

<sup>1</sup> National Conference of State Legislatures, 2007 Enacted State Legislation Related to Immigrants and Immigration (Jan. 13, 2008), <http://www.ncsl.org/programs/immig/2007immigrationfinal.htm> [hereinafter NCSL Data].

<sup>2</sup> *Id.* Much of the recent legislation was designed to benefit aliens living or working within the United States. For example, California AB 1559, signed into law Oct. 14, 2007, requires community college nursing programs to use admissions criteria that favor bilingual applicants and refugees. CAL. EDUC. CODE § 78261.5 (West 2007). Illinois recently enacted legislation that makes it a civil rights violation for an employer to requests more documentation than is required by federal law to verify an applicant's eligibility status. 775 ILL. COMP. STATE. 5/2-102 (2007). Additionally, Michigan, despite its constrained state budget, has by legislative enactment allocated more than ten million dollars in 2007 to state criminal-alien assistance programs, services for migrant children, and housing for migrant farm workers. 2007 Mich. Pub. Acts 124 (West); 2007 Mich. Pub. Acts 137 (West).

<sup>3</sup> *See, e.g.*, Hazleton, Pa., Ordinance 2006-18, Illegal Immigration Relief Act Ordinance 2006-18 (July 14, 2006) (requiring employers to verify employment eligibility of new hires with city enforcement code office); Chesapeake,

---

Va., Ordinance Amending Chapter 54 , Section 72.2 (Oct. 9, 2007) (requiring contractors to certify that they do not and will not employ illegal aliens during the performance of a city contract); Prince William County, Va., Resolution 07-609 (July 10, 2007) (requiring county police officers to check residency status where there is probable cause to believe a crime suspect is in the country illegally, and further denying illegal aliens public benefits); Pickens County, S.C., Resolution 06-09 (Oct. 2, 2006) (prohibiting the County from doing business with companies who knowingly hire illegal aliens); Suffolk County, N.Y., Resolution No. 1056-2006 (Oct. 4 , 2006) (requiring firms doing business with the Suffolk County to certify in a sworn affidavit that their employees are legally eligible for employment in the United States).

<sup>4</sup> Legal Arizona Workers Act, ARIZ. REV. STAT. ANN. §§ 23-211 to 23-214 (2007) (prohibiting the knowing employment of unauthorized aliens, and providing for penalties for employing unauthorized workers, including the revocation of business licenses); ARK. CODE ANN. § 19-11-105 (2007) (prohibiting state agencies from contracting with business that employ illegal immigrants); COLO. REV. STAT. § 8-17.5-102(1), (2)(b)(I) (2007) (requiring the use of E-Verify by state employers to confirm the employment eligibility of all newly hired employees); COLO. REV. STAT. § 8-72-110(3) (2007) (requiring documentation that proves legal United States residence by an individual applying for unemployment insurance benefits pursuant to a reciprocal interstate agreement when the individual is not a Colorado resident); Ga. Code Ann. § 48-7-21 *et seq.* (2007) (disallowing as a business expense compensation paid by a taxpayer to an unauthorized employee); MINN. STAT. § 268.085(12) (2007) (prohibiting state employment benefits for any week the alien is not authorized to work in the United States under federal law); MISS. CODE ANN. § 71-5-391 *et seq.* (2007) (prohibiting an award of unemployment compensation benefits on the basis of services performed by an alien not lawfully present for purposes of performing such services); N.M. STAT. § 51-1-4 *et seq.* (2007) (prohibiting an award of unemployment compensation to certain aliens admitted to the United States to perform agricultural labor); TENN. CODE ANN. § 50-1-103 (2007) (providing for administrative procedures against employers who knowingly hire illegal immigrants, including temporary suspension of the employer's business license); TEX. GOV'T CODE ANN. § 2264.001 *et seq.* (Vernon 2007) (prohibiting the use of certain public subsidies to employ undocumented workers); Utah Code Ann. § 35A-4-405 *et seq.* (2007) (prohibiting the award of unemployment compensation to employees without legal status in the United States); W. VA. CODE § 21-1B-2 *et seq.* (2007) (prohibiting the knowing employment of an unauthorized worker, and providing penalties for employing unauthorized workers, to include the revocation of business licenses).

<sup>5</sup> ARIZ. REV. STAT. ANN. §§ 23-211 to 23-214 (2007).

<sup>6</sup> Hazleton, Pa., Ordinance 2006-18, Illegal Immigration Relief Act Ordinance 2006-18 (July 14, 2006).

<sup>7</sup> Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (codified in 8 U.S.C. §§ 1324a-1324c (2007)), signed into law on November 6, 1986.

<sup>8</sup> Compare ARIZ. REV. STAT. ANN. § 23-212F(3) with Ordinance 2006-18, *supra* note 3, § 4.

<sup>9</sup> See *Arizona Contractors Ass'n v. Candelaria*, 534 F. Supp. 2d 1036, 1041 (D. Ariz. 2008); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 488 (M.D. Pa. 2007).

<sup>10</sup> 534 F. Supp. 2d at 1041.

<sup>11</sup> For a general discussion of immigration, federalism, and policy considerations behind local immigration law, see generally Katheryne J. Couch, *This Land is Our Land, A Local Solution to a Local Problem: State Regulation of Immigration Through Business Licensing*, 21 GEO. IMMIGR. L.J. 641 (2007); Karla M. McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and what the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1 (2007); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007); Adam L. Lounsbury, Comment, *A Nationalist Critique of Local Laws Purporting to Regulate the Hiring of Undocumented Workers*, 71 ALB. L. REV. 415 (2008).

<sup>12</sup> 424 U.S. 351 (1976).

<sup>13</sup> Plaintiff Arizona Contractors Association has filed a notice of appeal from *Arizona Contractors* with the U.S. Court of Appeals for the Ninth Circuit on February 8, 2008 (Docket No. 08-15357). Additionally, defendant City of Hazleton has filed a notice of appeal from *Lozano* with the U.S. Court of Appeals for the Third Circuit on August 23, 2007 (Docket No. 07-3531).

---

<sup>14</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>15</sup> U.S. CONST. art VI. cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

<sup>16</sup> See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 808 (1994) (Noting a “shift from automatic preemption to an intent-based test during the 1930s, when the enlargement of the commerce power would otherwise have threatened to preempt too much state power.”); William W. Bratton, Jr., Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 626 (1975) (“For a period of time, the Supreme Court’s preemption decisions consistently supported state interests, sacrificing federal legislative objectives in the process. This state-directed view of preemption dominated the Court’s thinking in the 1930’s, cresting in the succeeding decade.”).

<sup>17</sup> 289 U.S. 346, 350-51 (1933).

<sup>18</sup> *Id.* at 350.

<sup>19</sup> K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 257-58 (2005).

<sup>20</sup> Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1156 (1998) (“The 1930s saw a radical restructuring of American federalism in which the Commerce Clause was interpreted as granting to Congress greatly enlarged powers. Accordingly, the concept of preemption had to evolve to avoid the preemption of vast areas of state regulation.”); R. David Allnutt, Comment, *FIFRA Preemption of State Common Law Claims After Cipollone v. Liggett*, 68 WASH. L. REV. 859, 862 (1993) (“[D]uring the 1920s and 1930s, the Supreme Court greatly restricted the previously expansive preemption doctrine by erecting a presumption in favor of state regulation.”).

<sup>21</sup> 306 U.S. 79, 84-85 (1939).

<sup>22</sup> *Id.* at 85.

<sup>23</sup> *Id.* (citing *Illinois Cent. R.R. Co. v. Public Utilities Comm.*, 245 U.S. 493, 510 (1918)). See also William W. Bratton, Jr., Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 626-30 (1975), for a discussion of this period of what he calls “Judicial Solicitude of State Interests.”

<sup>24</sup> 312 U.S. 52 (1941).

<sup>25</sup> *Id.* at 60.

<sup>26</sup> *Id.* at 66.

<sup>27</sup> See, e.g., *Franklin Nat. Bank of Franklin Square v. New York*, 347 U.S. 373 (1954); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1961); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

<sup>28</sup> DuVivier, *supra* note 19, at 1156.

<sup>29</sup> 369 U.S. 663, 66 (1962).

<sup>30</sup> See Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 70 (2005) (“[I]n almost every preemption case, the Rehnquist Court has come down on the side of preemption.”); Michael S. Greve, *Federal Preemption: Madison, Call Your Office*, 33 PEPP. L. REV. 77, 82 (2005); Bratton, *supra* note 16, at 651-52.

<sup>31</sup> *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997).

<sup>32</sup> *United States v. Locke*, 529 U.S. 89, 108 (2000).

<sup>33</sup> *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

<sup>34</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>35</sup> *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

<sup>36</sup> *Hines*, 312 U.S. at 67.

<sup>37</sup> DuVivier, *supra* note 19, at 1156.

<sup>38</sup> The California statute in *DeCanas* was challenged as being an unconstitutional regulation of immigration as well

---

as preempted by the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, the comprehensive federal statutory scheme for regulation of immigration and naturalization. 424 U.S. at 352-53.

<sup>39</sup> *Id.* at 354.

<sup>40</sup> CAL. LAB. CODE § 2805 (West 1971) (reprinted in *DeCanas*, 424 U.S. at 352 n.1).

<sup>41</sup> *Id.* art. § 2805(a), (c).

<sup>42</sup> *DeCanas*, 424 U.S. at 354.

<sup>43</sup> *Id.* at 353.

<sup>44</sup> *Id.* The Supreme Court of California denied review. *DeCanas*, 424 U.S. at 354.

<sup>45</sup> 40 Cal.App.3d 976 (1974).

<sup>46</sup> *Id.* at 979.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *DeCanas*, 424 U.S. at 354.

<sup>50</sup> *Id.* at 355.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> The *DeCanas* opinion made no mention of express preemption, undoubtedly because the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, makes no attempt to expressly preempt state regulation of immigrant employment laws.

<sup>54</sup> *DeCanas*, 424 U.S. at 357. “[Respondents] fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.” *Id.* at 357-58.

<sup>55</sup> *Id.* at 358. The INA did not preempt state laws by occupation of field. *Id.* at 359. No intent to preclude state regulation was discerned from the legislative history of the INA or from the comprehensiveness of the INA. “This conclusion is buttressed by the fact that comprehensiveness of legislation governing entry and state of aliens was to be expected in light of the nature and complexity of the subject.” *Id.*

<sup>56</sup> *Id.* at 363.

<sup>57</sup> *Id.* In *DeCanas*, the Court remanded for further proceedings the question of implied conflict preemption. Providing guidance to the lower courts, it posited the inquiry in the following manner: “[i]n its application, does the [state or local] statute prevent employment of aliens who, although ‘not entitled to lawful residence in the United States,’ may under federal law be permitted to work here?” *Id.* at 364.

<sup>58</sup> While courts and commentators do not dispute that the Supreme Court’s prevailing preemption jurisprudence is consistent with *DeCanas*, many refer to *DeCanas* as the “test” by which immigration-related state and local laws are to be evaluated. *See, e.g.*, Couch, *supra* note 11, at 649 (“Whether the IIRA is preempted by federal law as an unconstitutional state regulation of immigration is analyzed under the *DeCanas* test”); Nicole E. Lucy, *Mediation of Proposition 187: Creative Solution to an Old Problem? Or Quiet Death for Initiatives?*, 1 PEPP. DISP. RES. L.J. 123 (2001) (“[Proposition 187] violated the first-prong of the *DeCanas* test because the classifications regulated immigration”); Emily Chiang, *Think Locally, Act Globally? Dorman Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 SYRACUSE L. REV. 923, 954 n.150 (2003) (“[T]he state statute at issue would not have passed a *DeCanas* test of harmoniousness”); League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 769 (C.D. Cal. 1995) (“[T]he benefits denial provisions are not impermissible regulations of immigration and thus are not preempted under the first *DeCanas* test”); Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 604 (E.D. Va. 2004) (“The second *DeCanas* test asks whether the state is attempting to regulate a field that is completely occupied by the federal government . . .”).

<sup>59</sup> *DeCanas*, 424 U.S. at 355.

<sup>60</sup> *Barnett Bank of Marion County*, 517 U.S. at 31.

<sup>61</sup> *Id.* at 357; *Santa Fe Elevator Corp.*, 331 U.S. at 230.



---

<sup>62</sup> *DeCanas*, 424 U.S. at 364; *Hines*, 312 U.S. at 67; *Florida Lime & Avocado Growers*, 373 U.S. at 142-43. See also Couch, *supra* note 13, at 649 (“The three-prong [*DeCanas*] test asks: (1) whether the state statute constitutes a regulation of immigration; (2) whether it was the clear and manifest purpose of Congress to effect a complete ouster of state power; and (3) whether the state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).

<sup>63</sup> The holding of *DeCanas* has not been limited by the Supreme Court, but *DeCanas* has been cited by the Supreme Court to reinforce the proposition that state laws that place additional burdens on immigrants are unconstitutional as preempted by federal law. See *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 898-99 (1984); *Toll v. Moreno*, 458 U.S. 1, 1 (1982).

<sup>64</sup> *Id.*

<sup>65</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. §§ 1324a to 1324c).

<sup>66</sup> See *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm’n*, 410 F.3d 492, 495 (9th Cir. 2005) (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). “Since pre-emption claims turn on Congress’ intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.” *Id.*

<sup>67</sup> See *DeCanas*, 424 U.S. at 356. The California law in question imposed criminal sanctions upon employers who “knowingly employ[] an alien who is not entitled to lawful residence in the United States.” *Id.* at 352 n.1.

<sup>68</sup> U.S. Immigration Policy and the National Interest, Staff Report of the Select Commission on Immigration and Refugee Policy 565 (1981), available at <http://www.popline.org/docs/0562/012523.html>.

<sup>69</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. §§ 1324a to 1324c).

<sup>70</sup> See 8 U.S.C. § 1324a(b).

<sup>71</sup> *Id.* § 1324a(a)(1).

<sup>72</sup> *Id.* § 1324a(h)(3).

<sup>73</sup> *Id.* § 1324a(b)(1)(A).

<sup>74</sup> *Id.* § 1324a(b)(1)(B)(i)-(ii).

<sup>75</sup> *Id.* § 1324a(b)(1)(D).

<sup>76</sup> *Id.* § 1324a(b)(6)(A).

<sup>77</sup> *Id.* § 1324a(b)(1)(E). An employer “that establishes that it has complied in good faith with the requirements of . . . this section . . . has established an affirmative defense that the person or entity has not violated [the IRCA].” 8 U.S.C. § 1324a(a)(3).

<sup>78</sup> *Id.* § 1324a(e)(4)(A)(i).

<sup>79</sup> *Id.* § 1324a(f)(1).

<sup>80</sup> *Id.* § 1324a(e)(8).

<sup>81</sup> *Hoffman Plastic Compounds, Inc. v. N.R.L.B.*, 535 U.S. 137, 147 (2002); see also *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 479 (1991).

<sup>82</sup> Immigration Act of 1990 § 544(a), Pub.L. No. 101-649 (1990) (codified at 8 U.S.C. § 1324c); see also *Madeira v. Affordable Housing Foundation, Inc.*, 469 F.3d 219, 231 (2d Cir. 2006).

<sup>83</sup> *Hoffman Plastic Compounds*, 535 U.S. at 148.

<sup>84</sup> 8 U.S.C. § 1324a(h)(2).

<sup>85</sup> S. 1200, 99th Cong. (1985).

<sup>86</sup> See Senate Judiciary Report on S. 1200 (Aug. 25, 1985).

<sup>87</sup> S. Rep. No. 99-132 (1985). Prior to 1976, federal immigration bills calling for employer sanctions did not contain a preemption clause. *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1047 (“After the *DeCanas* decision, Congressional bills calling for federal employer sanctions began containing preemption clauses for the first time. None passed. In following session of Congress, bills were introduced that included preemption clauses similar to

---

those of the 95th Congress. Again, none passed.” (internal citations omitted)).

<sup>88</sup> S. 1200 was passed by voice vote in the House of Representatives on Oct. 9, 1986.

<sup>89</sup> H.R. Rep. No. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

<sup>90</sup> H. Conf. Rep. No. 99-1000 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5480. For whatever prominence the House Report might have in a dispute centering on the IRCA, the Supreme Court indicated its disfavor in *Hoffman Plastic*, relegating treatment of the House Report to a footnote and noting the varied interpretations of what the report purports to even say. *Hoffman Plastic Compounds*, 535 U.S. at 149 n.4.

<sup>91</sup> “No commentator on immigration policy -- not academics, not immigrant advocates, not the Bush administration, not the enforcement-only enthusiasts . . . claims that employer sanctions have been effective.” Schuck, *supra* note 11, at 78. *See also* Jonathon Peterson, *INS Penalty System Falls Down on Job*, L.A. TIMES, Aug. 6, 2001 (“Employer sanctions were undermined by a booming market in phony documents, the needs of employers to fill their job openings, widespread resistance to the creation of a national identification card – and by politics.”); *see also* Robert Suro, *Traffic in Fake Documents Is Blamed for New Rise in Illegal Immigration*, N.Y. TIMES, Nov. 26, 1990, at A14.

<sup>92</sup> 8 U.S.C. § 1324a(d).

<sup>93</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 401, 110 Stat. 3009, 3009-655 to 3009-665 (1996) (codified in scattered sections of 8 U.S.C.) (emphasis added).

<sup>94</sup> *Id.*

<sup>95</sup> Department of Homeland Security E-Verify Fact Sheet [hereinafter E-Verify Fact Sheet], *available at* [http://www.smartbusinesspractices.com/legal\\_everifyfaq.php](http://www.smartbusinesspractices.com/legal_everifyfaq.php).

<sup>96</sup> Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 (2003) (note following 8 U.S.C. § 1324a). To oversimplify, the INS was restructured in 2003 as the U.S. Citizenship and Immigration Service (USCIS), Customs and Border Patrol (CBP), and Immigration and Customs Enforcement (ICE) Agency. E-Verify remains a partnership between the Social Security Administration and USCIS.

<sup>97</sup> E-Verify Fact Sheet, *supra* note 78. According to the Department of Homeland Security, 19,000 employers enrolled as of August 9, 2007, with an estimated 1000 new employers enrolling each month. *Id.* The Department of Homeland Security’s 2009 Proposed Budget would expand E-Verify and allocate \$100 million to “continue the expansion and enhancements for the Internet-based system.” Department of Homeland Security, Budget for Fiscal Year 2009, *available at* <http://www.whitehouse.gov/omb/budget/fy2009/pdf/budget/dhs.pdf>.

<sup>98</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1042.

<sup>99</sup> In other words, at least four states (Arizona, Arkansas, Colorado and West Virginia) require state hiring offices to verify the employment eligibility of job applicants using E-Verify.

<sup>100</sup> ARK. CODE ANN. § 19-11-105 (2007); COLO. REV. STAT. §§ 8-17.5-102(1), (2)(b)(I) (2007); W. VA. CODE § 21-1B-2 *et seq.* (2007). One state actually prohibits the utilization of E-Verify by both public and private employers. 820 ILL. COMP. STAT. 55/12 (2007). This law was scheduled to take effect on January 1, 2008, but the Illinois Attorney General agreed to stay enforcement pending the outcome of a suit by the Justice Department to permanently enjoin enforcement of this law.

<sup>101</sup> ARIZ. REV. STAT. ANN. § 23-212(I).

<sup>102</sup> Forbes.com, *S.C. Lawmakers Weigh Immigration Reform*, Apr. 3, 2008,

<http://www.forbes.com/markets/feeds/afx/2008/04/03/afx4850839.html>.

<sup>103</sup> Ordinance 2006-18, *supra* note , § 4.. The IIRA Ordinance was originally enacted on July 13, 2006. *See* McKanders, *supra* note 11, at 3.

<sup>104</sup> *See Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1042.

<sup>105</sup> ARIZ. REV. STAT. ANN. § 23-212(A). *Compare* 8 U.S.C. § 1324a(a)(1) (“It is unlawful for a person or other entity – (A) to hire, or recruit for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment.”).

<sup>106</sup> *Id.* § 23-214.

<sup>107</sup> *Id.* § 23-212(F)(1)(b).

---

<sup>108</sup> *Id.* § 23-212-F.1(c).

<sup>109</sup> *Id.* § 23-211-7. A “license” means “any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state.” It expressly includes articles of incorporation, a certificate of partnership, and it excludes professional licenses.

<sup>110</sup> *Id.* § 23-212(F)(1)(b).

<sup>111</sup> *Id.* § 23-212(I) (“For the purposes of this section, proof of verifying the employment authorization of an employee through the basic pilot program creates a rebuttable presumption that an employer did not intentionally employ an unauthorized alien or knowingly employ an unauthorized alien.”).

<sup>112</sup> *See* Ordinance 2006-18, § 5A (“It is unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, 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, unless such harboring is otherwise expressly permitted by federal law.”).

<sup>113</sup> *Id.* § 4(A).

<sup>114</sup> *Id.* § 3(E).

<sup>115</sup> *Id.* § 4(B)(4). Employers who violate of the employment provisions of Ordinance 2006-18 lose a business license for three days. *Id.* Any subsequent violations of the employment provisions of Ordinance 2006-18 cause the employer to lose its business license for twenty days. *Id.* § 4(B)(7).

<sup>116</sup> *Id.* § 4(B)(5) (“The Hazleton Code Enforcement Office shall not suspect the business permit of a business entity if, prior to the date of the violation, the business entity had verified the work authorization of the alleged unlawful worker(s) using the Basic Pilot Program.”). *See* Couch, *supra* note 13, at 644-45 for a brief explanation of the framework of Ordinance 2006-18.

<sup>117</sup> *Id.* § 4(C).

<sup>118</sup> *Id.* §4.B.(3).

<sup>119</sup> 534 F. Supp. 2d at 1036.

<sup>120</sup> 496 F. Supp. 2d at 477.

<sup>121</sup> *DeCanas*, 424 U.S. at 354.

<sup>122</sup> *Id.* at 355.

<sup>123</sup> *Id.*

<sup>124</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1051 (“Like the California law at issue in *DeCanas*, the Act does not determine ‘who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.’”); *Lozano*, 496 F. Supp. 2d at 524 n.45 (The Hazleton Ordinance “do[es] not regulate who can or cannot be admitted to the country or the conditions under which a legal entrant may remain.”)

<sup>125</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1051.

<sup>126</sup> Compare 8 U.S.C. § 1324a(h)(3) with ARIZ. REV. STAT. ANN. § 23-211(8).

<sup>127</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1052.

<sup>128</sup> *DeCanas*, 424 U.S. at 355.

<sup>129</sup> *Lozano*, 496 F. Supp. 2d at 524 n.45.

<sup>130</sup> *Id.*

<sup>131</sup> 8 U.S.C. § 1324a(h)(2).

<sup>132</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1046.

<sup>133</sup> *Id.* at 1048.

<sup>134</sup> *Lozano*, 496 F. Supp. 2d at 518.

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

<sup>136</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1046.

<sup>137</sup> BLACK’S LAW DICTIONARY 938 (8th ed. 2004).

<sup>138</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1046.

<sup>139</sup> *Id.* at 1046.

---

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1051.

<sup>142</sup> *Id.* (“In light of the disproportionate responsibilities and burdens of the states, Congress could reasonably conclude that states are better equipped than Congress to judge which licenses to sanction, and how much. It left the strong deterrence of licensing sanctions to individual states to implement in their own circumstances.”).

<sup>143</sup> *Lozano*, 496 F. Supp. 2d at 519.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (“[I]t would not make sense for Congress in limiting the state’s authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty.”)

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> H.R. No. 99-682(I) at 5662 (emphasis added).

<sup>149</sup> *Lozano*, 496 F. Supp. 2d at 520.

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

<sup>151</sup> H.R. No. 99-682(I) at 5662.

<sup>152</sup> *Lozano*, 496 F. Supp. 2d at 520 (“The other pre-emption exception is for ‘fitness to do business laws’ such as state form labor contractor laws or forestry laws.”)

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 519-20.

<sup>155</sup> *Id.* at 520.

<sup>156</sup> *Compare Lozano*, 496 F. Supp. 2d at 519-20 with *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1046.

<sup>157</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1051; *Lozano*, 496 F. Supp. 2d at 519.

<sup>158</sup> *Lozano*, 496 F. Supp. 2d at 519.

<sup>159</sup> *Compare Lozano*, 496 F. Supp. 2d at 519-20, with *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1051.

<sup>160</sup> *Lozano*, 496 F. Supp. 2d at 520.

<sup>161</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1051.

<sup>162</sup> *Id.* at 1057. *See also Hoffman Plastic Compounds*, 535 U.S. at 149 n.4. In *Hoffman Plastic Compounds*, the Supreme Court interpreted the IRCA, noting that the House Report did not itself claim to embody an understanding shared by the entire Congress. The majority opinion questioned the extent to which the House Report assists in an understanding of the savings clause. For whatever prominence the House Report might have in a dispute centering on the IRCA, the Supreme Court in *Hoffman Plastic Compounds* relegated treatment of the House Report to a footnote. At least in this respect, the *Arizona Contractors* decision *may* be more consistent (than *Lozano*) with the Supreme Court’s treatment of the IRCA’s legislative history.

<sup>163</sup> *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (citing *Hines*, 312 U.S. at 67).

<sup>164</sup> *Lozano*, 496 F. Supp. 2d at 521.

<sup>165</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1048.

<sup>166</sup> *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (“Congress’ inclusion of an express pre-emption clause does *not* bar the ordinary working of conflict pre-emption principles.” (emphasis in original)); *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341, 352 (2001) (“[N]either an express pre-emption provision nor a savings clause bars the ordinary working of conflict pre-emption principles.” (internal citations omitted)); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (“[A]n express definition of the pre-emptive reach of a statute ‘implies’ – i.e., supports a reasonable inference – that Congress did not intend to pre-empt other matters.”).

<sup>167</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1052 (“Conflict preemption turns on the second form of conflict, where state law ‘stands as an obstacle’ to federal law.”).

<sup>168</sup> *Id.* at 1052. *Compare* ARIZ. REV. STAT. ANN. § 23-212(C) with 8 U.S.C. § 1324a(e).

<sup>169</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1053-54. *Compare* ARIZ. REV. STAT. ANN. § 23-212(C) with 8 U.S.C. § 1324a(a)(e).

<sup>170</sup> *Arizona Contractors Ass’n*, 534 F. Supp. 2d at 1053-54. *Compare* ARIZ. REV. STAT. ANN. § 23-212(J) with 8

---

U.S.C. § 1324a(a)(3).

<sup>171</sup> *Arizona Contractors Ass'n*, 534 F. Supp. 2d at 1055.

<sup>172</sup> *Lozano*, 496 F. Supp. 2d at 526.

<sup>173</sup> Ordinance 2006-18 § 4(E)(1) (“The discharge of any employee who is not an unlawful worker by a business entity in the City is an unfair business practice if, on the date of the discharge, the business entity was employing an unlawful worker. The discharged worker shall have a private cause of action in the Municipal Court of Hazleton against the business entity for the unfair business practice.”).

<sup>174</sup> *Lozano*, 496 F. Supp. 2d at 526. It is not obvious that the differences highlighted above are “irreconcilable” or in actual conflict, however. *See, e.g., Rice v. Norman Williams Co*, 458 U.S. 654, 659 (1982); *Freightliner Corp.*, 514 U.S. at 289. Additionally, according to one author, “[t]here has been considerable case law indicating that invalidation based on conflict preemption should not extend beyond the necessarily obvious conflict in the case before the court.” Lounsbury, *supra* note 11, at 441.

<sup>175</sup> *Lozano*, 496 F. Supp. 2d at 528.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 526-28.

<sup>178</sup> *Arizona Contractors Ass'n*, 534 F. Supp. 2d at 1055.

<sup>179</sup> Implied conflict preemption analysis necessarily requires an analysis of both the federal law and the state or local law in question. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 899 (2000).

<sup>180</sup> Ordinance 2006-18 § 4(E)(1).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Enforcement is limited to a revocation or denial of business licenses. ARIZ. REV. STAT. ANN. § 23-212(C).

<sup>184</sup> *DeCanas*, 424 U.S. at 363. *DeCanas* has been cited by the Supreme Court to reinforce the proposition that state laws that place additional burdens on immigrants are unconstitutional as preempted by federal law. *See Toll*, 458 U.S. at 1 (citing *DeCanas*, 424 U.S. at 358 n.6) (“State regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.”); *see also Sure-Tan, Inc.*, 467 U.S. at 898.

<sup>185</sup> This was among the findings of the court in *Lozano*, noting that the Hazleton Ordinance “still provides for strict liability, without the element of knowledge, with regard to the civil cause of action it creates. The federal IRCA statute does not create such a cause of action.” 496 F. Supp. 2d at 526 (internal citations omitted).

<sup>186</sup> This conclusion is shared by Couch, *supra* note 11, at 660, who noted that the Hazleton Ordinance “disrupts [a] balance by expanding upon IRCA’s regulatory scheme, imposing additional obligations on employers and subjecting them to additional penalties.”

<sup>187</sup> *Arizona Contractors Ass'n*, 534 F. Supp. 2d at 1054. Any burden the Arizona Act imposes on employers is authorized by federal law. *Id.* *See also* Schuck, *supra* note 11, at 80 (“[It] is hard to see how state employer sanctions provisions that are carefully drafted to track the federal employer sanctions law can be inconsistent with it – unless we take ineffective enforcement to be the ‘real’ federal policy from which state law must not deviate.”).

<sup>188</sup> *DeCanas*, 424 U.S. at 357.

<sup>189</sup> *Id.* (citing *Rice*, 331 U.S. at 230).

<sup>190</sup> *Id.* at 358.

<sup>191</sup> *Arizona Contractors Ass'n*, 424 U.S. at 1048 (quoting *DeCanas*, 424 U.S. at 357).

<sup>192</sup> *Id.* (emphasis added). *See also* Scheck, *supra* note 11, at 87-88 (“*DeCanas* also made clear, however, that establishing field preemption of state immigration law required an express statement of congressional intent, and that Congress had not voiced its desire to preempt this entire field.”).

<sup>193</sup> *Arizona Contractors Ass'n*, 534 F. Supp. 2d at 1049.

<sup>194</sup> *Id.* Additionally, “Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.” *Freightliner Corp.*, 514 U.S. at 288 (“Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*.”). Because Congress included in the IRCA a provision

---

expressly addressing the issue of preemption, a court need not “infer congressional intent to pre-empt state laws [by occupation of the field] from the substantive provisions” of the IRCA. *Id.*

<sup>195</sup> 496 F. Supp. 2d at 523 (citing *Hoffman Plastic Compounds*, 535 U.S. at 147-48).

<sup>196</sup> 535 U.S. at 147.

<sup>197</sup> *Lozano*, 496 F. Supp. 2d at 525. (“[C]ongress has in fact enacted a comprehensive scheme with regard to the employment of unauthorized aliens and occupies the field to the exclusion of state law.”).

<sup>198</sup> *Lozano*, 496 F. Supp. 2d at 523.

<sup>199</sup> Kati L. Griffith, Comment, *A Supreme Stretch: the Supremacy Clause in the Wake of IRCA and Hoffman Plastic Compounds*, 41 CORNELL INT’L L.J. 127, 138 (2008); *see also* *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 254 (2d Cir. 2006) (Walker, J., concurring) (“Courts should not have to guess how often and to what extent employers and their illegal alie employees will break the law in order to decide a case.”).

<sup>200</sup> Couch, *supra* note 11, at 658.

<sup>201</sup> *Id.* at 657-58. Several decisions have interpreted the IRCA “extremely narrowly, so as to provide undocumented aliens *greater* rights than they would be afforded were IRCA to prevent state law.” *Id.* at 658. “In other words, courts around the country have decidedly interpreted IRCA *not* to restrict undocumented aliens’ access to state employment and medical benefits.” *Id.* (emphasis in original).