



# State and Local Restrictions on Employing Unauthorized Aliens

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## Summary

In May 2011, the Supreme Court ruled in *Chamber of Commerce of the United States of America v. Whiting* that federal immigration law did not preempt an Arizona statute that authorized or required the suspension or termination of the licenses of businesses that knowingly or intentionally hire unauthorized aliens, and also required that employers within Arizona use the federal government's E-Verify database to check employees' work authorization.

The doctrine of preemption derives from the Supremacy Clause of the U.S. Constitution, which establishes that federal law, treaties, and the Constitution itself are "the supreme Law of the Land." Thus, one essential aspect of the federal structure of government is that states can be precluded from taking actions that are otherwise within their authority if federal law is thereby thwarted. An act of Congress may preempt state or local action in a given area in any one of three ways: (1) the statute expressly states preemptive intent (express preemption); (2) a court concludes that Congress intended to occupy the regulatory field, thereby implicitly precluding state or local action in that area (field preemption); or (3) state or local action directly conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption).

When it was enacted in 1952, the Immigration and Nationality Act (INA) did not regulate the employment of unauthorized aliens, and several states subsequently enacted measures prohibiting the employment of individuals who were not lawful residents of the United States. In a 1976 decision declining to find one such measure preempted, the Supreme Court recognized that it was "within the mainstream of [a state's] police power" to restrict the employment of aliens within their jurisdiction whose presence in the United States was not authorized by the federal government. However, in 1986, Congress enacted the Immigration Reform and Control Act (IRCA), which amended the INA to sanction employers of unauthorized aliens and expressly preempt states and localities from sanctioning employers other than through "licensing and similar laws." Then, in 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which authorized the creation of a pilot program for verifying work authorization that ultimately developed into the program known as E-Verify. Under federal law, use of E-Verify by private entities is generally voluntary, and the Secretary of Homeland Security may not require persons or entities not specified in IIRIRA to participate.

Prior to *Whiting*, the federal courts of appeals had disagreed as to whether IRCA and IIRIRA preempted state and local measures like the Arizona statute. Some found that state licensing measures were within IRCA's "savings clause" even when the state independently determined whether an employer employed unauthorized aliens, and that IIRIRA did not prohibit states from requiring E-Verify use. Others found that licensing provisions disrupted the balance struck by Congress between deterring illegal immigration, minimizing burdens on employers, and preventing discrimination, and Congress did not want use of E-Verify to be mandatory.

The majority in *Whiting* relied primarily upon the "plain meaning" of IRCA and IIRIRA, while two dissents relied more heavily upon the legislative history and overall purpose of IRCA. The majority's decision apparently opens the door to additional state and local restrictions upon employing unauthorized aliens. However, several lower court decisions subsequent to *Whiting* suggest that any state and local E-Verify measures, in particular, may need to parallel federal law to avoid being found to be preempted. Measures that would criminalize the seeking or performance of work by unauthorized aliens were not at issue in *Whiting*, but were later found to be preempted in the Supreme Court's June 25, 2012, decision in *Arizona v. United States*.



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## Introduction

This report discusses state and local restrictions upon employing unauthorized aliens in light of the May 26, 2011, decision by the Supreme Court in *Chamber of Commerce of the United States of America v. Whiting*.<sup>1</sup> The Court's decision in *Whiting* arose from a facial challenge to the Legal Arizona Workers Act (LAWA), a predecessor of S.B. 1070,<sup>2</sup> which authorized or required the suspension or termination of the licenses of businesses that knowingly or intentionally hire unauthorized aliens, as well as required that employers in Arizona use the federal government's E-Verify database to check employees' work authorization.<sup>3</sup> Business, labor, and civil rights organizations had asserted that LAWA's licensing provisions were expressly and impliedly preempted by federal law and that its E-Verify provision was impliedly preempted.<sup>4</sup>

The doctrine of preemption derives from the Supremacy Clause of the Constitution, which establishes that federal law, treaties, and the Constitution itself are "the supreme Law of the Land."<sup>5</sup> Thus, one essential aspect of the federal structure of government is that states can be precluded from taking actions that are otherwise within their authority if federal law is thereby thwarted. An act of Congress may preempt state or local action in a given area in any one of three ways: (1) the statute expressly states preemptive intent (express preemption); (2) a court concludes that Congress intended to occupy the regulatory field, thereby implicitly precluding state or local action in that area (field preemption);<sup>6</sup> or (3) state or local action directly conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption).<sup>7</sup>

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<sup>1</sup> 131 S. Ct. 1968, \_\_\_ U.S. \_\_\_ (2011).

<sup>2</sup> S.B. 1070 is a more comprehensive Arizona law on unauthorized aliens. On June 25, 2012, the Supreme Court found that those aspects of S.B. 1070 criminalizing conduct related to the unlawful presence of aliens in the state (e.g., seeking and performing work, violations of the federal alien registration requirements) were preempted by federal law. However, the Court also held that those provisions of S.B. 1070 requiring Arizona police to check the immigration status of persons stopped for state or local offenses were not facially preempted. *Arizona v. United States*, 132 S. Ct. 2492, \_\_\_ U.S. \_\_\_ (2012). See generally CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by Kate M. Manuel and Michael John Garcia.

<sup>3</sup> See ARIZ. REV. STAT. ANN. §§23-211 to 23-214. To prevail on a facial challenge, the challenger must establish that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739 (1987). The U.S. Court of Appeals for the Ninth Circuit suggested, in its review of S.B. 1070, that "there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent and therefore is preempted by the Supremacy Clause." *United States v. Arizona*, 641 F.3d 339, 345-46 (9<sup>th</sup> Cir. 2011). The Ninth Circuit's application of *Salerno* here was one thing Arizona challenged in its petition to the Supreme Court for certiorari. See *Arizona v. United States*, Petition for a Writ of Certiorari (S. Ct. filed Aug. 10, 2011), at 16, 30 (copy on file with the author). The U.S. Court of Appeals for the Third Circuit had previously raised questions about the applicability of *Salerno* to a facial challenge to a Hazleton, Pennsylvania, ordinance sanctioning those who employ or rent housing to unauthorized aliens. See *Lozano v. City of Hazleton*, 620 F.3d 170, 203 n.25 (3d Cir. 2010), *aff'g, in part*, 496 F. Supp. 2d 477 (M.D. Pa. 2007). However, although the Supreme Court granted Arizona's petition for certiorari, its decision on S.B. 1070 did not directly address *Salerno*.

<sup>4</sup> See, e.g., *Chamber of Commerce v. Whiting*, No. 09-115, Brief for the Petitioners (S. Ct. filed Sept. 1, 2010), at 20, 37, 47, available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_09\\_10\\_09\\_115\\_Petitioner.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_115_Petitioner.authcheckdam.pdf).

<sup>5</sup> U.S. Const. art. VI, cl. 2.

<sup>6</sup> Congressional intent to "occupy the field" to the exclusion of state law can be inferred when "[1] the pervasiveness of the federal regulation precludes supplementation by the States, [2] where the federal interest in the field is sufficiently dominant, or [3] where the object sought to be obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (internal quotations omitted).

<sup>7</sup> See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *English v. Gen. Elec. Co.*, 496 U.S. 72, (continued...)

In finding that LAWAs were not preempted by federal immigration law, a majority of the Court apparently opens the door to additional state and local restrictions upon employing unauthorized aliens.<sup>8</sup> However, several lower court decisions subsequent to *Whiting* suggest that any state and local E-Verify measures, in particular, may need to parallel federal law to avoid being found to be preempted.<sup>9</sup> Measures that would criminalize the seeking or performance of work by unauthorized aliens were not at issue in *Whiting*, but were found to be preempted in the Supreme Court's June 25, 2012, decision in *Arizona v. United States*.<sup>10</sup>

This report does not address state and local authority to enforce federal immigration law, or state and local measures designed to deter unauthorized aliens from entering into or settling within a jurisdiction by restricting their ability to obtain housing, perform work, or receive state or local public benefits. These topics are addressed in other CRS Reports, including CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by Kate M. Manuel and Michael John Garcia, and CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel. The report also does not address potential due process or other issues that could be raised by state and local measures restricting the employment of unauthorized aliens.<sup>11</sup>

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78-79 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248-49 (1984); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983). The delineation between these categories, particularly between field and conflict preemption, is not rigid. *See English*, 462 U.S. at 79 n.5 (“By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation.”); *Crosby*, 530 U.S. at 373 n.6.

<sup>8</sup> *See, e.g., Uptick in State Immigration Laws May Force Congress to Act, Speakers Say*, 5 WORKPLACE IMMIGR. REP. 381 (July 25, 2011).

<sup>9</sup> *See, e.g., Louisiana Assoc. Gen. Contractors, Inc. v. Jindal*, No. 605912, Judgment, 19<sup>th</sup> Judicial District Court, Parish of East Baton Rouge, December 20, 2011 (finding that a Louisiana law that required employers to use E-Verify to verify the work authorization of all employees was preempted by federal rules and regulations governing E-Verify); *Positronic Indus., Inc. v. City of Springfield*, No. 12-3243-CV-S-RED, Order Granting Preliminary Injunction (W.D. Mo., May 10, 2012) (preliminarily enjoining enforcement of a municipal ordinance that would have fined employers who did not use E-Verify).

<sup>10</sup> *Arizona*, 132 S. Ct. 2492.

<sup>11</sup> All persons within the United States, including unauthorized aliens, are protected by the Fourteenth Amendment, which provides that no state may “deprive any person of life, liberty, or property, without due process of law.” *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (recognizing liberty interests in the right to contract and engage in the “common occupations of life”); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (recognizing property interests in the revocation of a business license). The types of procedures necessary to ensure due process can vary depending upon the circumstances and interests involved. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that “[i]dentification of the specific dictates of due process” requires consideration of (1) the private interests that would be affected by the action; (2) the risk of erroneous deprivation of such interests, and the probable value of alternative procedural safeguards; and (3) the government’s interests, including the burdens that would be entailed by alternate procedures). However, states and localities must generally provide, at a minimum, notice of the proposed deprivation and a hearing before an impartial tribunal. State and local restrictions upon the hiring or employment of unauthorized aliens have been challenged on the grounds that they deprive employers and/or employees of due process. *See, e.g., Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 867-69 (9<sup>th</sup> Cir. 2009), *aff’g* *Ariz. Contractors Ass’n v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008); *Gray v. City of Valley Park*, No. 4:07CB00881 ERW, 2008 U.S. Dist. LEXIS 7238, at \*84-\*97 (E.D. Mo. Jan. 31, 2008); *Lozano*, 496 F. Supp. 2d at 533-37. Such challenges have generally not succeeded, but could become more prevalent now that certain preemption-based challenges appear to be foreclosed by the Supreme Court’s decision in *Whiting*.

## Background

The Immigration and Nationality Act (INA) of 1952 established a “comprehensive federal statutory scheme for regulation of immigration and naturalization” and set “the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.”<sup>12</sup> However, the INA did not originally regulate employment of unauthorized aliens.<sup>13</sup> A number of states subsequently enacted measures prohibiting the employment of individuals who were not lawful residents of the United States.<sup>14</sup> The constitutionality of one such measure—a California law providing that “[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers”—was at issue in the Supreme Court’s 1976 decision in *De Canas v. Bica*.<sup>15</sup> There, in declining to hold that the California statute was preempted by federal immigration law,<sup>16</sup> the Court noted that

Power to regulate immigration is unquestionably exclusively a federal power. But 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 pre-empted by this constitutional power, whether latent or exercised.<sup>17</sup>

Further, the Court characterized prohibiting the employment of persons not entitled to work in the United States as “within the mainstream of [the State’s] police power,” and observed that the federal government had “at best” expressed a “peripheral concern” with the employment of unlawfully present aliens.<sup>18</sup>

Federal regulation of the employment of unauthorized aliens expanded significantly in 1986, when the Immigration Reform and Control Act (IRCA) was enacted.<sup>19</sup> IRCA amended the INA to make it unlawful for a person or other entity to hire, or to recruit or refer for a fee for employment in the United States, an alien, knowing that the alien is unauthorized.<sup>20</sup> IRCA also required

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<sup>12</sup> *De Canas v. Bica*, 424 U.S. 351, 353, 359 (1976).

<sup>13</sup> When it was enacted, the INA did contain a provision establishing that “employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.” See 8 U.S.C. §1324 note.

<sup>14</sup> See Brief for the Petitioners, *supra* note 4, at 25 (noting that approximately 12 states had such laws at the time IRCA was enacted).

<sup>15</sup> *De Canas*, 424 U.S. at 352 n.1.

<sup>16</sup> *Id.* at 365 (remanding the case for California courts to construe the California statute and determine whether it conflicts with federal law). The California Court of Appeals, in a decision which the California Supreme Court declined to review, had found that the statute was preempted because Congress intended to occupy the field. See 115 Cal. Rptr. 444, 446 (1974). Arguments expressly based on field preemption have not figured prominently in the litigation over state and local measures targeting the employment of unauthorized aliens since *De Canas*. However, the line between field and conflict preemption “is not rigid,” and those challenging LAWA argued, among other things, that Congress intended the federal system to be exclusive, and any state system necessarily conflicts with federal law. See Brief for the Petitioners, *supra* note 4, at 39 (“There is no room in this scheme [IRCA] for alternative investigatory and adjudicatory systems.”).

<sup>17</sup> *De Canas*, 424 U.S. at 354, 356 (internal citations omitted).

<sup>18</sup> *Id.* at 356, 360.

<sup>19</sup> P.L. 99-603, 100 Stat. 3359 (Nov. 6, 1986) (codified, as amended, at 8 U.S.C. §§1324a-1324b). Cf. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002) (noting that IRCA created a “comprehensive scheme prohibiting the employment of illegal aliens in the United States” and “forcefully made combating the employment of illegal aliens central to the policy of immigration law”).

<sup>20</sup> 8 U.S.C. §1324a(a)(1)(A). IRCA also defined an “unauthorized alien” as one who is not admitted for permanent (continued...)

employees to attest their eligibility to work and present specified identification documents, which employers are to examine and attest that they appear to be genuine.<sup>21</sup> The employer and employee attestations are accomplished through “I-9 forms,” which are key to the verification process under IRCA. Employers who attempt to comply in good faith with these requirements are generally deemed to have complied notwithstanding technical or procedural failures to comply.<sup>22</sup> Employers who violate IRCA’s prohibitions on the unlawful employment of aliens may be subject to civil and/or criminal penalties under federal law.<sup>23</sup> However, IRCA provides that, “[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”<sup>24</sup> The language within the parentheses is commonly referred to as the “savings clause” because it potentially saves state and local “licensing and similar laws” from preemption. However, even when a state and local measure is not expressly preempted, as is the case here, the possibility of implied preemption remains.<sup>25</sup>

Ten years later, Congress expanded upon IRCA’s employment verification regime when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>26</sup> IIRIRA directed the Attorney General (later the Secretary of Homeland Security) to conduct three pilot programs for electronic employment eligibility confirmation, one of which, the Basic Pilot Program, ultimately developed into the E-Verify program.<sup>27</sup> IIRIRA also provided that participation by private parties in the pilot programs is generally voluntary,<sup>28</sup> and the Secretary of Homeland

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residence, or not authorized to be employed by IRCA or the Secretary of Homeland Security. 8 U.S.C. §1324a(h)(3).

<sup>21</sup> 8 U.S.C. §1324a(b)(1)(A).

<sup>22</sup> 8 U.S.C. §1324a(b)(6)(A). There are exceptions for those who do not correct failures to comply after notice, or have engaged or are engaging in a pattern or practice of violations. 8 U.S.C. §1324a(b)(6)(B)-(C).

<sup>23</sup> 8 U.S.C. §1324a(e)-(f). For a discussion of current penalties, see CRS Report R40002, *Immigration-Related Worksite Enforcement: Performance Measures*, by Andorra Bruno.

<sup>24</sup> 8 U.S.C. §1324a(h)(2) (emphasis added).

<sup>25</sup> See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-70 (2000) (construing the language of the savings clause in question to find that “[n]othing in [its language] suggests an intent to save state-tort actions that conflict with federal law”).

<sup>26</sup> P.L. 104-208, div. C., title IV, subtitle A, §§401-405, 110 Stat. 3009-655 to 3009-666 (Sept. 30, 1996) (codified in various sections of Titles 8 and 18 of the United States Code).

<sup>27</sup> *Id.* at §401, 110 Stat. 3009-655 to 3009-656. Originally, the three pilot programs established by IIRIRA were to last for a four year period. *Id.* However, the Basic Pilot Program, in particular, was subsequently extended. See, e.g., Consolidated Security, Disaster Assistance & Continuing Appropriations Act, 2009, P.L. 119-329, §143, 122 Stat. 3574, 3580 (Sept. 30, 2008); Basic Pilot Program Extension and Expansion Act of 2003, P.L. 108-156, 117 Stat. 1944 (Dec. 3, 2003); Basic Pilot Program Extension Act of 2001, P.L. 107-128, 115 Stat. 2407 (Jan. 16, 2002). For more on E-Verify, see generally CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

<sup>28</sup> Use of E-Verify is required for federal government entities and federal contractors, and private entities that unlawfully employ unauthorized aliens may be required to use it. See *Chamber of Commerce of the United States of America v. Napolitano*, 648 F. Supp. 2d 726 (S.D. Md. 2009) (upholding Executive Order 13465 and its implementing regulations, which generally require federal contractors to use E-Verify to check the work authorization of employees performing federal contracts). In rejecting arguments that the executive order and regulations violated IIRIRA because they “required” contractors to use E-Verify, the court noted that the “decision to be a government contractor is voluntary and ... no one has a right to be a government contractor.” *Id.* at 733. The court also found that IIRIRA only prohibits the Secretary of Homeland Security from requiring use of E-Verify, not the President. *Id.* at 734. In his dissenting opinion in *Whiting*, Justice Breyer similarly emphasized that contractors “voluntarily” enter a “special relation with the Government” in explaining why the majority was mistaken in implying permission for states to require use of E-Verify from the language in IIRIRA prohibiting the Secretary of Homeland Security from requiring the use of E-Verify. *Whiting*, 131 S. Ct. at 1997.



Security “may not require any person or other entity to participate.”<sup>29</sup> However, as an incentive for participation, IIRIRA provides that entities which opt to participate and obtain confirmation of the identify and employment eligibility of employees establish a rebuttable presumption that they have not violated IRCA.<sup>30</sup>

Despite the enactment of IRCA and IIRIRA, concerns about the employment of unauthorized aliens persisted, particularly in states and localities that are significantly affected by unauthorized immigration.<sup>31</sup> Beginning in 2006, several of these states and localities enacted or considered measures that would deter unauthorized aliens from entering or settling in their jurisdiction by restricting access to work, housing, and benefits.<sup>32</sup> Those measures seeking to limit unauthorized aliens’ ability to obtain work typically sanctioned employers of unauthorized aliens and/or required employers to use E-Verify to verify employees’ work authorization.

As discussed below, the federal courts of appeals reached differing conclusions as to whether these measures were preempted by federal immigration law before the Supreme Court issued its decision in *Whiting*. Some courts found that state licensing measures were within IRCA’s “savings clause” even when the state independently determined whether an employer employed unauthorized aliens, and that IIRIRA did not prohibit a state from requiring use of E-Verify. Others found that such measures were preempted because the licensing provisions disrupted the balance struck by Congress between deterring illegal immigration, minimizing burdens on employers, and preventing discrimination against those perceived as “foreign,” and Congress did not want use of E-Verify to be mandatory. The Supreme Court granted certiorari in *Whiting*, in part, because of these differences among the courts of appeals.<sup>33</sup>

## Pre-*Whiting* Jurisprudence

Prior to the Supreme Court’s decision in *Whiting*, some reviewing federal and state courts found that state and local measures suspending or revoking the licenses of businesses found to have employed unauthorized aliens and/or requiring employers within the jurisdiction to use E-Verify were not preempted by federal immigration law.<sup>34</sup> For example, in *Chicanos por la Causa v.*

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<sup>29</sup> P.L. 104-208, div. C., title IV, subtitle A, §402(a), 110 Stat. 3009-656.

<sup>30</sup> *Id.*, at §402(b), 110 Stat. 3009-656 to 3009-657.

<sup>31</sup> For example, Arizona notes that it is the “gateway for nearly half of the nation’s illegal border crossings” in its petition to the Supreme Court for certiorari in the S.B. 1070 litigation. See Petition for a Writ of Certiorari, *supra* note 3, at 2.

<sup>32</sup> See S. Karthick Ramakrishnan and Tom (Tak) Wong, University of California – Riverside Campus, “Immigration Policies Go Local: The Varying Responses of Local Governments to Undocumented Immigration,” Nov. 9, 2007, available at [http://www.law.berkeley.edu/files/RamakrishnanWongpaperfinal\(1\).pdf](http://www.law.berkeley.edu/files/RamakrishnanWongpaperfinal(1).pdf) (finding that less than 1% of all municipalities had enacted measures addressing unlawfully present aliens). See also National Conference of State Legislatures, “State Laws Related to Immigration and Immigrants,” <http://www.ncsl.org/default.aspx?tabid=19897> (surveying state measures enacted or proposed between 2009 and the present).

<sup>33</sup> See 130 S. Ct. 3498 (2010).

<sup>34</sup> Other state and local measures targeting employers of unauthorized aliens have been found to be expressly preempted by IRCA. See Chamber of Commerce of the United States of America v. Edmondson, 594 F.3d 742 (10<sup>th</sup> Cir. 2010), *aff’g, in part*, Chamber of Commerce v. Henry, No. CIV-08-109-C, 2008 U.S. Dist. LEXIS 44168 (W.D. Okla. June 4, 2008) (finding that IRCA expressly preempted provisions of a state statute that would have (1) made it a “discriminatory practice” for an employer to terminate an authorized worker while retaining an employee that is known, or reasonably should have been known, to be unauthorized, and (2) required contractors to verify the work eligibility of their independent contractors or withhold certain taxes from them). The court found the latter requirement (continued...)

*Napolitano*, the U.S. Court of Appeals for the Ninth Circuit unanimously rejected the plaintiffs' argument that the Legal Arizona Workers Act was expressly preempted because it provided for the suspension and termination of licenses of employers whom state officers determined had hired unauthorized aliens.<sup>35</sup> The plaintiffs had asserted both that LAWAW's savings clause "encompass[es] only licenses to engage in specific professions, such as medicine or law,"<sup>36</sup> and that Congress intended to permit revocation of the licenses of only those entities whom the federal government had determined violated IRCA.<sup>37</sup> However, in an opinion that gave rise to the Supreme Court's decision in *Whiting*, the Ninth Circuit rejected these arguments based on the "plain" or dictionary meaning of "license," as well as the legislative history of IRCA.<sup>38</sup> The Ninth Circuit also declined to find that LAWAW's licensing provisions were impliedly preempted because of a "speculative, hypothetical possibility" of conflict in the practical operation of state and federal laws.<sup>39</sup> The Ninth Circuit similarly found that LAWAW's E-Verify requirements are not impliedly preempted by IIRIRA since Congress's making E-Verify voluntary at the federal level "did not in and of itself" indicate that Congress intended to prohibit states from requiring participation.<sup>40</sup> A majority of the U.S. Court of Appeals for the Tenth Circuit also concluded that the E-Verify requirement of the Oklahoma Taxpayer and Citizen Protection Act of 2007 was not impliedly preempted in its decision in *Chamber of Commerce of the United States of America v. Edmondson*.<sup>41</sup>

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preempted, in part, because it disrupted the balance that Congress had constructed in excluding independent contractors from verification obligations. 594 F.3d at 767, 769. Concerns about the effects of state and local legislation upon the balance struck by Congress also formed the basis for the decision by the U.S. Court of Appeals for the Third Circuit in *Lozano v. City of Hazleton*, discussed below. However, as is also discussed below, the controlling opinion in *Whiting* seemed skeptical of arguments that state enactments targeting employers of unauthorized aliens disrupt the balance established by Congress between deterring unauthorized immigration, protecting employers from burdensome requirements, and preventing discrimination.

<sup>35</sup> 558 F.3d at 864-66.

<sup>36</sup> *Id.* at 865. It should be noted that LAWAW expressly excludes professional licenses from its definition of "license." ARIZ. REV. STAT. §23-211(9)(c)(ii).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (quoting BLACK'S LAW DICTIONARY 940 (8<sup>th</sup> ed. 2004) and H.R. REP. NO. 99-682(i), at 58, as reprinted in 1986 U.S.C.C.A.N. 5649, 5662). In particular, the district and appellate courts noted that the language from the House Report which the plaintiffs relied upon as evidence that Congress did not intend to preempt state or local "processes" concerning the suspension, revocation, or refusal to issue a license to anyone "found to have violated the sanctions provisions of this legislation" was "contradicted" by a later statement that Congress did not intend to preempt licensing or "fitness to do business" laws. Under the plaintiffs' proposed reading, only those whom the federal government found to have violated IRCA could be sanctioned (pursuant to state or local "processes") because Congress provided that only those "found to have violated the sanctions provisions of this legislation" could be sanctioned, and federal officials adjudicate violations under IRCA. *But see Gray*, 2008 U.S. Dist. LEXIS 7238, at \*36 ("There is no requirement in the statute that a finding be made by the federal government that a person has employed, recruited, or referred for a fee for employment, unauthorized aliens, only that those individuals are subject to penalty.").

<sup>39</sup> 558 F.3d at 866. The Ninth Circuit did, however, acknowledge the possibility of as-applied challenges in the future. *Id.* at 861. *See also* Transcript of Oral Argument, at 41-42, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (copy on file with author) (counsel for Arizona noting the possibility of as-applied challenges). As of April 2010, there had been few legal actions brought under LAWAW. *See, e.g.,* Nicole Santa Cruz, *Arizona Has Rarely Invoked Its Last Tough Immigration Law*, LOS ANGELES TIMES, Apr. 19, 2010, available at <http://articles.latimes.com/2010/apr/19/nation/lana-employer-sanctions19-2010apr19> (reporting that 12 of the state's 15 counties had not taken legal action against any business for failure to comply with LAWAW, although Maricopa County reported that complaints had been brought against three businesses).

<sup>40</sup> 558 F.3d at 866-67. The court further noted that Congress had "plainly envisioned and endorsed" increased usage of E-Verify, and that LAWAW is consistent with and furthers Congress' purpose here. *Id.* at 866.

<sup>41</sup> *Edmondson*, 594 F.3d at 768. The dissenting judge in *Edmondson*, as well as the district court, would have found the (continued...)

Other courts reached contrary conclusions, finding that state and local licensing measures and/or E-Verify requirements are preempted by federal immigration law. In particular, in *Lozano v. City of Hazleton*, the U.S. Court of Appeals for the Third Circuit unanimously found that a city ordinance with licensing provisions and an E-Verify requirement like those in LAWA was impliedly preempted. Although it reversed the district court's finding that the ordinance's licensing provisions were expressly preempted because they constituted "sanctions" under IRCA,<sup>42</sup> the Third Circuit nonetheless found that the provisions impermissibly conflicted with IRCA because they disrupted the balance that Congress had crafted between the "competing policy objectives of effectively deterring employment of unauthorized aliens, minimizing the resulting burden on employers, and protecting unauthorized aliens and citizens perceived as 'foreign' from discrimination."<sup>43</sup> According to the Third Circuit, the ordinance "substantially undermine[d]" this balance by prioritizing deterring the employment of unauthorized aliens over Congress's other objectives.<sup>44</sup> The Third Circuit further found that the ordinance "contravene[d] congressional objectives by requiring the use of E-Verify when Congress had declined to do so."<sup>45</sup> In so doing, the Third Circuit noted that other courts, including the Ninth Circuit, had found otherwise, but suggested that these decisions "fail[ed] to afford proper weight to the purposes underlying Congress's decision to retain E-Verify as a voluntary program."<sup>46</sup>

## Supreme Court's Decision in *Whiting*

In *Whiting*, the Supreme Court upheld LAWA's licensing provisions and E-Verify requirements in a 5-3 decision authored by Chief Justice Roberts. Justice Thomas concurred in the outcome and in those parts of the opinion which found that the statute's licensing provisions are not expressly preempted given the plain meaning of the relevant passages of IRCA and LAWA,<sup>47</sup> and that the

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(...continued)

E-Verify requirement to be expressly preempted. The dissenting judge, in particular, emphasized that this requirement disputed the balance struck by Congress between the competing goals of deterring unauthorized immigration, minimizing the burden on employers, and preventing discrimination against those perceived as "foreign." *See id.* at 768.

<sup>42</sup> 620 F.3d at 208-10 (relying on MERRIAM-WEBSTER'S DICTIONARY and BLACK'S LAW DICTIONARY to establish the plain meaning of "license"). The Third Circuit also reversed the district's court's finding that a presumption against preemption should be applied when reviewing the ordinance. *See id.* 206-07 (presumption against preemption applies when legislation involves areas within states' historic police powers, even if Congress subsequently legislates in these areas). While the Ninth Circuit similarly concluded that a presumption against preemption should be applied when reviewing LAWA, the Tenth Circuit reached a contrary conclusion. *Compare Chicanos Por La Causa*, 558 F.3d at 865 with *Edmonson*, 594 F.3d at 768 n.2. In *Whiting*, the Supreme Court did not address whether a presumption against preemption is to be accorded to state and local measures regulating the employment of unauthorized aliens.

<sup>43</sup> 620 F.3d at 210.

<sup>44</sup> *Id.* at 211. In reaching this conclusion, the court noted that the ordinance increased the burden on employers by creating a "separate and independent adjudicative system," provided "substantially fewer" procedural protections than IRCA; and would subject employers to a "patchwork" of state and local laws. *Id.* at 212-17. The court also noted that the ordinance failed to balance its sanctions with anti-discrimination provisions, but instead "impos[ed] additional sanctions on employers who hire unauthorized aliens, while not penalizing those who discriminate." *Id.* at 217-19. IRCA specifically prohibits discrimination by employers on the basis of nationality or citizenship, and its fines for violations of this prohibition correspond to those for knowingly employing an unauthorized alien. *See* 8 U.S.C. §1324b.

<sup>45</sup> 620 F.3d at 214.

<sup>46</sup> *Id.* at 216. Hazleton appealed the Third Circuit's decision to the Supreme Court, which remanded the case for reconsideration in light of its decision in *Whiting*. *See* 180 L. Ed. 2d 243.

<sup>47</sup> 131 S. Ct. at 1977-81.

statute's E-Verify requirement is not impliedly preempted because it does not conflict with federal law.<sup>48</sup> Three Justices dissented in two separate opinions which would have found LAWAW's licensing provisions expressly preempted and its E-Verify requirements impliedly preempted. Justice Kagan recused herself.<sup>49</sup>

## Controlling Opinion

The controlling opinion, written by Chief Justice Roberts, focused first upon the "plain wording" of IRCA's savings clause and the Arizona statute, noting that federal law saves from express preemption "licensing and similar laws" and that the Arizona law, "on its face, purports to impose sanctions through licensing laws."<sup>50</sup> The petitioners had argued that LAWAW does not constitute a licensing law under IRCA because LAWAW defines "license" broadly, to include "any agency permit, certificate, approval, registration, charter or similar form of authorization," and governs only the suspension or termination of licenses, not their issuance.<sup>51</sup> However, the Court rejected both arguments. It found that LAWAW was a licensing law, in part, because LAWAW's definition of "license" largely "parroted" the definition of "license" given in the Administrative Procedure Act (APA).<sup>52</sup> The Court also found that laws which do not purport to govern the issuance of licenses constitute "licensing laws" under IRCA because a contrary construction would "run[] contrary to the definition [of license] that Congress itself has codified" in the APA, and "is also contrary to common sense."<sup>53</sup> Further, the Court suggested that even if LAWAW were not a "licensing law" for purposes of IRCA, IRCA's savings clause also encompasses "similar laws."<sup>54</sup> While the petitioners had also asserted that the legislative history of IRCA supported a narrow interpretation of the savings clause, the Court found these arguments unpersuasive given that

no such limit is remotely discernible in the statutory text. Absent any textual basis, we are not inclined to limit so markedly the otherwise broad phrasing of the savings clause.... Congress's authoritative statement is the statutory text, not the legislative history.<sup>55</sup>

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<sup>48</sup> *Id.* at 1985-86. Justice Thomas did not join in those sections of the controlling opinion which found that LAWAW's licensing provisions are not impliedly preempted because they do not conflict with federal law or impermissibly upset the balance among competing objectives that Congress sought to strike when enacting IRCA. *See id.* at 1981-84. Although Justice Thomas did not state his reasons for not joining these portions of the *Whiting* opinion, in prior preemption cases, he has expressed skepticism regarding the Court's reliance on the implied preemption doctrine and indicated an unwillingness to join portions of any opinion which expressly or implicitly endorses its usage. *See Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring) (agreeing with Court's judgment that federal law did not preempt state law claim relating to drug company's labeling of product, but stating that he could not "join the majority's implicit endorsement of far-reaching implied pre-emption doctrines").

<sup>49</sup> 131 S. Ct. at 1972.

<sup>50</sup> *Id.* at 1977.

<sup>51</sup> *Id.* at 1978-79 (quoting ARIZ. REV. STAT. ANN. §23-212(A) & (F) and §23-212.01(A) & (F)).

<sup>52</sup> *Id.* at 1978. The APA's definition of "license" includes "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. §551(8).

<sup>53</sup> 131 S. Ct. at 1978 (quoting 5 U.S.C. §551(9), which defines "licensing" as encompassing any "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license").

<sup>54</sup> *Id.* at 1978 ("[E]ven if a law regulating articles of incorporation, partnership certificates, and the like is not itself a 'licensing law,' it is at the very least 'similar' to a licensing law, and therefore comfortably within the savings clause.")

<sup>55</sup> *Id.* at 1980. In particular, the Court noted that the House Report, which the petitioners said evidenced Congress's intent to permit *only* state and local licensing measures targeting farm labor contractors whom the federal government determined had violated IRCA, had previously been dismissed by the Court as "'a rather slender reed' from 'one House of a politically divided Congress.'" *Id.* (quoting *Hoffman*, 535 U.S. at 149-50).

The controlling opinion also found that LAWA's licensing provisions are not impliedly preempted by IRCA.<sup>56</sup> In so finding, the Court noted that IRCA "specifically preserved authority for states" to impose sanctions through licensing and similar laws upon persons who employ unauthorized aliens.<sup>57</sup> According to the Court, because Congress specifically preserved this authority, "it stands to reason" that Congress did not intend that the federal system would be exclusive and necessarily conflict with any state system.<sup>58</sup> The Court further noted that Arizona's system, in particular, did not conflict with federal law, but rather "closely tracks IRCA's provisions in all material respects," adopting IRCA's definition of "unauthorized alien" and prohibiting state investigators from independently determining aliens' work authorization.<sup>59</sup> The Court also cited 8 U.S.C. §1373(c), which requires federal officials to respond to state and local inquiries regarding persons' immigration status, as evidence that Congress did not intend for the federal system to be exclusive.<sup>60</sup> In addition, the Court rejected petitioners' argument that LAWA upsets the balance that Congress sought to strike when enacting IRCA.<sup>61</sup> It did so, in part, because "[r]egulating in-state businesses through licensing laws has never been ... an area of dominant federal concern," and LAWA does not "directly interfere[] with the operation of [any federal] program."<sup>62</sup> It also rejected petitioners' assertion that LAWA's penalties for licensing violations, which the petitioners and Justice Breyer characterized as a "business death penalty," are such significant sanctions that they disrupt the balance struck by Congress.<sup>63</sup> Instead, the Court viewed these sanctions as "typical attributes of a licensing regime," and noted that IRCA sought to balance state and federal interests, not just deterring unauthorized immigration, minimizing burdens on employers, and preventing discrimination against those perceived as "foreign."<sup>64</sup> According to the Court, in enacting IRCA,

The principle that Congress adopted was not that the Federal Government can impose large sanctions, and the States only small ones.... [I]n preserving to the States the authority to impose sanctions through licensing laws, Congress did not intend to preserve only those state laws that would have no effect.<sup>65</sup>

The Court further found that LAWA's E-Verify requirements were not impliedly preempted by federal law. The petitioners had asserted that these requirements conflicted with federal law because mandatory use of E-Verify impedes Congress's purpose in establishing a reliable and non-burdensome system of work authorization.<sup>66</sup> However, the Court found that Arizona's requiring the use of E-Verify does not conflict with federal law because the text of IIRIRA only

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<sup>56</sup> *Id.* at 1981-85. Justice Thomas concurred in the result, but not in the Chief Justice's opinion here. *See supra* note 47 and accompanying text.

<sup>57</sup> *Id.* at 1981.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1982. *See also* 8 U.S.C. §1373(c) ("The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.").

<sup>61</sup> 131 S. Ct. at 1982.

<sup>62</sup> *Id.* at 1983. According to the controlling opinion, these factors differentiated the instant case from the precedents that the petitioners cited.

<sup>63</sup> *Id.* at 1983-84.

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

<sup>65</sup> *Id.* at 1984-95.

<sup>66</sup> Brief for the Petitioners, *supra* note 4, at 47-51.

prohibits the Secretary of Homeland Security from requiring the use of E-Verify, not anyone else.<sup>67</sup> The Court also emphasized that LAWA's E-Verify requirement is "entirely consistent" with federal law given that the consequences of using E-Verify were the same under federal and state law (i.e., the person was not entitled to a presumption that they had not violated IRCA).<sup>68</sup> The Court further found that "the Federal Government has consistently expanded and encouraged the use of E-Verify."<sup>69</sup> In addition, the Court noted that even the federal government disagreed with the petitioners' assertion that the E-Verify system would be overwhelmed—and Congress's purposes defeated—if other jurisdictions also required use of E-Verify.<sup>70</sup>

## Dissenting Opinions

Three Justices dissented in two separate opinions. Justice Breyer, in an opinion which Justice Ginsburg joined, rejected the majority's characterization of LAWA as a "licensing law" falling within IRCA's savings clause.<sup>71</sup> According to this dissent, LAWA should be found to be expressly preempted because the legislative history of IRCA,<sup>72</sup> coupled with the balance that IRCA established between deterring unauthorized immigration, minimizing burdens on employers, and preventing discrimination against those perceived as "foreign,"<sup>73</sup> demonstrate that Congress intended to exempt from preemption only a narrow class of state laws, such as those governing the licensing of agricultural labor contractors.<sup>74</sup> Justice Breyer specifically objected to the majority's resort to the plain meaning of "license" in determining Congress's intent, asserting that the "statutory context" of the phrase, not its dictionary meaning, should be used to ascertain its meaning.<sup>75</sup> He also criticized the majority opinion on the grounds that the opinion would create obstacles to the accomplishment and execution of the full purposes and objectives of Congress by "permit[ing] States to turn virtually every permission-related state law into an employment-related 'licensing' law."<sup>76</sup> The dissent similarly would have found LAWA's E-Verify requirements

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<sup>67</sup> 131 S. Ct. at 1985.

<sup>68</sup> *Id.* at 1985-86.

<sup>69</sup> *Id.* at 1986.

<sup>70</sup> *Id.* See also Chamber of Commerce v. Whiting, Brief for the United States as Amicus Curiae Supporting Petitioners, No. 09-115 (S. Ct. filed Sept. 2010), at 34, available at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_09\\_10\\_09\\_115\\_PetitionerAmCuUSA.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_115_PetitionerAmCuUSA.authcheckdam.pdf) ("[T]he E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create.").

<sup>71</sup> 131 S. Ct. at 1987 ("[The] statute strays beyond the bounds of the federal licensing exception, for it defines 'license' to include articles of incorporation and partnership certificates, indeed *virtually every* state-law authorization for *any* firm, corporation, or partnership to do business in the State.").

<sup>72</sup> *Id.* at 1994.

<sup>73</sup> *Id.* at 1989-90.

<sup>74</sup> *Id.* at 1992 ("The federal licensing exception cannot apply to a state statute that, like Arizona's statute, seeks to bring virtually all articles of incorporation and partnership within its scope. I would find the scope of the exception to federal pre-emption to be far more limited. Context, purpose, and history make clear that the 'licensing and similar laws' at issue involve *employment-related* licensing systems.").

<sup>75</sup> *Id.* at 1988.

<sup>76</sup> *Id.* at 1993 (noting that, under the majority's approach, a "state need only call the permission a 'license' and revoke the license should its holder hire an unauthorized alien. If what was not previously an employment-related licensing law can become one simply by using it as a sanction for hiring unauthorized aliens or simply by state definition, indeed, if the State can call a corporate charter an employment-related licensing law, then why not an auto licensing law (amended to revoke the driver's licenses of those who hire unauthorized aliens)? Why not a dog licensing law?"). In particular, the dissent noted a South Carolina law imputing licenses to all employers within the state that are conditioned on not hiring unauthorized aliens, and suggested that the exception would "swallow" the rule under the majority approach. *Id.* (citing S.C. CODE ANN. §41-8-20 (Supp. 2010) ("All private employers in South Carolina ... shall (continued...)").

preempted because, “[b]y making mandatory that which federal law seeks to make voluntary, the state provision stands as a significant ‘obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>77</sup> In particular, Justice Breyer suggested that the majority was mistaken in inferring permission for states to make the program mandatory from language in IIRIRA prohibiting the Secretary of Homeland Security from requiring the use of E-Verify.<sup>78</sup>

Justice Sotomayor would also have found LAWA’s licensing provisions expressly preempted. However, unlike Justice Breyer, she would have done so on the grounds that IRCA expressly preempts laws that permit states and localities to determine whether an employer has violated IRCA.<sup>79</sup> Her dissent reached this conclusion primarily because the legislative history of IRCA evidenced Congress’s desire to replace the pre-IRCA “patchwork” of state laws prohibiting the employment of unauthorized aliens with a “uniformly” enforced federal law.<sup>80</sup> Accordingly, the dissent would find that states and localities are preempted from independently adjudicating whether an employer has employed an unauthorized alien.<sup>81</sup> In support of this conclusion, the dissent also noted the limitations on use of I-9 forms under federal law,<sup>82</sup> as well as the fact that federal law provides no mechanism for states to access information regarding aliens’ work authorization.<sup>83</sup> The dissent similarly would have found LAWA’s E-Verify requirement impliedly preempted because it is “in contravention of the significant policy objectives motivating Congress’ decision to make participation in the E-Verify program voluntary.”<sup>84</sup> While noting that the fact that state law makes mandatory something Congress made voluntary does not, *per se*, result in preemption, Justice Sotomayor emphasized that LAWA differs from other state laws in that it directly regulates the relationship between the federal government and private parties by requiring private employers to use the federal E-Verify database.<sup>85</sup> The dissent also noted the U.S. government’s “uniquely federal interest” in managing the use of the E-Verify database, and that

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(...continued)

be imposed a South Carolina employment license, which permits a private employer to employ a person in this State”).

<sup>77</sup> *Id.* at 1995.

<sup>78</sup> *Id.* at 1997. In particular, Justice Breyer emphasized that the requirements of Executive Order 13465 are different from those in LAWA because federal contractors “enter voluntarily into a special relation with the Government.” *Id.* See *supra* note 28.

<sup>79</sup> *Id.* at 1998.

<sup>80</sup> *Id.* at 1999-2000 (quoting P.L. 99-603, §115, 100 Stat. 3384 (“It is the sense of the Congress that ... the immigration laws of the United States should be enforced vigorously and uniformly.”)). Justice Sotomayor emphasized that the majority’s approach would “subject[] employers to a patchwork of enforcement schemes similar to the one that Congress sought to displace when it enacted IRCA.” *Id.* at 2001-02.

<sup>81</sup> *Id.* at 2000-01. See also *id.* at 2003 (“I can discern no reason why Congress would have intended for state courts inexperienced in immigration matters to adjudicate, in the context of licensing sanctions, the very same question that IRCA commits to federal officers, [administrative law judges], and the courts of appeals.”).

<sup>82</sup> *Id.* at 2001 (discussing 8 U.S.C. §1324a(b)(5), which provides that neither I-9 forms nor the information contained in or appended to them may be used “for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of title 18” of the United States Code).

<sup>83</sup> *Id.* In further support of this conclusion, the dissent contrasted IRCA’s provisions regarding the employment of unauthorized aliens with those regarding aliens’ eligibility for Medicaid and food stamps, noting that while IRCA created a mechanism whereby states and localities could verify the latter, it did not create a similar mechanism whereby they could verify the former. Also, like Justice Breyer, Justice Sotomayor noted that 8 U.S.C. §1373(c) does not require federal officials to provide states and localities with information on aliens’ work authorization status.

<sup>84</sup> *Id.* at 1998.

<sup>85</sup> *Id.* at 2005-06.

Congress's decision not to create a mandatory program was based, in part, on the costs of such a program.<sup>86</sup>

## Implications

The Supreme Court's decision in *Whiting* apparently opens the door to the enactment of additional state and local measures restricting the employment of unauthorized aliens.<sup>87</sup> However, several lower court decisions subsequent to *Whiting* suggest that any state and local E-Verify measures, in particular, may need to parallel federal law to avoid being found to be preempted. For example, a state court in Louisiana struck down a state statute that required employers to use E-Verify to verify the work authorization of *all* employees after finding that it was preempted by federal rules and regulations, which generally provide that E-Verify may only be used to verify the employment eligibility of new hires, not current employees.<sup>88</sup> In another case, a federal district court in Missouri found that a municipal ordinance which would have fined employers who did not use E-Verify was preempted because it imposed sanctions that were not contemplated by federal law.<sup>89</sup> Under federal law, use of E-Verify is generally voluntary, although those who do use E-Verify are generally entitled to a presumption that they have not employed an unauthorized alien.<sup>90</sup> There do not appear to be any similar, post-*Whiting* decisions finding state or local licensing measures to be preempted because they differ significantly from the provisions of federal law. However, the controlling opinion in *Whiting* repeatedly emphasized how closely LAWA "tracks IRCA's provisions in all material respects,"<sup>91</sup> and reviewing courts could

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<sup>86</sup> *Id.* at 2006. The dissent further noted that the executive branch's view that it is now capable of handling the demands of increased usage of E-Verify is immaterial because only Congress's intent at the time it enacted IRCA is relevant. *Id.* at 2006-07.

<sup>87</sup> The petitioners in *Whiting* cited over a dozen such measures in their September 1, 2010, brief to the Supreme Court. Brief for the Petitioners, *supra* note 4, at 14 (citing Arizona, Colorado, Georgia, Louisiana, Mississippi, Missouri, Oklahoma, South Carolina, Tennessee, Virginia, and West Virginia statutes, as well as ordinances of Albertville, Alabama; Apple Valley, California; Hazleton, Pennsylvania; and Mission Viejo, California). However, this number has increased since then, with lawmakers in 14 states and Puerto Rico reportedly enacting 23 employment-related immigration bills in the first half of 2011. See *In First Half of 2011 States Enacted 23 Immigration-Related Immigration Measures*, 5 WORKPLACE IMMIGR. REP. 381 (July 25, 2011). Another five states reportedly enacted six omnibus bills with employment provisions. Many of these measures would require the use of E-Verify by at least some employers within the state. On the other hand, at least one state has tried to preclude use of E-Verify. See 820 ILL. COMP. STAT. ANN. 55/12 (2007) (prohibiting employers, with certain exceptions, from using E-Verify "until the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases are able to make a determination on 99% of the tentative non-confirmation notices issued to employers within 3 days, unless otherwise required by federal law"). This law was found to be preempted. *United States v. Illinois*, No. 07-3261, 2009 U.S. Dist. LEXIS 19533 (C.D. Ill. Mar. 12, 2009).

<sup>88</sup> *Louisiana Assoc. Gen. Contractors, Inc. v. Jindal*, No. 605912, Judgment, 19<sup>th</sup> Judicial District Court, Parish of East Baton Rouge, December 20, 2011.

<sup>89</sup> *Positronic Indus., Inc. v. City of Springfield*, No. 12-3243-CV-S-RED, Order Granting Preliminary Injunction (W.D. Mo., May 10, 2012)

<sup>90</sup> See 8 U.S.C. §1324a note ("If a person or other entity is participating in [E-Verify] and obtains confirmation of identity and employment eligibility in compliance with the terms and conditions of the program with respect to the hiring (or recruitment or referral) of an individual for employment in the United States, the person or entity has established a rebuttable presumption that the person or entity has not violated section 274A(a)(1)(A) with respect to such hiring (or such recruitment or referral).").

<sup>91</sup> S. Ct. at 1981 (noting that LAWA adopted IRCA's definition of "unauthorized alien" and prohibited state investigators from independently determining aliens' work authorization).



potentially find that state and local measures that “track” IRCA less closely are preempted,<sup>92</sup> as they have with state E-Verify measures.

There have been calls for Congress to preempt state and local E-Verify requirements, in particular, because of the burdens that complying with various state and local requirements could impose on employers.<sup>93</sup> Legislation has been introduced in recent Congresses that would do this.<sup>94</sup> Legislation has also been introduced in recent Congresses that would expressly preempt state and local measures that prohibit employers from verifying new hires or current employees through E-Verify,<sup>95</sup> as well as amend the employer sanctions provisions of the INA to establish that neither they nor any other federal law preempt state or local measures imposing civil or criminal sanctions upon those who employ unauthorized aliens.<sup>96</sup> Along with the Supreme Court’s decision in *Whiting*, the enactment of such legislation could also potentially shape the extent and nature of state and local restrictions on employing unauthorized aliens.

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<sup>92</sup> See *supra* note 34 (discussing those provisions of the Oklahoma Taxpayer and Citizen Protection Act of 2007 that were found to be preempted because they conflict with federal immigration law). For example, Had LAWA authorized state officials to independently determine aliens’ work authorization, it could potentially have been struck down as an impermissible regulation of immigration under *De Canas*. See 424 U.S. at 355 (characterizing a regulation of immigration as “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain”). See, e.g., *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 770 (C.D. Cal. 1995) (finding that California’s Proposition 187, which would have required state personnel to verify the immigration status of persons with whom they came into contact, was preempted, in part, because it “created an entirely *independent* set of criteria by which to classify individuals based on immigration status”); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 869-70 (N.D. Tex. 2008) (finding that an ordinance that relied upon classifications used by the U.S. Department of Housing and Urban Development in determining eligibility for housing subsidies to determine who could rent private housing constituted an impermissible regulation of immigration because it did not rely on the INA’s classification of aliens’ status).

<sup>93</sup> See, e.g., Uptick in State Immigration Laws, *supra* note 8.

<sup>94</sup> For example, H.R. 2164, 112th Congress, would have expressly preempted state and local E-Verify measures, along with other measures “relat[ing] to the hiring, continued employment, or status verification for employment eligibility purposes, of unauthorized aliens.” However, it would have allowed states and localities to revoke the business or other licenses of employers who fail to electronically verify the employment eligibility of their workers.

<sup>95</sup> See, e.g., S. 1196, 112th Congress. An Illinois statute that would have prohibited Illinois employers, with certain exceptions, from using E-Verify until certain conditions were met was found to be preempted by a federal district court in 2009. See *Illinois*, 2009 U.S. Dist. LEXIS 19533.

<sup>96</sup> See, e.g., H.R. 2670, 112th Congress. The Supreme Court in *Arizona* relied upon the terms, purpose, and legislative history of IRCA in finding that state and local measures that criminalize the seeking or performance of work by unauthorized aliens. Thus, changes in IRCA could potentially result in such measures being found not to be preempted by federal law in the future. See generally CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by Kate M. Manuel and Michael John Garcia.