CHAMBER OF COMMERCE V. WHITING: WHY THE STATES ARE PERMITTED TO PASS A TIDAL WAVE OF NEW STATE LAWS SO DANGEROUSLY INTERTWINED WITH FEDERAL IMMIGRATION LAW

I. INTRODUCTION

"While the power of the federal government to regulate immigration is not specifically mentioned in the Constitution, the Supreme Court has long recognized an implied federal power over immigration as a core attribute of national sovereignty."[1] Despite this implied federal power guiding immigration law in the United States, several state governments are now implementing laws to compensate for a lack of comprehensive federal-immigration reform.[2] This federal and state tension in immigration has become a heavily debated topic. And as the states were presented with tough economic times, a loophole was provided for state governments to remedy the economic crisis while implementing immigration reform.[3] States and cities across America have raced to create their own solutions as they have become increasingly unhappy with Congress' stalemate on the issue of immigration.[4] But, the question still remains: where, if at all, do these state laws fit within federally regulated immigration law?

1. Gary Endelman & Cynthia Juarez Lange, *State Immigration Legislation and the Preemption Doctrine*, 41ST ANN. IMMIGR. & NATURALIZATION INST., at 127 (PLI CORP. LAW AND PRAC., Course Handbook Series PLI Order No. 13921, 2008).

2. *Id.*

3. Bureau of Labor Statistics, *Foreign-Born Workers: Labor Force Characteristics—2010*, U.S. DEPT. OF LABOR (May 27, 2011, 10:00 A.M.), http://www.bls.gov/news.release/forbrn.nr0.htm ("The unemployment rate for the foreign born was 9.8 percent in 2010, little changed from a year earlier, the U.S. Bureau of Labor Statistics reported today. The jobless rate of the native born was 9.6 percent in 2010, up from 9.2 percent in 2009."). The unemployment rate was about 9% in 2011 and almost reached 10% in 2010 compared to the unemployment rate from 2001, which peaked at 5.7% but was below 5% for 8 months out of the year. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, U.S. DEPT. OF LABOR (Oct. 29, 2011, 1:04 P.M.), http://data.bls.gov/timeseries/LNS14000000.

4. Endelman & Lange *supra* note 1, at 127.

One of the first initiatives states have taken is to restrict the employment of undocumented immigrants. There is currently an enormous body of immigration laws devoted to the topic.[5] However, the trend to pass state laws started in the 1990s with California's Proposition 187,[6] which was eventually abandoned because of a stalemated legal battle.[7] Many of these new state statutes are meant to aid employers in hiring documented-immigrant workers, specifically through the I-9 system and a pilot program called E-Verify.[8] But unlike federal laws, which have made participation in E-Verify voluntary, many states are mandating its use.[9]

Generally, the state laws can be grouped into three categories: (1) laws imposing penalties on employers who employ "illegal aliens"; (2) laws requiring all employers to certify that they do not employ "illegal aliens"; and (3) laws mandating the use of the E-Verify program.[10] Most states use the statutes, which often overlap in purpose, to create state-run programs of "employment-based" laws to curb immigration issues.[11] One such law, the Legal Arizona Workers Act, falls into the first and third categories and has become one of the most detailed and stringent state laws to date.[12] It mandates the use of E-Verify with a

5. *See* discussion *infra* Section III.A.

6. *See generally CA's Anti-Immigrant Proposition 187 is Voided, Ending State's Five-Year Battle with ACLU, Rights Groups,* ACLU, July 29, 1999, http://www.aclu.org/immigrants-rights/cas-anti-immigrant-proposition-187-voided-ending-states-five-year-battle-aclu-righ. Proposition 187 (Prop. 187) limited access to education and healthcare by requiring professionals in those fields to report the immigration status of each person seen, both adult and child, to the government. *Id.*

7. Endelman & Lange, *supra* note 1, at 131.

8. *See* discussion *infra* Section III.A.2

9. Twelve of the eighteen states with E-Verify laws enacted them in 2011—Alabama, California, and Florida via executive order, and Georgia, Indiana, Louisiana, North Carolina, North Dakota, South Carolina, Tennessee, Utah and Virginia by legislation. National Conference of State Legislatures, *E-Verify FAQ* (revised Nov. 4, 2011), http://www.ncsl.org/?tabid=13127.

10. Endelman & Lange, supra note 1, at 132.

11. *Id.* Most statutes will overlap within the three categories; the example given is an E-Verify mandate that imposes additional penalties upon the employer. *Id.* Some statutes, however, only affect a small group of employers, or only one category. *Id.*

12. Endelman & Lange, supra note 1, at 133-34, 144-45. The Legal Arizona Workers Act is one of the most aggressive statutes passed because it not only mandates E-Verify use, but threatens to terminate a business's 'right to operate in Arizona as a penalty. Endelman & Lange, *supra* note 1, at 133-34. The Act also requires that employers use a new hiring procedure, which is more burdensome than

certification and includes a wide range of penalties for non-compliance. Its validity was the core issue addressed by the Supreme Court in *Chamber of Commerce v. Whiting*.[13] Like Proposition 187 in California, the state legislation was becoming less "employment" or "health care" oriented and more intertwined with immigration law—an area of law long considered to be the federal government's turf. Thus, immigrant advocacy groups began bringing lawsuits claiming that state statutes were preempted by federal law. In *Whiting*, the Court held otherwise and started the ball rolling on allowing states to pass more restrictive statutes on the basis of U.S. immigration status.

Section II of this Note breaks down *Whiting*'s convoluted procedural backdrop and the lower court's reasoning and sets the stage for the Supreme Court's holding. Section III explains the background of federal immigration statutes and cases used and applied in *Whiting*, while also outlining the different categories of the preemption doctrine at issue in the case. Section IV synthesizes the Court's decision and the dissenters' opinions. Lastly, Section V critically analyzes of the majority decision, which elaborates the strengths in the dissent's position and demonstrates the future impact of this decision.

II. FACTS AND HOLDING

Chamber of Commerce v. Whiting originated in the United States District Court for the District of Arizona as the pre-enforcement claim of twelve non-profit organization plaintiffs who brought suit against the governor of Arizona, the attorney general of Arizona, and the director of the Arizona Department of Revenue.[14] In the case, *Arizona Contractors Ass'n v. Napolitano*, the plaintiffs claimed that the Legal Arizona Workers Act[15] (the Act), although not yet enforced, could not ever be enforced against a business, because it was both expressly and impliedly preempted by the Immigration Reform and Control Act (IRCA).[16] Further, the plaintiffs asserted that the Act directly conflicted with IRCA and that no state law could mandate the use of E-

what other states currently require. Endelman & Lange, supra note 1, at 133-34.

13. Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).

14. Ariz. Contrs. Ass'n v. Napolitano, 526 F. Supp. 2d 968, 976 (D. Ariz. 2007).

15. *See generally* ARIZ. REV. STAT. ANN. §§ 23-211 to 23-214 (2007) (West).

16. Immigration Reform and Control Act 8 U.S.C.A. §§ 1324A-1324C (West 2011); *Napolitano*, 526 F. Supp. 2d at 976.

Verify, since it was a voluntary program under federal law.[17] The district court did not initially address or decide these issues due to a lack of standing.[18]

As a result of the ruling declaring a lack of standing, the plaintiffs amended the claim to add all of the county attorneys of Arizona as defendants.[19] The complaint was also amended to request a restraining order and preliminary injunction while there stood a pending appeal deciding the issue of whether or not enforcement of the Act was valid.[20] The court denied both the restraining order and preliminary injunction.[21] Simultaneously, thirteen plaintiffs re-filed the original suit, dropping the governor as a defendant and adding the county attorneys and the Arizona registrar of contractors as defendants at the district court level in *Arizona Contractors Ass'n v. Candelaria.*[22] The case was consolidated with another claim, which also had a pending injunction awaiting appeal at a preliminary hearing; this formed the new case name, *Candelaria*, and allowed the claim to continue with proper jurisdiction and standing.[23]

Since the court in the previous suit, *Arizona Contractors Ass'n v. Napolitano*, had determined proper standing, the court in *Candelaria* was able to consider the facial challenge to the validity of the Act. The *Candelaria* court's analysis made it clear that the E-Verify provision complied with Due Process and classified the requirement as "one of employment, not one of immigration," embodying Congress' intent.[24] Thus, the court held that the provision was valid under IRCA's savings clause and was

17. Ariz. Contrs. Ass'n v. Napolitano, 526 F. Supp. 2d 968, 976 (D. Ariz. 2007).

18. *Id.* at 982-3 (holding that the plaintiff had standing because there was foreseeable economic harm directly caused by the E-Verify provision of the Act to the plaintiffs as employers of Arizona employees, but not reaching the core issues because the defendants were improper). The court found a lack of jurisdiction because defendants of pre-enforcement suits must be those with the power to enforce the statute and, in this case, only one party to the suit was given that authority. *Id.*

19. Ariz. Contrs. Ass'n v. Napolitano, No. CV07-1355, 2007 U.S. Dist. LEXIS 90694, at *5 (D. Ariz. Dec. 7, 2007).

20. *Id.* at 5-6.

21. *Id.* at 6-7.

22. Arizona Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1041 (D. Ariz. 2008) (noting a thirteenth plaintiff was added).

23. *Id.*

24. Arizona Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1052 (D. Ariz. 2008).

not preempted under implied field or conflict preemption.[25]

The plaintiffs appealed to the Ninth Circuit in *Chicanos Por La Causa, Inc. v. Napolitano*.[26] The court affirmed the lower court's ruling; the court found that the Act was not preempted either impliedly or expressly via field or conflict preemption and that there were no Due Process violations.[27] The plaintiffs petitioned for writ of certiorari to the U.S. Supreme Court, which was granted in 2010.[28]

The Supreme Court affirmed the Ninth Circuit and held that the Act is not impliedly or expressly preempted by federal law because it fits within IRCA's savings clause. Further, the court found that the E-Verify mandate does not impliedly conflict with federal immigration law, thereby affirming the lower court's decision that the Act is valid.[29]

III. BACKGROUND

When *Whiting* arrived at the Supreme Court, it did so amidst a statutory-based system outlined in both IRCA and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).[30] The state-based statutory reform began at a time when immigration issues had become highly controversial. With high levels of unemployment and a highly publicized debt crisis, the states began to pass immigration-based employment laws through the savings clause of IRCA, which imposed, among other things, licensing sanctions or revocations of licenses on employers who employ or recruit unauthorized workers.[31] The last major

25. Arizona Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1052 (D. Ariz. 2008).

26. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009) (amending en banc *Chicanos Por La Causa v. Napolitano*, 544 F.3d 976 (9th Cir. 2008)). This was the opinion used by the Supreme Court when the writ of certiorari was granted.

27. *Napolitano*, 558 F.3d at 860-61.

28. Chamber of Commerce v. Candelaria, 130 S. Ct. 3498 (2010) (granting writ of certiorari). *See also* Chamber of Commerce v. Whiting, 131 S. Ct. 624 (2010) ("Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.").

29. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1970 (2011).

30. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104-208, signed September 30, 1996, 8 U.S.C.A. § 1324A (West 2011).

31. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1976 (2011). Please also note that both IRCA and IIRAIRA use the term "unauthorized alien" and not "illegal alien." *See* 8 U.S.C.A. § 1324A (West 2011). This is because to enter the United

case to deal with the issue of states imposing immigrant-based employment statutes was *De Canas v. Bica*, which was before IIRAIRA was enacted and E-Verify was created.[32] In *Whiting,* the Supreme Court was forced to reconsider the *De Canas* reasoning and decide if the Arizona act was expressly or impliedly preempted and if the mandated use of the E-Verify system was impliedly preempted by federal law.[33] In order to reach a conclusion, the Court had to consider the plain language of each statute, the holding of *De Canas*, the other cases dealing with preemption standards, and the intent of Congress upon enactment of IRCA and IIRAIRA.[34]

A. THE FEDERAL IMMIGRATION STATUTES

1. IMMIGRATION REFORM AND CONTROL ACT (IRCA)

In 1986, IRCA was enacted as the first attempt to sanction employers who employed and recruited unauthorized immigrants.[35] Before the enactment of IRCA, the states were permitted to enact laws that outlined provisions and sanctions of employers who employed unauthorized immigrants so long as the state law did not conflict with federal law.[36] With certain exclusions, it was illegal to knowingly hire and employ unauthorized immigrants, and it was mandatory that every employer participate in the "paper-based employment eligibility verification system set out in *8 U.S.C. § 1324a(b)*, known as the I-9 system."[37]

States without inspection is a civil offense, but also because in the employment context the correct term is "unauthorized worker" as outlined in the statutes being enforced against the worker. *Id.* §§ 1325, 1324a(h)(3). The correct term is "undocumented worker" or "undocumented immigrant." *See generally* Craig Robert Senn, *Proposing a Uniform Remedial Approach for Undocumented Workers Under Federal Employment Discrimination Law*, 77 FORDHAM L. REV. 113 (2008) (discussing how the various terms are used and affect the worker in various scenarios). The term "unauthorized worker" or "unauthorized alien" is used in this Note, but in a few instances where other sources are directly quoted, the term "illegal alien" may be used.

32. De Canas v. Bica, 424 U.S. 351, 353, 359 (1976).

33. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1981 (2011).

34. *See id.* at 1973-74.

35. Ariz. Contrs. Ass'n v. Napolitano, 526 F. Supp. 2d 968, 972 (D. Ariz. 2007); *See also* 8 U.S.C.A. §§ 1324A–1324C (West 2011).

36. *Napolitano*, 526 F. Supp. 2d at 972. *See also De Canas,* 424 U.S. at 352.

37. 8 U.S.C.A. § 1324A(h)(3) (West 2011); Robert F. Koets, Annotation, *Validity, Construction, and Application of § 274A of Immigration and Nationality Act (8 U.S.C.A. § 1324a) Involving Unlawful Employment of Aliens*, 130 A.L.R. Fed. 381

In IRCA, Congress delegated enforcement power to the Attorney General; all hearings must go before administrative law judges and are subject to federal review.[38] In these hearings, the government must prove by a preponderance of the evidence that the employer knowingly employed the unauthorized alien.[39] Also, there is an affirmative defense if the employer "complied in good faith" with the I-9 system.[40] Aside from regulatory provisions, IRCA contains a preemption clause in 8 U.S.C. § 1324a(h)(2), stating that "[t]he provisions of this section preempt any state or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, recruit, or refer for a fee for employment, unauthorized aliens." These express preemption and savings clauses are the overarching bases for the issues in *Whiting*.

2. THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT (IIRAIRA) AND THE E-VERIFY SYSTEM

With rampant document fraud in the I-9 system, Congress passed IIRAIRA in 1996 and created a pilot program to make the I-9 system more effective.[41] The program started in California, Florida, Illinois, New York, and Texas (with Nebraska joining later); after six years Congress authorized the expansion of the pilot program that would later be known as E-Verify to all fifty states in 2003.[42]

E-Verify is an Internet-based system that allows employers to check the authorization status of employees in addition to the I-9 system.[43] The system allows for employment status and I-9 form information to be checked by the Social Security Administration (SSA), the Department of Homeland of Security,

(1996). *See also*, 8 U.S.C.A. § 1324A(b) (West 2011).

38. 8 U.S.C.A. § 1324A(e) (West 2011).

39. 8 U.S.C.A. § 1324A(e)(3)(c) (West 2011).

40. 8 U.S.C.A. § 1324A(a)(3) (West 2011).

41. Ariz. Contrs. Ass'n v. Napolitano, 526 F. Supp. 2d 968, 973 (D. Ariz. 2007). IIRAIRA created three prototype programs, but E-Verify was the only one to survive for implementation indefinitely. *See also* in the original IIRAIRA of 1996 §§ 401(a), (c)(1)–403, *available at* http://www.nacua.org/documents/iirira.pdf (outlining the three prototypes).

42. National Conference of State Legislatures, *E-Verify FAQ* (July 29, 2011), http://www.ncsl.org/?tabid=13127.

43. National Conference of State Legislatures, *E-Verify FAQ* (July 29, 2011), http://www.ncsl.org/?tabid=13127.

and, if necessary, United States Citizen and Immigration Services.[44] First, the employer must fill out an I-9 form for the new hire within three days of employee's start date.[45] To do so, the employer must enter the I-9 information into the E-Verify system.[46] Most inquiries are completed within seventy-two hours after entry, but some cannot be confirmed within this time period due to changes of citizenship status, name changes, or typographical errors; in such cases, the Department of Homeland Security will issue a "tentative non-confirmation notice" until the issue is resolved.[47] Then, "the employee has eight federal work days to start resolving the case" and "about one-half of those who receive a non-confirmation notice contest the notice."[48] IIRAIRA did not make the use of E-Verify mandatory for employers.[49]

One issue plaguing E-Verify is its level of consistency and accuracy. The Government Accountability Office (GAO) compiled a report in December 2010 stating that United States Citizenship and Immigration Services (USCIS) improved the accuracy of E-Verify with a 5.4% increase in immediate confirmations.[50] However, the report made it clear that E-Verify remains vulnerable to identity theft, employer fraud, and name mismatches, leading to unwarranted tentative non-confirmation notices.[51] A previous study from 2007 conducted by Westat under

44. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 973 (9th Cir. 2009).

45. *E-Verify FAQ*, *supra* note 42 (stating that the I-9 form is filled out by the employer with the new employee and asks for the "employee's name and date of birth; social security number; citizenship status; an A number or I-94 number if applicable; documentation to establish work authorization; and proof of identity and expiration date, if applicable"). The employees can chose from various documents to prove identity and work authorization, such as a U.S. passport, current employment authorization card, or a driver's license and social security card, and the "[d]ocuments must appear genuine." *Id.*

46. *Id.* (stating that the information is "compared against 455 million records in the Social Security Administration (SSA) database and 80 million records in the Department of Homeland Security's (DHS) immigration database").

47. *E-Verify FAQ*, *supra* note 42.

48. *Id.*

49. Koets, *supra* note 37, at Cumulative Supplement § 22.5. *See also* in the original IIRAIRA of 1996 § 402, *available at* http://www.nacua.org/documents/iirira.pdf.

50. The report is available online: *Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain*, GOV'T ACCOUNTABILITY OFF. (Dec. 2010), http://www.gao.gov/new.items/d11146.pdf.

51. *Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain*, GOV'T ACCOUNTABILITY OFF. (Dec. 2010), http://www.gao.gov/new.items/d11146.pdf.

the direction of the Department of Homeland Security found that although accuracy had improved, the "error percentage was still too high for it to become a mandated program."[52] The report noted that the SSA estimated about 4.1%, or 17.8 million records, contained discrepancies and that 12.7 million of those discrepancies pertained to U.S. citizens.[53] The study further demonstrated that there were significant differences between citizen and noncitizen cases; only 72% of lawful permanent residents with Green Cards and 63% of documented immigrants with work authorization were confirmed automatically.[54] These studies demonstrate not only the difficulties facing implementation of the E-Verify program, but also that the immigrant population faces a greater chance of feeling the brunt of these inaccuracies and inconsistencies.

3. THE LEGAL ARIZONA WORKERS ACT (THE ACT)[55]

Along with at least eleven other states, Arizona made a conscious effort to curb employment of unauthorized workers by passing legislation mandating the use of the federal E-Verify system.[56] The Act states that employers may not intentionally or knowingly employ unauthorized immigrants and that employers must use the E-Verify system.[57] Further, the Act makes it clear that the county attorneys of Arizona may bring proceedings against an employer who does not comply, which may result in a suspension or total revocation of the license to do business in the State of Arizona.[58] The Act preserves the rebuttable presumption of compliance for employers who use E-Verify and implement the federal statutory definitions of "knowingly employ," "unauthorized alien," and "license."[59] Additionally, the statute

52. *E-Verify FAQ*, *supra* note 42.

53. *E-Verify FAQ*, *supra* note 42.

54. *E-Verify FAQ*, *supra* note 42.

55. *See generally* ARIZ. REV. STAT. ANN. §§ 23-211 - 214 (2007).

56. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1973-74 (2011). *See, e.g.*, MISS. CODE ANN. § 71-11-3(3)(d), (4)(b)(i) (Supp. 2010), UTAH CODE ANN. § 13-47-201(1) (West 2010), VA. CODE ANN. § 2.2-4311.1 (Lexis 2008).

57. Ariz. Contrs. Ass'n v. Napolitano, 526 F. Supp. 2d 968, 975-76 (D. Ariz. 2007).

58. ARIZ. REV. STAT. ANN. §§ 23-211-214 (2007).

59. The Act still points out that an employer who, in good faith, utilizes E-Verify is entitled to a rebuttable presumption in Arizona Revised Statute § 23-212(I). Furthermore, the Act employs the definitions of "knowingly employ" and "unauthorized alien" directly from IRCA in Arizona Revised Statute §§ 23-212(A), 23-211(8). The Arizona statute states that "'[k]nowingly employ an authorized alien'" means the actions described in 8 U.S.C.A. § 1324A. "This term shall be interpreted

prohibits the state from determining if the employee is in fact unauthorized. The state can only inquire about the employee's status from the federal government. Thus, continued proceedings are contingent on the federal government's results.[60]

B. THE HOLDING OF THE *DE CANAS* COURT

De Canas was a 1976 (pre-IRCA and IIRAIRA) landmark case dealing with a California statute that utilized immigration status and the clause "will not knowingly employ an illegal alien."[61] The Court reasoned that when states enacted employment-based immigration reform, it qualified as an area of the law that was "neither intrinsically nor historically an exclusive concern of the federal government," and therefore the federal system could not preclude enforcement of the state laws because it was not of the same subject.[62] The Court further stated that if the statute were to be preempted by federal statute, it must be such that it is explicitly regulating immigration law and penalties, not penalties of another area of law encompassed by state sovereignty.[63] The Court held that the California statute enforcing civil fines could be upheld because it was not preempted by federal law.[64] The Court came to this conclusion because they perceived a difference between immigrants and immigration law when creating statutes.[65] The difference is that if the federal government has already determined the status of an immigrant

consistently with 8 U.S.C. § 1324a and any applicable federal rules and regulations." ARIZ. REV. STAT. § 23-211(8). That portion of the statute refers to 8 U.S.C. § 1324(h)(3), which defines an "unauthorized alien" as someone who at the time of employment is not either "(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." 8 U.S.C.A. § 1324(h)(3) (West 2011). The Act also utilizes the definition of "license" from 5 U.S.C. § 551(8)-(9) in Arizona Revised Statute § 23-211(9). The Act states that "license" "[m]eans 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." ARIZ. REV. STAT. ANN. § 23-211(9)(a) (2007). This general definition is followed by a list of what qualifies as licenses, which ranges from certificates of partnerships to any grants of authority under specific titles and chapter of Arizona laws. ARIZ. REV. STAT. ANN. § 23-21(9)(b)(i)-(iv).

60. Ariz. Contrs. Ass'n v. Napolitano, 526 F. Supp. 2d 968, 975 (D. Ariz. 2007).

61. De Canas v. Bica, 424 U.S. 351, 352 (1976).

62. Ariz. Contrs. Ass'n, Inc. v. Candelaria, 534 F. Supp. 2d 1036, 1048 (D. Ariz. 2008) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

63. *De Canas*, 424 U.S. at 355.

64. De Canas v. Bica, 424 U.S. 351, 352 (1976).

65. Endelman & Lange, *supra* note 1, at 167.

and a statute dealing with a state-mandated area of the law utilizes this status within its sovereignty, it is a law dealing with immigrants, not a statute creating an immigration law.[66] The setback encompassed by the nature of this logic begs the question of where to draw the line.[67]

C. PREEMPTION STANDARDS

Overall, there are two categories of preemption: express and implied. "When a federal law contains an express preemption clause," the Court focuses "on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'"[68] On the other hand, implied preemption can be sub-categorized to either field preemption or conflict preemption. Although the types are not rigid by definition, there is a substantive distinction, and the outcome of revoking or overruling the statute changes dependent on classification. Also, the requirements surrounding the need for express or implied preemption differ.

1. EXPRESS V. IMPLIED PREEMPTION

There is a major distinction between what constitutes "express" and "implied" preemption. Federal law expressly preempts state action or law when Congress has addressed the issue of state law displacement within the statute's text by way of a preemption clause, savings clause, or both.[69] Some courts have held that when an express preemption clause exists, that clause standing alone should determine preemption without deference to implied preemption.[70] However, this argument seems to have been abandoned by subsequent cases.[71]

66. Endelman & Lange, *supra* note 1, at 166.

67. *Id.* at 166-67.

68. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1977 (2011) (citing CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).

69. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 738 (2008).

70. *Id.* at 739.

71. Merrill, *supra* note 69, at n.47 (providing case examples and holdings within footnote 47: Geier v. Am. Honda Motor Co., 529 U.S. 861, 868, 884-86 (2000) and Freightliner Corp. v. Myrick, 514 U.S. 280, 287-89 (1995)). The argument that express preemption should prevail would effectively constrain judicial discretion and expand legislative power beyond what it was meant to be. *Id.* at 738-39. Thus, express preemption is enough to displace a state law; however, courts often consider implied preemption as well in those cases to exercise discretion, placing a "check" on Congress's power. *Id.*

Implied preemption rests on the concept that any conflicts between laws that are cognizable under the Supremacy Clause[72] do not demand express preemption to cause state statute displacement.[73] Implied preemption breaks down into various sub-doctrines, but the *Whiting* court only deals with two: field and conflict preemption.[74] The following subsections will discuss these implied preemption doctrines in greater detail. Subsection (a) will discuss field preemption and its application while subsection (b) will discuss conflict preemption and its application.

a. Field Preemption

The amorphous field preemption occurs when federal legislation is so complex, detailed, and systematic that the court can glean from those extensive measures that Congress did not intend for the states to have room to create their own legislative measures.[75] When a court finds field preemption, they are limiting the states' police powers to the narrowest of circumstances and, as a result, either limiting or excluding them from the entire field.[76] In most cases, there is a presumption that Congress did not intend to displace state law, and therefore courts are often reluctant to infer field preemption.[77] This

72. 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.

See also Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'").

73. Merrill, *supra* note 70, at n.47.

74. Overall, every type of preemption is often couched in terms of Congress' intent. *See Id.* at 740 ("Congress, it is said, would not want to see federal law nullified by state law and would not want the policies and purposes reflected in its enactments undermined by the application of state law.").

75. Endelman & Lange *supra* note 1, at 159.

76. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000). In *Crosby*, a Massachusetts state statute was passed barring state entities from buying goods or services from Burmese companies. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 363 (2000). Subsequently, Congress sanctioned Burma. *Id.* The Court held that the Massachusetts's act was preempted by federal law despite lacking an express preemption provision because the act was an obstacle to the executive's discretion to sanction Burma and Congress' intent to limit the sanctions against Burma. *Id.* 363-64.

77. Endelman & Lange *supra* note 1, at 153-54.

presumption is always heeded unless there is no possible conclusion other than that Congress intended to preempt a field; courts generally resolve ambiguous cases in favor of the states.[78] However, this presumption is not upheld when the area of law is one where there has been a significant history of federal precedent.[79]

b. Conflict Preemption

As for conflict preemption, it is well settled that preemption must occur when federal and state laws directly conflict "or [the state law] stands as an obstacle to the operation of federal law."[80] This creates two types of conflict preemption: direct and frustration of purpose, or obstacle.[81] A direct conflict arises in the form of an impossibility to comply with both laws at once.[82] An obstacle or frustration of purpose conflict arises when compliance with the state law "blocks full and complete implementation of Congress-mandated objectives."[83] In both scenarios the conflict does not have to be express; even in cases where the policies or end goals of both statutes are the same but the plausible outcomes of implementation may conflict, state law is preempted.[84] Also, when the remedies of the statutes conflict, the state law must be preempted.[85] After the court finds conflict preemption, the states retain all police powers, but they are not to pass laws that defeat the conflicting federal powers and objectives.[86]

IV. THE COURT'S DECISION

The U.S. Supreme Court used the *De Canas* framework and

78. Endelman & Lange *supra* note 1, at 153-54.

79. Endelman & Lange *supra* note 1, at 153-54.

80. *Id.* at 154.

81. Merrill, *supra* note 69, at 739.

82. Endelman & Lange *supra* note 1, at 154-55.

83. *Id.*

84. *Id.* at 155. *See generally* Wisconsin Central, Ltd. v. Shannon, 539 F.3d 751, 761-66 (7th Cir. 2008) (holding that an Illinois statute regulating railroad overtime wages was preempted via field preemption because Congress had traditionally occupied all areas of the law related to railways, and their lack of deference to the states in that area of the law showed an intent to disbar them from the field).

85. *Id.* at 156.

86. Ariz. Contrs. Ass'n, Inc. v. Candelaria, 534 F. Supp. 2d 1036, 1053 (D. Ariz. 2008).

analyzed the Act under prevailing preemption doctrine.[87] In *Whiting*, the Court used the *De Canas* holding to prevent the statute from being automatically overruled by IRCA. The *Whiting* Court noted that the "[p]ower to regulate immigration is unquestionably . . . a federal power"; however, the Court also stated that the states should still maintain the broad authority within their police powers to regulate matters of employment in order to protect workers and citizens of the state.[88] Although IRCA had not been enacted when *De Canas* was decided, the *Whiting* Court used this holding to open the Act up to analysis. The holding gave the court the opportunity to analyze the statute rather than outright stating that the Act is explicitly an immigration law that must be preempted by federal law. The *Whiting* Court also drew textual comparisons between the California statute and the Act.[89] Additionally, although not relied on heavily by the majority opinion, the parties drew comparisons between the context of both *De Canas* and *Whiting* by demonstrating the acts were trying to achieve the same goals within the same harsh economic environment.[90]

The majority opinion focused primarily on a strict textual reading of IRCA and addressed pragmatic arguments through legislative history and public policy within counterarguments to their reasoning. The Court broke down the textual analysis of preemption in four ways. First, the Court considered if the entire Act was expressly preempted by field or conflict preemption.[91]

87. The prevailing preemption doctrines as applied by the Court are express preemption and implied preemption. *See* discussion *supra* Section III.C.

88. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1974 (2011) (citing De Canas v. Bica, 424 U.S. 351, 354-56).

89. *Id.* at 1973-74.

90. Brief of State Senator Russell Pearce as Amicus Curiae Supporting Respondents at 6-7, Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) (No. 09-115), *available at*:

http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_115_RespondentAmCuSenRussellPearce.authcheckdam.pdf.

Both parties to the suit were in favor of amicus curiae. *Id.* at 1. This brief filed by the respondents states that the California statute was enacted during the same type of economic downturn as citizens face today. *Id.* at 6-7. Further, the respondent's brief points out that these policy and state conditions heavily influenced the court in ruling in favor of the statute. *Id.*

91. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1970 (2011). Chief Justice Roberts delivered the opinion of the court in Parts I and II-A, stating that the Act is not expressly preempted by federal law, and in Part III-A, stating the mandatory E-Verify provision is not impliedly preempted. *Whiting*, 131 S. Ct. 1968. In Part II-B, Chief Justice Roberts was joined by Justices Scalia, Kennedy, and Alito in concluding

Second, the Court considered if federal law entirely preempted the Act.[92] Third, the Court analyzed whether the section mandating E-Verify caused the Act to be impliedly preempted either via field preemption or conflict preemption, making compliance impossible.[93] Lastly, the Court looked to the E-Verify requirement to determine if there was conflict preemption on account of it conflicting with Congress-mandated initiatives.[94] Justice Breyer (joined by Justice Ginsburg) and Justice Sotomayor both wrote dissenting opinions.[95]

A. EXPRESS PREEMPTION OF THE ACT

The Court determined that the Act was not expressly preempted because the Act fell within "the confines of the authority Congress chose to leave the States" and is permitted under "the plain text of the savings clause."[96] As evidence, the court considered the plain language of the statute and noted that the Arizona statute employed the term "license" as it is commonly used and implemented within the federal government.[97] Because the statute restricted penalties to a reasonable definition of licenses, it fell within the reserved powers left to the states within IRCA's savings clause.[98] Thus, the field was left open to the states in this specific area.[99] Further, the Court reasoned that there was no conflict because the term "license" in the Act did not conflict with Congress' intentions since it was strictly confined to licensing restrictions.[100]

In analyzing the express preemption of the Act, the Court utilized a textual, plain-meaning approach.[101] The petitioners noted that other similar federal acts require that parties exhaust

that the Arizona Act is not impliedly preempted by federal law, and in Part III-B, the Chief Justice was also joined by Justices Scalia, Kennedy, and Alito in concluding that the Act does not obstruct the goal of the E-Verify program and the intent of Congress. *Id.* Justice Kagan took no part in the decision. Justice Breyer dissented, with Justice Ginsburg joining, and Justice Sotomayor dissented separately. *Id.*

92. Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).
93. *Id.*
94. *Id.*
95. *Whiting*, 131 S. Ct. at 1972.
96. *Id.* at 1970-71.
97. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1970-71 (2011).
98. *Id.* at 1971.
99. *Id.*
100. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1971 (2011).
101. *Id.* at 1977.

administrative remedies before initiating state proceedings, and the Act does not provide for this.[102] The Court dismissed the argument, finding that the language of IRCA in no way created this requirement, and, therefore, finding it irrelevant to determining if any type of preemption existed.[103] Based on the foregoing, the Court concluded that the Act was not expressly preempted.[104]

B. IMPLIED FIELD AND CONFLICT PREEMPTION OF THE ACT

Petitioners argued that Congress intended for the federal immigration system to remain exclusive. The Court dismissed this argument by saying the right to regulate through licensing laws was expressly left to the states.[105] The Court stated that this is true because it cannot be possible that Congress intended to eliminate the states from this specific area of regulation.[106] The Court makes it clear that its rationale is based on the idea that field preemption could only apply to "uniquely federal areas of interests," of which business regulation through licensing laws is not.[107] Additionally, the Court reasoned that there was no conflict because the Act "tracks IRCA's provisions closely," posing no conflicting obligations between state and federal laws, and the Ace does not "upset the balance Congress intended to strike with IRCA" to create a conflict.[108]

During this discussion, the Court did not address the argument raised by petitioners that licensing sanctions would create discrimination among employers. Petitioners pointed out that effectively encouraging discrimination would conflict with Congress' intent and other statutory regulations. The Court reasoned that discrimination was not an issue because "[l]icense termination is not an available sanction for merely hiring unauthorized workers, but is triggered only by far more egregious

102. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1979 (2011).

103. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1979 (2011).

104. *Id.* at 1981.

105. *Id.* at 1970.

106. *Id.* at 1971.

107. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1971 (2011) In the opinion the majority gives a list of interests taken from the brief of the petitioners that describes what are generally considered to be uniquely federal interests. *Id.* at 1983. Some of the unique federal interests found from precedent are the presidential conduct of foreign policy, the foreign affairs power, fraud on federal agencies, regulation of maritime vessels, and patent law. *Id.*

108. *Id.* at 1974.

violations."[109] Further, that the standard to "knowingly" or "intentionally" hire unauthorized immigrants is high enough to avoid discrimination scenarios which are also prohibited by both state and federal anti-discrimination laws.[110] The Court declined to infer or conclude that employers would err on the side of discrimination rather than complying with the Act.[111]

C. E-VERIFY MANDATE AND IMPLIED FIELD AND CONFLICT PREEMPTION

The Court went on to consider whether the mandatory use requirement of E-Verify was impliedly preempted by IIRAIRA and federal law. The Court reasoned that the E-Verify clause was not impliedly preempted because IIRAIRA "contains no language circumscribing federal action."[112] Also, the Court made it clear that, although the federal government does not mandate the use of E-Verify, IIRAIRA does not indicate that the states *may not* require mandatory use as their preference.[113] Lastly, the Court reasoned that the Act did not explicitly conflict with federal systems because there were no extreme requirements outside of what is contemplated in current federal laws, there was the same rebuttable presumption, and all consequences of both federal and state action were the same.[114]

D. THE E-VERIFY MANDATE DOES NOT CONFLICT VIA FEDERAL LAW OBSTRUCTION

All justices taking part in the decision[115] agreed that the E-Verify mandate was not preempted impliedly via field or direct conflict preemption. However, this was not the case with the second form of conflict preemption regarding obstacles to implementation.[116] The majority reasoned that the E-Verify mandate was not impliedly preempted because the Arizona Act "in no way obstruct[ed] achieving the aims of the federal

109. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1971 (2011).

110. *Id.* at 1972.

111. *Whiting*, 131 S. Ct. at 1984.

112. *Id.* at 1972.

113. *Id.* (emphasis added).

114. *Id.*

115. Justice Kagan took no part in the decision. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1972 (2011).

116. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1972 (2011).

program."[117] The Court further noted that the state-created mandatory requirement actually accorded with the Government's attempts to expand the use of E-Verify and that there was no risk of overloading the system.[118]

E. JUSTICE BREYER'S DISSENT

In his dissent, Justice Breyer made two crucial proposals addressing not only the language of the statute but also public policy and legislative history.[119] First, Justice Breyer analyzed the Act and agreed that the "licensing" definition is in fact a generic definition.[120] However, for the terms of the Act to fall in the narrow savings clause at hand, the "licensing" must have been more specific in order to avoid conflict and thus avoid federal preemption.[121] In Justice Breyer's opinion, the definition currently provided by the Act insufficiently complied with what the savings clause actually meant by "licensing," which includes agricultural, construction, recruiting, and hiring licenses.[122] Justice Breyer examined the history of IRCA and argued that when it was enacted, Congress had no intention of allowing such a broad exemption within the states' power.[123] Because the "licensing" law language was too broad, it was not within the savings clause and, therefore, was impliedly preempted under field preemption.[124]

117. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1972 (2011).

118. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1972 (2011).

119. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1987 (2011) (Breyer, J., dissenting) (explaining that textual definitions of "licensing" are important, but so is the Act's practical context). Further, he wrote that one of the main things the court must consider is the purpose of the federal acts if the Act falls within the savings clause and is not impliedly preempted. *Id.* at 1987-88.

120. *Id.* (Breyer, J., dissenting).

121. *Id.* at 1988 (Breyer, J., dissenting).

122. *Id.* at 1987-88 (Breyer, J., dissenting).

123. *Whiting*, 131 S. Ct. at 1994-95 (Breyer, J., dissenting). Justice Breyer makes the argument that the licensing clause and IRCA itself was designed to work in a specialized area of the law, such as agricultural laborers, to create a system of dual enforcement to prevent a large range of serious-employment abuses. *Id.* (Breyer, J., dissenting). Justice Breyer cites various congressional bills to demonstrate that this was the purpose taken from the legislative history and that it narrows the savings clause to these special businesses, such as farm laborers and forestry laborers, not to a broad interpretation of any area of business (as it is interpreted by the majority). Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1995-96 (2011) (Breyer, J., dissenting).

124. *Id.* at 1995 (Breyer, J., dissenting).

Justice Breyer concluded that in order for the clause to be valid, the penalties would have to be limited to those who knowingly refer or recruit workers to be employed.[125] Further, because it created different penalties and results than what was intended by Congress when IRCA was enacted, it also impliedly conflicted with federal law and therefore was preempted under conflict preemption.[126]

Justice Breyer's second position was that the clause mandating E-Verify conflicted with federal law and therefore must be preempted.[127] Justice Breyer pointed out that by co-opting the federal program and making it mandatory, it changes the regulation and ignores Congress' reflected reasoning.[128] This change imposes a direct "obstacle to the accomplishment" of the legislative objectives.[129] Since IRCA contains clear statutory language designating E-Verify as a voluntary program, Arizona's Act undermines the entire federal objective for the program and its goals.[130]

F. JUSTICE SOTOMAYOR'S DISSENT

Justice Sotomayor disagreed with the majority opinion in two major capacities. She believed that the majority opinion misinterpreted the savings clause within the IRCA federal scheme.[131] In her dissent, she argued that when the savings clause is interpreted in the proper context, the licensing provision no longer falls within the savings clause and is therefore preempted.[132] Justice Sotomayor reasoned that continuing to interpret the federal scheme to create a state mechanism for adjudication is incorrect, since that would directly conflict with IRCA's policy that immigration is a federal matter.[133]

125. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1995 (2011) (Breyer, J., dissenting).

126. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1995 (2011) (Breyer, J., dissenting).

127. *Id.* (Breyer, J., dissenting).

128. *Id.* (Breyer, J., dissenting).

129. *Id. at* 1996-97 (Breyer, J., dissenting).

130. *Id.* at 1997 (Breyer, J., dissenting).

131. Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) (Sotomayor, J., dissenting).

132. *Id.* at 2004 (Sotomayor, J., dissenting).

133. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 2000-2002 (2011) (Sotomayor, J., dissenting).

Moreover, Justice Sotomayor also found that federal law preempted the provision of the Act for mandatory use of E-Verify.[134] Similar to Justice Breyer, she reasoned that by mandating the use of E-Verify, the State of Arizona made a decision for Congress in relation to the use and application of a federal resource.[135] Justice Sotomayor found that the policy decision significantly contravened the objectives of Congress, which had already determined that participation in the electronic system should be voluntary.[136] In Justice Sotomayor's opinion, this conflict forced preemption of the statute.[137]

V. ANALYSIS

A. CRITICISM OF IMPLIED PREEMPTION AND THE ACT ANALYSIS

The majority opinion reasoned that the Act in no way upsets the balance intended to be created by IRCA due to its close following of all IRCA provisions. However, as Justice Sotomayor pointed out in her dissent, including federal definitions and a similar presumption clause does not qualify the statute as being in accord with the overall scheme that IRCA constructs. "Congress," she wrote, "enacted IRCA amidst this patchwork of state laws. IRCA 'forcefully' made combating the employment of illegal aliens central to 'the policy of immigration law.'"[138] Because the savings clause is ambiguous, the outside factors and overall scheme of IRCA must be considered to glean Congress' intent in writing the Act.[139] The majority opinion textually analyzes the statute and the savings clause and interprets that Congress' intent is sufficiently embodied within the Act because it mimics the form and wording of IRCA.[140] This renders the statutory scheme as a whole inconsistent and incoherent.[141] However, as Justice Sotomayor pointed out, the savings clause is

134. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 2007 (2011) (Sotomayor, J., dissenting).

135. *Id.* at 2006 (Sotomayor, J., dissenting).

136. Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) (Sotomayor, J., dissenting).

137. *Id.* at 2005 (Sotomayor, J., dissenting).

138. *Whiting*, 131 S. Ct. at 1999 (Sotomayor, J., dissenting) (citing Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 147 (2005)) (quoting INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183, 194 (1991)).

139. *Whiting*, 131 S. Ct. at 1999 (Sotomayor, J., dissenting).

140. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1982 (2011) (Sotomayor, J., dissenting).

141. *Id.* at 2002 (Sotomayor, J., dissenting).

the point in controversy and is "hardly a paragon of textual clarity."[142]

This Casenote, agreeing with Justice Sotomayor's analysis, focuses on the gross inadequacies of the majority's logic and rationale. As a result of the statutory ambiguity, the majority should have consulted the overall implementation of IRCA and the purpose it was designed to serve at the time of enactment. The strict textual construction of the savings clause was insufficient due to ambiguity, and a more pragmatic approach, based on legislative history, should have been used.

As the reasoning of Justice Sotomayor follows, the express goal of "'unifor[m]' enforcement of 'the immigration laws of the United States,'" explicitly contradicts the idea that Congress also wished to allow all states and localities their own adjudication and enforcement procedures in this area of the law.[143] Further, she added the following:

> Reading the savings clause as the majority does subjects employers to a patchwork of enforcement schemes similar to the one that Congress sought to displace when it enacted IRCA. . . . Congress could not plausibly have meant to create such a gaping hole in that scheme through the undefined, parenthetical phrase "licensing and similar laws."[144]

Since the backdrop of IRCA must be considered, Justice Sotomayor concluded that the savings clause must be construed to impose licensing sanctions following a final determination under the federal statutes first.[145]

B. CRITICISM OF IMPLIED PREEMPTION AND E-VERIFY ANALYSIS

Justices Breyer and Sotomayor reached the same conclusion on the preemption issue.[146] Their reasoning and conclusion is the

142. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1998 (2011).

143. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 2003 (2011) (Sotomayor, J., dissenting).

144. *Id.* at 2003-04 (Sotomayor, J., dissenting).

145. *Whiting*, 131 S. Ct. at 2004 (Sotomayor, J., dissenting) (referring to a final determination under IRCA).

146. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 2005 (2011) (Sotomayor, J., dissenting). Justice Sotomayor stated that she was only writing her own dissent to point out other observations, but she agreed with Part IV of Justice Breyer's dissent. *Id.* (Sotomayor, J., dissenting). In her dissent, she referred to the reasoning

most persuasive because they distinguish the current regulation dealing with immigration law from the other regulations previously considered as not conflicting with federal law. As previously noted, the majority opinion considers the textual imposition of the Act within IRCA's language. The main point emphasized by the majority was that although IRCA does not mandate the use of E-Verify; there is no express prohibition of mandating the program's use.[147] Further, by encouraging the states to mandate the program, they are in accord with the intent of Congress, which was to benefit the entire process as a whole.[148] However, investigation beyond the literal clauses of the statute and consideration of the other purposes for which IRCA necessarily supports a different conclusion. This Casenote also contends that by mandating E-Verify, the states are creating an obstacle to the implementation of immigration law and Congress' objectives.[149]

Justice Breyer outlined at least five different reasons why reaching the conclusion that the Act falls within the savings clause of IRCA is an obstacle to the objectives of Congress. First and foremost, Justice Breyer pointed out that the language and voluntary nature of the program have remained consistent characteristics of the statute throughout its history and renewals.[150] Further, Congress has made it clear that, although improved, E-Verify is still problematic and therefore has not been qualified for expansion;[151] it is up to Congress to implement expansion of the federal program, not the states.[152] Next, Justice Breyer points out that the employers who are mandated to use E-Verify are federal contractors, who are a separate and distinct group subject to numerous unique requirements.[153] The federal

within Justice Breyer's dissent regarding statutory context and comparison to other statutes. *Id.* at 2006 (Sotomayor, J., dissenting).

147. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1972 (2011).

148. *Id.*

149. This reasoning is aligned with that of Justice Breyer. *See Whiting,* 131 S. Ct. at 1996 (Breyer, J., dissenting).

150. *Id.* at 1997 (Breyer, J., dissenting).

151. *See supra* Section III.A.2 (discussing two government reports demonstrating the remaining inaccuracies of the E-Verify system and how these inadequacies prevent Congress from mandating the program nationally).

152. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1997 (2011) (Breyer, J., dissenting).

153. *Id.* (Breyer, J., dissenting). *See also E-Verify FAQ*, *supra* note 42 (stating that federal contractors and subcontractors are the only group of employers required to use E-Verify when their contracts with the federal government contain the Federal

government's mandate of E-Verify in these specific limited instances does not, in and of itself, support the conclusion that its intent was to allow all states to mandate similar provisions for all employers.[154] Lastly, Justice Breyer concluded that there is no reason to interpret the enactment of a permissive program to give rise to a presumption that the states automatically have the right to make that program mandatory if they so choose.[155] The language of the statute plainly defines participation in the program as voluntary; allowing Arizona to mandate the program creates an obstacle to the express intent of Congress.[156]

Justice Sotomayor also raised additional objections to the mandatory implementation of E-Verify and how it contradicts Congress' intent. The strongest of these additional arguments is that the pure financial considerations of the bills demonstrate that the E-Verify program should be mandated by Congress, not the states. She points out that heavy costs come with the implementation of E-Verify and that Congress considered this when declining to require the use of E-Verify in all fifty states.[157]

Additionally, Justice Sotomayor makes the crucial point that permitting the states to use E-Verify will improperly put the states in the position of making decisions for the federal government that directly affect expenditures and allotment of federal resources.[158] Further, mandating E-Verify pushes costs and hardship onto both the employer and the newly-hired employees. As discussed above in Section III.A.2., the inaccuracies of the E-Verify system often end in tentative non-confirmation notices. These notices take away the ability for the new hires to work, which harms both the employer and employee monetarily and practically because they are stalemated and unable to be productive.

The final concern, especially expressed by Justice Breyer, is

Acquisition Regulation E-Verify Clause).

154. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1997 (2011) (Breyer, J., dissenting).

155. *Whiting*, 131 S. Ct. at 1997 (Breyer, J., dissenting).

156. *Id.*

157. *Id.* at 2006 (Sotomayer, J., dissenting). A congressionally mandated report concluded that the annual cost of this pilot program was about $11 million, if voluntary, and about $11.7 million, if mandatory. *See* H. R. REP. NO. 108-304, pt. 1, p. 6 (2003).

158. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 2006 (2011) (Sotomayer, J., dissenting).

discrimination. Justice Breyer explicitly discusses the "business death penalty" by saying that people will err on the side of discrimination rather than taking the chance of hiring someone who may be an "unauthorized worker."[159] The majority justifies their point that discrimination is not an issue because the standard of "knowingly," coupled with the express provisions of IRCA and other state laws penalizing discrimination, deters people from participating in a practice of discrimination.[160] However, as the reports from the Bureau of Labor Statistics show, immigrant workers who are documented are much more likely to receive tentative non-confirmation notices than citizens or other new hires.[161] These notices delay the new hire's ability to work and as a result cost both the employer and employee money within the business on top of the costs to resolve the issue. Although the employer is unable to take any adverse actions against an employee who receives the notice, the case still is referred to the Department of Homeland Security, and there is no estimate of time provided for how long it takes for the issue to be resolved.[162]

Considering these statistics and the uncertainty created by the process, discrimination is a valid concern. Justice Breyer sums the argument up authoritatively in his dissent by stating, "[e]ither directly or through the uncertainty that it creates, the Arizona statute will impose additional burdens upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the hiring of unauthorized aliens—without counterbalancing protection against unlawful discrimination."[163]

C. THE CURRENT EFFECTS OF THE *WHITING* HOLDING

Presently, more expansive and harsh state laws are being passed in reaction to the Arizona Act's approval and the

159. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1992 (2011) (Sotomayer, J., dissenting).

160. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1984-85 (2011).

161. *See* Section III.A.2.

162. United States Citizen and Immigration Services, *E-Verify for Employees* (last updated June 20, 2011), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=017bfb41c8596210VgnVCM100000b92ca60aRCRD&vgnextchannel=017bfb41c8596210VgnVCM100000b92ca60aRCRD.

163. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1992 (2011) (Breyer, J., dissenting).

continuing employment crisis nationwide. The issue with these statutes is how they are beginning to drift into other areas of law that are generally considered to fall within state sovereignty. For example, the first case to directly address and distinguish *Whiting* was *Georgia Latino Alliance for Human Rights v. Deal*.[164] The northern district court of Georgia decided whether House Bill 87, the Illegal Immigration Reform and Enforcement Act of 2011 (HB87), was constitutional in order to grant or deny a motion to dismiss and an injunction.[165] HB87 is a criminal-based immigration law that empowers Georgia law enforcement to charge citizens, non-citizens, and unauthorized immigrants with criminal offenses.[166]

The plaintiffs brought the claim against HB87 because they believed that efforts to educate the public about this new Act would divert attention away from the real issues underlying immigration.[167] Further, the plaintiffs asserted that HB87 reached too far in criminally punishing its own citizens who inadvertently or without another option transport or associate with an undocumented immigrant.[168] The two primary sections of the Georgia Act at issue were §§ 7 and 8. The court in this case distinguished both the *De Canas* and *Whiting* reasoning from HB87.[169] The court granted in part and denied in part the defendant's motion to dismiss because § 7 of HB87 has merits to be preempted by federal law and § 8 of HB87 has merits to be in conflict with constitutional rights.[170]

164. Ga. Latino Alliance for Human Rights v. Deal, No. 1:11-CV-1804, 2011 WL 2520752 (N.D. Ga. 2011).

165. *Id.* at *7.

166. *Id.* at *1. Section 8 of the statute allows officers to investigate the immigration status of all criminal suspects as long as there is probable cause that the suspect committed some other criminal offense. *Id. See also* GA. CODE ANN. § 17-5-100(b) (2011). Section 7 criminalized "'transporting or moving an illegal alien,'" "'concealing or harboring an illegal alien,'" or "'inducing an illegal alien'" to enter the state of Georgia. *Id.* It further required all agencies and political subdivisions to accept only certain verifiable and secure identification. *Id.* If the agency was found to have knowingly accepted non-secure or unverifiable forms of identification, that agency could be criminally prosecuted. *Id.* (citing GA. CODE ANN. § 16-11-200 (2011); GA. CODE ANN. § 16-11-201(2011); GA. CODE ANN. § 16-11-202 (2011)).

167. Ga. Latino Alliance for Human Rights v. Deal, No. 1:11-CV-1804, 2011 WL 2520752, at *1 (N.D. Ga. 2011).

168. *Id.*

169. Ga. Latino Alliance for Human Rights v. Deal, No. 1:11-CV-1804, 2011 WL 2520752, at *14-15 (N.D. Ga. 2011).

170. *Id.* at 14-17, 19. The court further granted the plaintiff's preliminary injunction. *Id.* at 19.

Another law in Alabama similarly impacts citizens, non-citizens, and unauthorized immigrants in regards to state education, random document verification by public officials, and intrastate transportation.[171] On August 29, 2011, Judge Blackburn of the northern district of Alabama authorized a temporary preliminary injunction until September 29, 2011 on the Alabama law known as HB56, or the "Beason-Hammon Alabama Taxpayer and Citizen Protection Act."[172] Judge Blackburn stated that because of the immense controversy and numerous complaints filed against HB56, a temporary injunction was proper.[173] On September 28, 2011, Judge Blackburn decided on the issues of a permanent injunction and declaratory relief in *United States v. Alabama*.[174] The United States challenged ten provisions of the statute, and the court only preliminarily enjoined four specific sections.[175] These specific sections dealt with criminalizing certain actions, reducing tax benefits, and creating a private civil statutory cause of action against employers who hired unauthorized workers over authorized workers or U.S. citizens.[176]

In the opinion, Judge Blackburn stated that *Whiting* provided guidance on one of the two cornerstones to the preemption of state laws in the immigration context.[177] She

171. *See* H.B. 56, 2011, Reg. Sess. (Ala. 2011), *available at* http://latindispatch.com/2011/06/09/text-of-alabama-immigration-law-hb-56/.

172. Hispanic Interest Coal. of Ala. v. Bentley, 2011 WL 5516953, at *2 (N.D. Ala. Sept. 28, 2011) (injunction pending appeal at the 11th Circuit).

173. *Id.* at 1-2.

174. United States v. Alabama, No. 2:11–CV–2746, 2011 WL 4582818 (N.D. Ala. Oct. 05, 2011).

175. LexisNexis Immigration Law Community Staff, *District Court on U.S. Challenge to Alabama Law: Win Some, Lose Some*, LEXISNEXIS BENDER'S IMMIGRATION BULLETIN (Oct. 4, 2011, at 3:28 PM), http://www.lexisnexis.com/community/immigration-law/blogs/blogs/archive/2011/10/04/bender-s-immigration-bulletin-news-from-oct-15-district-court-on-u-s-challenge-to-alabama-law-win-some-lose-some.aspx.

176. *Id.* § 11(a) made it a misdemeanor for any undocumented alien "to apply for, solicit, or perform work in Alabama"; § 13 criminalized any attempt or conspiracy to conceal, harbor, or shield an unauthorized alien while also criminalizing any actual, attempt, or conspiracy to transport an unauthorized alien; § 16 barred business-tax deduction on any wages paid to unauthorized alien; and § 17 created the "civil cause of action against an employer who either hired an authorized alien instead of an authorized one or a U.S. citizen, or discharged a citizen or authorized alien instead of an authorized alien." *Id.*

177. United States v. Alabama, No. 2:11–CV–2746, 2011 WL 4582818, at *27-28 n.3 (N.D. Ala. Oct. 05, 2011).

pointed out that the majority in *Whiting* clarified that IRCA expressly preempts a state's attempts to combat the employment of unauthorized workers unless they fall within the savings clause.[178] Judge Blackburn went through each of the eleven contested sections in her opinion, and four expressly use *Whiting* analysis and principles.[179] What is most interesting about the opinion is that of the four sections using this reasoning, only one of them even remotely dealt with employment issues.[180]

For example, § 10 creates a separate state-level misdemeanor offense for willful failure to complete or carry documents per 8 U.S.C. § 1304(e), 8 U.S.C. § 1306(a), or both.[181] In deciding if this section was preempted, Blackburn used *De Canas* to show that a separate immigration law, the Immigration and Naturalization Act (INA), does not allude to field preemption.[182] She then interpreted and used *Whiting* in holding that a state law is valid if it allows for deference to the immigration statutory scheme and bases decisions on immigrant status determinations from the federal government.[183]

In light of this expansion of state initiatives and these jurisprudential developments, it is highly likely that courts will now begin to apply this construction of *Whiting*. Plainly put, if the statute defers to any federal laws—not just IRCA or IIRAIRA, but now also the INA—and status determinations, it is most likely valid. Moreover, *Whiting* is being applied to show this standard regardless of subject matter and regardless of whether the savings clause is implicated. Here, § 10 does not deal with

178. United States v. Alabama, No. 2:11-CV-2746, 2011 U.S. Dist. LEXIS 112362, *26-27 n. 3 (N.D. Ala. 2011). Judge Blackburn used *Whiting* as an example of Congress' manifest intent to supersede the state laws and police power. *Id.* at *27-28.

179. *Id.*

180. United States v. Alabama, No. 2:11-CV-2746, 2011 U.S. Dist. LEXIS 112362 (N.D. Ala. 2011). Judge Blackburn uses *Whiting* to analyze both §§ 13(a) & 16, which address the transportation of unauthorized aliens and business-tax reductions, respectively. *Id.* at *6. She also uses *Whiting* to analyze § 10, which creates a misdemeanor offense for failure to receive documents and § 12(a), which requires law enforcement officials, when practicable, to determine the status of persons stopped, detained, or arrested if reasonable suspicion of the status exists. *Id.* at *5-6.

181. *Id.* at *30.

182. *Id.* at *42.

183. *Id.* at *40-41. Judge Blackburn declined to enjoin § 10 because it "complements" the statutory scheme and is not inconsistent with the text of the INA and other statutes, meaning that it is permitted to be an additional state statute to the federal system. *Alabama*, 2011 U.S. Dist. LEXIS 112362 at *42-43.

employment and in no way falls under Judge Blackburn's point that *Whiting* prohibits interference with employment provisions. However, she applied *Whiting*'s deference standard. As *Whiting* was applied in this case, so it will be considered on its appeal, and further in other states where similar statutes like this are being considered.

Cases such as *United States v. Alabama* demonstrate that *Whiting* has opened the door for states to pass laws that go beyond employment and into education, transportation, and criminalization. Further, courts are being forced to apply case holdings such as *Whiting* on subject matters that were not even contemplated in its reasoning. Additionally, it appears that courts are validating these laws under the *Whiting* precedent. The affirmation of the statute in *Whiting* has created the opportunity for states to attempt to fall both within IRCA's savings clause and the federal statutory scheme through deference and complementary laws. The problem is that *Whiting* permitted the states to start passing laws that press the concept of allowing states to pass immigration in other areas of law that may fall within state sovereignty.

As noticed by the Alabama injunction, the court system is being flooded with litigation on these issues. This confusion and this result of states mixing different immigration provisions is what Justice Sotomayor anticipated and feared in her dissent.[184] Further, it is in alignment with the idea that Congress enacted IRCA specifically to curb this problem.[185] As a result of the majority's narrow construal of the text by labeling IRCA "unambiguous," they have demonstrated just how "ambiguous" the words truly are. Courts, as in the Alabama case, are following this approach by also strictly adhering to the words of a statute for guidance on the intent of Congress to determine if a statute is preempted. Consequently, courts have allowed states to go against the intent of Congress through arbitrary deference.[186] The *Whiting* opinion will continue to be applied in these cases, and the states will continue to pass state legislation with some provisions holding under the licensing savings clause and others in entirely unrelated areas of law. Although the Arizona Act may have textually fell within the savings clause, the

184. *See supra* Section IV.F.

185. *See supra* Section IV.F.

186. *See supra* Sections IV.A-D.

repercussions of its validation have gone against the context of IRCA and intentional policy considerations of Congress by permitting states to pass valid laws in other areas of the law.[187]

VI. CONCLUSION

In regards to the Act, the Supreme Court reasoned too narrowly whether or not the licensing restriction or the E-Verify mandate was impliedly preempted by federal law and congressional initiatives. As outlined and asserted by the dissent, the majority opinion should have considered a broader interpretation of implied preemption. Because the savings clause is ambiguous on its face, the majority opinion should have stepped outside of the plain statutory language and considered the atmosphere of immigration when IRCA was enacted, the consequences of allowing mandatory implementation of federal programs, and the greater immigration statutory scheme.

When the Court's majority only consulted the wording of the statutes, it overlooked implied field preemption while also overlooking various conflicts between current laws and the Act. Both dissenting Justices touched upon important areas in which the Act conflicts with IRCA and other federal laws. Justice Sotomayor articulated how the Act will disturb the overall structure of IRCA by either expressly conflicting with the federal government in the area of immigration or by creating a statutory scheme separate from the federal scheme that may yield alternative results or implement alternative policies.[188] Additionally, for the mandatory use of E-Verify, Justices Sotomayor and Breyer both pointed out how the voluntariness of E-Verify is exactly why the program was created and that, as such, only Congress has the power to mandate it. Lastly, Justice Breyer adamantly demonstrated his concern for an influx in discrimination if states can mandate E-Verify.[189]

Either way, the decision in *Whiting* has opened the door to numerous immigration reform campaigns within the states nationwide. Louisiana recently passed an E-Verify bill and attempted to pass another E-Verify bill that went beyond

187. *See supra* Sections IV.E-F & V.A-B.

188. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 2004-06 (2011) (Sotomayor, J. dissenting).

189. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1992-93 (2011) (Breyer, J., dissenting).

employment law.[190] The E-Verify bill imposing other restrictions and straying into other areas of law was not adopted mainly because of the large costs that would be incurred for its implementation.[191] As a result of this continuing tension between the states and the federal government on the issue of immigration, immigration reform is becoming a larger issue in state law. The line seems to be blurred between what the states can and cannot do.

This Casenote and the subsequent immigration law boom makes the point that so long as this continues, the patchwork of laws that Justice Sotomayor referred to in her dissent will become a reality. The courts and Congress must now restrict E-Verify mandates to specific forms, define the savings clause or eliminate its use altogether, and begin to restrict and outline which subject matter areas do not fall within deference to federal law. One thing is certain—once the policy implications of this decision are clearly understood, *Whiting* will become infamously known as the case that started the tidal wave known as state immigration policy.

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190. LA. REV. STAT. ANN. §§ 23:991, 995. Act 402 from H.B. 646 was passed on August 15, 2011, and provides a safe harbor for employers who use either E-Verify *or* receive certain types of identification while creating fines and license revocation for those who do not. David Ware & Assocs., *Louisiana Implements E-Verify as Safe-Harbor for Employers*, http://david-ware.com/immigration-information/breaking-news/louisiana-implements-e-verify-safe-harbor-employers (last visited Feb. 7, 2012). A copy of the original H.B. 646 that became Act 402 and was enacted is available at http://e-lobbyist.com/gaits/text/343599.

191. *See* H.R. 411, 2011 Reg. Sess. (La. 2011) (designated the "Louisiana Citizen Protection Act") and H.B. 175, 2011 Reg. Sess. (La. 2011) (designated the "Employer E-Verify Program Use"). H.B. 411 was brought to committee in June 2011 but was withdrawn by its sponsor, Rep. Wooton, due major costs associated with the bill and was opposed by numerous local organizations. Report available at http://www.nola.com/politics/index.ssf/2011/06/rep_ernest_wooton_withdraws_bi.html (last visited Feb. 7, 2012).