LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW AND THE JOURNAL OF PUBLIC INTEREST LAW PRESENT

FEDERALISM AT WORK
STATE CRIMINAL LAW, IMMIGRANTS, AND IMMIGRATION-RELATED ACTIVITY

November 5, 2010
College of Law, Room 308
1 – 5:45 p.m.

CLE Credit—Louisiana Attorneys
This symposium has been approved for accreditation of 4.5 CLE credit hours by the MCLE Committee in Louisiana.
This is an era of unprecedented immigration enforcement. Never before in the history of the United States has the government removed so many noncitizens in so short a time frame. Between 2003 and 2008, the U.S. government removed 1,446,338 noncitizens from the United States … For every noncitizen who receives a formal order of removal, another four depart “voluntarily” as a result of their encounters with the immigration enforcement bureaucracy. At the same time, federal prosecutions of immigration crimes in criminal courts have reached an all-time high. Over the past five years, immigration crimes have risen to the top of the list of federal prosecutions, and now make up more than half of the federal criminal docket.”


Notwithstanding the federal focus on immigration enforcement, in the past decade, states have sought to play a more active role in immigration enforcement and, in particular, in deterring or punishing undocumented or unauthorized migration. To some extent, federal immigration law facilitates cooperative state initiatives in law enforcement undertaken under federal supervision. Federal immigration law also depends heavily on state criminal law in determining who is deportable and who is not. Many state legislatures or municipalities, however, have gone further and enacted statutes that regulate immigration related activities or the status of being an undocumented or unauthorized noncitizen. One example is the ordinance adopted by the City of Hazleton, which among other things prohibited landlords from knowingly letting, leasing or renting a dwelling unit to an “illegal alien” and prohibited employment of undocumented aliens. That ordinance has been enjoined as preempted by federal law. See Lozano v. City of Hazleton, 2010 U.S. App. LEXIS 18835 (3d Cir. Sept. 9, 2010). Previously, the Ninth Circuit Court of Appeals had concluded that a statute that prohibited employment of undocumented noncitizens by denying employers a license to do business in the state was not preempted. Chicanos Por La Causa, Inc. v. Napolitano, 558 F. 3d 856 (9th Cir. 2009), and the United States Supreme Court granted certiorari. Chamber of Commerce v. Candelaria, 2010 U.S. LEXIS 5321 (June 28, 2010). More recently, states have enacted statutes that impose criminal sanctions on a variety of immigration related activity. Perhaps the most famous of these initiatives is Arizona SB 170. At least, one Louisiana legislator has promised to introduce a similar statute for adoption in Louisiana.

This symposium examines the role that state criminal law has or should have in the context of immigration, immigration related activities and unauthorized or undocumented migration. Speakers on the first panel will address the use of state criminal law to heighten, complement or independently accomplish state immigration related goals, with state initiatives such as the Hazleton ordinance or Arizona’s SB 170. Speakers will also consider what role state initiatives may play in ameliorating the draconian effects of the heightened immigration enforcement at the federal level, such as using executive pardons as a way to avoid or impact the deportation of noncitizens whose state conviction may result in their deportation. Speakers will discuss, as well, the interaction between the federal and state governments, exploring the issue of preemption,
an issue likely to be settled by the Supreme Court this term, at least with regards the type of state regulation at issue in the *Candelaria* case. Speakers may also explore the role of race and national origin at the intersection of criminal and immigration law in the state context.

The second panel features law professors with expertise in immigration, criminal justice and constitutional law, and with practice expertise. In addition, some of the panelists are well versed in how these issues have played a role in Louisiana law enforcement and in the Louisiana legislature. The panel will explore issues raised by the presentations as well as issues that have been raised in the national and local dialogue on immigration. Both panels will reserve time for questions from the audience.

**CLE CREDIT - LOUISIANA ATTORNEYS**

This symposium has been approved for accreditation of 4.50 CLE credit hours by the MCLÉ Committee in Louisiana for the following date and location:

- **Course #:** 7536101105
- **Course Title:** Reconstructing Education in New Orleans Post Katrina
- **Date:** October 16, 2009
- **Location:** New Orleans

This course has only been approved for 4.50 hours of credit, not including ethics, professionalism or law office practice.
PROGRAM

1-1:30 p.m.  Keynote: Bill Ong Hing, University of San Francisco School of Law
SB1070 and the New Federal-State Anti-Immigration Regime

1:30 – 3:30 PM  Federalism in Theory: Constitutional Limits and Practical Implications
Searching for a (New?) Theory of Criminal Law Federalism: What the Immigration Debate Reveals about the Limits of Doctrine and Theory
Jennifer Chacon, University of California, Irvine School of Law

The Constitutionality of Criminalizing Unlawful Immigration Status
Karla McKanders, University of Tennessee College of Law

When State Courts Meet Padilla: Unrealistic Burden, Mandate for Specialization, or the Supreme Court’s (Inadvertent) Way of Throwing Immigrants Under the Bus?
César Cuauhtémoc García Hernández, Capital University Law School

Using the Pardon Power to Prevent Deportation – Legitimate, Desirable, or Neither?
Nora V. Demleitner, Hofstra University School of Law
Moderator: Johanna Kalb, Loyola University College of Law

3:30 – 3:45 p.m.  Break

3:45 – 5:45 PM  Roundtable: Federalism in Practice – National and Local Perspectives
This panel will explore state criminal law enforcement of immigrants and immigration related activity from a national and local perspective.
Ray T. Diamond, Louisiana State University Law Center
Ingrid Eagly, University of California, Los Angeles School of Law
The Honorable Joe Harrison, Louisiana House of Representatives
Hiroko Kusuda, Loyola University College of Law
Moderator: Andrea Armstrong, Loyola University College of Law
SPEAKERS

Jennifer Chacón

Professor Chacón currently serves as the Senior Associate Dean of Academic Affairs at the University of California Irvine School of Law. Professor Chacón does research in the field of immigration law. She teaches criminal law, criminal procedure, and immigration law and policy. She has written extensively on the intersection of immigration and criminal law.

Professor Chacón was awarded her J.D. from Yale Law School in 1998 and her A.B. with Distinction from Stanford University in 1994. After graduation, she served as a law clerk to the Honorable Sidney R. Thomas, U.S. Court of Appeals for the Ninth Circuit. From 1999-2003, she was an attorney with Davis Polk & Wardwell in New York City. She served as a Decanal Fellow at Yale Law School before joining the faculty at University of California at Davis, King Hall School of Law.

Nora V. Demleitner

Nora V. Demleitner is dean and professor of law at Hofstra University School of Law. Dean Demleitner received her J.D. from Yale Law School, her B.A. from Bates College, and an LL.M. with distinction in International and Comparative Law from Georgetown University Law Center. After law school Dean Demleitner clerked for the Hon. Samuel A. Alito, Jr., then a member of the U.S. Court of Appeals for the Third Circuit. She testified in front of the U.S. Senate on behalf of Justice Alito’s nomination to the U.S. Supreme Court.

Dean Demleitner teaches and has written widely in the areas of criminal, comparative, and immigration law. Her special expertise is in sentencing and collateral sentencing consequences. At conferences around the country she regularly speaks on sentencing matters, often in a comparative context, and issues pertaining to the state of legal education. Most recently, she reflected on “Clinical Design from a Dean’s Perspective” at the bi-annual immigration law teachers’ conference held at DePaul Law School in Chicago.

Dean Demleitner has also lectured widely in Europe. She has served as a visiting professor at the University of Michigan Law School, the University of Freiburg, Germany, St. Thomas University School of Law in Miami, and the Sant’ Anna Institute of Advanced Research in Pisa, Italy. She has also been a visiting researcher at the Max-Planck-Institute for Foreign and International Criminal Law in Germany, funded by a German Academic Exchange Service grant.

Dean Demleitner is an editor of the Federal Sentencing Reporter, and serves on the executive editorial board of the American Journal of Comparative Law. She is the lead author of Sentencing Law and Policy, a major casebook on sentencing law, published by Aspen Law & Business. Her articles have appeared in the Stanford, Michigan, and
Minnesota law reviews, among others.

For the third time in a row, Dean Demleitner was named one of Long Island’s Top 50 Most Influential Women in Business by The Long Island Business News. The award recognizes the contributions of female professionals to the region's economy and communities. As a three-time winner of the award, Dean Demleitner is now a member of the Hall of Fame.

Raymond T. Diamond

Ray Diamond, Jules F. and Frances L. Landry Distinguished Professor of Law, re-joined the faculty in 2009 at LSU Law Center. He had taught since 1990 at Tulane University, where he held the John Koerner Professorship in Law, was previously the C.J. Morrow Research Professor of Law, and was an Adjunct Professor of African Diaspora Studies. Before his entry into law teaching at LSU in 1984, Professor Diamond spent three years with the Federal Trade Commission’s Bureau of Competition, where he litigated a landmark price signaling case, worked for a year on Capitol Hill as a legislative assistant to Rep. Bob Livingston in the 95th Congress, and practiced law privately in New Orleans.

Professor Diamond has written widely in the area of constitutional law, race relations, and legal history. His scholarship in the area of the Second Amendment and the right to bear arms twice has been cited in Supreme Court jurisprudence, most recently in McDonald v. City of Chicago (2010) (Justice Thomas concurring), and has been awarded the 2000 Carter-Knight Freedom Fund Award. In connection with the issues he has raised in his Second Amendment scholarship, he was co-counsel on the amicus brief presented by the Congress of Racial Equality (CORE) to the Supreme Court in District of Columbia v. Heller, decided in 2008. He is the co-author of Brown v. Board of Education: Caste, Culture, and the Constitution, which was awarded the 2003 David J. Langum, Sr., Prize by the Langum Project for Historical Literature, and he has begun work on a book under contract to the University Press of Kansas, on the new Second Amendment jurisprudence of the Supreme Court.

Professor Diamond is a former member of the Board of Editors of the Journal of Southern Legal History and of the Board of Directors of the Louisiana Supreme Court Historical Society, and is a former chair of the Section on Legal History of the Association of American Law Schools. He earned his J.D. in 1977 from Yale Law School and his B.A. in 1973 from Yale College.

Ingrid Eagly

Ingrid Eagly is Acting Professor of Law at UCLA Law School. She teaches Evidence and the Criminal Defense Clinic. She has an extensive public interest background working in the areas of criminal defense and immigrant rights. She received her J.D. from Harvard Law School in 1995 and her A.B. from Princeton University in 1991. After law school, she received a Skadden Fellowship to
initiate a project on immigrant worker rights at the Legal Assistance Foundation of Chicago. She was later awarded a Soros Criminal Justice Fellowship to direct a domestic violence program at the Coalition for Humane Immigrant Rights of Los Angeles. Most recently, she served as a trial attorney for the Office of the Federal Public Defender in Los Angeles. She clerked for the Honorable David H. Coar of the United States District Court in Chicago. She joined the UCLA Law faculty in 2008.

Eagly's research focuses on the intersection between immigration and criminal justice. Her scholarship has appeared in the UCLA Law Review, the Clinical Law Review, and the Northwestern University Law Review.

The Honorable Joe Harrison

As a graduate of Nicholls State University in Business Management, Joseph Harrison is President of Harrison Financial Services, a firm that specializes in financial planning, employee benefits and insurance. Joe serves as Chair for the Bayou Lafourche Diversion Committee and serves on the House Appropriations, Education/Sub Committee of Appropriations, Joint Legislative Committee on the Budget, Natural Resources and Environment, Judiciary, and Coastal Protection and Restoration Authority Committees; he also serves on two National Committees: ALEC and the Energy Council. Joe has been awarded the Appreciation Award sponsored by Speech Pathologist and Audiologist in Louisiana Schools, Louisiana Endowment for the Humanities 2009 Legislative Award, Sponsor Legislator for Dyslexia Center at Nicholls State University, and the Louisiana Association of Principals Legislator of the Year 2009. He is very active in the community through programs such as Louisiana Referee Association – Football & Basketball, Labadieville Little League Coach – Football & Baseball, Labadieville Middle School Coach – Football & Basketball, K.C. #1099 Member, St. Philomena Catholic Church Member, CCA Member, Ducks Unlimited Member, and Katrina/Rita Search and Rescue Team. He is the husband of a public school principal, father of two, and a grandfather of four beautiful girls.

César Cuauhtémoc García Hernández

César Cuauhtémoc García Hernández joined Capital in 2010 after serving as a visiting assistant professor at the University of Tulsa College of Law and practicing immigration law. Professor García Hernández also served as a law clerk at the Rhode Island Superior Court. As an attorney, Professor García Hernández primarily represented individuals in removal proceedings as a result of criminal records. His scholarship and teaching likewise focus on immigration law. He has authored several articles concerning the policing of immigration law and the convergence of criminal law and immigration law. He teaches Torts, Criminal Procedure, Immigration Law, and a seminar titled Crimmigration. He received his J.D. from Boston College Law School and his A.B. with Honors from Brown University.
Bill Ong Hing

Bill Ong Hing is Professor of Law at University of San Francisco School of Law. He joined USF after serving as Professor of Law And Asian American Studies at the University of California, Davis, and as director of the law school's clinical programs.

Throughout his career, Professor Hing has pursued social justice through a combination of community work, litigation, and scholarship. He is the author of numerous academic and practice-oriented publications on immigration policy and race relations, including *Ethical Borders—NAFTA, Globalization, and Mexican Migration* (Temple University Press, 2010), *Deporting Our Souls—Morality, Values, and Immigration Policy* (Cambridge University Press, 2006), *Defining America Through Immigration Policy* (Temple University Press, 2004), and *Making and Remaking Asian America Through Immigration Policy* (Stanford University Press, 1993). His book *To Be An American: Cultural Pluralism and the Rhetoric of Assimilation* (NYU Press, 1997) received the award for Outstanding Academic Book by the librarians' journal *Choice*. Professor Hing was also co-counsel in the precedent-setting U.S. Supreme Court asylum case, *INS v. Cardoza-Fonseca* (1987). Hing is the founder of the Immigrant Legal Resource Center in San Francisco and continues to volunteer as general counsel for this organization. He serves on the National Advisory Council of the Asian American Justice Center in Washington, D.C.

Professor Hing received his A.B. from the University of California, Berkeley and his J.D. from the University of San Francisco. He has received a number of awards including the Donald Cressey Award, National Council on Crime and Delinquency (2008); the Keepers of the American Dream Award, National Immigration Forum (2007); the Heritage Award, Angel Island Immigration Station Foundation (2005); the University Distinguished Public Service Award, UC Davis (2003); and the Tobriner Public Service Award, San Francisco Legal Aid Society (2003).

Hiroko Kusuda

Hiroko Kusuda is a Clinical Professor of Immigration Law Section of Loyola Law Clinic & Center for Social Justice. Ms. Kusuda assists student attorneys to gain essential skills in representing immigrants before the Immigration Courts, Board of Immigration Appeals, as well as in federal courts. Her student attorneys also learn how to be an effective advocate for immigrants before different federal immigration and local agencies.

Ms. Kusuda is also a Staff Attorney of Catholic Legal Immigration Network, Inc. (CLINIC), a subsidiary of U.S. Conference of Catholic Bishops. In this capacity, she coordinates a state-wide detention project which includes direct representation of detained immigrants, "legal rights presentations" for detainees and local advocacy with the U.S. Immigration and Customs Enforcement (ICE), an agency within the U.S.
Department of Homeland Security, and other enforcement agencies. Ms. Kusuda also supports and assists immigration program staff of the Gulf Coast Immigration Project, a project created after Hurricane Katrina which is a collaborative effort among Catholic diocesan immigration programs in Louisiana and Mississippi.

Ms. Kusuda is a member of Louisiana State Bar Association and American Immigration Lawyers Association (“AILA”). She has served on the Executive Board of AILA Midsouth Chapter since 2000. She currently serves as ICE liaison for the Midsouth Chapter of the AILA. Ms. Kusuda has been a frequent guest speaker on various immigration issues at seminars and conferences including AILA Annual Conference, Louisiana State Bar Association CLE on Immigration Law, Louisiana Association of Criminal Defense Lawyers Annual Conference, Federal Public Defender Association’s Annual Conference, Migration & Refugee Conference and CLINIC’s National Convening. Ms. Kusuda is a graduate of Tsuda College in Tokyo, Japan and Tulane University School of Law where she was a member of the Tulane Journal of International and Comparative Law.

**Karla McKanders**

Professor McKanders joined the University of Tennessee College of Law faculty as an Associate Professor in 2008. She teaches in the Advocacy Clinic where she supervises students working on immigration cases before the Memphis Immigration Court, the Board of Immigration Appeals, and United States Citizenship and Immigration Services. Prior to teaching at Tennessee, she was a Reuschlein Clinical Teaching Fellow in the Clinic for Refugee Asylum and Emigrant Services (“CARES”) at Villanova University School of Law from 2006-2008, where she taught a law student clinical course where students handled asylum cases before immigration judges, asylum officers and the Board of Immigration Appeals. The students engaged in bi-weekly seminar on substantive and procedural asylum law geared towards improving their written and oral advocacy skills. Prior to joining Villanova, she clerked for the Honorable Damon J. Keith of the United States Sixth Circuit Court of Appeals. She received her J.D. from Duke University School of Law in 2003, and her B.A. from Spelman College in 2000. She also was an Associate with a law firm in Michigan specializing in labor and employment law.

Her research focuses on civil rights, immigration and asylum law and policy. Among her writings she has explored the constitutionality of recent state and local laws targeting immigrants as well as the legal connections between past discriminatory laws and current anti-immigrant legislation. She has also co-authored with other immigration professors an extensive report on proposed reforms to the immigration system.

Professor McKanders is currently a Fellow at the University of Tennessee’s Center for the Study of Social Justice in the Migration and Refugee Studies group.
Moderators

Andrea Armstrong

Professor Armstrong joined the Loyola Law School faculty in 2010. Her research and teaching interests include criminal procedure, criminal law, civil rights, domestic and international human rights, law and poverty, and race and the law. Professor Armstrong is a graduate of Yale Law School and the Woodrow Wilson School of Public and International Affairs at Princeton University, where she completed her M.P.A. in International Relations.

Prior to law school, Professor Armstrong researched regional conflict dynamics at the Center on International Cooperation at NYU and transitional justice strategies at the International Center for Transitional Justice. She has also examined conflict prevention for the United Nations Department of Political Affairs; the denial of citizenship in Central Asia and the Caucasus for the Commission on Human Security; and human rights/refugee protection for the International Rescue Committee. She has also taught policy modules on democratization at the Junior Summer Institute at Princeton University.

After law school, Professor Armstrong served as a clerk for the Honorable Helen G. Berrigan of the United States Eastern District of Louisiana. She also litigated prisoners’ rights issues, among others, as a Thomas Emerson fellow with David Rosen and Associates in New Haven, CT. She is admitted to practice in federal and state court in Connecticut and in state court in New York (pending).

Johanna Kalb

Professor Kalb joined the Loyola Law School faculty in 2008. Her research and teaching interests include civil procedure, constitutional law, federal courts, national security law, comparative law, and law and development.

Professor Kalb is a graduate of Yale Law School and the Johns Hopkins University School of Advanced International Studies where she completed her M.A. in International Relations with a focus on African Studies.

While in law school, she served as Submissions Editor for the Yale Journal of International Law and as Articles Editor for the Yale Human Rights & Development Law Journal. She was also a member of the Complex Federal Litigation Clinic, the Criminal Defense Clinic, and the Hurricane Law Project. Working under the direction of Professor Neal K. Katyal of the Georgetown University Law Center, Professor Kalb was a member of the legal team that successfully challenged the use of military tribunals at Guantanamo Bay, Cuba, in Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
After law school, Professor Kalb served as a clerk for the Honorable E. Grady Jolly of the United States Court of Appeals for the Fifth Circuit and the Honorable Ellen Segal Huvelle of the District Court of the District of Columbia. She is admitted to practice in the State of Mississippi.
First Panel

**Keynote:** Bill Ong Hing, University of San Francisco School of Law
*SB1070 and the New Federal-State Anti-Immigration Regime*

**Federalism in Theory: Constitutional Limits and Practical Implications**
*Searching for a (New?) Theory of Criminal Law Federalism: What the Immigration Debate Reveals about the Limits of Doctrine and Theory*
  Jennifer Chacon, University of California, Irvine School of Law

*The Constitutionality of Criminalizing Unlawful Immigration Status*
  Karla McKanders, University of Tennessee College of Law

*When State Courts Meet Padilla: Unrealistic Burden, Mandate for Specialization, or the Supreme Court’s (Inadvertent) Way of Throwing Immigrants Under the Bus?*
  César Cuauhtémoc García Hernández, Capital University Law School

*Using the Pardon Power to Prevent Deportation – Legitimate, Desirable, or Neither?*
  Nora V. Demleitner, Hofstra University School of Law

**Moderator:** Johanna Kalb, Loyola University College of Law
In the wake of a federal judge’s ruling that Arizona’s anti-immigration law is likely unconstitutional, Arizona governor Jan Brewer declared that SB1070 was needed "to address a crisis [Arizona] did not create and the federal government has actively refused to fix." She is right about one thing, Congress needs to address immigration reform, but not through what proponents of Arizona’s law call an “attrition through enforcement” only approach.

Congress is currently sitting on Senate and House proposals for reform that attempt to strike a balance between greater enforcement and a fair way to adjust the status for the 10-12 million undocumented immigrants in the country. However, if the package does not include at least the first steps toward helping Mexico improve its economy and infrastructure, undocumented Mexican migration will not be solved permanently, and the tension over undocumented migration will resurface down the road even if current proposals are enacted.

Given our experience with politicized debates over health care and finance reform, as framed, the immigration proposals in the Senate and the House will invite analogous criticism from the right and the left. Those in the immigrant rights camp are not happy with proposals to increase enforcement through biometric cards, stepped up ICE raids, and enhanced militarization of the border. Anti-immigrant forces are not happy with anything that suggests an amnesty for “law breakers,” including a temporary guest worker program. In contrast, if serious consideration is given to a long-range economic strategy with Mexico, I believe that conservatives and liberals alike would have reason to collaborate. The need and desire of Mexican workers to leave their country looking for work would be reduced—making conservatives happy. The workers—the vast majority of whom would rather stay home—would have that choice, making liberals happy.

The problem with the obsession of resources at the border and enforcement of employer sanctions is that those responses have been tried for years, yet unauthorized immigration continues. Migrants keep coming in spite of the militarization of the border and immigration raids. They keep coming in spite of the very real risk of death along the southern border, where our strategy is to force surreptitious entry over the most dangerous terrain. While Mexicans are not the only undocumented immigrants, they are the majority. To understand undocumented migration, we have to look beyond the simple explanation that many cross the border looking for work; we have to ask why they cannot find what they want in Mexico.

In 1994, we were told that NAFTA would solve the undocumented problem because jobs would be created in Mexico. But NAFTA contributed to huge job losses in Mexico. Mexican corn farmers could not compete with heavily-subsidized U.S. corn farmers, and now Mexico imports most of its corn from the U.S. Because of globalization, 100,000 jobs in Mexico’s domestic
manufacturing sector were lost from 1993 to 2003. Where do those unemployed workers look for work? El Norte.

When the European Union experienced a push to expand its ranks to include poorer nations, wealthy members worried. EU membership includes the right to open labor migration, and wealthier countries worried that membership bring a flood of poorer workers across the borders. Beginning with the 1973 EU enlargement to include Denmark, Ireland, and the United Kingdom, the British insisted on an approach to aid poorer regions. When Greece (1981), and Portugal and Spain (1986) were added, all three nations as well as Ireland received infusions of capital and assistance with institutional planning. The approach worked. Their economies transformed, Ireland, Portugal, and Spain who were all emigrant-sending nations prior to EU membership, now are net immigrant-receiving nations. Today, only 2 percent of EU citizens looked for work in other EU countries. The EU strategy of providing “adhesion” funds was one forged by conservatives and liberals.

The anti-immigrant lobby has used the politics of fear to generate much of the hysteria over immigration today. They advance the image of hordes of immigrants coming to take our jobs and commit crimes, all the while not wanting to speak English. Of course the empirical data contravene those myths. Yet through fear and intimidation, comprehensive immigration reform has been stalled. Fear makes us lose our conscience; fear paralyzes us; we lose our sense of analysis and reflection. Fear has led to an enforcement regime that has resolved nothing, while wreaking havoc in communities through ICE raids and increased migrant deaths. Fear explains why so many Americans support Arizona’s law.

At the end of the day, economic investment in Mexico is what’s needed to solve the undocumented migration challenge. Conservatives should understand that. And liberals should recognize that reducing undocumented migration is in Mexico’s interest as well; the persistent loss of able-bodied workers needed to build its infrastructure and economy cannot be good for Mexico. All of us understand that economic investment in Mexico will not and, probably, should not be done without some close monitoring. The EU enlargement policy sets certain standards for candidate countries. These criteria require a country that wishes to join the EU to meet certain political, social and economic standards. We need a similar strategy in our own hemisphere. In order to solve the undocumented immigration challenge, we need to include investment in Mexico as part of comprehensive immigration reform.
Outline of Remarks

Searching for a (New?) Theory of Criminal Law Federalism: What the Immigration Debate Reveals about the Limits of Doctrine and Theory

Jennifer M. Chacón

As a growing number of states and localities enact local criminal ordinances intended to regulate migration, a vigorous debate over immigration federalism has erupted. Proponents of sub-federal immigration laws such as Arizona’s S.B. 1070 argue that the power to enact these criminal law ordinances is rooted in long-established state police power. While generally conceding that the federal government has supremacy in the regulation of immigration, supporters of local regulation argue that localities have the power to adopt local laws that "mirror" federal immigration law or complement the federal regulatory scheme. They maintain that these laws fall within their traditional policing powers, and so long as they do not contravene federal immigration policy, they are (and ought to be) constitutional.

On the other side, opponents of state and local regulation argue that most state and local immigration-related ordinances are either expressly or impliedly preempted by federal regulation of immigration and therefore are (and should be) unconstitutional.

In many ways, the preemption debate now stands in for much deeper disagreements about immigration policy. In my talk, I hope to disentangle the policy questions from doctrinal and theoretical arguments about preemption. Rather than focusing on the contentious policy debate, I’d like to explore what exists by way of theory in this area and point out the limitations of such theory.

First, I will discuss the federalism and preemption arguments that are being made in the litigation over Arizona’s S.B. 1070 and other, similar litigation. I’ll talk about how these arguments have taken primacy over other legal arguments in these cases, even though the other arguments have much more popular resonance.

Second, I will discuss the ways in which the doctrine of federal preemption as it has developed in the criminal and immigration law contexts is actually insufficient to provide robust answers to some of the tough questions raised by ordinances like Arizona’s S.B. 1070. Laws like Arizona’s S.B. 1070 exist in an uneasy space where arguments about the federal power to control immigration come into conflict with arguments about the state’s police powers and traditional theories of concurrent jurisdiction in criminal law federalism. Thus, although Arizona’s law is a criminal law that purports to “mirror” certain federal criminal (and civil) provisions, there is very little guidance in existing theories of criminal law federalism that would help to answer the question of how federalism ought to operate in the context of laws like Arizona’s S.B. 1070.

In the final portion of my talk, I hope to illuminate the broader theoretical questions that must be addressed before a coherent theory of preemption can be brought to bear on the troubling immigration questions of our time, and to offer some tentative thoughts on how we might set about answering those questions.
OUTLINE

“The illegality of people erases entitlements to human rights by rendering people invisible to the law. […] this is the contemporary equivalent of civil death. […] A few decades ago, crossing borders in contravention of the law was regarded as a transgression that was not truly criminalized. It has now become a transgression more condemned that criminal acts removing all rights.”

INTRODUCTION

This symposium focuses on the timely topic Federalism At Work: State criminal law, noncitizens and immigration related activity. This symposium comes at a time where there has been a lot of state and local legislation in areas surrounding immigration and the need to criminalize undocumented immigrants for their unlawful presence. Specifically, with the enactment of the Arizona Law SB 1070, many states and localities are seeking to pass similar laws which make it a state crime to be present in their jurisdiction without proper documentation verifying their immigration status. One of the main concerns of state criminal laws that sanction unlawful presence is whether they are constitutionally preempted. State and local laws sanctioning unlawful presence substantially overlap with the Immigration and Nationality Act criminal provisions for unlawful entry and re-entry and civil immigration penalties that result in deportation.

In addressing these issues, this paper will proceed in three parts. The first part of the paper will detail how as a sovereign nation, our country’s laws have traditionally excluded undesirables from admission into our country. Early immigration laws provided civil sanctions for unlawful presences, but provide criminal sanctions for unlawful re-entry. In describing the

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2 Immigration and Nationality Act § 275 (illegal entry provision); Immigration and Nationality Act § 276 (illegal re-entry provisions).
history, this section explains the increasing phenomena of state and local legislation criminalizing unlawful immigration status. The second section will critique the section of Arizona’s new law SB 1070, A.R.S. § 13-1509 which makes it a state crime to be present in Arizona without proper documentation to verify your immigration status. This section will address if it is possible for states and localities to criminalize unlawful presence. The third section analyze the constitutionality the provision of Arizona Law SB 1070 that makes it a state crime to be unlawfully present in the state in relation to specific provisions of the Immigration and Nationality Act and overall immigration policy. This section will compare other laws that police unlawful presence as a starting point for analysis of the consequences of using multiple parties to police unlawful immigration status and the implications of excluding certain populations within a nation’s borders.

I. History of Immigration Laws Excluding “Undesirables”

Traditionally immigration laws are considered a nation’s prerogative as nation has the ability to discriminate against who is permitted to enter its borders. In this context, law is the social construct that creates illegality, which is subject to the values that the nation wants to inculcate through the admission or exclusion of certain populations.3 “The most straight forward way to define illegal migration is by reference to the migration law of the state doing the counting. Under this method, anyone who is currently in contravention of the law has illegal status. This will include people who enter in breach of the law and those who overstay their permission to remain.”4 “Illegality is a creation of the law.”5 This section describes U.S. history on how the law, depending on the time period, has expanded or contracted regulating populations who are permitted to enter the country. “Each extension of the law regulating migration increases illegal migration through defining increasingly larger categories as being outside the law.”6

- **Immigration Regulation 1600s:** Our country has a long history of excluding undesirable immigrants. In 1639, “colonies began legislating to exclude ‘paupers’ and ‘criminals.’”7 “Those restrictions excluding ‘public charges’ embraced not only

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3 Catherine Dauvergne, Making People Illegal.
4 Making People Illegal, pg. 11.
5 Making People Illegal, pg. 12.
6 Making People Illegal, pg. 15.
people sent by English courts but also the poor and diseased who came voluntarily.” Early restrictions show the hostilities settlers had towards immigrants. “Under the articles of confederation, each state apparently determined its own immigration policy, but there was confusion over the status of prior colonial enactments.

- **Immigration Regulation 1700s**: The United States Constitution, adopted in 1789, granted Congress broad power to regulate foreign commerce included immigration.

- **Immigration Regulations 1800s**: In the 1800s, Congress passed the Chinese exclusion laws barring persons of Chinese descent from immigrating to the United States and implementing forced labor for those who violated the laws. California instigated the passing of discriminatory and racist exclusion laws that excluded Chinese through the passage of Chinese laundry laws.

In the 1840s, the country was predominately Protestant where Catholic Irish and Germans were not accepted. “The anti-Catholicism that had prevailed in colonial days resurfaced. Several groups and overlapping political parities, including social reformers, Protestant evangelicals, the Nativists, the Order of the Star-Spangled Banner, and the Know-Nothing Party, campaigned for legislation halting immigration and prohibiting even naturalized immigrants from participating in the nation’s political process.”

Not until 1875 did the Supreme Court in *Henderson v. City of New York* declare state restrictions on immigration to be unconstitutional, as an infringement on the federal power over foreign commerce.” The Facilitating Act of 1864 was repealed in 1868, and in 1875 Congress passed the first restrictive statute. That statute, borrowing from earlier colonial legislation, barred convicts and prostitutes from admission. These limits were the first of many ‘quality control’ exclusions based on the nature of the immigrants themselves.

The Act of 1882 also excluded lunatics, idiots, and immigrants who were likely to become public charges.

The 1891 Act included diseased, paupers, and polygamists to the list. These additions were motivated in part by wanting to protect the U.S. economy.

- **Immigration Regulation 1900s**: The 1900s were marked by the expansion in excluding undesirable populations. This was facilitated in part by a 1911 report. In

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9 [http://academic.udayton.edu/race/02rights/immigr09.htm](http://academic.udayton.edu/race/02rights/immigr09.htm); David Weisbrodt & Laura Danielson, Immigration Law and Procedure pg. 7 (2005).
11 Id. at 5.
12 Id. at pg. 4.
13 Id. at pg. 6.
14 Id. at pg. 7.
15 Id. at pg. 7.
16 Id. at pg. 7.
the report the Immigration Commission “concluded that twentieth century immigration to the U.S. was significantly different from earlier immigration and that the new immigration was dominated by the so-called ‘inferior’ and ‘less desirable’ groups. As a result, the Commission concluded that the United States no longer benefited from a liberal immigration policy and should impose further entry restrictions. The Commission recommended a literacy test as one such restriction.” 17 Even though these restrictions were put in place they were extremely hard to enforce. The Immigration Commission had limited power to enforce the immigration laws. 18

In 1903, Congress passed a law excluded epileptics, the insane, beggars, and anarchists from admission. 19

“The 1907 law excluded the feebleminded, the tubercular, and those persons with a mental or physical defect that ‘may affect’ their ability to earn a living…” 20

Our country also has a pattern of excluding certain racial and ethnic groups. For example, in 1907, Japanese immigration was restricted. 21 In addition to broad based categorical exclusions of certain populations, immigration “restrictions were governed, in part, by a concern about persons not being able to assimilate in America.” 22

In 1965, in the wake of the Civil Rights Movement, the Immigration Act was passed which abolished all racial quotas and racial considerations from influencing whether a person could immigrate to the United States.

American history demonstrates that we have not utilized egalitarian methods to admit persons into our country. Government immigration policies, however, have historically excluded persons in a discriminatory fashion. The characteristics used to exclude undesirable persons have been based on a person’s race and nationality (i.e. Chinese exclusion laws); religion (Catholic); and their economic standing (public charge concept). When we view current state and local laws targeting immigrants policies in light of the past exclusionary immigration laws, the state and local laws demonstrate that we are simply repeating historical exclusionary practices of groups that are deemed unfavorable based on arbitrary and discriminatory characteristics. 23

As this section demonstrates, during different time periods, the law has defined undesirable populations to exclude from membership. “[T]he illegal nomenclature adheres better

18 Id.
19 Id at 8 (2005).
20 Id.
21 Id.
22 Id. at 10 (2005).
to some than others. We imagine illegals as poor and brown and destitute not backpacking tourist
that overstays visa."\textsuperscript{24} It is in this context that the law reifies the exclusion of certain populations,
sometimes on arbitrary and biased grounds.

II. Arizona SB 1070 and Similar Laws

Immigration Law Scholar Kevin Johnson has long stated, “[i]mmigration law offers a
helpful gauge for measuring this nation’s racial sensibilities.”\textsuperscript{25} Certainly, the Arizona law gives
our nation insight into our failure to remember the past treatment of racial minorities and poor
populations to prevent us from repeating divisive, discriminatory racial policies.

Arizona passed Senate Bill 1070.\textsuperscript{26} This law permits police officers and other state
agencies to identify, prosecute and attempt to deport undocumented immigrants.\textsuperscript{27} “The law
would require the police “when practicable” to detain people they reasonably suspected were in
the country without authorization. It would also allow the police to charge immigrants with a
state crime for not carrying immigration documents. And it allows residents to sue cities if they
believe the law is not being enforced.”\textsuperscript{28} “The law creates new immigration crimes and penalties
inconsistent with those in federal law, asserts sweeping authority to detain and transport persons
suspected of violating civil immigration laws and prohibits speech and other expressive activity
by persons seeking work.”\textsuperscript{29} When states enforce immigration, anyone who looks or sounds
“foreign” will be targeted. State and local officials lack training to identify undocumented
immigrants, which leads to racial profiling and discrimination. Undoubtedly, enforcement of
Arizona law will lead to arbitrary requests to persons to produce identity documents.

Arizona Governor Jan Brewer claims that the law is in reaction to the federal
government’s unwillingness to pass comprehensive immigration legislation and that the states
have to enact and enforce their own immigration laws. If anti-immigrant laws, like the Arizona
law, are allowed to stand they will reinforce divisive cultural norms that exclude Latinos from

\textsuperscript{24} Making People Illegal, pg. 16.
\textsuperscript{25} http://academic.udayton.edu/race/02rights/immigr09.htm
\textsuperscript{26} http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf
\textsuperscript{27} http://www.nytimes.com/2010/04/22/us/22immig.html
participating in society as full members returning to the days when discriminatory laws forbade certain classes of people from owning land, running businesses or living in certain places.\footnote{Karla McKanders, Jim Crow and Anti-Immigrant Laws (arguing that if Hazleton Pennsylvania like laws are permitted to stand will take us back to days where certain populations are forbidden to live or work…).}

The main part of the SB 1070 that raises criticisms is the part that requires all local law enforcement to investigate a person’s immigration status when certain indicators exist that give rise to reasonable suspicion that they are in the country unlawfully, regardless of whether that person is suspected of a crime. Under the law, a person would be presumed to be in the country lawfully unless they could show valid government ID or tribal identification.\footnote{ACLU Constitutionality Article, Analyzing Each Provision} This paper focuses in on Section 3 of SB 1070.\footnote{A.R.S. § 13-1509.} Section 13-1509 that establishes a separate state offense for any person to violate provisions of the federal immigration law regarding registration and carrying registration documents.\footnote{8 U.S.C. §§ 1304(e), 1306(a).} The first offense would be a class one misdemeanor, punishable by up to six months of jail time and an additional $500 fine, as well as jail costs, with the assessments to be applied towards the GIITEM Fund. The second offense would be a class four felony and an additional $1,000 fine and jail costs. Persons who have accepted voluntary removal or who had been deported in the past five years would be subject to a class four-felony charge upon their first arrest under this section. A person found in possession of drugs or weapons would face a class three-felony charge upon their first arrest.

Unlike the early exclusionary immigration laws that were hard to enforce, laws like the Arizona immigration laws seek to use state and local officials, namely police officers to detect unlawful presence and enforce the immigration laws. The Arizona SB 1070 law seeks to have any one who is suspected of being an immigrant produce documentation showing that they are lawfully in the country.

\section*{III. Constitutional Challenges to State Criminalizing Unlawful Immigrant Presence}

Since 2007, states and localities have been passing anti-immigrant laws. State and localities should not be able to enforce immigration laws. The Immigration and Nationality Act is a comprehensive law that is typically given supremacy over state anti-immigrant laws. The
federalism and supremacy arguments are centered on the premise that states and localities, in enacting laws that target immigrants, are encroaching on an area that is subject to federal control. Generally, anti-immigrant laws are being challenged in state and federal courts on federal preemption grounds.

A. Historical Background: Plenary Powers Doctrine

The preemption doctrine derives from the Supremacy Clause of the Constitution, which states that the “Constitution [] and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” The Supremacy Clause “invalidates state laws that ‘interfere with or are contrary to federal law.’” Under the preemption doctrine, federal law or regulations can expressly or implicitly preempt state law. In the immigration context, a state statute is expressly preempted if it clearly attempts to regulate immigration. In the alternative, a state statute can be impliedly preempted.

Under the field preemption doctrine, a state statute is impliedly preempted if Congress intends to occupy a field, which the state statute attempts to regulate. A state statute will be preempted under the field preemption test if there is a showing that it was “the clear and manifest purpose of Congress” to effect a “complete ouster of state power— including state power to promulgate laws not in conflict with federal laws” with respect to the subject matter. Under the conflict preemption doctrine, the state statute is also impliedly preempted where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

Under the obstacle to federal purposes test, concurrent state and federal enforcement activities are authorized when they do not impair federal regulatory interests. Courts “resort to principles of implied preemption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law” as a last resort. Under the implied preemption test, the court’s task is essentially one of statutory construction. States have traditionally used their Tenth Amendment police powers to exercise control over immigrants within their communities. Municipalities have the power to enact

ordinances that govern licensing businesses under their Tenth Amendment police powers in the Constitution. The Tenth Amendment states “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” States and localities have used their Tenth Amendment police powers to regulate employment and impose criminal sanctions for the unlawful employment of illegal aliens with no federal right to employment within the country. In *DeCanas v. Bica*, the Supreme Court characterized employment matters as local problems due to the state’s interest in protecting its own workers. Accordingly, Hazleton and other cities have used this authority to enact immigration regulations that regulate the employment of undocumented workers.

In the immigration context, *DeCanas v. Bica* is the seminal Supreme Court preemption case. In *DeCanas*, the Supreme Court held unconstitutional a California statute that prohibited an employer from knowingly employing an alien who was not entitled to lawful residence in the United States. The case arose when migrant farm workers brought an action against farm-labor contractors alleging that the contractors unlawfully terminated their employment. The farm workers argued, and the California courts agreed that state regulatory power over immigration was foreclosed because “Congress ‘as an incident of national sovereignty,’ enacted the INA as a comprehensive scheme governing all aspects of immigration and naturalization, including the employment of aliens . . . .”

The Supreme Court rejected this argument. The Court explained that it has never held that every state enactment dealing with immigrants is a regulation of immigration and is *per se* preempted. The Court reasoned, “standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration . . ..” The Court found that Congress did not express an intention to fully occupy the field of employing undocumented immigrants. In addition, the Court held that the California statute did not regulate immigration; instead, it narrowly regulated employing undocumented immigrants under the state’s police powers. Other scholars have acknowledged, “because *DeCanas* establishes a preemption analysis favorable to state and local regulations—including invoking a presumption against federal preemption and holding that the INA does not completely occupy the immigration field—it is clear that few state and local [immigration] laws will actually be preempted by the INA.”
The Court of Appeals for the Ninth Circuit addressed the complexity of immigration law in *Gonzales v. Peoria*, another case involving whether federal laws preempt local police enforcement of immigration laws. The ninth circuit held that local governments can enforce the more complex criminal provisions of immigration laws but cannot enforce the civil provisions. The court reasoned that criminal immigration provisions are few and narrow and are unsupported by a complex administrative structure. Therefore, there is a reasonable inference that the federal government did not occupy the field of immigration enforcement with respect to the criminal provisions.

In reaching this conclusion, the court found it imperative to distinguish between criminal and civil immigration violations. The court explained that criminal violations apply to aliens who have illegally entered the country. In contrast, civil violations also apply to aliens who are illegally present in the United States. The court found that there are numerous reasons why a person might be illegally present in the United States without having entered in violation of § 1325. For example, the expiration of a visitor’s visa, change of student status, or acquisition of prohibited employment could all cause an alien to be illegally present in the country without having violated any criminal provision. The court found that the arrest of a person for illegal presence would exceed the authority granted to the local police by state law. The court held that “nothing in federal law precluded the [local police] from enforcing the criminal provisions of the [INA],” specifically § 1325, “where there is probable cause to believe that the arrestee has illegally entered the United States.” The court found that the “enforcement procedures must distinguish illegal entry from illegal presence and must comply with all arrest requirements imposed by the federal Constitution.” *Peoria* does not read *DeCanas* narrowly in holding that local governments, namely local police officers, are barred from enforcing the civil provisions of immigration laws.

**B. Constitutionality of Arizona “Unlawful Presence” Law**

The Arizona statute requires police “where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when
practicable, to determine the immigration status of the person.” Detention is required until the immigration status of the person is verified. The statute provides that an officer may make a warrantless arrest if he or she has probable cause to believe that an individual has “committed any public offense that makes the person removable from the United States.”

The question in this context is whether a local police officer can determine a person’s immigration status from looking at them when unlawful presence is a legal construct. “U.S. citizenship is not a characteristic apparent to the eye because it is a legal determination. U.S. citizens are not required to carry proof of their citizenship while inside of the United States. Therefore, it is unlikely that in a routine encounter with law enforcement a U.S. citizen will possess a birth certificate, U.S. passport, naturalization certificate, or certificate of citizenship that would demonstrate citizenship.

Further, under the Immigration and Nationality Act, unlawful presence is a civil violation, not a criminal violation. There is no section in the INA that makes unlawful presence a crime. Birth in the United States certainly is a clear indicator that a person is not an alien. But foreign—birth is not a certain indicator of alienage. Acquisition of citizenship at birth depends on numerous factors, such as the parents’ respective citizenship, the duration and timing of their residence in the United States, their marital status at the time of the individual’s birth, the year in which the person was born, the place where the person was born, and in some situations, even the date on which the a child born out of wedlock was legitimated—none of which can be ascertained or observed by police in any contact or that could give rise constitutionally to any suspicion alienage.

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35 Arizona Senate Bill 1070, Section 2 as amended by Arizona HB 2162, Section 3, adding new § 11—1051(B).
36 Id.
37 Arizona Senate Bill 1070, Section 6, adding new § 13---3883(A)(5), A.R.S.
38 American Immigration Lawyers Association, Amicus Brief, pg. 5.
39 AILA Brief citing U.S. Const. amend. XIV, §1.
40 AILA Brief at pg. (citing See generally, 8 U.S.C. § 1401(c); 8 U.S.C. § 1401 (h) (establishing conditions under which children born in—wedlock outside of the United States acquire U.S. citizenship at birth) and §1409 (establishing conditions under which children born out-of-wedlock outside of the United States acquire U.S. Citizenship at birth).
Conclusion

Many immigrant rights groups have taken various stances in opposition to the Arizona law. Representative Raúl M. Grijalva, a Democrat from Arizona, called for a convention boycott of his state.\(^{41}\) In response to Arizona’s law, many groups have called for boycotts of the state of Arizona. For example, the American Immigration Lawyers Association cancelled its fall conference in Arizona. In addition, President Obama, who has stalled on immigration reform, stated that the Arizona law, he added, threatened “to undermine basic notions of fairness that we cherish as Americans, as well as the trust between police and our communities that is so crucial to keeping us safe.”\(^{42}\)

In most instances, unlawful immigration is the result of globalization and very mobile economy where businesses easily permeate borders. Even though there has been globalization and the open mobility of ideas, our immigration laws have not kept up pace with permitting easy mobility of labor. “Although money and ideas circumvent the globe, people remain in place.”\(^{43}\) This has resulted in an outdated immigration laws that cannot keep up with the economic and global markets. Therefore, the state laws criminalizing unlawful presence fail to recognize and adequately assess how our laws should come into conformity with the reality of globalization. In this context state and local criminalization of immigrant presences is not a viable solution.


\(^{43}\) Making People Illegal, pg. 43.
When State Courts Meet *Padilla*
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On March 31, 2010, the United States Supreme Court issued a decision, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), holding that the Sixth Amendment right to effective assistance of counsel requires criminal defense attorneys to inform their clients who are not U.S. citizens of the likelihood of deportation upon entry of a plea when deportation will clearly result from that plea. Despite its short history, *Padilla* has already begun to reverberate through state courts, where most criminal prosecutions occur.

This presentation considers state courts’ treatment of *Padilla* during its first six months. I argue that there is a high risk that state courts will inaccurately determine ineffective assistance of counsel claims under *Padilla* because state courts lack the institutional competency to properly determine the accuracy of a criminal defense attorney’s immigration advice. I come to this conclusion after closely examining state courts’ early analyses of *Padilla* claims and observing that courts frequently misinterpret fundamental aspects of removal proceedings or misconstrue the Immigration and Nationality Act’s crime-related grounds of removal. This lack of familiarity with critical procedural and substantive aspects of removal proceedings is perhaps inevitable given that state courts have not regularly addressed immigration law matters. While state courts struggle to catch up on the intricacies of removal proceedings and crime-related grounds of removal, their current treatment threatens to subvert *Padilla*'s unmistakable goal of ensuring that individuals are not unwittingly deported as a result of pleading guilty to a crime.
Editors’ Observations

By: Nora V. Demleitner

Pardon Power and Sentencing Policy

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These observations have three goals. First, we open with a guided tour through the issue’s fourteen articles and seventeen appendix documents. Next, we examine the history of the pardon power, some relevant developments in the sentencing and correctional process since the late 19th century, and pardon’s steep decline over the past hundred years. Finally, we suggest some principles to guide the relationship between pardon power and sentencing policy.

Many of the materials here take issue with, or draw lessons from, President Clinton’s controversial pardons during his final year in office. While it is premature — because of pending investigations — to draw final conclusions about the wisdom or propriety of individual acts of clemency, we trust that readers will find much of value in the intriguing studies and spirited debate offered by our contributors.

I. Reader’s Guide

A. Articles

The articles are grouped in three categories. The first, Guidance for Pardons, presents five essays that describe different conceptions of the role pardons have played throughout history and competing philosophies that lead various authors to urge expansion, or limitation, of a president’s power to mitigate punishment previously imposed. Introducing these essays is an article by Margaret Love, a former Pardon Attorney in the Justice Department, offering her own perspective on the pardon process. Love analyzes the evolving role of clemency in terms of tension between rule-based justice and discretionary mercy. She concludes that “our commitment to determinate sentencing ought . . . to make it easy to carve out a respectable role for pardon,” which was intended by the Framers to provide necessary flexibility where the legal system is unable to take appropriate account of individual circumstances. She discusses the remaining articles in the context of her rule discretion framework, and views President Clinton’s pardons as the result of a breakdown of the rule-based pardon process.

David Tait, an Australian criminologist, offers an historical and comparative approach. He shows how clemency and forgiveness, like punishment, are found throughout the criminal justice system. The policy issue he identifies is “how to distribute the power to punish or pardon most appropriately between juries, judges, constitutional courts, legislatures and the executive.” Emory law professors Charles Shanor and Marc Miller then tell of amenities and pardons that presidents from Washington to Carter granted to “heal the wounds of war at home.” Based on that history, the authors urge consideration of pardoning as a systematic policy tool to redress sentencing disparities flowing from the war on drugs. Quite an opposite perspective is suggested in Virginia law professor John Harrison’s essay on prerogative. Believing that pardons ought to be confined to unusual situations that justify doing good in the absence of a rule, he urges that they not displace the general presumption that “govern-
ments do good through rules and not outside them."

Dan Kohl of Capital University Law School examines both sides of the question whether the Constitution should be amended to require a president to give reasons for pardons, and explains why he thinks such a requirement would be counterproductive. Finally, Vice-Chair John Steer of the U.S. Sentencing Commission and Paula Biderman of the Parole Commission show how the sentencing guideline system provides "a detailed set of standards that may be helpful in evaluating clemency petitions." In their view, "judicious use of the President's commutation power...to achieve a more just sentence in exceptional cases" can be exercised compatibly with a "sentencing system that is designed to avoid unwarranted disparity in punishment." They see a need for commutations in the sentencing reform era because of (1) limitations on guideline departure authority under present law; (2) limitations in accounting adequately for post-sentencing developments; and (3) distortions in sentences where mandatory minimum penalties "work at cross purposes with the goals of the Sentencing Reform Act."

The second category of articles, Reflections on the Clinton Pardons, opens with the op-ed advice Kathleen Dean Moore, Oregon State University philosophy professor and author of a leading treatise on pardons, offered to President Clinton in the Washington Post six days before his final grants. Senior District Judge David Doty then discusses two cases involving drug offenders convicted in his courtroom who later had their sentences commuted: one whose post-sentence rehabilitation led the judge to support clemency; the other whom the judge and the United States Attorney deemed undeserving. Evan Schulitz of Legal Times and Assistant U.S. Attorney Brian Hofstein debate the question whether the Justice Department should retain its central role in the clemency process. Deborah Devaney and David Zlotnick, both former federal prosecutors, describe actual cases and discuss the role they think prosecutors ought to play, and presidents ought to heed, when pardons are presented for consideration.

In the Roads Less Traveled category, New Mexico law professor Elizabeth Rapaport recounts how the State of Georgia pardoned more than 100 resident immigrants for state misdemeanors committed years before a federal statute retroactively exposed them to mandatory deportation as "aggravated felons"—defined as having been sentenced to 12 months, served or suspended. Mary Price of FAMM proposes (by a route that would lessen reliance on the pardon process) that the Sentencing Commission breathe life into 18 U.S.C. § 3582(c)(1)(A) by guiding judges to reduce sentences more frequently, upon motion of the Bureau of Prisons, for "extraordinary and compelling reasons."

B. The Appendix

Beginning at page 192, the appendix section on Rules of the Pardon Process reprints Justice Department regulations relating to clemency, including procedures for clemency petitioners to follow, along with the Department's policy guidance for United States Attorneys in situations where comments on a petition are solicited.

Section B. Historical Snapshots, begins with Alexander Hamilton's 1788 explanation of the Constitution's pardon clause. This is followed by an excerpt from Wayne Morse's classic 1939 survey of pardons and other release mechanisms for President Roosevelt's Justice Department; and four short excerpts from Pardon Attorney reports in the 1960s during the administrations of Presidents Eisenhower, Kennedy and Johnson. Of special interest in the 1939 Survey is Dean [later Senator] Morse's analysis of the interrelationship between parole and pardon, the importance of keeping those functions separate, and the value of retaining parole supervision (rather than conditional pardon) as the primary avenue of early release. The concluding items in this section are Proclamations by Presidents Gerald Ford and George Bush granting pardons to Richard Nixon, and to Caspar Weinberger and others involved in the Iran-Contra affair. In each instance, the president spells out in detail the reasons underlying his controversial decision.

Section C. Effect of a Pardon, analyzes the sweep and limitations of pardons previously granted. In a Justice Department memorandum, Walter Dellinger concludes that pardons can bar deportation, remove a state firearm disability, and compel remission of court-ordered restitution. In the Abrams case, on the other hand, the DC Court of Appeals holds that a presidential pardon does not prevent the Bar from censuring an attorney who gave false testimony to congressional committees concerning the government's role in the Iran-Contra Affair. Finally,
Webster Hubbell, in a piece originally published by the San Francisco Chronicle, describes the collateral consequences of convictions that, if neither pardoned nor removed by statutory repeal, stigmatize a released offender for life.4

The concluding section, Clinton Era Cases and Comments, juxtaposes [1] two short White House policy statements (1996 and 2000) and a 1999 letter by President Clinton explaining his commutations of PALN terrorists (a subject discussed from a different perspective by former PALN prosecutor Deborah Devaney in her Voice for Victims article), with [2] three press accounts in early 2001, from the New York Times and Washington Post, reporting on the circumstances surrounding the final Clinton pardons. This section also includes Judge Doty’s letter to the President recommending clemency for Kim Willis, one of the defendants described in his Two Commutations article.

II. LESSONS FROM HISTORY: PARDONS, PROCESS, SUBSTITUTES

We think it worthwhile to examine the history of the pardon power and how it has evolved over the past two hundred years. That history demonstrates a transformation in the relationship between the pardon power and sentencing policy that holds important lessons for today’s system.

A. Pardons Pro and Con

Throughout history, kings, princes, popes and presidents have been vested with power to grant clemency—for reasons of mercy, forgiveness, compassion, justice—to persons previously punished by the state. It is an honorable tradition (occasionally dishonored in the breach) in the eyes of persons awarded a second chance, and of members of the public for whom forgiveness and mitigation symbolize the sovereign’s humanity or wisdom in providing a safety valve against convictions haphazardly found to be erroneous or punishments deemed unduly oppressive.

Clemency provokes strong detractors as well. Similarly situated offenders (and their families) often feel disparately and inexplicably left behind. And more broadly, prosecutors, judges and ordinary citizens often fear that clemency has been bestowed on an undeserving or high-risk offender whose pardon or expedited release will endanger public safety or undermine respect for law.

For the lucky few who receive clemency, a second chance may take different forms—complete pardon with restoration of civil rights, commutation to a lesser punishment, reprieve, amnesty, remission of fines. Timing differs as well. On occasion, second chances have been awarded in advance to persons not yet tried or convicted (as with Richard Nixon, the Iran-Contra defendants, and draft-age citizens who fled to Canada during the Vietnam war). At other times the pardon process is significantly deferred: according to current rules of the Department of Justice, a petition for pardon may not be filed until “expiration of a waiting period of at least five years after the date of release of the petitioner from confinement.”

B. Flaws in the Pardon Process

A critical dimension in many clemency cases focuses on the facts and procedures on which decisions are based. Pardons are determined by the President, a single decisionmaker at the apex of government. There is no requirement to provide due process. Fact-finding takes place behind closed doors. Reasons for grants need not be stated and are seldom volunteered. The decision is not subject to judicial review. The potential for arbitrariness is high.

At the same time, because pardon was designed to be the ultimate safety net, the stakes are high, the pressure of time (as with reprieves) is often intense, and no other forum is available. Outcome on occasion is much more important than process.

Disturbing as the arbitrariness of the pardon process may be, observers need to acknowledge that pardons do not stand alone in the spectrum of low-visibility, unexplained, unreviewable decisions to mitigate the seriousness of a criminal charge. Low-visibility discretion pervades the criminal justice process. Accuracy or error, evenhandedness or disparity, justice or injustice—all occur from time to time in decisions by the police not to arrest; by juries to acquit if the penalty seems more severe than the crime warrants; or by prosecutors when they file lower charges than those on which the person was arrested, or decline prosecution entirely, or give discounts to secure some offenders’ cooperation but not others.

"[T]o rely more than sparingly on pardons runs the risk of adding a significant new layer of arbitrariness that is not justified by the view that justice for some is better than justice for none."
Yet to rely more than sparingly on pardons runs the risk of adding a significant new layer of arbitrariness that is not justified by the view that justice for some is better than justice for none. This is especially so when the "some" seem to have back-room connections, political connections or financial connections. As we will see in the next section, various mechanisms introduced starting in the late 19th century significantly mitigated the use or severity of prison sentences and thereby facilitated a more parsimonious use of the pardon power.

C. 20th Century Substitutes for Pardons
In the early days of the Republic, a high proportion of federal prisoners -- tiny in number by today's standards -- secured release through pardons, often granted in 50-70% of all cases. Later, as federal crime became defined more broadly and prosecuted more expansively, the rate of pardons to prison population fell precipitously. During the period 1896 to 1936, for example, according to W.H. Humbert (who was among the first to carry out empirical work on the historical use of the presidential pardon power), the average daily federal prison population grew from 500 to 14,000 and the clemency rate fell from 6.4% to 2.7%.

Humbert says many reasons were offered for pardon's decline during the early 20th century. Among these were the rise in serious federal crime, an increase in the prosecution of repeat offenders, and -- most significant for us today -- the proliferation of legislative and administrative mechanisms to provide for sentence mitigation, post-sentence review and early release from confinement.

Options that served to diminish the need for pardons included sentences of probation in lieu of prison, awards of credit for good behavior while in prison, and the use of furloughs and work release to enable prisoners to serve part of their sentences outside prison walls. Probably the greatest change was the establishment in 1910 of the federal parole system to conditionally release selected offenders under supervision, often well before expiration of their prison terms.

There was thus a transition in this country away from pardons. As crime and caseloads grew, there was a rapid movement toward the use of administrative agencies and correctional practices to expedite the release of offenders from prison, usually under supervision, or as a substitute for prison as an initial matter.

III. RECENT REFORMS IN SENTENCING
In the past quarter century, the thrust of sentencing reform has been directed more to the front end of the system where sentence is imposed than to the back end where the offender is released. Yet while the system was being redesigned to emphasize fairness and uniformity in the imposition of sentences, Congress chose to limit judges' discretion and to increase the severity of punishment in ways that created other disparities.

A. Structural Reforms
In the mid-1970s Congress began to study sweeping reforms to rationalize federal sentencing. Spurred by a desire to reduce the unwarranted disparity and uncertainty surrounding indeterminate sentences, it ultimately enacted the Sentencing Reform Act of 1984, establishing a commission to promulgate guidelines and structure judicial discretion.

To allow individualization of sentences but enhance the accountability of judges, Congress authorized judges to depart from guideline ranges when they encountered circumstances for which guidelines made inadequate provision. It directed judges to explain sentences with statements of reasons. And it established a system for appellate review of sentences. These measures took account of longstanding concerns about the unfairness of a process that provided no standards for sentencing judges and no review on appeal.

B. Severity Reforms
At the same time, a number of changes wrought by the new system increased severity and narrowed opportunities to mitigate penalties. Congress abolished parole. It slashed good time credits. The Sentencing Commission, in turn, curtailed by more than 50% the use of probationary sentences. It also discouraged resort to work release and other alternatives to incarceration that had matured over preceding decades.
Of overwhelming impact, Congress began in 1986, only two years after the Sentencing Reform Act and before the first defendant was sentenced under the federal sentencing guidelines, to enact a series of severe mandatory sentencing laws, principally in relation to drug offenses. These laws curtailed the Sentencing Reform Act’s emphasis on tailoring sentences to the “nature and circumstances of the offense and the history and characteristics of the offender.” The combination of the mandatory sentencing regime and the sentencing guidelines has produced its own pernicious form of disparity and perceived unfairness, including, for example, substantial assistance departures below the mandatory minimum sentence for more culpable defendants, while less culpable co-defendants may not qualify for reduced sentences. The mandatory sentencing concept expanded throughout the 1990s and—with exceptions here and there—continued to grow harsher.

C. Mitigation Developments
Three species of sentence mitigation have tended to moderate the severity of the mandates just mentioned. In the process, they have slightly diminished the need for pardons. In 1994, Congress created a “safety valve” relieving certain low-level drug defendants from the strictures of otherwise-applicable mandatory minimum sentences. In 1996, departures from the guidelines were allowed to play a more significant role in individualizing particular sentences when the Supreme Court’s decision in Koon v. United States encouraged district courts to depart more flexibly in appropriate cases. According to the Sentencing Commission’s annual reports, there are soaring departure rates in many districts.

Finally, prosecutors and judges have been employing a range of techniques—of both high and low visibility—to mitigate punishments they perceive as being too severe. These techniques include explicit prosecutorial charge and plea bargaining and explicit judicial departures based on a fair factual record. These techniques also include more troubling behavior, such as fact bargaining. Furthermore, prosecutors know how to formally oppose departure motions while at the same time alerting the judge that no appeal will be forthcoming if she chooses to depart. Judges have also learned the low-visibility corners of the guidelines where their decisions to depart, or not to enhance a sentence, will rarely be disturbed, regardless of the prosecutors’ views.

Overall, sentencing reforms of the past quarter century have achieved a measure of success in bringing rationality to the process of imposing sentences. However, along the way the severity of many sentences has increased markedly. We are thus left with a criminal justice system that cries out for selective relief from long sentences, yet devices such as parole, better suited to make individual decisions in an orderly way, are not available. The larger need seems to be not for more pardons, but for further sentencing reform.

IV. CONCLUSION
Pardons can be all things to all people. They can be justice finally delivered, or well-deserved forgiveness for an old aberrant transgression. They can be an undeserved or inexplicable break for unrepentant offenders with connections. They can be painful reminders of still tender wounds for victims who thought justice had already been done.

As a general matter, considerations of crime control are of vital importance whenever clemency is contemplated. There are many crimes for which lengthy prison sentences are appropriate. If offenders are released or pardoned without adequate scrutiny of their records, public safety may be jeopardized. Equally troubling is the diminished respect for the law that follows when pardons are granted without explicit regard for the gravity of the decision.

We agree that reasons for pardons ought not be required as a constitutional matter but they do perform a salutary function when used to explain why it is appropriate to upset the deliberate judgment of the courts. For the same reasons that judges are now required to explain punitive sentences, we believe a president should voluntarily explain pardons and commutations. Public information needs to be recognized as critical to public confidence in the administration of justice.

But what to do about areas of federal sentencing policy that need attention and adjustment? Despite the extraordinary potential for arbitrariness, some urge significant increases in individual grants of clemency. Others urge that Congress reconsider its severe limitation of
administrative mitigation devices such as parole; its tacit prohibitions against individualized sentencing (e.g., through mandatory minimum penalty laws); and its requirement, of disproportionately high penalty levels for certain offenses without regard to circumstances of the crime or the offender.

Between these two choices, we favor the latter, more demanding road toward democratic reform. Wherever a rule can be structured to guide the discretion of judges or administrative agencies in determining — with reasons — whether to mitigate the sentences of similarly situated offenders, we think such a system should ordinarily be accorded priority over one that relies exclusively upon the unstructured, unexplained discretion of a president to grant or deny individual pardons or commutations. While presidents may wish to use systematic pardons or exemplary commutations to prompt debate or to motivate a recalcitrant Congress, they ought not invoke the pardon power to convert the Presidency into a legislature of one. As difficult as it may be to accomplish, completing the task of legislative sentencing reform is preferable to excessive — and often misunderstood — reliance on case-by-case pardons.

Notes
1 FSR has already examined collateral consequences in depth in volume 12, issue no. 5. See, e.g., Nora V. Demleitner, Stopping a Vicious Cycle: Release, Restrictions, Re-Offending, 12 Fed. Sent. Rep 243 (2000). We are not alone. In response to the controversy surrounding the November 2000 presidential election, the National Commission on Federal Election Reform, chaired by Presidents Carter and Ford, issued its final report in August 2001. The Commission noted that:
We believe the question of whether felons should lose the right to vote is one that requires a moral judgment by the citizens of each state. In this realm we have no special advantage of experience or wisdom that entitles us to instruct them. We can say, however, that we are equally modest about our ability to judge the individual circumstances of all the citizens convicted of felonies. Therefore, since the judicial process attempts to tailor the punishment to the individual crime, we think a strong case can be made in favor of restoration of voting rights when an individual has completed the full sentence the process chose to impose, including any period of probation or parole. In those states that disagree with our recommendation and choose to disfranchise felons for life, we recommend that they at least include some provision that will grant some scope for reconsidering this edict in particular cases, just as the sovereign reserves some power of clemency even for those convicted of the most serious crimes.
2 W.M. HUMPHREY, THE PARDONING POWER OF THE PRESIDENT 115 (1941)
3 518 U.S. 81 (1996)
4 See, e.g., Frank O. Bowman, Ill & Michael Heise, Quiet Rebellion? Explaining Nearly A Decade of Declining Federal Drug Sentences, 86 Iowa L. Rev. 1043 (2001) (noting that the decline in average federal drug sentences may be caused by discretionary decisions of prosecutors and judges, but observing that drug sentences are still longer than they were about a decade ago).
Second Panel

Roundtable: Federalism in Practice – National and Local Perspectives

The panel will explore state criminal law enforcement of immigrants and immigration related activity from a national and local perspective.

Ray T. Diamond, Louisiana State University Law Center

Ingrid Eagly, University of California, Los Angeles School of Law

The Honorable Joe Harrison, Louisiana House of Representatives

Hiroko Kusuda, Loyola University College of Law

Moderator: Andrea Armstrong, Loyola University College of Law
This Symposium’s examination of the role of state criminal law in immigration enforcement touches upon one of the most important areas in the criminal and immigration law fields. For some time now, as part of an increased focus on immigration enforcement, we have seen a devolution of immigration control to the state and local level. During my brief comments for the Symposium, I will provide a conceptual sketch of the three major categories of state laws and local criminal laws and practices used to enforce federal immigration law.¹ Broadly speaking, these laws and practices can be divided into three categories: (1) state laws that criminalize immigration crimes and immigration-related conduct; (2) state procedural rules that treat noncitizens differently from citizens in the criminal courts and corrections system; and (3) state and local laws and policies that expand the law enforcement authority of local officers and/or require law enforcement to engage in immigration screening. I will discuss each of these categories and relate them to trends that we are seeing nationally in local police departments and prosecutors’ offices.

Immigration crime is now the most prosecuted crime in federal courts—and not just the most prosecuted, but also it actually constitutes over half of the federal criminal docket. Noncitizens now represent almost forty percent of defendants sentenced under the Federal Sentencing Guidelines—and if petty offenses such as illegal entry were included in that total, the number would be even higher. In the federal system, the close connection between federal criminal prosecution and the immigration agency is eroding procedural protections for noncitizens (such as the denial of bond in criminal cases) and resulting in the functional use of the criminal law to operate as immigration law (namely, to select noncitizens for removal).²

As compared to the federal system that is subject to relatively centralized control and standardized reporting mechanisms, we know much less about how immigration influences criminal prosecution at the local level—less about the cases that are brought, the defendants who are charged, and the rules that apply in practice. Now that these laws are on the books, it is important to find out how they are being used in practice. In what situations are police and prosecutors citing to criminal immigration laws in their arrests and criminal charges? What sorts of challenges to the law are being brought by defendants? How do criminal prosecutions under these laws affect the immigration process? These are among the questions that I hope to address during our panel discussion and beyond.

¹ Ingrid Eagly, Immigration in Criminal Court, 58 UCLA L. REV. ___ (forthcoming 2011).
AN ACT

To enact Chapter 21 of Title 49 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 49:1311 through 1323, relative to immigration; to provide for the determination of citizenship status for persons charged with certain crimes; to provide for verification of persons determined to be a foreign national; to provide for time limitation for verification; to provide for notification to certain entities; to provide for rebuttable presumption that certain persons are a flight risk; to provide for participation in certain verification system; to provide for establishing certain discriminatory practice; to provide for requiring agencies and political subdivisions to verify lawful presence of persons applying for certain benefits; to provide for nondiscriminatory treatment; to require certain applicants to be verified through the Systematic Alien Verification for Entitlement Program; to require certain entities to monitor certain program; to require publication of annual report and certain recommendations; to require certain entities to submit a report of errors to certain agency; to require certain withholding of state income tax under certain circumstances; to provide relative to postsecondary education; to direct the Attorney General to negotiate terms of certain memorandum; to prohibit certain actions by government entities; to provide for establishing a Fraudulent Documents Identification Unit within the Department of Public Safety subject to availability of funding; to provide for a purpose; to provide for employment of sufficient employees; and to provide for related matters.
Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 21 of Title 49 of the Louisiana Revised Statutes of 1950, comprised of R.S. 49: 1311 through 1323, is hereby enacted to read as follows:

CHAPTER 21. THE LOUISIANA TAXPAYER AND CITIZEN PROTECTION ACT

PART I. GENERAL PROVISIONS

§1311. Title

This Chapter may be cited as the "Louisiana Taxpayer and Citizen Protection Act".

§1312. Legislative intent

The state of Louisiana finds that illegal immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public agencies within this state provide public benefits without verifying immigration status. The state of Louisiana further finds that when illegal immigrants have been harbored and sheltered in this state and encouraged to reside in this state through the issuance of identification cards that are issued without verifying immigration status, these practices impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Louisiana. Therefore, the people of the state of Louisiana declare that it is a compelling public interest of this state to discourage illegal immigration by requiring all agencies within the state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws. The state of Louisiana also finds that other measures are necessary to ensure the integrity of various governmental programs and services.

§1313. Definitions

As used in this Chapter the following terms shall have the definitions ascribed in this Chapter unless context clearly requires otherwise:

(1) "Public employer" means every department, agency, or instrumentality of the state or a political subdivision of the state.
(2) "Subcontractor" means a subcontractor, contract employee, staffing agency, or any contractor regardless of its tier.

(3) "Unauthorized alien" means an alien as defined in Section 1324a(h)(3) of Title 8 of the United States Code.

PART II. PUBLIC BENEFITS

§1314. Public benefits

A. Except as provided in Subsection C of this Section or where exempted by federal law, each agency and each political subdivision of this state shall verify the lawful presence in the United States of any natural person fourteen years of age or older who has applied for state or local public benefits, as defined in 8 U.S.C. 1621, or for federal public benefits, as defined in 8 U.S.C. 1611, that is administered by an agency or a political subdivision of this state.

B. The provisions of this Section shall be enforced without regard to race, religion, gender, ethnicity, or national origin.

C. Verification of lawful presence under the provisions of this Section shall not be required:

(1) For any purpose for which lawful presence in the United States is not restricted by law, ordinance, or regulation.

(2) For assistance for health care items and services that are necessary for the treatment of an emergency medical condition, as defined in 42 U.S.C. 1396b(v)(3), of the alien involved and are not related to an organ transplant procedure.

(3) For short-term, noncash, in-kind emergency disaster relief.

(4) For public health assistance for immunizations with respect to diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(5) For programs, services, or assistance such as soup kitchens, crisis counseling and intervention, and short-term shelter specified by the United States attorney general, in the sole and unreviewable discretion of the United States attorney general, in the sole and unreviewable discretion of the United States.
attorney general after consultation with appropriate federal agencies and departments which:

(a) Deliver in-kind services at the community level, including through public or private nonprofit agencies.

(b) Do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the income or resources of the individual recipient.

(c) Are necessary for the protection of life or safety.

D. (1) Verification of lawful presence in the United States by the agency or political subdivision required to make such verification shall require that the applicant execute an affidavit under penalty of perjury that:

(a) He is a United States citizen.

(b) He is a qualified alien under the federal Immigration and Nationality Act and is lawfully present in the United States.

(2) The agency or political subdivision providing the state or local public benefits shall provide notary public services at no cost to the applicant.

E. For any applicant who has executed the affidavit described in Subparagraph (1)(b) of Subsection D of this Section, eligibility for benefits shall be verified through the Systematic Alien Verification for Entitlements (SAVE) Program operated by the United States Department of Homeland Security or an equivalent program designated by the United States Department of Homeland Security. Until such eligibility verification is made, the affidavit may be presumed to be proof of lawful presence for the purposes of this Section.

F. Any person who knowingly and willfully makes a false, fictitious, or fraudulent statement of representation in an affidavit executed pursuant to Subsection D of this Section shall be subject to criminal penalties applicable in this state for fraudulently obtaining public assistance program benefits. If the affidavit constitutes a false claim of U.S. citizenship under 18 U.S.C. 911, a complaint shall
be filed by the agency requiring the affidavit with the United States attorney general for the applicable district based upon the venue in which the affidavit was executed.

G. Agencies or political subdivisions of this state may adopt variations to the requirements of the provisions of this Section which demonstrably improve the efficiency or reduce delay in the verification process, or to provide for adjudication of unique individual circumstances where the verification procedures in this Section would impose unusual hardship on a legal resident of Louisiana.

H. It shall be unlawful for any agency or a political subdivision of this state to provide any state, local, or federal benefit, as defined in 8 U.S.C. 1621, or 8 U.S.C. 1611, in violation of the provisions of this Section.

I. Each state agency or department which administers any program of state or local public benefits shall provide an annual report to the governor, the president pro tempore of the Senate and the speaker of the House of Representatives with respect to its compliance with the provisions of this Section. Each agency or department shall monitor the Systematic Alien Verification for Entitlements Program for application verification errors and significant delays and shall provide an annual public report on such errors and significant delays and recommendations to ensure that the application of the Systematic Alien Verification of Entitlements Program is not erroneously denying benefits to legal residents of Louisiana. Errors shall also be reported to the United States Department of Homeland Security by each agency or department.

PART III. CRIMINAL

§1315. Criminal: booking of arrested person, submission of booking information summary; citizenship, immigration status

A. It is the duty of every peace officer making an arrest, or having an arrested person in his custody, promptly to conduct the person arrested to the nearest jail or police station and cause him to be booked.

B. A person is booked by an entry, in a book kept for that purpose, showing his name and address, a list of any property taken from him, the date and time of
booking, and the submission of a booking information summary as provided for in
Paragraph (C) of this Section to the person making the entry in the police or jail
book. Every jail and police station shall keep a book for the listing of the above
information as to each prisoner received. The book and booking information
summaries shall always be open for public inspection. The person booked shall be
imprisoned unless he is released on bail.

C.(1) At the time of booking, the peace officer causing the arrested person
to be booked shall deliver to the person at the jail or police station who accepts
custody of the arrestee a booking information summary which shall include at least
the following information:

   (a) The proper legal name of the arrestee, if known.
   (b) The charge or charges upon which the person was arrested and the name
       of the person making the arrest.
   (c) A short recitation of the facts or events which caused the defendant to be
       arrested.
   (d) The names of all other persons arrested as a result of the same events or
       facts.

(2) If the peace officer presenting an arrestee for booking is unable to submit
a complete booking information summary, he shall provide the person receiving
custody of the arrestee a written statement or form, explaining why a complete
booking information summary cannot be presented.

D.(1) At the time of booking, the peace officer causing the arrested person
to be booked shall attempt to determine the citizenship or immigration status of the
person being booked.

(2) If the arrested person is a foreign national, the peace officer shall make
a reasonable effort to verify that the person has been lawfully admitted into the
United States. If the verification of lawful status cannot be determined from
documents in the possession of the arrested person, the peace officer shall attempt
to notify the United States Department of Homeland Security as soon as is practicable.

E. The office of state police shall be responsible for investigating and apprehending persons or entities that participate in the manufacture, sale, or distribution of fraudulent documents used for identification purposes, including but not limited to fraudulent identification documents prepared for persons who are unlawfully residing within the state of Louisiana. The office of state police is hereby authorized to create a unit devoted to such investigations by rule promulgated in accordance with the Administrative Procedure Act.

§1316. Unlawful harboring, concealing, or sheltering of an alien

A. It shall be unlawful for any person to harbor, conceal, or shelter from detection any alien in any place within the state of Louisiana, including any building, when the offender has knowledge of the fact that the alien has entered or remained in the United States in violation of law and if either of the following occur:

(1) The offender has the intent of assisting the alien in eluding a federal, state, or local law enforcement agency, or the United States Citizenship and Immigration Services Bureau.

(2) The offender has the intent of assisting the alien in avoiding or escaping arrest, trial, conviction, or punishment.

B. For the purposes of this Section, “alien” has the same meaning as defined in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(3).

C. Nothing in this Section shall be construed so as to prohibit or restrict the provision of any state or local public benefit described in 8 U.S.C. 1621(b), or regulated public health services provided by a private charity using private funds.

D.(1) Whoever commits the crime of unlawfully harboring, concealing, or sheltering an alien on a first conviction shall be fined not more than one thousand dollars, or imprisoned for not more than six months, or both.
(2) Whoever commits the crime of unlawfully harboring, concealing, or
sheltering an alien on a second or subsequent conviction shall be fined not more than
two thousand dollars, or imprisoned for not more than one year, or both.

E. The following shall be affirmative defenses to prosecution under this
Section:

(1) The person was providing humanitarian aid as a designated
representative of a nonprofit organization which is tax exempt pursuant to Section
501(c)(3) of the Internal Revenue Code.

(2) The person was the attorney or his designee, or such other persons
authorized to represent clients in immigration matters pursuant to 8 C.F.R. 1292.1,
or their designee, and who was assisting the alien and providing representation to the
alien in the course and scope of the attorney's or other authorized representative's
employment.

§1317. Unlawful transportation of an alien

A. It shall be unlawful for any person to transport, move, or attempt to
transport in the state of Louisiana any alien, knowing or in reckless disregard of the
fact that the alien has entered or remained in the United States in violation of law,
in furtherance of the illegal presence of the alien in the United States.

B. For the purposes of this Section, “alien” has the same meaning as defined

C. Nothing in this Section shall be construed so as to prohibit or restrict the
 provision of any state or local public benefit described in 8 U.S.C. 1621(b), or
regulated public health services provided by a private charity using private funds.

D.(1) Whoever commits the crime of unlawfully transporting an alien on a
first conviction shall be fined not more than one thousand dollars, or imprisoned for
not more than six months, or both.

(2) Whoever commits the crime of unlawfully transporting an alien on a
second or subsequent conviction shall be fined not more than two thousand dollars,
or imprisoned, with or without hard labor, for not more than one year, or both.
E. The following shall be affirmative defenses to prosecution under this
Section:

(1) The person was providing humanitarian aid as a designated
representative of a nonprofit organization which is tax exempt pursuant to Section
501(c)(3) of the Internal Revenue Code.

(2) The person was the attorney or his designee, or such other persons
authorized to represent clients in immigration matters pursuant to 8 C.F.R. 1292.1,
or other designee, representing the alien and who was transporting the alien in the
course and scope of the attorney’s or other authorized representative’s employment.

PART IV. STATUS VERIFICATION

§1318 Status Verification

A. “Status Verification System” means an electronic system operated by the
federal government, through which an authorized official of an agency of the state
of Louisiana or of a political subdivision therein may make an inquiry, by exercise
of authority delegated pursuant to Section 1373 of Title 8 of the United States Code,
to verify or ascertain the citizenship or immigration status of any individual within
the jurisdiction of the agency for any purpose authorized by Part V of this Chapter.
The Status Verification System shall be deemed to include:

(1) The electronic verification of work authorization program of the Illegal
Immigration Reform and Immigration Responsibility Act of 1996, P.L. 104-208,
Division C, Section 403(a); 8 U.S.C. 1324a, and operated by the United States
Department of Homeland Security, known as the Basic Pilot Program.

(2) Any equivalent federal program designated by the United States
Department of Homeland Security or any other federal agency authorized to verify
the work eligibility status of newly hired employees, pursuant to the Immigration

(3) Any other independent, third-party system with an equal or higher degree
of reliability as the programs, systems, or processes described in this Section.
(4) The Social Security Number Verification Service, or such similar online verification process implemented by the United States Social Security Administration.

B. The following entities may create, publish or otherwise manufacture an identification document, identification card, or identification certificate and may possess an engraved plate or other such device for the printing of such identification; provided, the name of the issuing entity shall be clearly printed upon the face of the identification:

(1) Businesses, companies, corporations, service organizations and federal, state and local governmental agencies for employee identification which is designed to identify the bearer as an employee.

(2) Businesses, companies, corporations and service organizations for customer identification which is designed to identify the bearer as a customer or member.

(3) Federal, state, and local government agencies for purposes authorized or required by law or any legitimate purpose consistent with the duties of such an agency, including, but not limited to, voter identification cards, driver licenses, nondriver identification cards, passports, birth certificates and social security cards.

(4) Any public school or state or private educational institution, as defined by Title 17 of the Louisiana Statutes of 1950, to identify the bearer as an administrator, faculty member, student or employee.

(5) Any professional organization or labor union to identify the bearer as a member of the professional organization or labor union.

(6) Businesses, companies or corporations which manufacture medical-alert identification for the wearer thereof.

C. All identification documents as provided for in Paragraph (3) and (4) of Subsection B of this Section shall be issued only to United States citizens, nationals and legal permanent resident aliens.
D. The provisions of Subsection C of this Section shall not apply when an applicant presents, in person, valid documentary evidence of:

(1) A valid, unexpired immigrant or nonimmigrant visa status for admission into the United States.

(2) A pending or approved application for asylum in the United States.

(3) Admission into the United States in refugee status.

(4) A pending or approved application for temporary protected status in the United States.

(5) Approved deferred action status.

(6) A pending application for adjustment of status to legal permanent residence status or conditional resident status. Upon approval, the applicant may be issued an identification document provided for in Paragraph (3) and (4) of Subsection B of this Section. Such identification document shall be valid only during the period of time of the authorized stay of the applicant in the United States or, if there is no definite end to the period of authorized stay, a period of one (1) year. Any identification document issued pursuant to the provisions of this subsection shall clearly indicate that it is temporary and shall state the date that the identification document expires. Such identification document may be renewed only upon presentation of valid documentary evidence that the status by which the applicant qualified for the identification document has been extended by the United States Citizenship and Immigration Services or other authorized agency of the United States Department of Homeland Security.

E. The provisions of Subsection B of this Section shall not apply to an identification document described in Paragraph (4) of Subsection B of this Section that is only valid for use on the campus or facility of that educational institution and includes a statement of such restricted validity clearly and conspicuously printed upon the face of the identification document.

F. Any driver license issued to a person who is not a United States citizen, national or legal permanent resident alien for which an application has been made

CODING: Words in struck through type are deletions from existing law; words underscored are additions.
for renewal, duplication or reissuance shall be presumed to have been issued in accordance with the provisions of Subsection D of this Section; provided that, at the time the application is made, the drivers license has not expired, or been cancelled, suspended or revoked. The requirements of Subsection D of this Section shall apply, however, to a renewal, duplication or reissuance if the Department of Public Safety is notified by a local, state, or federal government agency of information in the possession of the agency indicating a reasonable suspicion that the individual seeking such renewal, duplication or reissuance is present in the United States in violation of law. The provisions of this Subsection shall not apply to United States citizens, nationals, or legal permanent resident aliens.

PART V. PUBLIC EMPLOYERS

§1319. Public employers

A. Every public employer shall register with and utilize a Status Verification System as described in R.S. 49:1317 of this Chapter to verify the federal employment authorization status of all new employees.

B. (1) After July 1, 2010, no public employer shall enter into a contract for the physical performance of services within this state unless the contractor registers and participates in the Status Verification System to verify the work eligibility status of all new employees.

(2) After July 1, 2010, no contractor or subcontractor who enters into a contract with a public employer shall enter into such a contract or subcontract in connection with the physical performance of services within this state unless the contractor or subcontractor registers and participates in the Status Verification System to verify information of all new employees.

(3) The provisions of this Subsection shall not apply to any contracts entered into prior to the effective date of this Section even though such contracts may involve the physical performance of services within this state after July 1, 2010.

C.(1) It shall be a discriminatory practice for an employing entity to discharge an employee working in Louisiana who is a United States citizen or...
permanent resident alien while retaining an employee who the employing entity
knows, or reasonably should have known, is an unauthorized alien hired after July
1, 2010, and who is working in Louisiana in a job category that requires equal skill,
effort, and responsibility, and which is performed under similar working conditions,
as defined by 29 U.S.C. 206(d)(1), as the job category held by the discharged
employee.

(2) An employing entity which, on the date of the discharge in question, was
currently enrolled in and used a Status Verification System to verify the employment
eligibility of its employees in Louisiana hired after July 1, 2010, shall be exempt
from liability, investigation, or suit arising from any action under this Section.

(3) No cause of action for a violation of this Section shall arise anywhere in
Louisiana law but from the provisions of this subsection.

PART VI. CONTRACTORS

§1320. Contractors; withholding of income tax on compensation paid to alien
contractors

A. In conformity with the Louisiana Taxpayer and Citizen Protection Act,
a contracting entity shall be required to withhold individual income tax from the
compensation paid to an individual independent contractor who is contracting for the
performance of services in this state and who fails to provide to the contracting entity
documentation verifying the independent contractor's employment authorization,
pursuant to the prohibition against the use of unauthorized alien labor through
contracts set forth in 8 U.S.C. 1324(a)(4). The withholding of taxes shall apply to
all compensation which exceeds the amount of compensation the contracting entity
is required to report as income on United States Internal Revenue Service Form
1099. The rate of withholding shall be the maximum marginal income tax rate as
provided in R.S. 47:32(A)(3), without any exemptions.

B. Any contracting entity failing to comply with the withholding
requirements of this Section shall become personally liable for such tax in addition
to any applicable interest, penalties and attorney fees. The tax, interest, penalties,
and attorney fees shall be payable as provided in this Chapter, the amount of which
may be determined, computed, and collected by any method generally provided for
in this Chapter. However, the provisions of this Subsection shall not apply to a
contracting entity which is exempt from federal withholding provisions with respect
to such individual independent contractor pursuant to a properly filed Internal
Revenue Service Form 8233 or its equivalent.

C. Nothing in this Section is intended to create, or should be construed as
creating, an employer-employee relationship between a contracting entity and an
individual independent contractor.

PART VII. HIGHER EDUCATION

§1321. Higher education

A. In addition to any other powers and duties authorized by Title 17 of the
Louisiana Revised Statutes of 1950, each postsecondary system management board
may adopt a policy that allows a graduate of a public or approved nonpublic high
school to qualify for that tuition and mandatory attendance fee amounts at an
institution under its supervision and management shall be equal to tuition and
mandatory attendance fee amounts applicable to students who are residents of
Louisiana at such an institution if the student resided in the state while attending
classes at a public or approved nonpublic high school for at least two years prior to
graduation.

B. If the student cannot present to the institution valid documentation of
United States nationality or an immigration status permitting study at the institution,
he shall nevertheless be eligible for resident tuition and mandatory fee amounts if
does one of the following:

(a) He provides to the institution a copy of a true and correct application or
petition filed with the United States Citizenship and Immigration Services to legalize
his immigration status.
(b) Files an affidavit with the institution stating that he will file an application
to legalize his immigration status at the earliest time he is eligible to do so, provided
that such time is no later than the later of the following:

(i) One year after the date on which the student enrolls for study at the
institution.

(ii) If there is no formal process to permit children of parents without lawful
immigration status to apply for lawful status without risk of deportation, one year
after the date the United States Citizenship and Immigration Services provides such
a formal process.

C. Any student who completes the required criteria prescribed in Subsection
(B) of the Section shall not be disqualified on the basis his immigration status from
any scholarship or financial aid provided by the state.

D. The provisions of this Section shall not impose any additional conditions
to maintain resident tuition status at a Louisiana public postsecondary education
institution who was enrolled in a degree program and first received such resident
tuition status at that institution prior to the 2010-2011 school year.

PART VIII. GOVERNMENTAL ENTITIES
§1322. Memorandum of understanding; local ordinance prohibited; right of action
A. The attorney general is authorized and directed to negotiate the terms of
a Memorandum of Understanding between the state of Louisiana and the United
States Department of Justice or the United States Department of Homeland Security,
as provided by Section 1357(g) of Title 8 of the United States Code, concerning the
enforcement of federal immigration and customs laws, detention and removals, and
investigations in the state of Louisiana.

B. The Memorandum of Understanding negotiated pursuant to Subsection A
of this Section shall be signed on behalf of this state by the attorney general and the
governor or as otherwise required by the appropriate federal agency.

C. No local government, whether acting through its governing body or by an
initiative, referendum, or any other process, shall enact any ordinance or policy that
limits or prohibits a law enforcement officer, local official, or local government
employee from communicating or cooperating with federal officials with regard to the
immigration status of any person within this state.

D. Notwithstanding any other provision of law, no government entity or
official within the State of Louisiana may prohibit, or in any way restrict, any
government entity or official from sending to, or receiving from, the United States
Department of Homeland Security, information regarding the citizenship or
immigration status, lawful or unlawful, of any individual.

E. Notwithstanding any other provision of law, no person or agency may
prohibit, or in any way restrict, a public employee from doing any of the following
with respect to information regarding the immigration status, lawful or unlawful, of
any individual:

(1) Sending such information to, or requesting or receiving such information
from, the United States Department of Homeland Security;

(2) Maintaining such information; or

(3) Exchanging such information with any other federal, state, or local
government entity.

F. The provisions of this Section shall allow for a private right of action by
any natural or legal person lawfully domiciled in this state to file for a writ of
mandamus to compel any non cooperating local or state governmental agency to
comply with such reporting laws.

PART IX. FRAUDULENT DOCUMENTS IDENTIFICATION UNIT

§1323. Fraudulent documents identification

Subject to the availability of funding, the Department of Public Safety shall
establish a Fraudulent Documents Identification (FDI) Unit for the primary purpose
of investigating and apprehending persons or entities that participate in the sale or
distribution of fraudulent documents used for identification purposes. The unit shall
additionally specialize in fraudulent identification documents created and prepared
for persons who are unlawfully residing within the state of Louisiana. The department shall employ sufficient employees to investigate and implement an FDI Unit.

Section 2. This Act shall become effective July 1, 2010.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

Harrison HB No. 1205

Abstract: Creates omnibus illegal alien act.

Proposed law provides each agency and each political subdivision of this state shall verify the lawful presence in the United States of any natural person fourteen years of age or older who has applied for state or local public benefits.

Proposed law provides status verification system means an electronic system operated by the federal government, through which an authorized official of an agency of the state of Louisiana or of a political subdivision therein may make an inquiry to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized.

Proposed law provides every public employer shall register with and utilize a status verification system as described in of this Chapter to verify the federal employment authorization status of all new employees.

Proposed law provides that it shall be unlawful for any person to transport, move, or attempt to transport in the state of La. any alien, knowing or in reckless disregard of the fact that the nonresident alien has entered or remained in the U.S. in violation of law, in furtherance of the illegal presence of the alien in the U.S.

Proposed law further provides that whoever commits the crime of unlawfully transporting an alien on a first conviction shall be fined not more than $1,000, or imprisoned for not more than six months, or both. On a second or subsequent conviction, the offender shall be fined not more than $2,000, or imprisoned with or without hard labor for not more than one year, or both.

Proposed law provides for definitions and affirmative defenses.

Proposed law provides that it shall be unlawful for any person to harbor, conceal, or shelter from detection any alien in any place within the state of La., including any building or means of transportation, knowing or in reckless disregard of the fact that the alien has entered or remained in the U.S. in violation of law.

Proposed law defines "alien" as any person who is not a U.S. citizen, who is physically present in the U.S. without the legal right to remain in the U.S.

Proposed law requires the withholding of individual income tax on the compensation paid to an individual independent contract by a contracting entity if the independent contractor fails to provide documentation verifying his employment authorization pursuant to the prohibition against the use of unauthorized alien labor through contract as set forth in federal law. Further, if a contracting entity fails to collect such tax, with certain exceptions, the

CODING: Words in struck through type are deletions from existing law; words underscored are additions.
contracting entity shall become liable for payment of the tax, interest, penalties and attorneys fees.

Proposed law establishes the rate at which such income tax shall be withheld to be the maximum marginal rate of tax as provided in present law, which is 6%.

Proposed law provides each postsecondary system management board may adopt a policy that allows a graduate of a public or approved nonpublic high school to qualify for that tuition and mandatory attendance fee amounts at an institution under its supervision and management shall be equal to tuition and mandatory attendance fee amounts applicable to students who are residents of Louisiana at such an institution if the student resided in the state while attending classes at a public or approved nonpublic high school for at least two years prior to graduation.

Proposed law provides the attorney general is authorized and directed to negotiate the terms of a Memorandum of Understanding between the state of Louisiana and the United States Department of Justice or the United States Department of Homeland Security concerning the enforcement of federal immigration and customs laws, detention and removals, and investigations in the state of Louisiana.

Proposed law provides subject to the availability of funding, the Department of Public Safety shall establish a Fraudulent Documents Identification (FDI).

Effective July 1, 2010.

(Adds R.S. 49:1311-1323)
Preliminary Analysis of and Potential Challenges to Louisiana Revised Statute 14:100.2.2.

Soon after Hurricane Katrina struck the Gulf Coast region of Louisiana and as an unprecedented number of immigrants were arriving to help rebuild the devastated areas, the police officers in Orleans, Jefferson and St. Bernard Parishes were using a Louisiana criminal statute, LSA-R.S. 14:100.2.2 (Operating a Vehicle Without Lawful Presence in the United States), to arrest members of the growing post-Katrina Latino community in New Orleans. The statute, promulgated in 2002 as a measure to “complement federal efforts to uncover those who seek to use the highways of [Louisiana] to commit acts of terror,” makes it a felony for “alien students” and “nonresident aliens” to drive a vehicle without documentation demonstrating that they are lawfully present in the United States.

I. LSA-R.S. 14:100.2.2 is preempted by the federal government’s plenary power over immigration.

In *De Canas v. Bica*, 424 U.S. 351 (1976), the Supreme Court articulated three tests to determine whether federal law preempts a state statute relating to immigration. A state statute that fails any one of these three tests is preempted. *See LULAC v. Wilson*, 908 F.Supp. 755, 768 (C.D.Cal. 1995).

The first test requires an assessment of whether the state statute constitutes a “regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *De Canas*, 424 U.S. at 355. If so, the statute is preempted because the federal government has exclusive authority to regulate immigration. *Id.* at 356. However, not every state law which deals with immigrants can be properly classified as a regulation of immigration. *Id.* at 355.

LSA-R.S. 14:100.2.2 regulates immigration by requiring police officers to detect, arrest, and report the presence of individuals who are not lawfully present in the United States. Police officers, who have no expertise in immigration law, are obligated to make independent determinations about drivers’ immigration status. These determinations are based on state-created standards, which are incompatible with federal immigration law. Under LSA-R.S. 14:100.2.2, “alien students” and “nonresident aliens” are prohibited from driving without carrying documents demonstrating lawful presence in the United States. These categories, which do not appear in the Immigration and Nationality Act (“INA”), 8 U.S.C. §1101 *et seq.*, are misleading. Most notably, the term “non-resident” alien, which is defined as anyone who is not a U.S. citizen or legal permanent resident,1

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1 This definition is consistent with the Louisiana Supreme Court’s holding that the term “resident alien” as used in Louisiana Supreme Court Rule XVII, which governs the requirements for
actually includes numerous individuals – such as refugees, asylees, persons
granted withholding of removal, parolees, and persons granted temporary
protected status – who are authorized to reside in the United States permanently
or at least indefinitely. In any case, the INA vests the Attorney General and the
Secretary of Homeland Security with the exclusive authority to make
determinations regarding immigration status. See INA §§ 103, 242, 287.

In essence, the statute establishes a new procedure for determining whether an
individual is unlawfully present in the United States. After ascertaining that an “alien
student” or “nonresident alien” is driving without proof of immigration status, a police
officer must arrest such an individual and, among other things, notify the INS (now,
DHS) of the driver’s name and location. A driver’s inability to produce immigration
documents to a police officer upon demand is construed to imply that s/he is
undocumented. This inference is neither mandated nor supported by the INA. Moreover,
the only conceivable purpose of the notification requirement is to enable DHS to initiate
removal proceedings against the driver. Although the introductory section of LSA-R.S.
14:100.2.2 characterizes it as an effort to fight terrorism, there is no evidence to indicate
that requiring licensed drivers to carry proof of immigration status achieves this goal.
Taken together, the classification, arrest, and notification requirements of LSA-R.S.
14:100.2.2 constitute a regulation of immigration. See LULAC, 908 F.Supp. at 770
(finding that determinations of immigration status by state agents based on state-created
categories constitute immigration regulation). The statute is thus preempted under the
first De Canas test.

Under the second test, a state statute is preempted where Congress
intended to “occupy the field” which the state statute attempts to regulate and to
preclude even harmonious state regulation. De Canas, 424 U.S. at 357-58. As
discussed above, Congress has fully occupied the field of immigration regulation
by promulgating the INA, which vests the Attorney General and Secretary of
Homeland Security with exclusive authority to make determinations regarding
immigration status. The Attorney General also has exclusive authority for
registration of all immigrants who have not been lawfully admitted to the United
States for permanent residence. See §263. The only provision of the INA which
obligates immigrants to carry their immigration documents is §264(e):

Every alien, eighteen years of age and over, shall at all times carry with
him and have in his personal possession any certificate of alien
registration or alien registration receipt card issued to him pursuant to
subsection (d). Any alien who fails to comply with the provisions of this
subsection shall be guilty of a misdemeanor and shall upon conviction for
each offense be fined not to exceed $100 or be imprisoned not more than
thirty days, or both.

admission to the Louisiana Bar, applies only to permanent residents of the United States. See In re
Bourke, 819 So.2d 1020, 1022 (La. 2002).
Accordingly, states do not have authority to legislate in these areas. See, e.g., LULAC, 908 F.Supp. at 786 (“The State is powerless to enact its own scheme to regulate immigration or to devise immigration regulations which run parallel to or purport to supplement the federal immigration laws.”). Therefore, LSA-R.S. 14:100.2.2 is preempted under the second De Canas test.2

A state statute is preempted under the third test if it impedes federal objectives, including by “interfer[ing] with the methods by which the federal statute was designed to reach [a] goal.” De Canas, 424 U.S. at 363; International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987). In other words, a state statute is preempted if it conflicts with federal law, making compliance with both state and federal law impossible. LULAC, 908 F.Supp. at 768. Like the statute at issue in LULAC, which delegated classification, notification, and cooperation/reporting tasks to state officials, LSA-R.S. 14:100.2.2 “contradict[s] the INA’s mandate that the procedure outlined in the INA ‘shall be the sole and exclusive procedure for determining the deportability of the alien.’” Id. at 777; citing 8 U.S.C. §§1251-52. As discussed above, LSA-R.S. 14:100.2.2 creates a new procedure for identifying individuals subject to removal and reporting them to federal authorities. This procedure interferes with the INA’s methods by causing police officers to notify DHS not only about undocumented immigrants, but also about many individuals who are lawfully present in the United States. For these reasons, LSA-R.S. 14:100.2.2 violates the third De Canas test.

II. LSA-R.S. 14:100.13 is void for vagueness.

To withstand a vagueness attack, a statute must give individuals a reasonable opportunity to discern whether their conduct is proscribed by law and provide explicit standards for purposes of application. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Where a statute imposes criminal penalties, vagueness review is particularly exacting. See Forbes v. Napolitano, 236 F.3d 1009, 1011 (9th Cir. 2000). In addition to “defining a core of proscribed behavior to give people constructive notice of the law, a criminal statute must provide standards to prevent arbitrary enforcement.” Id.; citing City of Chicago v. Morales, 527 U.S. 41, 52 (1999).

LSA-R.S. 14:100.2.2 is arguably void for vagueness based on the lack of any clear standards for identifying individuals who are “alien students” or

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2 Courts tend to grant greater deference to statutes that address purely local problems. See, e.g. Leclere v. Webb, 419 F.3d 405 (5th Cir. 2005) (finding that the INA did not preempt a Louisiana law limiting membership to U.S. citizens and “resident aliens” on the ground that it was designed to address local problems arising from the transitory status of nonimmigrant aliens, which could impede the Bar’s regulatory and disciplinary efforts). In this case, a court could theoretically construe the field on which LSA-R.S. 14:100.2.2 touches not as the broad field of immigration regulation, but rather the more narrow field of public safety. Cf. De Canas, 424 U.S. at 356-57 (defining the relevant field as employment of illegal aliens); LULAC, 908 F.Supp. at 776 (defining the relevant field as alien eligibility for public benefits). However, requiring drivers to carry proof of their immigration status does not make them more likely to observe the rules of the road.
“nonresident aliens.” Because of the difficulty of distinguishing among different
categories of immigrants, police officers often resort to the use of last names, accents, and physical appearances to determine whether an individual may be subject to arrest under the statute. In several instances, U.S. citizens and legal permanent residents who could not produce driver’s licenses have been improperly arrested. In all these cases, the victims were Latino. Consequently, some criminal defense lawyers, immigrants, magistrates and judges have begun to refer to the statute as a prohibition on “driving while Hispanic” or “driving while brown.”

III. Police officers who stop drivers for traffic violations lack probable cause to make arrests under LSA-R.S. 14:100.13.

The reports NILC has received suggest that police officers use racial profiling to enforce the statute. Drivers stopped for routine traffic violations are asked to produce their driver’s licenses. Those who are unable to do so are particularly likely to be arrested for DWLP if they “look foreign.” In some cases, police have not even requested immigration documents before making an arrest. Megan Garvey, a public defender in Orleans Parish, has argued repeatedly that the police do not have probable cause to make arrests under LSA-R.S. 14:100.13. To date, magistrates have found this argument unconvincing.

This case is arguably distinguishable from Whren v. United States, 517 U.S. 806 (1996), in which the U.S. Supreme Court permitted the seizure of drugs in a car discovered following a police stop for a civil traffic violation. At their pre-trial suppression hearing, the petitioners argued that the police officer did not have probable cause or even reasonable suspicion to believe that they were engaged in drug-dealing, and that the stated ground for stopping their vehicle was merely pretextual. Id. at 809. The Court affirmed the DC Court of Appeals’ holding that the evidence was admissible regardless of the police officer’s subjective intent because “a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation.” Id. By contrast with the situation in Whren, where the drugs gave the police officer probable cause to arrest the petitioners for drug-dealing, a driver’s inability to produce a license does not constitute evidence that s/he is driving without lawful presence in the United States.

D. LSA-R.S. 14:100.13 violates the Equal Protection Clause of the Fourteenth Amendment. 2

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2 In Whren, the U.S. Supreme Court also left open the possibility of using the Equal Protection Clause to attack racially-based law enforcement activity. Id. at 813. The ACLU has spearheaded many of these cases, which are extremely resource-intensive. See David A. Harris, The Stories, the Statistics, and the Law: Why “Driving While Black” Matters, 84 MINN. L. REV. 265, 324 (December 1999).
Whether a court would use strict scrutiny or rational basis review in this case is unclear. To date, the U.S. Supreme Court has applied strict scrutiny only to state laws affecting “resident aliens” and “permanent resident aliens.” See *Graham v. Richardson*, 403 U.S. 365, 372-73 (1971). As the Fifth Circuit has explained:

Characterizing resident aliens as a Carolene Products minority reconciles the breadth of rights and responsibilities they enjoy with their lack of political capacity. Contrary to the plaintiffs’ contention, nonimmigrant aliens – who ordinarily stipulate before entry to this country that they have no intention of abandoning their native citizenship, and who enter with no enforceable claim to establishing permanent residence or ties here – need not be accorded the extraordinary protection of strict scrutiny by virtue of their alien status alone. …Moreover, the numerous variations among nonimmigrant aliens’ admission status make it inaccurate to describe them as a class that is “discrete” or “insular.” *Leclerc v. Webb*, 419 F.3d at 418-19 (5th Cir. 2005).

Although LSA-R.S. 14:100.2.2 technically applies only to “alien students” and “non-resident aliens,” the latter category includes many individuals – such as refugees, asylees, persons granted withholding of removal, parolees, and persons granted temporary protected status – who are authorized to reside in the United States permanently or indefinitely.

Even if a court applied the more relaxed rational basis standard of review, the relevant question would be whether the classification scheme in LSA-R.S. 14:100.2.2 bears a rational relation to a legitimate state interest. See *Leclerc v. Webb*, 419 F.3d at 422 (finding that a Louisiana law restricting Bar admission to U.S. citizens and permanent residents was rationally related to the state’s interest in assuring continuity and accountability in legal representation). As previously discussed, there is no evidence to indicate that requiring “alien student” and “non-resident alien” drivers to carry proof of immigration status assists in fighting terrorism. The statute also has nothing to do with public safety. Requiring drivers to carry proof of their immigration status does not make them any more likely to observe the rules of the road. In fact, enforcement of the statute actually undermines public safety by deterring immigrants, as well as those who look or sound like immigrants, from reporting crimes and by diverting scarce police resources from protecting the community. Because the classification scheme in LSA-R.S. 14:100.2.2 is unrelated to a legitimate state interest, it violates the Equal Protection Clause of the Fourteenth Amendment.
The merger of immigration enforcement and the criminal justice system.

Immigration and Customs Enforcement (ICE), the agency within the Department of Homeland Security charged with detaining and deporting immigrants, uses local law enforcement and jails in its enforcement operations. The ICE ACCESS initiative combines 13 programs with the goal of using local criminal justice systems—the courts, jails, and police—to hunt down people deemed to be “criminal aliens.” The Criminal Alien Program (CAP), 287(g) Agreements, and Secure Communities initiative are the three most well-known ACCESS programs used to accomplish this goal. ICE spent over $1 billion on these programs in FY 2009.3 FY 2010 funding is projected to be nearly $1.5 billion.1

The alleged target: “criminal aliens” who commit serious offenses

The term “criminal alien” is used to describe any noncitizen who has been arrested or convicted for any criminal offense, regardless of the severity of the person’s crime or whether s/he is undocumented or has lawful immigration status. Under current laws and practices, ICE is classifying increasingly alarming numbers of noncitizens as “criminal aliens.” This “criminal alien“ dragnet is being used to indiscriminately target, apprehend, and deport ever larger numbers of noncitizens, including long-time green card holders with U.S. citizen spouses and children. Since the fall of 2006, ICE has identified and charged over 450,000 noncitizens through CAP, with increasingly more immigrants charged each year.

While ICE claims to target serious criminals, the Government Accountability Office in the March 2009 review of the 287(g) program found that ICE failed to meet this goal, and was aggressively focusing on “easier” targets—those who are charged with minor offenses, like shoplifting and even traffic violations.

How do these programs refer immigrants in the criminal justice system to ICE?

Local police and jails collect immigration information on all people arrested (e.g. booking or at arrest), share this information with ICE, and allow ICE to interrogate defendants in

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1 287 (g) Program: ICE contracts with state and local police and jail officials to enforce immigration laws. Secure Communities: Interagency sharing of crime databases to identify, detain, and deport “criminal aliens.” Criminal Alien Program: ICE officers visit at the request of local jail officials, police, and the courts to identify “criminal aliens” incarcerated within federal, state, and local facilities.
ICE also encourages local law enforcement officials to use integrated criminal-immigration databases and ICE fingerprint checks. A “detainer,” or an immigration “hold,” is placed on those in custody, preventing their release from jail.

**Detainer damage: a misused and mishandled tool**

The immigration “detainer” is the key tool used by ICE to apprehend noncitizens in the criminal justice system. When booked into jail, the staff may suspect the arrestee is a foreign born based on his or her appearance or limited English proficiency. The jail provides this information to ICE, who then files a detainer on the person. The detainer permits the jail to detain immigrants beyond their criminal case so that ICE can pick them up for deportation. In Irving, TX, 60% of people who had detainers placed on them were arrested for low-level offenses, such as speeding, public intoxication, misdemeanor assault, and theft.

Under the law, a detainer only permits a jail to hold the person for a 48-hour period. However, noncitizens frequently remain in jail beyond the 48 hour limit. ICE does not provide proper guidance to jail officials on detainer authority, including the 48-hour limitation or ways to lift the detainer when it is erroneously lodged against someone. ICE detainers mean that noncitizen defendants are being held in jail for much longer periods than citizens. For example, in Travis County, Texas, “the 2007 average length of stay for all non-ICE misdemeanants was 8.2 days. For those ICE detainers with misdemeanor violations, the average length of stay in 2007 was 28 days—this is nearly four times the length of stay for non-ICE inmates.”

**Any suspicion of noncitizen status means the person gets referred to ICE for deportation. How effective are these programs?**

There are no government regulations or any other procedural mechanisms in place to ensure effective oversight, accountability, or redress.

While rounding up “criminal aliens” sounds good, these programs actually subvert the criminal justice system, erode due process, and make us less safe “sound and well established policing practices.” Despite rhetoric that the “criminal alien” population is on the rise, studies show that immigrants commit fewer crimes than native-born citizens, and that a high proportion of immigrants in a neighborhood is associated with lower rates of crime. A California study, a state with more immigrants than any other, concluded the foreign-born are incarcerated at a rate half as high as their presence in the population. According to the latest Justice Department statistics available, noncitizen prisoners accounted for only 5.9% of the combined federal and state prisoner population.
What is wrong with local enforcement of immigration law?

Jeopardizes Community Safety

Increasingly, police departments are targeting immigrants for arrests—often on minor violations—that result in deportation. This diverts resources away from law enforcement’s primary role of promoting community safety. Scholars and police chiefs alike worry that using local law enforcement to pursue immigrants sabotages the police officers’ fundamental duty to protect the public. Maricopa County, Arizona, where Sheriff Arpaio has shifted resources to controlling illegal immigration, FBI statistics show that violent crime is up by 69%, murder is up 166%, robbery is up 74%, property crime is up 26%, and burglary is up 25%.

Fosters bias against immigrants in our criminal justice system

Misguided policies against suspected immigrants, legal or undocumented, by judges and our criminal court systems are on the rise. Treating immigrants differently than U.S. citizens in our criminal justice system subverts the core purpose of our legal system to enforce equal treatment of the law. In Harris County, TX, the district attorney who has vowed to fight illegal immigration proposed to bar plea deals for people who refuse to provide citizenship information. This is in violation of state law. State legislatures and judges are abandoning time-tested bail provisions to create blanket no-bail policies for noncitizens with detainers—regardless of the severity of the crime—even though there is “no conclusive research to show that illegal immigrants are more likely than their U.S.-born counterparts to abscond on state charges while out on bail.”

Violates the basic promises of fairness and due process

The U.S. Supreme Court held that our Constitution requires that people accused of a crime be given the right to remain silent and the right to have a court-appointed attorney to defend these and other due process rights. Under immigration law, immigrants have limited Constitutional protection, including no right to an attorney until after they have incriminated themselves, and no right to an appointed attorney ever. Arresting immigrants, locking them up in jail, interrogating them without lawyers, and then using this illegally obtained information to prosecute and deport them is un-American.
No. 09-115

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA et al.,
Petitioners,

v.

CRISS CANDELARIA et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] 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." 8 U.S.C. § 1324a(h)(2).

2. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note.

3. Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens.
PARTIES TO THE PROCEEDING

Petitioners, which were plaintiffs/appellants below, are Chamber of Commerce of the United States of America; Arizona Contractors Association; Arizona Chamber of Commerce; Arizona Employers for Immigration Reform; Arizona Farm Bureau Federation; Arizona Hispanic Chamber of Commerce; Arizona Landscape Contractors Association; Arizona Restaurant and Hospitality Association; Arizona Roofing Contractors Association; Associated Minority Contractors of America; Chicanos Por La Causa; Somos America; Valle Del Sol, Inc.; National Roofing Contractors Association; and Wake Up Arizona! Inc.

Respondents, who were defendants/appellees below, are Criss Candelaria; Kenny Angle; Melvin R. Bowers Jr.; Martin Brannan; James Currier; Daisy Flores; Fidelis V. Garcia; Gale Garriott; Terry Goddard; Terrence Haner; Barbara Lawall; Janet Napolitano; Sheila Polk; Derek D. Rapier; Ed Rheinheimer; George Silva; Jon Smith; Matthew J. Smith; Andrew P. Thomas; and James P. Walsh.

There are no parent corporations or publicly held corporations that own 10% or more of the stock of any of Petitioners.
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JURISDICTION

The Ninth Circuit entered judgment on September 17, 2008, and denied a timely petition for rehearing and rehearing en banc on March 9, 2009. On June 2, 2009, Justice Kennedy granted an extension of time to and including July 24, 2009, to file a petition for a writ of certiorari. The petition was filed on July 24, 2009, and granted on June 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause provides that “the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.

Relevant provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, codified at 8 U.S.C. § 1324a and § 1324b, are reproduced at Pet. App. 127a-147a and at Add1-Add15 of the addendum to this brief. Relevant provisions of the pre-amendment version of the Migrant and Seasonal Agricultural Worker Protection Act, co-

Relevant provisions of the Legal Arizona Workers Act (LAWA), Ariz. Rev. Stat. §§ 23-211 to -216 (2009), and recent amendments to certain of those provisions, are reproduced at Pet. App. 169a-192a and at Add39-Add41 of the addendum.

**STATEMENT OF THE CASE**

In IRCA, Congress created a comprehensive scheme for regulating the employment of aliens, including the methods by which to verify a job applicant's eligibility for employment. It balanced multiple, sometimes competing, objectives: deterring illegal immigration, protecting applicants from discrimination, accommodating privacy concerns, and minimizing burdens on employers. This scheme was intended to be "uniform," IRCA § 115, and exclusive of state regulation: Congress broadly and expressly preempted state laws that regulate the employment of unauthorized workers, 8 U.S.C. § 1324a(h)(2), and imposed precise sanctions for violations of federal law, id. § 1324a(e), (f). Congress left a narrow exception for sanctions imposed "through licensing and similar laws," id. § 1324a(h)(2), which serves the limited purpose of preserving aspects of traditional state and local licensing authority.

Arizona has done precisely what federal law says it cannot. Using the "licensing" exception as its own license to regulate, it has enacted a statute that does
not remotely resemble a licensing law, nor any traditional exercise of licensing authority. Rather, the "Legal Arizona Workers Act" is a regime by which the State purports to regulate and enforce employment status verification. It authorizes state officials to adjudicate employment eligibility. It imposes sanctions more severe than those carefully calibrated by federal law, including withdrawal of a company’s charters and articles of incorporation—the “business death penalty,” as the then-Arizona governor accurately described it. J.A. 399. This separate system of regulating and enforcing work-status authorization is utterly unlike the very limited state licensing authority that Congress meant to preserve, and is expressly preempted by and conflicts with the federal system enacted by Congress.

Confirming the extraordinary nature of Arizona’s overreach, the State has arrogated to itself the power to mandate participation in a federal verification system that Congress repeatedly and explicitly has declared to be voluntary. At a minimum, Arizona has undermined Congress's objectives in adopting and enacting a non-mandatory verification system.

A. Federal Regulation Of Immigration.

This Court long has recognized that most questions involving immigration are regulated exclusively by the federal government. *Hines v. Davidowitz*, 312 U.S. 52, 60-62 (1941). One exception used to be the employment of aliens. Prior to 1986, it could fairly be said that federal law (in the form of the then-controlling Immigration and Nationality Act, ch. 447, 66 Stat. 163 (1952)) had only “a peripheral concern with employment of illegal entrants.” *De Canas v. Bica*, 424 U.S. 351, 360 (1976). This fundamentally changed when Congress enacted IRCA. That statute, which President Reagan termed “the product of one of
the longest and most difficult legislative undertakings in recent memory,”¹ created a “comprehensive scheme prohibiting the employment of illegal aliens in the United States” and it “forcefully made combating the employment of illegal aliens central to the policy of immigration law.” Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 147 (2002) (alterations and internal quotation marks omitted); see also INS v. Nat’l Ctr. for Immigrants’ Rights, 502 U.S. 183, 194 n.8 (1991). Congress was explicit that enforcement was to be “uniform[].” IRCA § 115.

1. IRCA prohibits hiring unauthorized workers, and establishes a federal system for verifying work-authorization status and defining, investigating, and adjudicating violations. Under IRCA, it is unlawful to “hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.” 8 U.S.C. § 1324a(a)(1). An “unauthorized alien” is defined by federal law as one who is (i) not “lawfully admitted for permanent residence” or (ii) not “authorized to be so employed by this chapter or by the Attorney General.” Id. § 1324a(h)(3). Whether a worker is “authorized” is not coextensive with citizenship or immigration status: The Attorney General has promulgated an array of rules setting forth allowances and exclusions for dozens of classes of individuals who are “authorized” to be employed in this country. See, e.g., 8 C.F.R. § 274a.12.² Federal statutes and regulations vest ex-


² For example, 8 C.F.R. § 274a.12(a) and (c) allow work authorization for lawful permanent residents; lawful temporary resi-
clusive authority to administer these requirements in the Departments of State, Labor, Homeland Security (DHS), and Justice. See, e.g., 6 U.S.C. §§ 236, 271; 8 U.S.C. §§ 1103(a), 1103(g), 1151, 1153, 1182(a)(5), 1201; 8 C.F.R. § 274a.12; id. pt. 1003; 20 C.F.R. pts. 655, 656.

Alleged violations are investigated by federal immigration officials. 8 U.S.C. § 1324a(e)(2); see 6 U.S.C. § 557 (noting the transfer of certain authority to DHS). The Attorney General must provide to the employer formal notice of the allegations and an opportunity for a hearing. 8 U.S.C. § 1324a(e)(3)(A). That hearing must be held before a federal administrative law judge at the time and place prescribed by federal statute and regulation. Id. § 1324a(e)(3)(B); 8 C.F.R. § 274a.9. The federal government bears the burden of proof, and every aspect of the procedures—from the admissibility of evidence to the size of the paper on which pleadings are submitted—is spelled out by federal law. 28 C.F.R. pt. 68. The employer is further guaranteed the right to appeal an adverse finding through an administrative review process (including, in certain circumstances, review by the At-

_dents; refugees; asylees; persons granted withholding of removal, extended voluntary departure, or temporary protective status; persons subject to a final order of removal; parents or children of certain lawful permanent residents; certain spouses, fiancéées, and dependents of holders of A, G, K, and J visas; persons subject to the federal government’s “Family Unity Program”; certain persons holding E, F, G, H, I, J, L, O, P, Q, R, S, T, U, and V visas, and certain Mexican and Canadian holders of A, E, G, H, I, J, L, O, P, and R visas under NAFTA; certain applicants for asylum, withholding of removal, cancellation of removal, and suspension of deportation; certain staff and employees of holders of B, E, F, H, I, J, and L visas; and battered spouses and children under the federal Violence Against Women Act._
torney General), and to petition for review in a federal court of appeals. 8 U.S.C. § 1324a(e)(7)-(8). Orders issued under these provisions may be enforced through a suit brought by the Attorney General "in any appropriate district court of the United States." Id. § 1324a(e)(9).

IRCA also carefully regulates the penalties that may be assessed against employers. Id. § 1324a(e)(4). The administrative law judge is required to impose a monetary fine of "not less than $250 and not more than $2,000 for each unauthorized alien" for a first violation. Id. Penalties increase to $2,000-$5,000 for a second violation, and $3,000-$10,000 for subsequent violations.3 Id. An employer that engages in a "pattern or practice" of violations is subject to criminal fines of $3,000 and six months' imprisonment for each unauthorized alien. Id. § 1324a(f).

2. IRCA does not focus single-mindedly on enforcement and punishment. To the contrary, Congress recognized other, oftentimes-competing goals. In particular, it intended IRCA to be the "least disruptive to the American businessman ... [while] also minimiz[ing] the possibility of employment discrimination." H.R. Rep. No. 99-682(I), at 56; S. Rep. No. 99-132, at 8-9 (same).

Over the course of the lengthy legislative debates, particular concern arose that imposing penalties on businesses could cause employers to discriminate against job applicants based on perceived national origin. The fear was that employers would simply choose to hire candidates who safely "appear" employable, rather than risk violating federal law. To

3 These penalties have been increased by regulation to account for inflation. 8 C.F.R. § 274a.10.

These same considerations were reflected in the I-9 process that Congress created for determining a prospective employee's work-authorization status. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). That process directs employers to provide a new employee with a list of the types of documents that he or she may submit as proof of identity and employment authorization. 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(a)(2), (3). The employee may choose any of the permissible documents to submit to the employer. 8 U.S.C. § 1324a(b)(1)(A). So long as the documents "reasonably appear[ ] on [their] face to be genuine," the employer must accept them as proof of identity or work authorization, and is forbidden from requesting different or additional documents. Id. An employer who complies with these requirements "in good faith" cannot be held liable for knowingly hiring an unauthorized worker, notwithstanding "a technical or procedural failure to meet [a prescribed] requirement," and even if the individual is later revealed to have been unauthorized to work. Id. § 1324a(a)(3), (b)(6). The I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of" the INA. Id. § 1324a(b)(5).
In addition to providing a means to ensure verification of employees, see H.R. Rep. No. 99-682(I), at 56, Congress anticipated that the I-9 process and related good-faith defense would decrease burdens on employers, and prevent them from making personal or unnecessary inquiries that would intrude on privacy and might result in discrimination. *Id.*; S. Rep. No. 99-132, at 8-9 (describing as “imperative” the need for a “formal, effective verification system combined with an affirmative defense for those [employers] who in good faith follow the proper procedure,” in order to ensure that employers do not “seek to avoid penalties by avoiding persons they suspect might be illegal aliens”).

Having balanced these considerations and calibrated its chosen enforcement mechanisms, Congress asserted the primacy of its authority: It expressly preempted “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.” 8 U.S.C. § 1324a(h)(2). Even within the federal government, changes to the congressional design would require significant study and advance warning. The statute required the Comptroller General to prepare annual studies for several years, so that Congress could consider refinements. IRCA § 101(a)(1) (codified at 8 U.S.C. § 1324a(j)(1) (1986)). IRCA requires the President to monitor the effectiveness of the verification system, and to transmit to Congress detailed written reports of proposed changes well in advance of their effective date. 8 U.S.C. § 1324a(d). Any change in the documents used to prove work-authorization status is a “major change” requiring two years’ written notice to Congress. *Id.* § 1324a(d)(3)(A)(iii), (D)(i).
3. For a decade, the I-9 process was the exclusive means for verifying employees' work-authorization status. In 1996, Congress established three "pilot programs" for status verification, IIRIRA § 401, in which employers could "[v]oluntar[il]y elect[ ] to participate, id. § 402. The only pilot program that remains in existence\(^4\) is an Internet-based program—first called the Basic Pilot Program and currently known as E-Verify—that is administered by the Secretary of Homeland Security. Id. § 403.\(^5\) Employers who choose to participate in the program still must utilize the I-9 form. Id. § 403(a)(1); see U.S. Citizenship & Immigration Servs., E-Verify User Manual for Employers 13 (June 2010), available at http://www.uscis.gov. Participating employers submit status-verification information about new employees to the federal government over the Internet, which the government checks against databases. Privacy Act: Verification Information System Records Notice, 72 Fed. Reg. 17,569 (Apr. 9, 2007). The employer then receives either confirmation that the employee is work-authorized, or a tentative response of non-confirmation. IIRIRA § 403(a). In the latter case, the employee bears the burden of contesting the response with the federal government. Id. § 403(a)(4)(B). Participating employers are prohibited from terminating an employee because of the tentative non-


\(^5\) Responsibility for administering E-Verify was initially vested in the Attorney General, see IIRIRA § 403, and later transferred to the Secretary of DHS, see Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, §§ 3-4, 117 Stat. 1944, 1944-45.
confirmation during his or her challenge to a tentative non-confirmation. *Id.*

From E-Verify’s inception, the program has been designed and implemented as experimental, and explicitly declared to be “voluntary.” *Id.* § 402. Congress directed that the Secretary of Homeland Security “may not require any person or other entity to participate” in the program, *id.*, subject to limited, enumerated exceptions covering the federal government and IRCA violators, *id.* § 402(e). Congress has reauthorized and modified the program on several occasions,6 and has repeatedly declined to act on proposals to make E-Verify or a similar program mandatory.7

B. The Legal Arizona Workers Act And Other State Laws.


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have no choice but to take strong action to discourage the further flow of illegal immigration through our borders.” J.A. 397. While nominally recognizing that “[i]mmigration is a federal responsibility,” Arizona decided that “Congress [is] incapable of coping with the comprehensive immigration reforms of our country’s needs.” J.A. 394. Multiple States and localities followed Arizona’s lead, enacting their own independent systems by which they purport to regulate authorization to work in the United States.

1. The Arizona Act has two principal parts: a regime to define who is an unauthorized worker and to adjudicate and impose sanctions on those who employ one; and an E-Verify mandate.

a. The Arizona Act creates a new state-law offense of “knowingly” or “intentionally” employing “an unauthorized alien.” Ariz. Rev. Stat. §§ 23-212(A), 23-212.01(A). It also establishes a state-law enforcement regime to enforce this prohibition. The Act directs Arizona’s attorney general to “prescribe a complaint form for a person to allege,” including “anonymous[ly],” that an employer is employing an unauthorized alien. Id. §§ 23-212(B), 23-212.01(B). Upon receiving any complaint that is not both “false and frivolous,” the attorney general or county attorney must notify federal immigration enforcement officials and “local law enforcement” officials “of the unauthorized alien.” Id. §§ 23-212(C), 23.212.01(C). Moreover, the attorney general must “notify the appropriate county attorney to bring” an enforcement action against the employer in state court “in the county where the unauthorized alien employee is or was employed by the employer.” Id. §§ 23-212(C)-(D), 23-212.01(C)-(D).

The Arizona Act defines “unauthorized alien” by reference to that term’s federal definition, id. § 23-
211(11) (citing 8 U.S.C. § 1324a(h)(3)), and specifies how to adjudicate such status. It directs state courts, in “determining whether an employee is an unauthorized alien,” to “consider only the federal government’s determination pursuant to 8 United States Code § 1373(c).” Id. §§ 23-212(H), 23-212.01(H). Section 1373(c), however, directs federal officials to respond to state inquiries about “citizenship or immigration status,” not work authorization. Infra pp. 40-42; cf. supra note 2 (identifying classes of individuals with work authorization but not necessarily immigration status). In addition, the federal government’s determination creates only “a rebuttable presumption of the employee’s lawful status.” Ariz. Rev. Stat. §§ 23-212(H), 23-212.01(H). Thus, a state court can reject immigration status information received from the federal government under § 1373(c), and reach its own determination under the Arizona Act whether an employee is an “unauthorized alien” and whether the employer knowingly or intentionally employed such an unauthorized worker. Id. §§ 23-212(I), 23-212.01(I); see also id. §§ 23-212(J), 23-212.01(J) (establishing defense of “good faith” compliance with federal I-9 process, as determined by state court).

In addition to the new state-law prohibition and system of investigation and adjudication, the Arizona Act establishes a range of sanctions. For any violation, the court must order the employer “to terminate the employment of all unauthorized aliens” and to file quarterly reports with the county attorney listing new employees hired. Id. §§ 23-212(F)(1), 23-212.01(F)(1). In addition, for a first “knowing” violation, a state court may direct the suspension of an employer’s “licenses.” Id. § 23-212(F)(1). The court must direct suspension of an employer’s “licenses” upon a first “intentional” violation, id. § 23-
212.01(F)(1), and for a second "knowing" or "intentional" violation, the court must order state agencies to "permanently revoke all licenses," id. §§ 23-212(F)(2), 23-212.01(F)(2).

The Act does not use the term "license" as it is used elsewhere in Arizona law; rather, it specially defines the term to include "any agency permit, certificate, approval, registration, charter, or similar form of authorization," as well as a company's foundational documents, such as "[a]rticles of incorporation" and "certificate[s] of partnership." Id. § 23-211(9). The definition expressly excludes "[a]ny professional license." Id. § 23-211(9)(ii). Thus, a company found to have violated Arizona's law faces not only losing the ability to engage in a particular business, but also having its existence extinguished.

b. The Act also requires all Arizona employers to participate in E-Verify. Id. § 23-214(A). Employers must provide proof of E-Verify registration to any state entity from which they seek any "grant, loan or performance-based incentive." Id. § 23-214(B). An employer that fails to participate in E-Verify will be denied these incentives, and forced to repay any benefits it previously obtained. Id.

2. As the governor forthrightly predicted, J.A. 397, States and municipalities across the country have followed Arizona’s lead, enacting an array of different laws. The National Conference of State Legislatures reports that thousands of immigration bills have been introduced by state legislatures in the last five years, with hundreds enacted into law.8 The re-

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8 Nat'l Conf. of State Legislatures, 2010 Immigration-Related Bills and Resolutions in the States (July 20, 2010), available at http://www.ncsl.org/default.aspx?TabId=20881; see also Nat'l
sult has been a radical departure from the "uniform and uniformly enforced immigration law" that even Arizona's governor agreed is necessary. *Id.* These laws impose a variety of different and sometimes conflicting obligations on employers, and subject them to a range of penalties for unauthorized worker violations, including in some cases imprisonment.⁹ This variability particularly plagues legislation concerning E-Verify, with some States requiring participation, others attempting to preclude it, and various alternatives in-between.¹⁰ These statutes have created a


C. Procedural Background.

A strikingly diverse group of business, labor, and civil rights groups challenged the constitutionality of the Arizona Act in the United States District Court for the District of Arizona. They alleged, among other things, that the Act was expressly and impliedly preempted by IRCA. The multiple similar lawsuits later were consolidated for decision. Pet. App. 6a, 12a, 107a-09a.

The district court held the Act not preempted. With respect to express preemption, it acknowledged that the penalties imposed by the Act are “sanctions” within the meaning of IRCA’s preemption provision. Pet. App. 61a-76a. It concluded, however, that the Act constituted a “licensing [or] similar law[,]” and so fell within the preemption provision’s savings clause. *Id.* The court further held that the Act’s provisions concerning E-Verify were not impliedly preempted. *Id.* at 82a-85a. Although it recognized that Congress had made E-Verify voluntary, the court found no preemption because Congress had not explicitly precluded States from making the program mandatory. *Id.*

*continued from previous page*

- Section No. 945-08 § 4; Mission Viejo, Cal., Ordinance No. 07-260 § 1; Hazleton, Pa., Ordinance No. 2006-18 § 4(D), *held preempted in Lozano*, 496 F. Supp. 2d at 526-29, *and* Okla. Stat. tit. 25, §§ 1312, 1313(B)(2) (requiring employers to use a state-created employment verification system, which may or may not be compatible with E-Verify), *with* 820 Ill. Comp. Stat. 55/12(a) (forbidding employers to participate in E-Verify), *held preempted in United States v. Illinois*, No. 07-3261, 2009 WL 662703, at *2-3 (C.D. Ill. Mar. 12, 2009).
The Ninth Circuit affirmed. It agreed with the district court that, because Arizona had defined the Act's sanctions to be "licensing" penalties, the statute fell within IRCA's savings clause. Pet. App. 14a-19a. It also agreed that, because Congress "could have, but did not, expressly forbid state laws from requiring E-Verify participation," Arizona's E-Verify mandate was not preempted. Id. at 20a. Both the district court and the Ninth Circuit viewed themselves as largely bound by this Court's 1976 decision in De Canas. See id. at 15a-16a, 69a-70a. The Ninth Circuit followed De Canas, notwithstanding its recognition that IRCA's enactment had dramatically changed the legal landscape. See id. at 15a-16a.

SUMMARY OF ARGUMENT

1. The Ninth Circuit erred when it held that the Arizona Act is saved from preemption as a "licensing [or] similar law[.]") because one of the various possible consequences under the comprehensive regulatory regime enacted by Arizona is to deny or revoke a "license" as Arizona has redefined that term. Pet. App. 14a-19a. On this theory, a State may regulate work-authorization status in whatever fashion it wishes—so long as, at the end of the day, something labeled a license may be affected.

This conclusion distorts the meaning of the statute, and subverts congressional intent. If this is all that is required to constitute a "licensing [or] similar law[.]", the preemption clause is meaningless, as this very case demonstrates. Nothing about the Arizona Act remotely resembles a "licensing law." In purpose and function, it is a law regulating the employment of unauthorized workers. It establishes state law prohibitions against employing unauthorized workers; creates methods under state law (different from those
under federal law) for investigating and adjudicating violations, including methods (different from those under federal law) for determining who is an unauthorized worker; and authorizes an array of sanctions for violations (of which a license sanction is just one) having little to do with “licensing” in the traditional sense. If this regime is not preempted, then IRCA’s fundamental purpose of establishing a national and “uniform[ ]” system of regulating alien employment, IRCA § 115, is utterly without effect.

IRCA’s history and structure demonstrate that the savings clause targeted a narrow purpose: ensuring that States could rely on federal determinations of compliance with federal immigration laws when issuing business licenses or permits to farm labor contractors. This purpose is clear from the legislative history and is reflected in IRCA’s conforming amendments to the federal Migrant and Seasonal Agricultural Worker Protection Act (AWPA). These amendments removed AWPA’s independent prohibition against hiring unauthorized workers, which had been enforced through federal administrative proceedings, and substituted a requirement of a predicate IRCA determination. See 29 U.S.C. § 1813(a)(6). IRCA’s displacement of other federal enforcement provisions demonstrates the statute’s sharply preemptive effect, and belies any suggestion that IRCA was intended to allow States to judge for themselves an individual’s work-authorization status.

At most, a state statute is a “licensing [or] similar law” under IRCA if it conditions the issuance or retention of a genuine license—a registration or permit governing “fitness to do business,” H.R. Rep. No. 99-682(I), at 58—on a prior federal determination of noncompliance with federal immigration law. The savings clause permits States to tack on certain sanc-
tions—in the form of the "suspension, revocation or refusal to reissue a license"—for persons "who ha[ve] been found to have violated the sanctions provisions in this legislation." *Id.* IRCA provides for these determinations to be made by federal officials, in specialized administrative proceedings conducted under federal rules and regulations, see 8 U.S.C. § 1324a(e); 28 C.F.R. pt. 68, and nothing in the statute hints at authorizing States to adjudicate immigration status or employment eligibility—much less in the face of a contrary federal determination. Quite the contrary, the preemption provision was aimed at displacing existing state statutes that undertook just such regulation.

The preemption provision in fact confirms what would already be the case: Competing state regulatory schemes like Arizona’s conflict with the comprehensive system that Congress crafted in IRCA. IRCA represents a careful compromise among multiple interests and objectives beyond enforcement—preventing discrimination, protecting privacy, and avoiding undue burdens on business. The balance struck by Congress is reflected in IRCA’s detailed administrative scheme for investigating, adjudicating, and sanctioning unauthorized worker violations, with corresponding anti-discrimination protections and a right to petition for federal judicial review. The Arizona scheme upsets this balance. It imposes sanctions that federal law does not allow, through an adjudicatory process that federal law does not contemplate, and without providing the rights of fair process and appeal that federal law guarantees. In short, Arizona has created its own separate status-

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11 Emphases are added throughout unless otherwise noted.
verification system that, in focusing exclusively on enforcement, ignores the methods Congress chose and subverts the public interest balance Congress struck.

2. The Ninth Circuit further erred in authorizing Arizona to make mandatory the voluntary federal E-Verify program. Federal law repeatedly and expressly makes clear that E-Verify is, and must be administered as, a voluntary program. This is clear from the very title of the authorizing statute: “Voluntary Election to Participate in a Pilot Program.” IIRIRA § 402. The statute affords employers the choice whether to participate: “[A]ny person or other entity that conducts any hiring ... may elect to participate in that pilot program.” Id. § 402(a). And, the Secretary of Homeland Security is required to “widely publicize ... the voluntary nature of the pilot programs.” Id. § 402(d)(2).

Congress made E-Verify voluntary for good reason. E-Verify was initiated as an experimental program, to assess its viability as an alternative to the I-9 process and its acceptance by the business community. It never has been made permanent. It historically has been error-prone, and requires participating employers to weigh possible benefits against serious burdens. Congress considered these issues in enacting IIRIRA, making the I-9 process (with a variety of document-based verification methods) mandatory, while instituting E-Verify as a voluntary test program—“the Basic Pilot Program”—that employers may choose to use. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). Arizona’s decision to make E-Verify mandatory conflicts directly with Congress’s decision to make it voluntary, and the state law therefore is preempted.
No. 09-115

In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MICHAEL B. WHITING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

Federal immigration law expressly preempts "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." 8 U.S.C. 1324a(h)(2). The Legal Arizona Workers Act, an Arizona statute, imposes civil sanctions on employers that knowingly or intentionally employ an unauthorized alien, up to and including the mandatory revocation of articles of incorporation, partnership agreements, and other documents that the Arizona statute defines as "licenses." The questions presented are:

1. Whether the Arizona statute is saved from express preemption as a "licensing [or] similar law[.]"

2. Whether the Arizona statute conflicts with the federal framework regulating the employment of unauthorized aliens and therefore is impliedly preempted.

3. Whether the Arizona statute's requirement that all employers participate in a federal electronic employment verification system conflicts with, and is preempted by, the federal law establishing that verification system, which provides that participation shall be voluntary.
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No. 09-115

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MICHAEL B. WHITING, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether provisions of the Legal Arizona Workers Act (Arizona statute), Ariz. Rev. Stat. Ann. §§ 23-211 et seq.,¹ are preempted by federal law regulating the employment of aliens. The Department of Homeland Security (DHS) and Department of Justice enforce the prohibition against hiring unauthorized aliens, and the corresponding nondiscrimination provisions, that were enacted in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. See 8 U.S.C. 1324a, 1324b. DHS

¹ Unless otherwise indicated, Arizona statutory provisions appear in the 2009 supplement.
now administers the voluntary E-Verify program originally created by Title IV of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-655. At the Court’s invitation, the United States filed a brief at the petition stage of this case.

STATEMENT


IRCA added two new provisions to the INA that are relevant here. The first prohibits employers from hiring unauthorized aliens and authorizes sanctions against employers that violate that prohibition. The second applies a parallel set of civil-rights protections to ensure that employers do not engage in racial, ethnic, or other invidious discrimination against legal immigrants and other minorities.

The employer-sanctions provision, 8 U.S.C. 1324a, prohibits employers from hiring for employment “an alien knowing the alien is an unauthorized alien,” as well as hiring any individual “without complying with the requirements of [8 U.S.C. 1324a(b)].” 8 U.S.C. 1324a(a)(1). Subsection (b), in turn, establishes the paper-based “I-9 system,” pursuant to which an employer must examine specified documents to verify a
new employee’s identity and authorization to work in the United States. 8 U.S.C. 1324a(b); 8 C.F.R. 274a.2.

Employers that violate these requirements may be sanctioned. Immigration and Customs Enforcement (ICE), within DHS, brings such charges; an employer may seek a hearing before an administrative law judge (ALJ) in the Department of Justice. The ALJ may assess civil monetary penalties and issue cease-and-desist orders. Any sanctions may be reviewed in an administrative appeal and then by a federal court of appeals. 8 U.S.C. 1324a(e); 8 C.F.R. 274a.9(e) and (f); 28 C.F.R. 68.1 et seq.; see 8 C.F.R. 1.1(c). Employers that engage in a pattern or practice of violating the requirements may also be criminally prosecuted, enjoined, or restrained in proceedings brought in federal district court by the Attorney General. 8 U.S.C. 1324a(f). Good-faith compliance with the I-9 system generally establishes “an affirmative defense” against charges of knowingly employing an unauthorized alien. 8 U.S.C. 1324a(a)(3) and (b)(6).

Section 1324a expressly “preempt[s] 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.” 8 U.S.C. 1324a(h)(2).

b. In 1996, Congress directed the Attorney General (who was then responsible for immigration enforcement) to “conduct 3 pilot programs of employment eligibility confirmation.” IIRIRA § 401(a), 110 Stat. 3009-655. The first (originally called the Basic Pilot Program) has evolved into what is now called E-Verify. (The other two pilot programs no longer exist.) E-Verify “is an internet-based system that allows an employer to verify an employee’s work-authorization status.” Pet. App. 10a. An
employer that participates in E-Verify and uses that system to confirm a new employee’s identity and employment authorization is rebuttably presumed not to have knowingly hired an unauthorized alien. IIRIRA § 402(b), 8 U.S.C. 1324a note.²

In IIRIRA, Congress required that federal departments participate in one of the three pilot programs. § 402(e)(1)(A)(i). Employers that violate Section 1324a or 1324b also may be required to participate. § 402(e)(2). Subject to those exceptions, however, Congress provided that “the Attorney General may not require any person or * * * entity to participate in a pilot program.” § 402(a), 110 Stat. 3009-656. Instead, IIRIRA states that an employer “may elect to participate in [a] pilot program,” and describes such participation as “voluntary.” Ibid.; see § 402(d)(2) and (3)(A) (referring to program’s “voluntary nature”).

The pilot program was originally to last four years and to be made available in at least “5 of the 7 States with the highest estimated population of aliens who are not lawfully present in the United States.” § 401(b) and (c), 110 Stat. 3009-655 to 3009-656. Since 1996, Congress has on four occasions extended the program’s term.³ In the 2003 extension, Congress substituted the Secretary of Homeland Security (Secretary) for the Attorney Gen-

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² Unless otherwise indicated by a parallel citation from the Statutes at Large, references to sections of IIRIRA refer to the statute as subsequently amended and set out at 8 U.S.C. 1324a note.

eral, and directed the Secretary to make E-Verify available in all 50 States. 2003 Act, § 3(a) and (d), 117 Stat. 1944, 1945; IIRIRA § 401(c)(1). The E-Verify program is currently authorized through September 30, 2012. 2010 Act, § 547, 123 Stat. 2177.

2. a. The Arizona statute makes it a violation of state law for an employer to "knowingly" or "intentionally" employ "an unauthorized alien," and provides for enforcement of that prohibition in actions brought in state court by elected county attorneys. Ariz. Rev. Stat. Ann. §§ 23-212(A) and (D), 23-212.01(A) and (D). The Arizona statute defines "[u]nauthorized alien" by reference to federal law. Id. § 23-211(11) (incorporating 8 U.S.C. 1324a(h)(3)). In determining whether a particular alien meets that definition, the Arizona statute first provides that a state court "shall consider only the federal government’s determination pursuant to 8 [U.S.C.] 1373(c)," id. §§ 23-212(H), 23-212.01(H), which requires federal officials to respond to inquiries about "the citizenship or immigration status of any individual." In its next sentence, however, the Arizona statute states that "[t]he federal government’s determination" pursuant to Section 1373(c) creates only "a rebuttable presumption of the employee's lawful status." Ibid.

The Arizona statute does not require a prior federal determination of whether an employer knowingly or intentionally employed an unauthorized alien. Instead, the statute provides for the state court to make its own determination, subject to two evidentiary rules that refer to federal law. First, an employer's demonstration that it verified the employee's work authorization through the federal E-Verify program "creates a rebuttable presumption" that the employer did not violate the Arizona statute. Ariz. Rev. Stat. Ann. §§ 23-212(I),
23-212.01(1). Second, as under Section 1324a(a)(6), an employer "establishes an affirmative defense" to liability under the Arizona statute if it shows "that it has complied in good faith with the requirements of 8 [U.S.C.] 1324a(b)." Id. §§ 23-212(J), 23-212.01(J).

b. For a first knowing violation of the Arizona statute, the state court "may" order all relevant state agencies to suspend for up to ten business days "all licenses" held by the employer that are "specific to the business location where the unauthorized alien performed work," or, if the employer has no such licenses, "all licenses that are held by the employer at the employer's primary place of business." Ariz. Rev. Stat. Ann. § 23-212(F)(1)(c) and (d). For a first intentional violation, the court "shall" order such a suspension "for a minimum of ten days." Id. § 23-212.01(F)(1)(c).

Any first violation results in three to five years of probation. An employer on probation must file quarterly reports with respect to every new hire at the business location where the previous violation occurred. Ariz. Rev. Stat. Ann. §§ 23-212(F)(1)(b), 23-212.01(F)(1)(b). If the state court finds that an employer has committed a violation (whether knowing or intentional) while on probation, the court "shall order the appropriate agencies to permanently revoke all licenses" at the business location of the violation or the primary place of business. Id. §§ 23-212(F)(2) and (3)(b), 23-212.01(F)(2) and (3)(b).

The Arizona statute includes a general definition of a "license" as "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).
The Arizona statute further provides, however, that "[l]icense" also includes the organizing documents of corporations, partnerships, and limited liability companies. See id. § 23-211(9)(b)(i)-(iii). "Any professional license" is excluded, as are certain water and environmental permits. Id. § 23-211(9)(e).


   a. The court of appeals first concluded that the Arizona statute’s employer-sanctions provisions fall within the savings clause permitting States to impose sanctions “through licensing and similar laws.” 8 U.S.C. 1324a(h)(2); see Pet. App. 14a-19a. Relying on De Canas, supra, the court of appeals applied a presumption against preemption “because the power to regulate the employment of unauthorized aliens remains within the states’ historic police powers.” Pet. App. 16a. The court also determined that the Arizona “statute’s broad definition of ‘license’ is in line with” the dictionary definition of the term and that IRCA’s legislative history did not require a different result. Id. at 17a-18a.
The court further concluded that the employer-sanctions provisions are not impliedly preempted by federal law. Pet. App. 21a.

b. The court of appeals rejected petitioners' contention that the requirement to use E-Verify "is impliedly preempted because it conflicts with Congressional intent to keep the use voluntary." Pet. App. 19a. The court observed that "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation," and it determined that Congress's decision to make "participation * * * voluntary at the national level" did not "in and of itself indicate that Congress intended to prevent states from making participation mandatory." Id. at 20a. The court concluded that Congress "strongly encouraged" use of E-Verify "by expanding its duration and its availability," and that "Congress plainly envisioned and endorsed an increase in its usage." Id. at 21a.

SUMMARY OF ARGUMENT

I. The Arizona statute is expressly preempted because it does not fit into the narrow exception for "licensing and similar laws." The statute prohibits employing unauthorized aliens and punishes employers that violate that prohibition. That those employers happen to hold documents that the statute calls "licenses" does not turn the statute into a licensing law. No licenses are issued under the statute, and it does not regulate licensees' professional conduct or fitness to do a particular business. It only imposes punishment, and only for violation of a single, across-the-board rule. And the punishment it imposes extends far beyond any common understanding of "licenses": the Arizona statute provides for the suspension and termination of business
entities' very legal existence. Articles of incorporation and similar charters are not "licenses," and the Arizona statute's broad punitive sweep confirms that it is not a licensing law.

In addition, and independently, the Arizona statute is impliedly preempted because it upsets the careful balance that IRCA established. The INA permits federal officials to decide when to seek sanctions and requires them to do so within a carefully crafted framework of procedural and substantive protections, which include graduated penalties; specialized federal tribunals; federal judicial review; and civil-rights provisions that prevent discriminatory or overzealous enforcement. Not only does the Arizona statute omit these protections, it affirmatively contradicts them: it allows elected Arizona prosecutors to demand and obtain sanctions in Arizona courts even after federal officials decide to seek lesser penalties, or federal tribunals reject sanctions altogether. In finding no conflict with federal law, the court of appeals wrongly relied on De Canas v. Bica, 424 U.S. 351 (1976), which pre-dates and is superseded by Congress's determination in IRCA that restricting the employment of unauthorized aliens should be an essential part of the federal framework of immigration regulation. Indeed, the very state law upheld against a preemption challenge in De Canas was preempted by IRCA.

II. The requirement that employers enroll in E-Verify also conflicts with federal law and is preempted. Congress made voluntary participation a hallmark of E-Verify: the clear text provides that an employer "may" make a "voluntary election" to participate and "may terminate" that election. IIRIRA § 402(a) and (c)(3). The court of appeals erroneously relied on Congress's 2003 decision to give the program nationwide
scope; Congress did not thereby approve of any and all measures to expand participation.

ARGUMENT

I. FEDERAL LAW PREEMPTS THE ARIZONA STATUTE’S EMPLOYER-SANCTIONS PROVISIONS

The INA expressly preempts “any State or local law imposing civil or criminal sanctions * * * upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. 1324a(h)(2). Neither respondents nor the court of appeals disputes that the Arizona statute is a sanctions law, Pet. App. 14a; Br. in Opp. 12, and all such laws are preempted unless they are “licensing and similar laws.” Because the Arizona statute does not confer or administer any license to do anything, but instead creates an independent state-law prohibition against employing unauthorized aliens and prescribes a unique and mandatory sanction that sweeps far more broadly than the term “license” allows, the statute is not a “licensing [or] similar law[]” and is not saved from preemption.

The Arizona statute is also preempted because it disrupts the delicate balance that federal law embodies. Neither the savings clause nor principles of conflict preemption permit the States to undermine federal law in that manner.

A. The Arizona Statute Is Not A “Licensing Law”

The court of appeals erroneously concluded that because the Arizona statute mentions the term “license,” it is within the scope of the savings clause. A mere intersection with “licenses” is not enough for a state statute to qualify as a “licensing * * * law[].” Rather, a licensing law must actually provide for the granting and
questing identification of the computerized files and not the files themselves. The information sought by the EEOC will afford it the opportunity to make sure that it doesn't request vastly more information than it needs. As the EEOC correctly points out, "the subpoena is designed to solicit information from FedEx that will enable the EEOC to draft a future request for employee documents that will not be overly broad." The subpoena is not overly broad.

CONCLUSION

To enable the EEOC to make informed decisions at each stage of the enforcement process, Congress has conferred upon it a broad right of access to relevant evidence. Given this broad grant of power, it can hardly be said that the EEOC plainly lacks jurisdiction. Because Congress granted the EEOC the authority to investigate (and nothing in Title VII divests the EEOC of that authority when a charging party files suit) and because the evidence requested by the EEOC is relevant and material to the investigation, the district court did not err in enforcing the EEOC's administrative subpoena. The judgment of the district court is

AFFIRMED.

CHICANOS POR LA CAUSA, INC.; Somos America, Plaintiffs–Appellants,

and

Arizona Employers for Immigration Reform Inc.; Chamber of Commerce of the United States; Arizona Chamber of Commerce; Arizona Hispanic Chamber of Commerce; Arizona Farm Bureau Federation; Arizona Restaurant and Hospitality Association; Associated Minority Contractors of America; Arizona Roofing Contractors Association; National Roofing Contractors Association; Wake Up Arizona! Inc.; Arizona Landscape Contractors' Association; Arizona Contractors Association, Plaintiffs–Appellees,

v.

Janet Napolitano; Terry Goddard; Gale Garriott, Defendants–Appellees.

Chicanos Por La Causa, Inc.; Somos America, Plaintiffs,

and

Arizona Employers for Immigration Reform Inc.; Chamber of Commerce of the United States; Arizona Chamber of Commerce; Arizona Hispanic Chamber of Commerce; Arizona Farm Bureau Federation; Arizona Restaurant and Hospitality Association; Associated Minority Contractors of America; Arizona Roofing Contractors Association; National Roofing Contractors Association; Wake Up Arizona! Inc.; Arizona Landscape Contractors' Association; Arizona Contractors Association, Plaintiffs–Appellants,

v.

Janet Napolitano; Terry Goddard; Gale Garriott, Defendants–Appellees.

Arizona Contractors Association, Inc.; Arizona Employers for Immigration Reform Inc.; Chamber of Commerce of the United States; Arizona Chamber of Commerce; Arizona Hispanic Chamber of Commerce Inc.; Arizona Farm Bureau Federation; Arizona Restaurant and Hospitality Association; Associated Minority Contractors of America; Arizona Roofing Con-
tractors Association; National Roofing Contractors Association; Arizona Landscape Contractors’ Association, Plaintiffs–Appellants,

and

Wake Up Arizona! Inc.; Valle Del Sol Inc.; Chicanos Por La Causa, Inc.; Somos America, Plaintiffs,

v.

Criss Candelaria; Ed Rheinheimer; Terrence Haner; Daisy Flores; Kenny Angle; Derek D. Rapier; Martin Brannan; Andrew P. Thomas; Matthew J. Smith; James Currier; Barbara Lawall; James P. Walsh; George Silva; Sheila Polk; Jon Smith; Terry Goddard; Fidelis V. Garcia; Gale Garriott; Melvin R. Bowers Jr., Defendants–Appellees.

Arizona Contractors Association, Inc.; Arizona Employers for Immigration Reform Inc.; Chamber of Commerce of the United States; Arizona Chamber of Commerce; Arizona Hispanic Chamber of Commerce Inc.; Arizona Farm Bureau Federation; Arizona Restaurant and Hospitality Association; Associated Minority Contractors of America; Arizona Roofing Contractors Association; National Roofing Contractors Association; Arizona Landscape Contractors’ Association, Plaintiffs,

and

Wake Up Arizona! Inc.; Valle Del Sol Inc.; Chicanos Por La Causa, Inc.; Somos America, Plaintiffs–Appellants,

v.

Criss Candelaria; Ed Rheinheimer; Terrence Haner; Daisy Flores; Kenny Angle; Derek D. Rapier; Martin Brannan; Andrew P. Thomas; Matthew J. Smith; James Currier; Barbara Lawall; James P. Walsh; George Silva; Sheila Polk; Jon Smith; Terry Goddard; Fidelis V. Garcia; Gale Garriott; Melvin R. Bowers Jr., Defendant–Appellant.

Nos. 07–17272, 07–17274, 08–15357, 08–15359, 08–15360.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 12, 2008.

Filed Sept. 17, 2008.

Amended March 9, 2009.

Background: Various business and civil rights organizations brought action chal-
lenging validity of Legal Arizona Workers Act, which allowed Arizona courts to suspend or revoke business licenses of employers who knowingly or intentionally hired unauthorized aliens. The United States District Court for the District of Arizona, Neall Vincent Wake, Jr., 526 F.Supp.2d 968 and 534 F.Supp.2d 1056, upheld statute, and plaintiffs appealed.

**Holdings:** The Court of Appeals, Schreiber, Circuit Judge, held that:

1. Act was licensing measure that fell within savings clause of Immigration Reform and Control Act's (IRCA) preemption provision;
2. Act was not impliedly preempted by IRCA; and
3. Act did not, on its face, violate employers' right to procedural due process.

**Affirmed.**

Opinion, 644 F.3d 976, amended and superseded on denial of rehearing.

1. **States ⇔18.5**
   “Conflict preemption” of state law occurs when either compliance with both federal and state regulations is physically impossible, or where state law stands as obstacle to accomplishment and execution of Congress’s full purposes and objectives.

   See publication Words and Phrases for other judicial constructions and definitions.

2. **States ⇔18.5**
   For conflict preemption of state law to apply, conflict must be actual conflict, not merely hypothetical or potential conflict.

3. **States ⇔18.13**
   When Congress legislates in field that states have traditionally occupied, it is assumed that states’ historic police powers were not to be superseded by federal act unless that was Congress’s clear and manifest purpose.

4. **Aliens, Immigration, and Citizenship ⇔787**

**States ⇔18.43**
Legal Arizona Workers Act, which allowed Arizona courts to suspend or revoke business licenses of employers who knowingly or intentionally hired unauthorized aliens, was licensing measure that fell within savings clause of Immigration Reform and Control Act’s (IRCA) preemption provision, where Act did not attempt to define who was eligible or ineligible to work under immigration laws, but rather was premised on enforcement of federal standards as embodied in federal immigration law. Immigration Reform and Control Act of 1986, § 101(a)(1), 8 U.S.C.A. § 1324a(h)(2); A.R.S. § 23–212.

5. **Aliens, Immigration, and Citizenship ⇔787**

**States ⇔18.43**
Provision of Legal Arizona Workers Act requiring employers to utilize federal government’s internet-based system to determine work authorization status of new hires was not impliedly preempted by Immigration Reform and Control Act (IRCA) provision precluding Attorney General from requiring employers to use system; Congress could have, but did not, expressly forbid state laws from requiring participation in its system, and Congress plainly envisioned and endorsed increase in its usage. Immigration Reform and Control Act of 1986, § 101(a)(1), 8 U.S.C.A. § 1324a(b); A.R.S. § 23–212(H).

6. **Federal Courts ⇔698.1**
Record on appeal was inadequate to permit determination of whether potential sanctions under the Legal Arizona Workers Act, which allowed Arizona courts to suspend or revoke business licenses of employers who knowingly or intentionally hired unauthorized aliens, impliedly conflicted with the Immigration Reform and
Control Act's (IRCA) monetary sanctions, so as to make the Arizona statute facially invalid, where no complaint had been filed under the Arizona statute and there was no record reflecting its effect on employers. Immigration Reform and Control Act of 1986, § 101(a)(1), 8 U.S.C.A. § 1324a(h)(2); A.R.S. § 23–212.

7. Constitutional Law ⇒3912

Due process requires that deprivation of property interest be preceded by notice and opportunity for hearing appropriate to case's nature. U.S.C.A. Const.Amends. 5, 14.

8. Statutes ⇒206

Under Arizona law, each word, phrase, clause, and sentence in statute must be given meaning so that no part will be void, inert, redundant, or trivial.

9. Aliens, Immigration, and Citizenship ⇒770

Constitutional Law ⇒4267

Licenses ⇒7(1)

Legal Arizona Workers Act, which authorized state courts to suspend or revoke business licenses of employers that intentionally or knowingly employed unauthorized aliens, did not, on its face, violate employers' right to procedural due process, despite employers' contention that Act's reliance on federal government's determination of employee's status denied employers any chance to present evidence that employee was authorized, where Act created presumption regarding accuracy of federal determination, but permitted employers to rebut that presumption. U.S.C.A. Const.Amend. 14; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 642(c), 8 U.S.C.A. § 1373(c); A.R.S. § 23–212.

ORDER AND AMENDED OPINION

ORDER

The Opinion filed on September 17, 2008, and appearing at 544 F.3d 976, is amended as follows: on slip Opinion page 13076, lines 21–22, change heading “B.” to read:

B. The Act's provisions mandating the use of E-Verify and creating potentially harsh sanctions are not impliedly preempted by federal law.

The Opinion filed on September 17, 2008, and appearing at 544 F.3d 976, is further amended as follows: on slip Opinion page 13078, line 14, insert the following text:

Plaintiffs also argue that the Act's potential sanctions of suspension or revocation of an employer's business license impliedly conflict with IRCA because

Circuit, sitting by designation.
the Act's sanctions are harsher than IRCA's monetary sanctions. Plaintiffs urge that the harsh sanctions, even though expressly saved from express preemption, have the effect of encouraging employers to discriminate, and that such an effect would conflict with IRCA's purposes. Their argument is essentially speculative, as no complaint has yet been filed under the Act and we have before us no record reflecting the Act's effect on employers. There is thus no adequate basis in this record for holding that the sanctions provisions create an implied conflict rendering the Act facially invalid. See Crawford, 128 S.Ct. at 1621–22.

With these amendments, the panel judges have voted to deny the petition for panel rehearing. Judges Schroeder and N.R. Smith have voted to deny the petition for rehearing en banc, and Judge Walker so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

SCHROEDER, Circuit Judge:

This case is a facial challenge to an Arizona state law, enacted in 2007 and aimed at illegal immigration, that reflects rising frustration with the United States Congress's failure to enact comprehensive immigration reform. The Arizona law, called the Legal Arizona Workers Act, targets employers who hire illegal aliens, and its principal sanction is the revocation of state licenses to do business in Arizona. It has yet to be enforced against any employer.

Various business and civil-rights organizations (collectively, "plaintiffs") brought these actions against the fifteen county attorneys of the state of Arizona, the Governor of Arizona, the Arizona Attorney General, the Arizona Registrar of Contractors, and the Director of the Department of Revenue of Arizona (collectively, "defendants"). Plaintiffs allege that the Legal Arizona Workers Act ("the Act"), Ariz.Rev. Stat. §§ 23–211 to 23–216, is expressly and impliedly preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§ 1324a–1324b, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104–208, 110 Stat. 3009 (1996), codified in various sections of 8 U.S.C. and 18 U.S.C. They also allege that the Act violates employers' rights to due process by denying them an opportunity to challenge the federal determination of the work-authorization status of their employees before sanctions are imposed.

The district court held that the law was not preempted. The main argument on appeal is that the law is expressly preempted by the federal immigration law provision preempting state regulation "other than through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). The district court correctly determined that the Act was a "licensing" law within the meaning of the federal provision and therefore was not expressly preempted.

There is also a secondary, implied preemption issue that principally relates to the provision requiring employers to use the electronic verification system now being refined by the federal government as a tool to check the work-authorization status of employees through federal records. It is known as E–Verify. Under current federal immigration law, use of the system is voluntary, and the Arizona law makes it mandatory. We hold that such a require-
ment to use the federal verification tool, for which there is no substitute under development in either the state, federal, or private sectors, is not expressly or impliedly preempted by federal policy.

Plaintiffs also contend that the statute does not guarantee employers an opportunity to be heard before their business licenses may be revoked. The statute can and should be reasonably interpreted to allow employers, before any license can be adversely affected, to present evidence to rebut the presumption that an employee is unauthorized.

We uphold the statute in all respects against this facial challenge, but we must observe that it is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision. See Crawford v. Marion County Election Bd., --- U.S. ---, 128 S.Ct. 1610, 1621, 170 L.Ed.2d 574 (2008) (describing heavy burden of persuasion to sustain a broad attack on the facial validity of a statute in all its applications).

Background

Sanctions for hiring unauthorized aliens were first created at the federal level when Congress passed IRCA in 1986. See Pub.L. No. 99–603, 100 Stat. 3359 (1986). IRCA prohibits knowingly or intentionally hiring or continuing to employ an unauthorized alien, 8 U.S.C. § 1324a(a), which it defines as an alien either not lawfully admitted for permanent residence or not authorized to be employed by IRCA or the U.S. Attorney General, 8 U.S.C. § 1324a(h)(3).

IRCA also sets out the method of demonstrating an employer's compliance with the law through a paper-based method of verifying an employee's eligibility, known as the I-9 system. Id. § 1324a(b). It requires employees to attest to their eligibility to work and to present one of the specified identity documents. Id. § 1324a(b)(1), (2). IRCA then requires employers to examine the identity document the employee presents and attest that it appears to be genuine. Id. § 1324a(b)(1)(A). The employer is entitled to a defense to sanctions if the employer shows good-faith compliance with the I-9 system, unless the employer has engaged in a pattern or practice of violations. Id. § 1324a(b)(6).

The Attorney General is charged with enforcing violations of IRCA. Id. § 1324a(e). Hearings are held before selected administrative law judges ("ALJs"), and the ALJs' decisions are reviewable by the federal courts. Id. § 1324a(e)(3).

IRCA contains an express preemption provision, which states: "The 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." Id. § 1324a(h)(2). The scope of the savings clause, which permits state "licensing and similar laws," is a critical issue in this appeal.

IIRIRA directed the Attorney General to establish three pilot programs to ensure efficient and accurate verification of any new employee's eligibility for employment. Pub.L. No. 104–208, §§ 401–405, 110 Stat. 3009, 3009–655 to 3009–666. One of these programs, the Basic Pilot Program, was to be made available in at least five of the seven states with the highest estimated populations of aliens not lawfully present in the United States. Id. § 401(c), 110 Stat. at 3009–656. Congress amended IIRIRA in 2002 by extending the four-year period for the pilot programs to a six-year period, see Basic Pilot Extension Act of

The Basic Pilot Program has thus been extended until November 2008. The Expansion Act also expanded the availability of the Basic Pilot Program to all fifty states. See id. § 3. The Basic Pilot Program, now known as E-Verify, is an internet-based system that allows an employer to verify an employee's work-authorization status. It is an alternative to the I-9 system. After an employer submits a verification request for an employee, E-Verify either issues a confirmation or a tentative nonconfirmation of work-authorization status. If a tentative nonconfirmation is issued, the employer must notify the employee, who has eight days to challenge the finding. The employer cannot take any adverse action against the employee during that time. If an employee does challenge the tentative nonconfirmation, the employer will be informed of the employee's final work-authorization status. Any employee who either does not challenge a tentative nonconfirmation or is unsuccessful in challenging a tentative nonconfirmation must be terminated, or the employer must notify the Department of Homeland Security ("DHS") that it will continue to employ that person. An employer who fails to notify DHS of the continued employment of a person who received a final nonconfirmation is subject to a civil money penalty. An employer who continues to employ a person after receiving a final nonconfirmation is subject to a rebuttable presumption that it knowingly employed an unauthorized alien.

Against this federal backdrop, we turn to the state law at issue here. Arizona enacted the Legal Arizona Workers Act on July 2, 2007, with an effective date of January 1, 2008. 2007 Ariz. Sess. Laws Ch. 279. The Act allows the superior courts of Arizona to suspend or revoke the business licenses of employers who knowingly or intentionally hire unauthorized aliens. Ariz.Rev.Stat. §§ 23–212. Any person may submit a complaint to the Arizona Attorney General or a county attorney. Id. § 23–212(B). After determining a complaint is not false or frivolous, the appropriate county attorney is charged with bringing an action against the employer in superior court. Id. § 23–212(C), (D). The Act uses IRA's definition of "unauthorized alien." See id. § 23–211(11). Additionally, the Act requires that the court use the federal government's determination of the employee's lawful status. Id. § 23–212(H).

The Act makes participation in E-Verify mandatory for all employers, although it provides no penalty for violation of the requirement. See id. § 23–214(A). The Act also includes an affirmative defense for good-faith compliance, explicitly incorporating IRA. See id. § 23–212(J).

The Act mandates a graduated series of sanctions for violations. A first violation requires the employer to terminate the employment of all unauthorized aliens, file quarterly reports of all new hires for a probationary period, and file an affidavit stating that it terminated all unauthorized aliens and will not intentionally or knowingly hire any others. Id. §§ 23–212(F)–212.01(F). A second violation during the probationary period results in the permanent revocation of the employer's business license. Id. §§ 23–212(F)(2), (3), 23–212.01(F)(2), (3).

Plaintiffs originally filed an action challenging the Act on July 13, 2007, less than one month after the Act's enactment. The district court dismissed the first action for lack of subject matter jurisdiction because
it did not name as defendants any of Arizona's county attorneys, who have the responsibility of enforcing the Act.

In December 2007, plaintiffs filed a second complaint, this time including the Arizona county attorneys as defendants. The principal contentions were that the Act was expressly preempted by federal law because the Act was not a “licensing” or “similar” law within the meaning of the savings clause of IRCA's preemption provision; that, even if the Act was not expressly preempted, it was impliedly preempted because its sanctions provisions and E-Verify requirement conflict with federal law; and that the Act violated employers' due process rights because it did not allow them an adequate opportunity to dispute the federal government's response that an employee was not authorized to work.

The matter proceeded to hearing, and the district court dismissed the Arizona Attorney General for lack of subject matter jurisdiction, because he lacks the authority to bring enforcement actions. The court ruled in favor of the remaining defendants on the merits. It held that the Act is not expressly preempted by IRCA because the Act is a licensing law within the meaning of the savings clause. It held that neither the Act's sanctions provisions, nor the provision mandating use of E-Verify, was inconsistent with federal policy, and thus they were not impliedly preempted. Finally, the court held that the Act did not, on its face, violate due process because employers' due process rights were adequately protected. Plaintiffs now appeal.

Discussion

I. Preemption


[1, 2] Implied preemption has two subcategories. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). The first is field preemption, where "the depth and breadth of a congressional scheme ... occupies the legislative field." Id. (citing Fid. Fed. Sav., 458 U.S. at 753, 102 S.Ct. 3014). The second is conflict preemption, which occurs when either "compliance with both federal and state regulations is a physical impossibility," Fid. Fed. Sav., 458 U.S. at 152, 102 S.Ct. 3014 (quoting Fla. Lime & Avocado Growers, Inc., 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963)), or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," id. (internal quotation marks omitted) (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). For conflict preemption to apply, the conflict must be an actual conflict, not merely a hypothetical or potential conflict. See English v. Gen. Elec. Co., 496 U.S. 72, 89, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). Plaintiffs contend that even if the entire Act is not expressly preempted, the mandatory requirement to use E-Verify is impliedly preempted because it conflicts with the voluntary program in IIRIRA.
A. The Act is not expressly preempted because it falls within IRCA's savings clause.

The explicit preemption provision in IRCA states: "The 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." 8 U.S.C. § 1324a(h)(2). The parties agree that the Act is expressly preempted by IRCA unless it falls within the savings clause of IRCA's express preemption provision. Plaintiffs argue that the Act does not fall within the savings clause because they contend the Act is not a "licensing law" within the ordinary meaning of the phrase, and that the savings clause was not intended to permit a state to create an adjudication and enforcement system independent of federal enforcement of IRCA violations.

The district court held that the plain language of section 1324a(h)(2) does not facially preempt the Act because it does no more than impose conditions on state licenses to do business and thus falls within the savings clause. Ariz. Contractors Ass'n v. Candelaria, 534 F.Supp.2d 1086, 1046–47 (D. Ariz. 2008). The court rejected plaintiffs' argument that section 1324a(h)(2) permits only licensing sanctions that are preceded by a federal adjudication of employer liability, reasoning that neither the plain language of section 1324a(h)(2) nor the legislative history supports plaintiffs' position. Id. at 1046–48.

[3] The district court also rejected plaintiffs' argument that the savings clause should be interpreted narrowly, holding that because regulation in the employment field is traditionally an area of state concern, there is a presumption against preemption. Id. at 1050–52. An issue central to our preemption analysis is thus whether the subject matter of the state law is in an area of traditionally state or federal presence. When Congress legislates "in a field which the States have traditionally occupied ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." United States v. Locke, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000) (internal quotation marks omitted) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Conversely, we do not assume non-preemption "when the State regulates in an area where there has been a history of significant federal presence." Id.

A leading case involving the employment of illegal aliens is De Canas v. Bica, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). The Supreme Court there upheld a state law prohibiting the employment of unauthorized aliens against a preemption challenge because it concluded that the authority to regulate the employment of unauthorized workers is "within the mainstream" of the state's police powers. Id. at 356, 365, 96 S.Ct. 933. The Court reasoned that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." Id. at 355, 96 S.Ct. 933.

Plaintiffs argue that reliance on De Canas is now misplaced because IRCA, passed after De Canas, brought the regulation of unauthorized employees within the scope of federal immigration law. They rely on language in a later case where the Court said that IRCA made the employment of unauthorized workers "central to [t]he policy of immigration law." Hoffman Plastic Compounds, Inc. v.
NLRB, 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (quoting INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194 & n. 8, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991)) (alteration in original). That case, however, did not involve preemption, or indeed any state regulation. It considered whether the National Labor Relations Board ("NLRB") could award backpay to an unauthorized worker, and the Court held it could not. The Court said that the NLRB had impermissibly "trench[ed] upon federal statutes and policies unrelated to the [National Labor Relations Act]" by awarding backpay to an unauthorized alien worker who was improperly terminated from his employment for participating in union-related activities. Id. at 140, 141, 144, 122 S.Ct. 1275. Because it did not concern state law or the issue of preemption, Hoffman did not affect the continuing vitality of De Canas. We conclude that, because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption applies here.

Plaintiffs contend that the term "license" was intended to encompass only licenses to engage in specific professions, such as medicine or law, and not licenses to conduct business. There is no support for such an interpretation. "Licensing" generally refers to "[a] governmental body's process of issuing a license," Black's Law Dictionary 940 (8th ed.2004), and a "license" is "a permission, usually revocable, to commit some act that would otherwise be unlawful," id. at 938. The Act provides for the suspension of employers' licenses to do business in the state. See Ariz.Rev.Stat. § 23-212(F). Such licenses are defined as "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." Id. § 23-211(9)(a).

The statute's broad definition of "license" is in line with the terms traditionally used and falls within the savings clause. The language of the savings clause therefore exempts such state licensing regulation from express preemption. A recent district court case that considered the same issue reached the same conclusion. See Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294, at **8, 10, 12 (E.D.Mo. Jan. 31, 2008) (holding that city ordinance governing issuance and denial of business permits fell within meaning of savings clause). But see Lozano v. City of Hasleton, 496 F.Supp.2d 477, 519–21 (M.D.Pa.2007) (concluding that state law prohibiting employment of illegal aliens was expressly preempted by IRCA).

Plaintiffs nevertheless contend that the legislative history demonstrates that Congress intended the savings clause to permit states to impose a state sanction only after there had been a federal determination of an alien’s unauthorized status. Plaintiffs rely on the second sentence in a paragraph from Part I of House Report 99–682, which as a whole states:

The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or “fitness to do business laws,” such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.
H.R.Rep. No. 99-682(i), at 58 (1986) as reprinted in 1986 U.S.C.C.A.N. 5649, 5662. As the district court found, however, this paragraph as a whole does not support plaintiffs’ argument. The paragraph describes the federal law as pre-empting “civil fines and/or criminal sanctions,” neither of which the Act imposes. The paragraph does not suggest that the federal law would preempt local laws that suspend or revoke licenses on the basis of IRCA violations, or state licensing laws that require employers not to hire unauthorized workers. As the district court concluded, plaintiffs’ reading of the second sentence, as permitting enforcement only of state licensing regulations conditioned on federally adjudicated violations, is contradicted by the third sentence, which recognizes states can condition an employer’s “fitness to do business” on hiring documented workers. That is what the Arizona Act does.

[4] In sum, the Act does not attempt to define who is eligible or ineligible to work under our immigration laws. It is premised on enforcement of federal standards as embodied in federal immigration law. The district court therefore correctly held that the Act is a “licensing” measure that falls within the savings clause of IRCA’s preemption provision.

Plaintiffs finally contend that this kind of state regulation must be preempted because there is a potential for conflict in the practical operation of the state and federal law. They point to a hypothetical situation in which an employer may be subject to conflicting rulings from state and federal tribunals on the basis of the same hiring situation. Whether principles of comity or issue preclusion would allow such a result are questions not addressed by the parties. In any event, a speculative, hypothetical possibility does not provide an adequate basis to sustain a facial challenge. See Crawford, 128 S.Ct. at 1621.

B. The Act’s provisions mandating the use of E-Verify and creating potentially harsh sanctions are not impliedly preempted by federal law.

Plaintiffs argue that the Arizona provision mandating the use of E-Verify is impliedly preempted because it conflicts with Congressional intent to keep the use voluntary. They contend that Congress wanted to develop a reliable and non-burdensome system of work-authorization verification, and that mandatory use of E-Verify impedes that purpose. They rely on the Supreme Court’s decision in Geier v. Am. Honda Motor Co., 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). Geier recognized that state laws that fall within a savings clause and are therefore not expressly preempted are still subject to the “ordinary working of conflict pre-emption principles.” Id. at 899, 120 S.Ct. 1913. A state law is preempted through conflict preemption when it “‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Id. at 873, 120 S.Ct. 1913 (quoting Hines, 312 U.S. at 67, 61 S.Ct. 399). Geier involved a Department of Transportation regulation that was designed to encourage competition among automobile manufacturers to design effective and convenient passive-restraint systems. The regulation required only 10% of a car manufacturer’s production to include airbags. The Court in Geier held that state tort law, permitting liability to be imposed for failure to provide airbags, conflicted with the federal policy to encourage development of different restraint systems. Id. at 886, 120 S.Ct. 1913.

[5] The district court here held that Arizona’s requirement that employers use E-Verify was not preempted because, while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Con-
gress intended to prevent states from making participation mandatory. *Ariz. Contractors*, 584 F.Supp.2d at 1055–56. We agree with that holding. Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation. It certainly knew how to do so because, at the same time, it did expressly forbid “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.” 8 U.S.C. § 1324a(h)(2).

Furthermore, this case is unlike *Geier*, where the Supreme Court found strong evidence of Congress’s intent to promote competition and balance federal goals in a competitive environment by encouraging alternative systems. Here, E-Verify is a federal government service that Congress has implicitly strongly encouraged by expanding its duration and its availability (to all fifty states). See Basic Pilot Program Extension and Expansion Act of 2003, Pub.L. No. 108–156, 117 Stat.1944, 1944; Basic Pilot Extension Act of 2001, Pub.L. No. 107–128, sec. 2, 115 Stat. 2407, 2407. Though Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage. The Act’s requirement that employers participate in E-Verify is consistent with and furthers this purpose, and thus does not raise conflict preemption concerns.

Appellants contend that conflict preemption is a concern here also because of the Act’s potentially discriminatory effects. Their argument is that E-Verify increases discrimination against workers who look or sound “foreign,” and that mandatory E-Verify usage thus upsets the enforcement/discrimination balance that Congress has maintained by keeping E-Verify optional. This argument fails because Congress requires employers to use either E-Verify or I–9, and appellants have not shown that E-Verify results in any greater discrimination than I–9.

[6] Plaintiffs also argue that the Act’s potential sanctions of suspension or revocation of an employer’s business license impliedly conflict with IRCA because the Act’s sanctions are harsher than IRCA’s monetary sanctions. Plaintiffs urge that the harsh sanctions, even though expressly saved from express preemption, have the effect of encouraging employers to discriminate, and that such an effect would conflict with IRCA’s purposes. Their argument is essentially speculative, as no complaint has yet been filed under the Act and we have before us no record reflecting the Act’s effect on employers. There is thus no adequate basis in this record for holding that the sanctions provisions create an implied conflict rendering the Act facially invalid. See *Crawford*, 128 S.Ct. at 1621–22.

II. Due Process

The Act sets forth the procedures to be followed in bringing an enforcement action. Any person may submit a complaint about a suspected violation to either the Arizona Attorney General or a county attorney. Ariz.Rev.Stat. § 23–212(B). The Attorney General or county attorney investigating a complaint must verify the alleged unauthorized alien's work-authorization status with the federal government pursuant to 8 U.S.C. § 1373; the state official is prohibited from attempting to make an independent determination of the alien's status. Id. After a complaint is investigated and found not to be false or frivolous, a county attorney must bring an enforcement action against the employer in state court in the county in which the alien was employed. Id. § 23–212(C), (D). The court is to expedite the action, which includes scheduling the hearing as quickly as is practicable. Id. § 23–212(E).

Subsection (H) of section 212 describes the state court's procedures to obtain information from the federal government on whether an alien was unauthorized to work:

On [sic] determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code § 1373(c). The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code § 1373(c). Id. § 23–212(H). Section 1373(c) of title 8 of the U.S.Code provides that 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." 8 U.S.C. § 1373(c).

Plaintiffs contend, in this facial challenge, that the Act violates due process because it deprives employers of their business licenses without providing them an adequate opportunity to dispute whether an employee was authorized to work. Plaintiffs rely on the first sentence of subsection (H) to argue that the Act prohibits employers at the state-court hearing from presenting any evidence to rebut the federal government's § 1373 response on the issue of the employee's work status. Defendants, however, point to the second sentence of subsection (H), which provides that the federal response creates only a rebuttable presumption. They contend that the employer can rebut the federal response with other evidence during a hearing.

[8, 9] Plaintiffs' interpretation of subsection (H) is flawed because it gives no meaning to the second sentence of the provision. That sentence at least implicitly contemplates a hearing to rebut the presumption created by the federal determination of an employee's unauthorized status. See Ariz.Rev.Stat. § 23–212(H). Arizona law, consistent with ordinary principles of statutory interpretation, requires that "[e]ach word, phrase, clause, and sentence (of a statute) must be given meaning so that no part will be void, inert, redundant, or trivial." Williams v. Thode, 188 Ariz. 257, 934 P.2d 1349, 1351 (1997) (second alteration in original) (emphasis omitted) (quoting City of Phoenix v. Yates, 69 Ariz. 68, 208 P.2d 1147, 1149 (1949)). We conclude that the statute provides an employer the opportunity, during the state court proceeding, to present rebuttal evidence.
Furthermore, defendants explain any apparent incongruity between the first two sentences of subsection (H) by pointing to parallel language found in an earlier subsection, subsection (B), which relates to the initial investigation of a complaint:

When investigating a complaint, the attorney general or county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code § 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.

Ariz.Rev.Stat. § 23-212(B). Defendants explain that this section, like the first sentence of subsection (H), provides, somewhat inartfully, that the initial investigation and the basis for bringing an enforcement action must be limited to the federal response, thereby precluding independent state investigation. The employer would then have the opportunity to present evidence. The district court agreed. The district court persuasively reasoned that requiring the state or county to obtain a federal determination of an employee's work status before bringing proceedings may be intended to protect employees from direct investigation by the state.

We therefore conclude that the district court correctly determined that the Act provides sufficient process to survive this facial challenge. More importantly, the district court also found that the statute does not preclude the presentation of counterevidence when an employer's liability is at issue, Ariz. Contractors, 534 F.Supp.2d at 1058, and we agree with this interpretation. An employer's opportunity to present evidence at a hearing in superior court, in order to rebut the presumption of the employee's unauthorized status, provides the employer a meaningful opportunity to be heard before sanctions are imposed.

We conclude that subsection (H) is facially constitutional.

The district court's judgment is AFFIRMED.

Joseph CARVER, Plaintiff-Appellant,

v.

Joseph LEHMAN; Kimberly Acker; Victoria Roberts; Six to be Named Defendants, Defendants-Appellees.

No. 06-35176.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 17, 2007.


Background: Former inmate of Washington Department of Corrections (DOC), who had been sentenced to term of imprisonment plus term of community custody based on his status as sex offender, brought § 1983 action against secretary of DOC, alleging that denial of inmate's application for early release into community custody constituted violation of his due process rights. The United States District Court for the Western District of Washington, Ronald B. Leighton, J., granted summary judgment for DOC secretary, and former inmate appealed.

Holding: The Court of Appeals, Milan D. Smith, Jr., Circuit Judge, held that state statutes did not create liberty interest in early release into community custody for sex offenders who earned good-time early release date.

Affirmed.