

Comment

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Challenging State and Local Anti-Immigrant Employment Laws: An Evaluation of Preemption, Equal Protection, and Judicial Awareness Tactics

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INTRODUCTION

Recently, state governments have passed increasing amounts of legislation regulating immigration in areas ranging from housing to employment. According to the National Conference of State Legislatures, states introduced 1,607 bills or resolutions dealing with immigrants and refugees in 2011.¹ That is 200 more bills and resolutions than were introduced in 2010 and 1,300 more bills and resolutions than were introduced in 2005.² Several of the state bills introduced in the last few years included provisions dealing with E-Verify, the internet-based system through which employers can confirm new hires' work-authorization status. In 2011 and 2012, thirteen states introduced bills or executive orders that required the use of E-Verify for either the first time or for a wider range of employers than previously required.³ Prior to 2011, twelve states had laws or executive orders requiring the use of E-Verify.⁴ Additionally, two states had laws placing limitations on the use of E-Verify.⁵

With states passing more immigration laws, the number of challenges to those laws has also risen.⁶ Civil rights groups and immigrant rights groups, such as the American Civil Liberties Union and the National Immigration Law Center, have led some of these

¹ Brooke Meyer et al., *Immigration Policy Report: 2011 Immigration-Related Laws and Resolutions in the States (Jan. 1–Dec. 7, 2011)*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx> (last visited Jan. 19, 2013).

² Joy Segreto et al., *Immigration Policy Report: 2011 Immigration-Related Laws and Resolutions in the States (January-June)*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 19, 2011) <http://www.ncsl.org/issues-research/immig/state-immigration-laws-january-to-june-2011.aspx>.

³ Ann Morse et al., *E-Verify FAQ*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/immig/everify-faq.aspx> (last updated Dec. 18, 2012).

⁴ *Id.*

⁵ *Id.*

⁶ Meyer et al., *supra* note 1.

challenges.⁷ These challengers have employed several tactics to combat laws they view to be anti-immigrant in establishment and effect. These tactics include challenging the laws on grounds such as preemption, equal protection, and judicial awareness.

While the laws range in coverage from education to health, this Comment focuses on lawsuits challenging immigration laws in the employment context. Part I of this Comment gives an overview of federal immigration laws that regulate employment. Part II covers cases involving challenges to employment immigration laws, including the recent United States Supreme Court case, *Chamber of Commerce of the United States v. Whiting*.⁸ Part III looks at the effects of recent court decisions and legislation. Finally, Part IV of this Comment analyzes the three tactics of preemption, equal protection, and judicial awareness for challenging anti-immigrant employment laws.

I

OVERVIEW OF FEDERAL IMMIGRATION LAW IN THE EMPLOYMENT CONTEXT

The two main federal statutes that regulate immigration in the employment context are the Immigration Reform and Control Act of 1986 (IRCA)⁹ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹⁰ Under IRCA, “[i]t is unlawful for a person or other entity to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment.”¹¹ An “unauthorized alien” is an alien who is not “lawfully admitted for permanent residence” or who is not “authorized to be so employed by this chapter or by the Attorney General.”¹² Before hiring an employee, IRCA requires the employer to review certain documents that establish a new hire’s eligibility for employment.¹³ If employers violate IRCA, they may be subject to

⁷ Julia Preston, *Class-Action Lawsuit Says Utah Immigration Law Violates Civil Rights*, N.Y. TIMES, May 4, 2011, <http://www.nytimes.com/2011/05/04/us/04immigration.html>.

⁸ *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011).

⁹ Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

¹⁰ Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104–208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

¹¹ Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(a)(1)(A) (2006).

¹² *Id.* § 1324a(h)(3).

¹³ *Id.* § 1324a(b).

both civil and criminal sanctions.¹⁴ Civil penalties include cease and desist orders, financial penalties, and other remedial measures.¹⁵ Criminal penalties include fines and jail time of up to six months.¹⁶ IRCA also imposes fines and other sanctions on employers who engage in “unfair immigration-related employment practice[s],” such as discrimination based on citizenship or national origin.¹⁷ IRCA’s preemption clause states the following: “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.”¹⁸ Thus, state and local laws that impose a civil or criminal sanction on employers are preempted unless they are licensing or similar laws.¹⁹ Under IIRIRA, Congress established three programs to improve the process for verification of worker eligibility for employers.²⁰ E-Verify, originally called the Basic Pilot Program, is the only program that is still currently in operation.²¹

*A. E-Verify—the Federal System for Verification of Work-
Authorization Status*

E-Verify “is an internet-based system that allows an employer to verify an employee’s work-authorization status.”²² As of mid-March 2012, more than 345,400 employers were enrolled in E-Verify.²³ This number represented about six percent of U.S. employers, but this percentage will continue to increase with an average of 2,000 new employers enrolling each week.²⁴

¹⁴ *Id.* § 1324a(e)–(f).

¹⁵ *Id.*

¹⁶ *Id.* § 1324a(f)(1).

¹⁷ *Id.* § 1324b(a)(1), (g)(2)(B).

¹⁸ *Id.* § 1324a(h)(2).

¹⁹ *Id.*

²⁰ Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 401, 110 Stat. 3009, 3009-655 to -56 (1996); *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1975 (2011).

²¹ Omnibus Consolidated Appropriations Act of 1997 § 401; *Whiting*, 131 S. Ct. at 1975.

²² *Whiting*, 131 S. Ct. at 1975 (quoting *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 862 (9th Cir. 2009)); U.S. CITIZENSHIP AND IMMIGRATION SERVS., I AM AN EMPLOYER . . . HOW DO I . . . USE E-VERIFY? (2008), available at www.uscis.gov/USCIS/Resources/E4en.pdf.

²³ ANDORRA BRUNO, CONG. RESEARCH SERV., R40446, ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION 3 (2012).

²⁴ *Id.*

Employers that use E-Verify must verify the status of all new hires—citizens and noncitizens alike.²⁵ E-Verify compares the information an employee provides on the Employment Eligibility Verification I-9 Form against government records, including Social Security Administration records, Department of State passport records, and Department of Homeland Security (DHS) databases.²⁶ To begin the employment verification process, the employer submits a request to the E-Verify system based on information that the worker provides on the I-9 Form.²⁷ Next, the employer will receive one of four notices: employment authorized notice, DHS verification in process notice, tentative nonconfirmation notice, or final nonconfirmation notice.²⁸ An employment authorized notice means the worker is authorized for employment.²⁹ A DHS verification in process notice means, “a manual review of the records in government databases is necessary.”³⁰ A tentative nonconfirmation notice:

²⁵ *E-Verify: Preserving Jobs for American Workers: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 26–27 (2011) [hereinafter *2011 House Subcommittee on Immigration Policy and Enforcement Hearing*] (written testimony of Theresa C. Bertucci, Associate Director, Enterprise Services Directorate, U.S. Citizenship and Immigration Services) (stating that federal contractors with a Federal Acquisition Regulation E-Verify clause in their contract may elect to verify new hires and existing employees or may choose to verify their entire workforce); U.S. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 22, at 2.

²⁶ *2011 House Subcommittee on Immigration Policy and Enforcement Hearing*, *supra* note 25, at 26; *What is E-Verify? Instant Verification of Work Authorization*, U.S. CITIZENSHIP AND IMMIGR. SERVICES (Dec. 8, 2010), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=a7469589cdb76210VgnVCM100000b92ca60aRCRD&vgnnextchannel=a7469589cdb76210VgnVCM100000b92ca60aRCRD>; *see also* BRUNO, *supra* note 23, at 2 (stating that employers must submit the following information from the new hires’ I-9 forms: “name, date of birth, Social Security number, immigration/citizenship status, and alien number, if applicable”).

²⁷ *E-Verify for Employers: The Verification Process*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d4abfb41c8596210VgnVCM100000b92ca60aRCRD&vgnnextchannel=d4abfb41c8596210VgnVCM100000b92ca60aRCRD> (last updated May 7, 2012).

²⁸ *Id.*; *E-Verify for Employees: E-Verify Overview*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=7f19fb41c8596210VgnVCM100000b92ca60aRCRD&vgnnextchannel=7f19fb41c8596210VgnVCM100000b92ca60aRCRD> (last updated Sept. 14, 2012).

²⁹ *Id.*; *E-Verify for Employers: The Verification Process*, *supra* note 27.

³⁰ *E-Verify for Employers: The Verification Process*, *supra* note 27; *E-Verify for Employers: Tentative Nonconfirmations*, U.S. CITIZENSHIP AND IMMIGR. SERVICES (Oct. 4, 2010), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=8fdbfb41c8596210VgnVCM100000b92ca60aRCRD&vgnnextchannel=8fdbfb41c8596210VgnVCM100000b92ca60aRCRD>.

[M]eans that the Social Security Administration (SSA) and/or the U.S. Department of Homeland Security (DHS) could not confirm that the employee's information matches government records. It does not mean an employee is unauthorized to work or is an illegal immigrant as there are legitimate reasons why an employee may receive this result.³¹

Employees may challenge a tentative nonconfirmation notice,³² and they have eight federal workdays to do so.³³ If a worker contests the notice, the employer cannot take adverse action against a worker, such as reducing work hours, delaying training, or terminating employment.³⁴ If an employee chooses not to challenge a nonconfirmation notice or that challenge is unsuccessful, then it becomes a final nonconfirmation.³⁵ A final nonconfirmation means the employee must be terminated or, if the employer continues to employ the new hire, DHS must be informed.³⁶ If an employer continues to employ the worker who received a final nonconfirmation, it "is subject to a rebuttable presumption that it knowingly employed an unauthorized alien."³⁷

B. Requiring the Use of E-Verify

Currently, under federal law, only certain federal government employers are required to use E-Verify to verify employee work-authorization status.³⁸ In fact, IIRIRA prohibits the Secretary of Homeland Security from requiring "any person or other entity"

³¹ *E-Verify for Employers: Tentative Nonconfirmations*, *supra* note 30.

³² *E-Verify for Employees: Resolving a Tentative Nonconfirmation*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=017bfb41c8596210VgnVCM100000b92ca60aRCRD&vgnnextchannel=017bfb41c8596210VgnVCM100000b92ca60aRCRD> (last updated Sept. 14, 2012).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1975 (2011); *E-Verify for Employees, E-Verify Overview*, *supra* note 28.

³⁷ Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 403(a)(4)(C)(iii), 110 Stat. 3009, 3009-662 (1996); *Whiting*, 131 S. Ct. at 1975; *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 862 (9th Cir. 2009).

³⁸ Omnibus Consolidated Appropriations Act of 1997 § 403(a), (e); *What is E-Verify?*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e94888e60a405110VgnVCM1000004718190aRCRD&vgnnextchannel=e94888e60a405110VgnVCM1000004718190aRCRD> (last updated Nov. 1, 2012) ("E-Verify is also mandatory for employers with federal contracts or subcontracts that contain the Federal Acquisition Regulation E-Verify clause.").

outside of the federal government to use E-Verify.³⁹ However, to encourage use of the program outside of the federal government, IIRIRA states that any employer that uses E-Verify “and obtains confirmation of identity and employment eligibility in compliance with the terms and conditions of the program . . . has established a rebuttable presumption that” it has not violated IRCA’s prohibition against employing unauthorized aliens.⁴⁰ Even though the federal government cannot require nonfederal employers to use E-Verify, several states have passed laws requiring nonfederal employers to use E-Verify.⁴¹

II

STATE AND LOCAL ANTI-IMMIGRANT EMPLOYMENT LEGISLATION

In the past few years, there have been many cases involving state and local laws regulating the area of employment and immigration. The cases discussed below are just two examples of the types of challenges that are likely to succeed or fail in this area of law. The cases also demonstrate the complexity of the immigration laws in the United States.

A. Challenges to State Legislation

Recently, decisions have been made in several cases challenging state legislation involving employment and immigration.⁴² *Chamber*

³⁹ Omnibus Consolidated Appropriations Act of 1997 § 402(a); *Whiting*, 131 S. Ct. at 1975.

⁴⁰ Omnibus Consolidated Appropriations Act of 1997 § 402(b)(1); *Whiting*, 131 S. Ct. at 1975.

⁴¹ *Morse*, *supra* note 3.

⁴² *See, e.g.*, *United States v. Alabama*, 691 F.3d 1269, 1290 (11th Cir. 2012) (holding that certain parts of Alabama House Bill 56 were preempted in a lawsuit brought by the United States Department of Justice. Specifically, the court held that denying an employer a tax deduction when it employed unauthorized immigrants was a sanction under the meaning of IRCA, and thus, the state was preempted from imposing it.); *Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 750 (10th Cir. 2010) (affirming on preemption grounds a preliminary injunction barring enforcement of certain provisions of an Oklahoma law that required all employers to verify work-authorization status of new hires; holding the requirement that public agencies and state contractors verify work-authorization status was not preempted); *Utah Coal. of La Raza v. Herbert*, No. 2:11-CV-401 CW, 2011 WL 7143098 (D. Utah May 11, 2011) (the ACLU and the National Immigration Law Center have filed a class-action lawsuit challenging Utah House Bill 497 (Illegal Immigration Enforcement Act) on preemption and other grounds); *see also* Lizette Alvarez, *Florida Struggles with Arizona’s Immigration Plan*, N.Y. TIMES, May 4, 2011, <http://www.nytimes.com/2011/05/05/us/05florida.html> (citing the fact that a provision requiring the use of E-Verify was voted out of the Florida state immigration

of *Commerce of the United States v. Whiting* is the most recent Supreme Court decision regarding preemption of immigration laws in the employment context.⁴³ To fully grasp the success of preemption challenges in the immigration employment context this case must be discussed. *Whiting* involved a preemption challenge by the Chamber of Commerce of the United States to the Legal Arizona Workers Act (the Act).⁴⁴ The Act allows and, in certain circumstances, requires the licenses of employers to be suspended or revoked if they knowingly or intentionally employ an unauthorized worker.⁴⁵ The Act provides a certain procedure for determining an employee's work-authorization status after a complaint has been filed alleging an employer has hired an unauthorized worker.⁴⁶ To verify an employee's work-authorization status, "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)."⁴⁷ This section states the following:

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.⁴⁸

The Act prohibits state, county, or local officials from attempting "to independently make a final determination on whether an alien is authorized to work in the United States"⁴⁹ as is prohibited by 8 U.S.C. § 1373(c). If verification of the employee's work authorization status shows the employee is an unauthorized worker, then the attorney general or county attorney must notify United States Customs and

law); *Judge Blocks Key Parts of Georgia Immigration Law*, CNN (June 27, 2011), http://articles.cnn.com/2011-06-27/us/georgia.immigration.lawsuit_1_judge-blocks-key-parts-illegal-immigration-immigration-status?_s=PM:US; Jeremy Redmon, *Georgia's New Immigration Law Requirements Confuse Businesses*, ATLANTA J.-CONST. (Sept. 3, 2011, 2:58 PM), <http://www.ajc.com/news/georgia-politics-elections/georgias-new-immigration-law-1157121.html> (citing that in Georgia, parts of a law requiring the use of E-Verify were criticized because the E-Verify procedures confuse employers).

⁴³ See *Whiting*, 131 S. Ct. 1968.

⁴⁴ See *id.*

⁴⁵ ARIZ. REV. STAT. ANN. §§ 23-211 to 23-212.01 (West, Westlaw through 2012 2d Reg. Sess.); *Whiting*, 131 S. Ct. at 1976.

⁴⁶ ARIZ. REV. STAT. ANN. § 23-212(B).

⁴⁷ *Id.*

⁴⁸ 8 U.S.C. § 1373(c) (2006).

⁴⁹ ARIZ. REV. STAT. ANN. § 23-212(B).

Immigration Services (USCIS) officials, notify local law enforcement, and bring an action against the employer.⁵⁰ The Act also requires that all Arizona employers use E-Verify to confirm the employees are legally authorized to work.⁵¹ Verification of a worker's authorization for employment through E-Verify "creates a rebuttable presumption that an employer did not knowingly employ an unauthorized alien."⁵²

In *Whiting*, the Court focused on whether the Act was expressly or impliedly preempted by federal immigration laws.⁵³ The Court held that the provisions of the Act were neither expressly nor impliedly preempted.⁵⁴ When the Court looked at whether the law was expressly preempted, the Court asked whether the federal law at issue had a preemption clause.⁵⁵ When the federal law contains an express preemption clause, the Court will "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent."⁵⁶ The federal law at issue, IRCA, contains an express preemption clause, which states, "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."⁵⁷ The Court looked at the text of the Act and concluded that, on its face, the Act "purports to impose sanctions through licensing laws."⁵⁸ Licensing laws are one area that the IRCA preemption clause leaves open for states to regulate employment of immigrants.⁵⁹ Thus, the Court said the Act "falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted."⁶⁰

The Chamber of Commerce made several arguments in favor of preemption. First, it argued the Act was impliedly preempted because it conflicts with federal law as Congress intended the federal system

⁵⁰ *Id.* § 23-212(C)(1)-(3), (D).

⁵¹ *Id.* § 23-214(A).

⁵² *Id.* § 23-212(I).

⁵³ *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1974 (2011).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1977.

⁵⁶ *Id.* at 1977 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

⁵⁷ 8 U.S.C. § 1324a(h)(2) (2006).

⁵⁸ *Whiting*, 131 S. Ct. at 1977-78.

⁵⁹ 8 U.S.C. § 1324a(h)(2).

⁶⁰ *Whiting*, 131 S. Ct. at 1981.

to be exclusive.⁶¹ The Court held the Act was not impliedly preempted because Congress expressly allowed states to implement sanctions through licensing laws, which is what the Arizona law does.⁶² The Court also pointed to the fact that “Arizona went the extra mile” to ensure its law followed the federal laws (IRCA and IIRIRA) in “all material respects.”⁶³ For example, the Arizona Act adopts the federal definition of “unauthorized alien,” as defined in 8 U.S.C. §1324a(h)(3).⁶⁴ In addition, the Act tries to ensure that only the federal government determines the work-authorization status of an employee.⁶⁵ Specifically, the Act says state investigators must verify the work authorization of an allegedly unauthorized alien with the federal government and “shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.”⁶⁶ Additionally, a state court must consider only the federal government’s determination when deciding if an employee is an unauthorized worker.⁶⁷ Other similarities exist between the Act and federal laws. For instance, both prohibit “knowingly” employing an unauthorized alien,⁶⁸ both provide the same affirmative defense of good-faith compliance with the I-9 process,⁶⁹ and both give employers a rebuttable presumption of compliance with the law when they use E-Verify to validate a finding of employment eligibility.⁷⁰

Second, the Chamber of Commerce argued the Act is impliedly preempted because it “upsets the balance that Congress sought to strike when enacting IRCA.”⁷¹ The Court said that regulating in-state

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* Compare *id.*, with *Lozano v. City of Hazleton*, 620 F.3d 170, 213 (3d Cir. 2010) (showing the similarity between the courts’ reasoning despite the different outcomes. In *Whiting*, the Court noted that the Act mirrored federal law, and upheld it. In *Lozano*, the court noted that the law differed from federal law, and struck it down.), *cert. granted, vacated sub nom.* *City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011).

⁶⁴ *Whiting*, 131 S. Ct. at 1981.

⁶⁵ ARIZ. REV. STAT. ANN. § 23-212(B), (H) (West, Westlaw through 2012 2d Reg. Sess.).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Whiting*, 131 S. Ct. at 1982. Compare 8 U.S.C. § 1324a(a)(1)(A) (2006), with ARIZ. REV. STAT. ANN. § 23-212(A).

⁶⁹ *Whiting*, 131 S. Ct. at 1982. Compare 8 U.S.C. § 1324a(a)(3), with ARIZ. REV. STAT. ANN. § 23-212(J).

⁷⁰ *Whiting*, 131 S. Ct. at 1982-83. Compare Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 402(b), 110 Stat. 3009, 3009-656 to -657 (1996), with ARIZ. REV. STAT. ANN. § 23-212(I).

⁷¹ *Whiting*, 131 S. Ct. at 1983.

businesses through licensing has never been an area of dominant federal concern, and states can regulate in this area.⁷² Thus, the federal program in this case “operates unimpeded by the state law.”⁷³

Third, the Chamber of Commerce argued that employers would tend to discriminate rather than risk license termination and sanctions by hiring unauthorized immigrants.⁷⁴ In response, the Court reasoned that license termination is a severe consequence, so only “egregious violations of the law trigger that consequence.”⁷⁵ The Court stated that the Act does not displace the IRCA antidiscrimination provisions and Arizona antidiscrimination laws that protect employees from discrimination.⁷⁶ The Court also stated that the “high threshold [for a] state law . . . to be preempted for conflicting with the purposes of a federal Act” was not met here.⁷⁷

Lastly, the Chamber of Commerce argued that the Arizona Act provision mandating use of E-Verify was impliedly preempted because it impeded Congress’s purpose.⁷⁸ The Court said states could require use of E-Verify because IIRIRA only constrains the federal government from mandating the use of E-Verify.⁷⁹ Thus, the Court found federal law neither expressly nor impliedly preempted the Arizona Legal Workers Act.⁸⁰

B. Challenges to Local Ordinances

There have been several recent cases challenging local ordinances on preemption grounds.⁸¹ However, *Lozano v. City of Hazleton* offers

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1984.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 1985 (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring)); *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (this high threshold was described as: “whether there exists an irreconcilable conflict between the federal and state regulatory scheme. The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.”).

⁷⁸ *Whiting*, 131 S. Ct. at 1985.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1974.

⁸¹ *See, e.g.*, *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010) (“As we noted at the outset, state and local attempts to regulate issues related to immigration have skyrocketed in recent years.”), *cert. granted, vacated sub nom.* *City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011); *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835 (N.D. Tex. 2010) (striking down a local ordinance dealing with regulation of rental housing for immigrants on preemption grounds); *Gray v. City of*

the best example because the Supreme Court vacated the judgment and remanded the case to the Third Circuit for consideration in light of the decision in *Whiting*.⁸² In *Lozano*, the Third Circuit upheld the district court's decision to enjoin the enforcement of two local ordinances in Pennsylvania that were passed to regulate employment and housing of certain immigrants.⁸³ One of the ordinances titled the Illegal Immigration Relief Act Ordinance (IIRAO) deals with employment of unlawful immigrants.⁸⁴ The ordinance states that it is illegal for a business to employ an "unlawful worker."⁸⁵ An "'unlawful worker' means a person who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law, including but not limited to . . . an unauthorized alien as defined by [8 U.S.C. § 1324a(h)(3)]."⁸⁶ The ordinance requires every business that applies for a business permit to "sign an affidavit . . . affirming that they do not knowingly utilize the services or hire any person who is an unlawful worker."⁸⁷ Any Hazleton resident may submit a complaint to the Code Enforcement Office.⁸⁸ Once a complaint is received, the Code Enforcement Office sends a request to the business for identity information about the alleged unlawful worker.⁸⁹ The business must provide the information within three business days or its license will be suspended.⁹⁰ If the worker is an alleged unlawful immigrant, "the Code Enforcement

Valley Park, No. 4:07CV00881, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008) (upholding a local employment ordinance against preemption, Due Process Clause, and Equal Protection Clause challenges), *aff'd on other grounds*, 567 F.3d 976 (8th Cir. 2009); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (striking down local ordinances barring landlords from renting to undocumented persons among other proscriptions based on preemption grounds); Ann Morse et al., *Immigrant Policy Project: 2009 State Laws Related to Immigrants and Immigration January 1–December 31, 2009*, NAT'L CONF. ON ST. LEGISLATURES (Dec. 1, 2009), <http://www.ncsl.org/issues-research/immig/2009-state-immigration-laws.aspx>; Joy Segreto, *supra* note 2.

⁸² *Lozano*, 620 F.3d at 176.

⁸³ *Id.*

⁸⁴ *Id.* at 177. The second ordinance titled the Rental Registration Ordinance deals with the housing of unlawful immigrants and will not be discussed in detail here because it does not touch upon employment of unlawful immigrants.

⁸⁵ *Id.* at 177–78.

⁸⁶ *Id.* at 178 (quoting HAZELTON, PA., ORDINANCE 2006-18, § 3(E), *available at* <http://www.aclupa.org/issues/immigrantsrights/hazleton/hazletonordinances.htm> [hereinafter HAZELTON ORDINANCE]).

⁸⁷ *Id.* (quoting HAZELTON ORDINANCE, *supra* note 86, § 4(A)).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

Office submits any identity information received from the business to the federal government, pursuant to 8 U.S.C. § 1373, for verification of ‘the immigration status of such person(s).’⁹¹ If the federal government confirms the worker is not authorized to work in the United States, the business must terminate the worker’s employment within three business days or its license will be suspended.⁹² The ordinance provides safe harbor from this sanction if the business verifies the work-authorization status of its workers through E-Verify.⁹³

Pedro Lozano, other Hazleton residents, and the Hazleton Hispanic Business Association facially challenged the ordinances on several grounds, including the Supremacy Clause (preemption), the Equal Protection Clause, the Due Process Clause, and the limits of Hazleton’s police powers.⁹⁴ The Third Circuit struck down both local ordinances based on Supremacy Clause (preemption) grounds.⁹⁵ The court said the employment ordinance was a licensing law, and therefore, was not expressly preempted by IRCA, which provides that licensing or similar laws are not preempted.⁹⁶ However, the court struck down the ordinance because of implied conflict preemption,⁹⁷ noting several differences between the local ordinance and IRCA.⁹⁸

First, the court said one purpose of IRCA was to reduce the burden on the employer, and the local ordinance “significantly increases employer burden by creating a separate and independent adjudicative system for determining whether an employer is guilty of employing unauthorized aliens.”⁹⁹ For example, under the local ordinance, Hazleton’s Code Enforcement Office must investigate *every* complaint, while IRCA requires that complaints with a “substantial probability of validity” be investigated.¹⁰⁰ The local ordinance also provides fewer procedural protections for employers than IRCA.¹⁰¹ Under IRCA, certain protections are given to employers before

⁹¹ *Id.* (quoting HAZLETON ORDINANCE, *supra* note 86, § 4(B)(3)).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 181.

⁹⁵ *Id.* at 210.

⁹⁶ *Id.* at 208–09.

⁹⁷ *Id.* at 210; *see infra* Part IV.A for description of implied conflict preemption.

⁹⁸ *Lozano*, 620 F.3d at 212–13.

⁹⁹ *Id.* at 212.

¹⁰⁰ *Id.* Compare 8 U.S.C. § 1324a(e)(1) (2006), with HAZLETON ORDINANCE, *supra* note 86, § 4(B)(2)–(3).

¹⁰¹ *Lozano*, 620 F.3d at 212.

sanctions can be imposed.¹⁰² For example, an employer must be given notice and a hearing opportunity, and an administrative law judge must find a violation of IRCA *before* an employer is sanctioned.¹⁰³ Under the local ordinance, none of the same protections exist.¹⁰⁴ An employer's license will be suspended immediately if it fails to provide information about alleged unlawful workers or if it fails to terminate a worker who is found to be unlawful within three business days.¹⁰⁵

Second, the *Lozano* court also looked at the differences in the antidiscrimination provisions and sanctions. IRCA imposes equal sanctions on employers who hire unauthorized workers and who discriminate, but the local ordinance does not impose equal sanctions.¹⁰⁶ In fact, the local ordinance imposes more sanctions on employers who hire unauthorized workers.¹⁰⁷ The *Lozano* court stated the following: "This creates the exact situation that Congress feared: a system under which employers might quite rationally choose to err on the side of discriminating against job applicants they perceive to be foreign. This is inconsistent with IRCA and therefore cannot be tolerated under the Supremacy Clause."¹⁰⁸ While the *Lozano* court found several differences between the local ordinance and IRCA, it ultimately said the following:

The crux of this conflict, however, transcends the differences between the IIRAO's prosecution and adjudication system and IRCA's. Rather, it is rooted in the fact that Hazleton has established an alternate system *at all . . .* Congress created a comprehensive and carefully balanced prosecution and adjudication system, and foremost among its goals in doing so was to minimize the burden this system would impose on employers. We therefore cannot fathom that Congress intended to tolerate the "supplementing" of its carefully crafted system with independent state and local systems, which by their mere existence drastically increase burdens on employers.¹⁰⁹

While the Supreme Court ultimately vacated and remanded the case back to the Third Circuit, it is not clear that the decision will be

¹⁰² *Id.* at 212–13; 8 U.S.C. § 1324a(e).

¹⁰³ *Lozano*, 620 F.3d at 212–13 (citing 8 U.S.C. § 1324a(e)).

¹⁰⁴ *Lozano*, 620 F.3d at 213.

¹⁰⁵ *Id.*; HAZELTON ORDINANCE, *supra* note 86, § 4(B)(3)–(4).

¹⁰⁶ *Lozano*, 620 F.3d at 217–18.

¹⁰⁷ *Id.* at 218.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 213 (citation omitted).

overturned. This is because the Third Circuit's decision rested on the fact that the City of Hazleton passed ordinances that strayed from the federal system. The decision in *Whiting* emphasized the fact that Arizona passed an Act that aligned with the federal system.¹¹⁰ Thus, the Third Circuit used reasoning similar to that of the Court in *Whiting*.

III

EFFECTS OF RECENT CHALLENGES TO ANTI-IMMIGRANT EMPLOYMENT LEGISLATION

The Supreme Court's decision in *Whiting* and the other recent legislation has affected the area of immigration and employment in several ways. These effects include the use of E-Verify, the concerns about discrimination, and the possibility of strain on law enforcement agencies.

A. *Impact of Chamber of Commerce of the U.S. v. Whiting*

The Court's decision in *Whiting* has had at least three major outcomes. These impacts include (1) the mandatory use of E-Verify, (2) the discriminatory actions of employers, and (3) the effect on other preemption challenges. Each of these impacts and its current and future implications will be discussed in this Section.

1. *The Mandatory Use of E-Verify*

One result of the Court's decision in *Whiting* is that states may require employers to use E-Verify.¹¹¹ The Arizona Act, at issue in *Whiting*, requires that "every employer, after hiring an employee, shall verify the employment eligibility of the employee" using E-Verify.¹¹² If states can require employers to use E-Verify to verify new hires' authorization status, this increased use will place more strain on an already flawed system of verification.

Since the implementation of E-Verify, several studies have been conducted on the strengths and weaknesses of the system. One study

¹¹⁰ See *supra* Part II.A.

¹¹¹ Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968, 1974 (2011); *E-Verify for Employers: Tentative Nonconfirmations*, *supra* note 30 (E-Verify is an internet-based system that compares the information an employee provides on the I-9 Form to various government databases to determine the employee's work-authorization status).

¹¹² ARIZ. REV. STAT. ANN. § 23-214(A) (West, Westlaw through 2012 2d Reg. Sess.).

conducted by the Migration Policy Institute Task Force, chaired by former Senator Spencer Abraham and former Representative Lee Hamilton, showed E-Verify has significant problems.¹¹³ For example, some of “[t]he problems that need to be corrected include delayed entry of data reflecting admission or status changes, data entry errors, the ability of individuals to view and correct their records, and alternate spellings or word order of foreign names.”¹¹⁴ These problems can lead to incorrect work-authorization status determinations, especially if a worker’s data has not been updated. In addition, E-Verify “generates an unacceptably high level of secondary verification responses. Twenty percent of noncitizens and thirteen percent of US [sic] citizens are initially not confirmed and can only be confirmed if they contact SSA or USCIS.”¹¹⁵ Since the Migration Policy Institute report, E-Verify has been improved in certain areas. One such area is that the system accuracy has increased and the tentative nonconfirmation rate has decreased.¹¹⁶

While some improvements have been made, other problems still exist. For example, in a three-month period in 2008, about 3.4 percent of E-Verify’s work-authorization confirmations were found to be mistakes due to fraudulent identity data.¹¹⁷ This points to a larger issue with the E-Verify system. E-Verify cannot detect identity or document fraud because while “the system usually can confirm whether or not a name and social security or alien identification number exist in a federal database, the system cannot confirm whether a name and identifying number actually belong to the worker being hired.”¹¹⁸ While USCIS has implemented a photo-matching tool to help prevent the use of false identities, this tool only allows

¹¹³ DORIS MEISSNER ET AL., *MIGRATION POLICY INST., IMMIGRATION AND AMERICA’S FUTURE* 48–49 (2006), available at <http://www.migrationpolicy.org/ITFIAF/>.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 49 (“Ninety percent of these tentatively non-confirmed applicants fail to pursue their cases because employers mishandle their applications, workers find it easier to change employment than to correct their records, or they do not have legal status and are not authorized to work.”).

¹¹⁶ Marc R. Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform*, INSIGHT (Migration Policy Inst., Wash., D.C.), Feb. 2011, at 6–7, available at <http://www.migrationpolicy.org/pubs/E-Verify-Insight.pdf>.

¹¹⁷ *Id.* at 6 (citing WESTAT CORP., *FINDINGS OF THE E-VERIFY PROGRAM EVALUATION* 50, 115 (2009), available at http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf).

¹¹⁸ ANDORRA BRUNO, CONG. RESEARCH SERV., R42434, *IMMIGRATION OF TEMPORARY LOWER-SKILLED WORKERS: CURRENT POLICY AND RELATED ISSUES* 17 (2012); Rosenblum, *supra* note 116, at 5.

employers to compare DHS-issued documents and U.S. passports.¹¹⁹ This search limitation will not completely prevent fraud when employees use a driver's license to establish their identity.¹²⁰ This inability to detect fraud is compounded by employers' actions. First, when employers tell workers to provide documents that do not trigger the photo-screening tool, which has occurred in Arizona, fraud goes undetected. Second, when employers do not use E-Verify to check the status of all their new hires even when required to do so by law, which is likely to have occurred in Arizona, they allow fraud to continue.¹²¹

Another issue with E-Verify is that employers tend to misuse the system. When an employee has a tentative nonconfirmation, employers must follow certain requirements. However, some employers have not followed these requirements. Instead, they have not informed employees or applicants of their status or have taken adverse employment action against them.¹²² Even though employer misuse of E-Verify is a problem, there does not seem to be a viable solution. This is because USCIS has only limited authority to investigate employer misuse.¹²³ Additionally, Immigration and Customs Enforcement, the agency that investigates, sanctions, and prosecutes employers, "has limited resources to investigate and sanction employers that knowingly hire unauthorized workers or

¹¹⁹ *Document Fraud in Employment Authorization: How an E-Verify Requirement Can Help: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 4 (2012) (statements of Lamar Smith, Chairman of the H. Judiciary Comm., U.S. Rep.) [hereinafter *2012 House Subcommittee on Immigration Policy and Enforcement Hearing*]; *E-Verify for Employers: Photo Matching*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menu.item.eb1d4c2a3e5b9ac89243c6a7543f6d1a?vgnextoid=bbcbfb41c8596210VgnVCM100000b92ca60aRCRD&vgnextchannel=bbcbfb41c8596210VgnVCM100000b92ca60aRCRD> (last updated Oct. 4, 2010).

¹²⁰ *E-Verify for Employers: Photo Matching*, *supra* note 119; *see also* Rosenblum, *supra* note 116, at 9–11 (noting that although USCIS has created a Monitoring and Compliance Branch, it is limited in its ability to detect fraud and enforce violations.).

¹²¹ Rosenblum, *supra* note 116, at 6; WESTAT, *supra* note 117, at 87.

¹²² WESTAT, *supra* note 117, at 235; *see also* Rosenblum, *supra* note 116, at 7–8.

¹²³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-330T, EMPLOYMENT VERIFICATION: FEDERAL AGENCIES HAVE TAKEN STEPS TO IMPROVE E-VERIFY, BUT SIGNIFICANT CHALLENGES REMAIN 30–32 (2011); *see also 2011 House Subcommittee on Immigration Policy and Enforcement Hearing*, *supra* note 25, at 38 (statement of Richard M. Stana, Director, Homeland Security and Justice Issues, United States Government Accountability Office).

those that knowingly violate E-Verify program rules.”¹²⁴ Recognizing these problems, Congress has continually made E-Verify a voluntary program for most employers.¹²⁵ However, there are currently several bills in Congress that contain provisions to make E-Verify a mandatory program¹²⁶ or propose a program to replace E-Verify.¹²⁷

2. *The Discriminatory Actions of Employers*

A second impact of the *Whiting* decision is the increased potential for discrimination by employers. The Arizona Act at issue in *Whiting* gives employers protection from sanctions if they use the E-Verify system: “proof of verifying the employment authorization of an employee through the e-verify program [sic] creates a rebuttable presumption that an employer did not knowingly employ an unauthorized alien.”¹²⁸ Thus, in Arizona, state law incentivizes employers to use E-Verify by offering some protection from sanctions.

With the possibility of avoiding sanctions, an employer may choose to use E-Verify and still discriminate. For example, if the employer receives a tentative nonconfirmation or has to wait for a new hire to be authorized, it may choose instead not to hire that person because it believes the person is not authorized. This may be due to the fact that a new hire appears foreign or speaks with an accent. An employer may also discriminate because of the harsher penalties it would face under the Arizona law. For example, if employers suspect a new hire may be unauthorized, they may discriminate against that person and not hire them in order to avoid

¹²⁴ 2011 House Subcommittee on Immigration Policy and Enforcement Hearing, *supra* note 25, at 45 (prepared statement of Richard M. Stana, Director, Homeland Security and Justice Issues, United States Government Accountability Office).

¹²⁵ Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 403(a), (e), 110 Stat. 3009, 3009-659 (1996); Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968, 1975 (2011); *What is E-Verify?*, *supra* note 38.

¹²⁶ See Accountability Through Electronic Verification Act, S. 1196, 112th Cong. (June 14, 2011); Jobs Recovery by Ensuring a Legal American Workforce Act of 2011, H.R. 800, 112th Cong. (Feb. 11, 2011); see also ANDORRA BRUNO ET AL., CONG. RESEARCH SERV., R42036, IMMIGRATION LEGISLATION AND ISSUES IN THE 112TH CONGRESS 7–9 (2012).

¹²⁷ See Legal Workforce Act, H.R. 2885, 112th Cong. (Sept. 12, 2011); Electronic Employment Eligibility Verification and Illegal Immigration Control Act, H.R. 483, 112th Cong. (Jan. 26, 2011); Illegal Immigration Enforcement and Social Security Protection Act of 2011, H.R. 98, 112th Cong. (Jan. 5, 2011); see also BRUNO ET AL., *supra* note 126, at 7–9.

¹²⁸ ARIZ. REV. STAT. ANN. § 23-212(I) (West, Westlaw through 2012 2d Reg. Sess.); see also *id.* § 23-212(J).

the sanctions. Under the Arizona law, if an employer is found to have intentionally hired an unauthorized worker, it faces harsher penalties than it would under IRCA.¹²⁹ The dissent in *Whiting* pointed to the possibility of discrimination due to these severe penalties:

If even the federal [sic] Act (with its carefully balanced penalties) can result in some employers discriminating, how will employers behave when erring on the side of discrimination leads only to relatively small fines, while erring on the side of hiring unauthorized workers leads to the “business death penalty” [under state law]?¹³⁰

Another report by Westat concluded that “E-Verify contributes to post-hiring discrimination against foreign-born workers, since foreign-born workers with employment authorization are more likely to incorrectly receive TNCs [tentative nonconfirmations].”¹³¹ A USCIS Report to Congress also found that problems with the E-Verify system contributed to unintentional discrimination against foreign-born persons.¹³²

The antidiscrimination provision was included in IRCA precisely because House members feared that imposition of sanctions on employers would cause discrimination. The House Committee on Education and Labor stated the following:

The Committee on Education and Labor strongly endorses this provision and the [sic] has consistently expressed its fear that the imposition of employer sanctions will give rise to employment discrimination against Hispanic Americans and other minority group members. It is the committee’s view that if there is to be sanctions enforcement and liability there must be an equally strong and readily available remedy if resulting employment discrimination occurs. In the last Congress, the full House of Representatives recognized in [sic] potential for this unfortunate cause and effect relationship between sanctions enforcement and

¹²⁹ Compare 8 U.S.C. § 1324a(e)(4)(A) (2006), with ARIZ. REV. STAT. ANN. § 23–212.01(F) (stating that under federal statute, an employer is subject to civil penalties ranging from \$250 to \$10,000 while under the Arizona statute, an employer will have its licenses revoked for a minimum of ten days).

¹³⁰ *Whiting*, 131 S. Ct. at 1990 (Breyer, J., dissenting).

¹³¹ WESTAT, *supra* note 117, at 235 (“Although the process for resolving TNCs is usually neither costly nor burdensome, some workers with employment authorization are dismissed or not hired because of TNCs without an opportunity to avail themselves of their right to resolve their TNCs with SSA or USCIS.”).

¹³² U.S. CITIZENSHIP AND IMMIGRATION SERVS., REPORT TO CONGRESS ON THE BASIC PILOT PROGRAM 3 (2004), (“[T]he tentative nonconfirmation rate was unacceptably high for foreign-born *work-authorized* employees and was higher than desirable for U.S.-born employees. This created burdens for employees and employers . . . and led to unintentional discrimination against foreign-born persons.”).

resulting employment discrimination and by an overwhelming vote of 404–9, adopted the so-called “Frank Anti-discrimination” amendment.¹³³

Some of the House testimony about the possibility of discrimination came from former Senator Gary Hart who said, “The employer sanctions in the legislation will undoubtedly act as an incentive for businesses to ‘play it safe’ and refuse to hire individuals whose status may be in question. This would mean that [B]lacks, Hispanics, and Asians would encounter new difficulties in getting hired.”¹³⁴ Congress’s fear of discrimination was not unfounded. A 1990 U.S. Government Accountability Office Report found widespread discrimination as a result of IRCA.¹³⁵

In *Whiting*, the Chamber of Commerce made several arguments about the discriminatory effects of the law.¹³⁶ The majority rejected these arguments, citing in part the protections provided by Title VII and Arizona law.¹³⁷ However, under IRCA, an employee cannot seek the protection of both IRCA’s antidiscrimination clause and Title VII.¹³⁸ Additionally, while IRCA does offer some protection against alienage discrimination,¹³⁹ meaning discrimination based on a person’s citizenship status, Title VII does not.¹⁴⁰

The Court also failed to recognize that workers do not always recover under these protections.¹⁴¹ One reason it is difficult to recover is that only certain people are able to recover under IRCA—citizens,

¹³³ H.R. REP. NO. 99–682(II), at 12 (1986).

¹³⁴ 132 CONG. REC. S16879–01 (daily ed. Oct. 17, 1986) (statement of Sen. Hart).

¹³⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, T-GGD-90-31, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (1990).

¹³⁶ Chamber of Commerce of the United States v. *Whiting*, 131 S. Ct. 1968, 1984 (2011).

¹³⁷ *Id.* (“Other federal laws, and Arizona anti-discrimination laws, provide further protection against employment discrimination—and strong incentive for employers not to discriminate.”); see 42 U.S.C. § 2000e–2(a) (2006) (prohibiting discrimination based on “race, color, religion, sex, or national origin”); ARIZ. REV. STAT. ANN. § 41–1463(B)(1) (West, Westlaw through 2012 2d Reg. Sess.).

¹³⁸ 8 U.S.C. § 1324b(a)(2)(B), (b)(2).

¹³⁹ *Id.* § 1324b(a)(1)(B).

¹⁴⁰ See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

¹⁴¹ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002) (stating that a plaintiff who is not work authorized may face severely limited remedies). *But see Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1162 (10th Cir. 2007) (holding that the lawful permanent resident plaintiff was unable to recover under a Title VII claim of national origin discrimination); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1068–69 (9th Cir. 2004) (calling into doubt whether *Hoffman* applies because of policy against discrimination).

certain lawful permanent residents, newly legalized immigrants, refugees, and asylees.¹⁴² However, certain lawful permanent residents, nonimmigrants (even if they are authorized to work), and parolees are not protected under IRCA.¹⁴³ Another reason it is difficult to recover is that IRCA requires discriminatory intent on the part of the employer if it asks for more or different documents than required by statute.¹⁴⁴ United States citizens may not be able to recover on the basis of citizenship discrimination under certain statutes.¹⁴⁵ This is a problem when the employer or E-Verify incorrectly identifies a United States citizen as an unauthorized employee who is then fired because of the mistake. Thus, even though statutes offer some protection against discrimination, they may not offer enough protection to workers. This is especially true if employers choose to err on the side of discriminating instead of facing the harsh sanctions under Arizona law.

3. *The Effect on Other Preemption Challenges*

A third implication of the Court's decision in *Whiting* is its effect on other recent decisions involving preemption challenges. An example of the most direct effect is the Supreme Court's decision to vacate the judgment in *Lozano v. City of Hazleton* and remand the case back to the Third Circuit for further consideration in light of the *Whiting* decision.¹⁴⁶ The effect of the *Whiting* decision on this case is unclear but is discussed further in Part IV.A.

B. Impact of Recent Legislation

Recently, many states and municipalities have passed laws and ordinances affecting immigrants.¹⁴⁷ While many of these laws do not

¹⁴² 8 U.S.C. § 1324b(a)(3).

¹⁴³ *Id.*

¹⁴⁴ *Id.* § 1324b(a)(6).

¹⁴⁵ *Espinoza*, 414 U.S. 86; *Jatoi v. Hurst–Eules–Bedford Hosp. Auth.*, 807 F.2d 1214, 1219 (5th Cir. 1987) (dismissing § 1981 claim because plaintiff was a U.S. citizen), *modified*, 819 F.2d 545 (5th Cir. 1987); *Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731, 735 (5th Cir. 1986) (stating in regard to the plaintiff's § 1981 claim, “but (in America) discrimination against Americans can never be discrimination based on alienage”).

¹⁴⁶ *Lozano v. City of Hazleton*, 620 F.3d 170, 201–02 (3d Cir. 2010), *cert. granted, vacated sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011).

¹⁴⁷ *Id.* (“As we noted at the outset, state and local attempts to regulate issues related to immigration have skyrocketed in recent years.”); Ann Morse et al., *Immigrant Policy Project: 2009 State Laws Related to Immigrants and Immigration January 1–December*

involve employment, they still provide insight into the ill effects of strict enforcement of immigration laws. This anti-immigrant legislation has had varying impacts on employers, immigrants, and local law enforcement.

One example of the effect recent legislation has had on employers can be found in Prince William County, Virginia.¹⁴⁸ In Virginia, county supervisors passed measures allowing police officers to check the immigration status of anyone who breaks the law.¹⁴⁹ The measures also stop undocumented immigrants from accessing services that help those who are homeless, elderly, or addicted to drugs.¹⁵⁰ Many immigrants have left Prince William County to avoid racial profiling caused by these measures.¹⁵¹ With the rapid departure of so many inhabitants, local businesses were adversely affected.¹⁵²

Another example of the adverse impact of recent legislation can be seen with Florida's debate over immigration legislation. The Florida bill originally contained a provision mandating all employers to use E-Verify.¹⁵³ However, that provision was struck down amidst protests by opponents of the provision, including "the Florida Chamber of Commerce, Disney, the agricultural industry and law enforcement groups, as well as immigrant advocates."¹⁵⁴ The provision's possible impact on agriculture and tourism industries brought up talk of boycotts by Latino and African-American civil rights leaders.¹⁵⁵

31, 2009, NAT'L CONF. ON ST. LEGISLATURES (Dec. 1, 2009), <http://www.ncsl.org/issues-research/immig/2009-state-immigration-laws.aspx>; Segreto, *supra* note 2.

¹⁴⁸ Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 27–28 (2009).

¹⁴⁹ Nick Miroff & Kristen Mack, *After Vote, Pr. William Immigrant Plan Faces Hurdles*, WASH. POST, Oct. 18, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/17/AR2007101700234.html>.

¹⁵⁰ *Id.*

¹⁵¹ Nick Miroff, *A Hispanic Population in Decline*, WASH. POST, July 10, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/09/AR2008070902173.html>; Johnson, *supra* note 148, at 27–28.

¹⁵² Johnson, *supra* note 148, at 27; Miroff & Mack, *supra* note 149.

¹⁵³ Alvarez, *supra* note 42. *But see* Exec. Order No. 11-116, *available at* <http://www.flgov.com/2011-executive-orders/> (requiring that all state agencies and state contractors use E-Verify to check the work-authorization status of new hires).

¹⁵⁴ Alvarez, *supra* note 42.

¹⁵⁵ Preston, *supra* note 7 (“Make no mistake about that: it will bring a loss of revenues, and it will do nothing to solve the immigration problem,” said Janet Murguía, president of the National Council of La Raza. She estimated that a boycott led by the groups in Arizona cost that state \$490 million in lost tourism and convention business.”).

Employers and others have also expressed concern over making E-Verify a mandatory program for all employers.¹⁵⁶ Agricultural employers in particular are concerned with how a mandatory system would affect their ability to quickly hire workers who are desperately needed.¹⁵⁷ Employers also cite the cost of implementing E-Verify as a concern.¹⁵⁸ Others are worried that making E-Verify mandatory would not solve the problem of employing unauthorized workers but rather would force some employers to pay employees under the table.¹⁵⁹ This means that employees would lose any protections they may have had, tax revenue from workers' wages would be lost, and some jobs would be sent overseas.¹⁶⁰ Many of these concerns go hand in hand with calls for reform of this country's immigration laws as a whole.¹⁶¹

While immigrants and employers feel the effects of recent legislation, so do state and local law enforcement agencies. For example, police officers will have increased duties because many of

¹⁵⁶ Rosenblum, *supra* note 117, at 11–13.

¹⁵⁷ See 2012 House Subcommittee on Immigration Policy and Enforcement Hearing, *supra* note 119 (statement of Bert Lemkes, Co-Owner, Van Wingerden International, Inc.).

¹⁵⁸ 2011 House Subcommittee on Immigration Policy and Enforcement Hearing, *supra* note 25, at 139 (statements of Zoe Lofgren, Ranking Member, U.S. Rep.) (citing a Bloomberg Government analysis stating that it would have cost small businesses \$2.6 billion to implement E-Verify if it had been mandatory and stating that even though E-Verify is free to use, employers must bear the cost of, among other actions, training employees to use it and paying for an internet connection); Dawn Lurie & Kevin Lashus, *E-Verify is Free—But is it Affordable?*, 2011 EMERGING ISSUES 5524, Feb. 22, 2011.

¹⁵⁹ 2011 House Subcommittee on Immigration Policy and Enforcement Hearing, *supra* note 25, at 5, 20 (statements of Zoe Lofgren, Ranking Member, U.S. Rep. and statements of John Conyers, Jr., Ranking Member, U.S. Rep.); Daniel Gonzalez, *Illegal Workers Manage to Skirt Ariz. Employer-sanctions Law*, ARIZ. REPUBLIC (Nov. 30, 2008, 12:00 AM), http://www.azcentral.com/news/articles/2008/11/30/20081130underground1127.html?nclick_check=1.

¹⁶⁰ 2011 House Subcommittee on Immigration Policy and Enforcement Hearing, *supra* note 25, at 5, 20 (statements of Zoe Lofgren, Ranking Member, U.S. Rep. and statements of John Conyers, Jr., Ranking Member, U.S. Rep.).

¹⁶¹ 2012 House Subcommittee on Immigration Policy and Enforcement Hearing, *supra* note 119, at 2–3 (Mandating the use of E-Verify without reforming immigration laws “will aggravate the problem [of identity theft] while costing taxpayers billions, harming agriculture and other industries. . . . [T]he biggest problem with IRCA was that it cracked down on unauthorized employment without ensuring that agriculture and other industries had access to authorized labor. Basically it created penalties to address a symptom of a broken immigration system, but it did nothing to actually fix the immigration problem itself. In doing so, IRCA created a market for false documents and ensured that such a market would grow with the Nation’s economy.”).

the state and local laws require police to check immigration status.¹⁶² In Arizona's case, employers are required to report a worker who is unauthorized to local law enforcement and to USCIS.¹⁶³ Also under the Arizona Act, county attorneys are authorized to charge employers that have employed unauthorized workers.¹⁶⁴ These increased duties are likely to strain local law enforcement resources, which could lead to the misapplication of federal immigration laws by states.¹⁶⁵ For example, if local officials, who are untrained in immigration laws, are required to check immigration status, it is more likely that mistakes about a person's status will be made. It is hard to place full faith in these state and local authorities to verify immigration status when even courts are unsure of immigration status. For example, one court made an incorrect ruling about the immigration status of the plaintiff; USCIS later stated the plaintiff was legally in the United States.¹⁶⁶

IV

TACTICS TO COMBAT ANTI-IMMIGRANT LEGISLATION AFTER *CHAMBER OF COMMERCE OF THE U.S. V. WHITING*

Challenges to anti-immigrant legislation usually involve preemption and equal protection arguments. This Part addresses those arguments and their likelihood of success. Lastly, a policy argument for increased judicial awareness will also be addressed.

A. Tactic One: Preemption Challenges

The first tactic, and most likely to be successful, is a challenge based on preemption. The Preemption Doctrine has grown out of the

¹⁶² Alvarez, *supra* note 42; Bill Mears, *Parts of Alabama Immigration Law Blocked by Federal Appeals Court*, CNN (Oct. 14, 2011, 3:22 PM), <http://www.cnn.com/2011/10/14/us/alabama-immigration-law>; Miroff & Mack, *supra* note 149.

¹⁶³ ARIZ. REV. STAT. ANN. § 23-212(C)(1)–(3), (D) (West, Westlaw through 2012 2d Reg. Sess.).

¹⁶⁴ *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 2005 (2011). (Sotomayor, J., dissenting) (citing ARIZ. REV. STAT. ANN. §§ 23–212(D), 23–212.01(D)).

¹⁶⁵ See *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004); *Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655 (E.D. Va. 2004). See generally Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. REV. 47 (2008).

¹⁶⁶ Cortez, *supra* note 165, at 56–57; see *Merten*, 325 F. Supp. 2d at 662; Amy Argetsinger, *Va. Student Unsure of His Standing*, WASH. POST, Sept. 25, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A48785-2004Sep24.html>.

Supremacy Clause of the United States Constitution,¹⁶⁷ which states, “the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁶⁸ Those who want to challenge immigration laws can argue three types of preemption challenges—express preemption, implied field preemption, and implied conflict preemption.¹⁶⁹ First, express preemption means Congress can preempt state law by “so stating in express terms.”¹⁷⁰ Second, implied field preemption applies when language expressly preempting the state law is absent,¹⁷¹ but “Congress’ [sic] intent to pre-empt [sic] all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.”¹⁷² Third, implied conflict preemption applies when there is no language that expressly preempts state law, but a state law “actually conflicts with federal law.”¹⁷³ This means either that compliance with both state and federal law is impossible, or that state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁷⁴ No matter the type of preemption challenge, “the purpose of Congress” is the “touchstone” of any preemption inquiry.¹⁷⁵

Additionally, courts look to whether states have reached beyond the scope of their historic police power into an area historically regulated by the federal government.¹⁷⁶ However, it is unlikely that a court will find a state has reached beyond the scope of its historic police power by regulating employment. The Supreme Court has long recognized that regulation of employment is within a state’s police powers. For example, in *De Canas v. Bica*, the Court said, “[s]tates

¹⁶⁷ *Lozano v. City of Hazleton*, 620 F.3d 170, 203 (3d Cir. 2010), *cert. granted, vacated sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011).

¹⁶⁸ U.S. CONST. art. VI, cl. 2.

¹⁶⁹ *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

¹⁷⁰ *Id.* (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

¹⁷¹ *Id.*

¹⁷² *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹⁷³ *Id.*

¹⁷⁴ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁷⁵ *Lozano v. City of Hazleton*, 620 F.3d 170, 203 (3d Cir. 2010) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)) (internal quotation marks omitted), *cert. granted, vacated sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011).

¹⁷⁶ *Id.* at 203.

possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.”¹⁷⁷

An express preemption challenge to a state law based on the fact that it conflicts with IRCA may fail. For a state law to be expressly preempted by IRCA, it must not be a licensing or similar law.¹⁷⁸ In both *Lozano* and *Whiting*, the courts found the laws were licensing or similar laws, and thus, were not expressly preempted by federal law.¹⁷⁹ However, a recent decision points to the possibility of a state’s law being expressly preempted because it does not fall within the narrow field in which states are allowed to legislate—licensing or similar laws. In *United States v. Alabama*, the Eleventh Circuit held a section of an Alabama law preempted because the state said its law was not a licensing law and the penalties placed on employers for hiring unauthorized workers did not fall within the definition of “sanctions.”¹⁸⁰ The court reasoned that under IRCA, states are preempted from “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.”¹⁸¹ Thus, in this case, it is possible the sanction could have been imposed if it had been through a licensing or similar law.¹⁸² However, the Eleventh Circuit determined that the penalty imposed was not a sanction, and thus, that section of the law was preempted.¹⁸³ The reasoning employed by the Eleventh Circuit was similar to that of Justice Breyer’s dissent in *Whiting* in which he stated that the Arizona law did not fall under the “licensing and similar laws” exception and should be preempted.¹⁸⁴ Thus, even though *Whiting* rejected an express preemption challenge to the Arizona law, this could still be a successful claim against a different law.

An implied *field* preemption challenge is likely to fail because it relies on the inference that “Congress ‘left no room’ for

¹⁷⁷ *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

¹⁷⁸ 8 U.S.C. § 1324a(h)(2) (2006) (“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.”).

¹⁷⁹ See *supra* Parts II.A. and II.B. for discussion of this point.

¹⁸⁰ *United States v. Alabama*, 691 F.3d 1269, 1288–90 (11th Cir. 2012).

¹⁸¹ *Alabama*, 691 F.3d at 1289–90 (quoting 8 U.S.C. § 1324a(h)(2)).

¹⁸² *Id.* at 1288–90.

¹⁸³ *Id.*

¹⁸⁴ *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1987 (2011) (Breyer, J., dissenting).

supplementary state regulation.”¹⁸⁵ But IRCA specifically left room for states to regulate under licensing or similar laws.¹⁸⁶ Thus, Congress explicitly left room for states to regulate in this narrow area of immigration law.

An implied *conflict* preemption challenge is the tactic most likely to be successful in challenging immigration laws. Under implied conflict preemption, a state law can be preempted in two ways: (1) if compliance with both state and federal law is impossible, or (2) if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁸⁷ While the courts in *Whiting* and *Lozano* reached different results, both opinions suggest there are still a few ways in which a state law could be preempted on implied conflict grounds.

First, both cases suggest that if a state law is not closely modeled after federal law, then it could be preempted because the state law would stand in the way of the federal law’s objectives. In *Whiting*, the Supreme Court upheld the state law because it mirrored federal immigration laws on employment.¹⁸⁸ The state law in that case adopted the definitions and employment verification process directly from the federal statute.¹⁸⁹ Thus, the state law could not conflict with federal law when it followed federal law so closely. In *Lozano*, the Third Circuit struck down the local ordinance precisely because it differed from federal law.¹⁹⁰ The local ordinance adopted different definitions than the federal law.¹⁹¹ Thus, it conflicted with the objective of the federal law. This approach suggests the success of a preemption challenge lies in how closely the state or local law mirrors the federal law. Even though the judgment in *Lozano* was vacated and remanded to the Third Circuit, it is unlikely this will affect the conclusion that a successful preemption challenge relies on how

¹⁸⁵ *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹⁸⁶ 8 U.S.C.A. § 1324a(h)(2) (“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.”).

¹⁸⁷ *Automated Med. Labs.*, 471 U.S. at 713 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁸⁸ *Whiting*, 131 S. Ct. at 1981.

¹⁸⁹ *Id.*

¹⁹⁰ *Lozano v. City of Hazleton*, 620 F.3d 170, 218 (3d Cir. 2010), *cert. granted, vacated sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011).

¹⁹¹ *See id.* at 212–18.

closely state law mirrors federal law. The court is likely to consider how closely the local ordinance mirrors federal law, regardless of the final disposition, because that was an important consideration in *Whiting*.¹⁹²

Second, court decisions suggest that another way to successfully challenge an immigration employment law is to demonstrate the state or local law is inconsistent with the purpose of the federal law. Two purposes of IRCA are to discourage discrimination in the work authorization and hiring process and to lessen the burden on employers.¹⁹³ Thus, a law's application would be inconsistent with federal law if it would lead to discrimination of employees¹⁹⁴ or place too great a burden on employers.¹⁹⁵ However, the *Whiting* decision seemed to reject these two arguments. Even though there are studies showing the discriminatory effects of employer use of E-Verify, the Court rejected the argument that requiring use of E-Verify would lead to discrimination.¹⁹⁶ Thus, it is unlikely this argument will be successful without more proof of discrimination.

¹⁹² See *Whiting*, 131 S. Ct. at 1981.

¹⁹³ *Lozano*, 520 F.3d at 211–12 (“Congress paid considerable attention to the costs IRCA would impose on employers and drafted the legislation in a manner that would minimize those burdens. . . . Just as importantly, Congress strove to ensure that the prohibition against hiring unauthorized aliens would not result in discrimination against authorized workers (whether alien or citizen) who appear ‘foreign,’ as Congress feared that overcautious employers might incorrectly assume such persons were unauthorized to work in the United States. IRCA’s legislative history could not be more plain or emphatic about the congressional commitment to preventing this sort of discrimination.” (citation omitted)).

¹⁹⁴ See H.R. REP. NO. 99–682(I), at 68 (1986) (“Numerous witnesses over the past three Congresses have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members [T]he Committee does believe that every effort must be taken to minimize the potentiality of discrimination and that a mechanism to remedy any discrimination that does occur *must* be a part of this legislation [A]nti-discrimination protections are essential to this bill” (emphasis added) (internal quotation marks omitted)).

¹⁹⁵ *Lozano*, 620 F.3d at 213 (“Congress created a comprehensive and carefully balanced prosecution and adjudication system, and foremost among its goals in doing so was to minimize the burden this system would impose on employers. . . . We therefore cannot fathom that Congress intended to tolerate the ‘supplementing’ of its carefully crafted system with independent state and local systems, which by their mere existence drastically increase burdens on employers.” (citation omitted)); *Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 751 (10th Cir. 2010) (“[IRCA] exhaustively details a specialized administrative scheme for determining whether an employer has knowingly employed an unauthorized alien.”).

¹⁹⁶ *Whiting*, 131 S. Ct. at 1984–85.

While the success of future challenges to immigration employment legislation is unclear after *Whiting*, there is still hope that a preemption challenge could be successful. This is demonstrated by the decision in *United States v. Alabama* and other recent cases.¹⁹⁷

B. Tactic Two: Equal Protection Challenges

The second tactic available to challenge anti-immigrant legislation in the employment context is the Equal Protection Clause. In *Yick Wo v. Hopkins*, the Supreme Court held that the Equal Protection Clause applied to noncitizens.¹⁹⁸ While noncitizens can challenge laws based on Equal Protection grounds, they will have an uphill battle. In most cases, courts have refused to strike down laws based on the Equal Protection Clause.¹⁹⁹ One reason for the failure of Equal Protection challenges is the requirement of finding a discriminatory intent behind a facially neutral law.²⁰⁰ The Supreme Court has held that the Equal Protection Clause applies to aliens and that laws that are neutral on their face may violate it if motivated by discriminatory intent.²⁰¹ The difficulty of showing discriminatory intent is compounded when Congress can pass laws that treat citizens differently from noncitizens. This difficulty is clearly seen in the Supreme Court decision of *Mathews v. Diaz*, where the Court held, “In the exercise of

¹⁹⁷ See BRUNO ET AL., *supra* note 126, at 9 n.39 (“However, *Whiting* should not be construed to mean that all state and local E-Verify measures are permissible. See, for example, *Louisiana Assoc. Gen. Contractors, Inc. v. Jindal*, No. 605912, Judgment, 19th Judicial District Court, Parish of East Baton Rouge, December 20, 2011 (finding that a Louisiana law that required employers to use E-Verify to verify the work authorization of all employees was preempted by federal rules and regulations governing E-Verify); *Positronic Indus., Inc. v. City of Springfield*, No. 12-3243-CV-S-RED, Order Granting Preliminary Injunction (W.D. Mo., May 10, 2012) (preliminarily enjoining enforcement of a municipal ordinance that would have fined employers who did not use E-Verify).”).

¹⁹⁸ *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

¹⁹⁹ See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 86–87 (1976) (rejecting an Equal Protection challenge); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 542 (M.D. Pa. 2007) (finding the plaintiffs could not prove discriminatory intent in passage of the local ordinance), *aff’d in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted, judgment vacated sub nom.* *City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011). *But see* *Graham v. Richardson*, 403 U.S. 365, 376–80 (1971) (holding that a state statute denying welfare benefits to resident aliens who have not resided in the United States for a specific number of years violates the Equal Protection Clause).

²⁰⁰ See *Lozano*, 496 F. Supp. 2d at 540 (finding that plaintiffs could not prove discriminatory intent in passage of the local ordinance); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1742–44 (2010) (“Plaintiffs will likely lose an equal protection argument because of the law’s requirement of discriminatory intent and its presumption against finding it.”).

²⁰¹ *Yick Wo*, 118 U.S. at 373–74.

its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is ‘invidious.’”²⁰² Thus, an Equal Protection challenge is a valuable tactic to use and is likely to succeed if discriminatory intent can be shown. However, if there is no discriminatory intent, the challenge is likely to fail.

C. Tactic Three: Judicial Awareness Arguments

The third tactic available to challengers of anti-immigrant employment laws is a policy-based argument of increased judicial awareness, which means that courts should take a more active role rather than following the Plenary Power Doctrine. The Plenary Power Doctrine gives a great degree of deference to Congress’s decisions in the area of immigration.²⁰³ One example of the doctrine in action comes from *Chae Chan Ping*, in which Justice Field stated: “If . . . [the] legislative department[] considers the presence of foreigners of a different race . . . to be dangerous to its peace and security, . . . its determination is conclusive upon the judiciary.”²⁰⁴ Another example of the Plenary Power Doctrine comes from *Fiallo v. Bell* in which the Court stated: “We observed recently that in the exercise of its broad power over immigration and naturalization, ‘Congress regularly makes rules that would be unacceptable if applied to citizens.’”²⁰⁵

Contrary to this doctrine is the idea of judicial awareness. The argument is that courts should not simply follow congressional legislation without questioning its compliance with constitutional principles. Courts should not be satisfied with state regulations that “simply require employers to use federal standards,”²⁰⁶ but rather courts should look deeper to determine (1) whether federal standards

²⁰² *Mathews*, 426 U.S. at 79–80.

²⁰³ See, e.g., *DeMore v. Kim*, 538 U.S. 510, 522 (2003) (“[S]ince *Mathews*, this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.”); *Mathews*, 426 U.S. at 80 (Congress has the authority to “make rules [regarding noncitizens] that would be unacceptable if applied to citizens”); *Fong Yue Ting v. United States*, 149 U.S. 698, 711, 713 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 602 (1889). See generally *Johnson*, *supra* note 148, at 6–8.

²⁰⁴ *Chae Chan Ping*, 130 U.S. at 606.

²⁰⁵ *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews*, 426 U.S. at 80).

²⁰⁶ *Cortez*, *supra* note 165, at 55.

are actually being applied and (2) whether federal standards are being correctly applied.²⁰⁷

In the case of immigration employment laws, courts should not simply look to an employer's use of E-Verify as confirmation of application of federal standards.²⁰⁸ This is especially true when E-Verify is not even a standard required for all federal workers—the federal government does not mandate use of E-Verify for all employers.²⁰⁹ Additionally, the results from a federal database do not definitively establish who is in the country legally or not.²¹⁰ These drawbacks are magnified when the federal database relied upon to make work-authorization determinations has significant defects.²¹¹ For example, an employer may receive a DHS verification in process notice or tentative nonconfirmation and must wait for a *manual* determination of a worker's work-authorization status.²¹² Even with a manual determination of status, the system is still prone to identity and document fraud issues.²¹³ The fact that the federal work-authorization system implemented by Congress has defects is just one reason that courts should step out of the shadow of the Plenary Power Doctrine.

CONCLUSION

While these three tactics all deserve consideration when challenging a state or local law, the tactic most likely to be successful is that of preemption. Even with these tactics, challenging legislation is not a long-term solution to the problems with the country's immigration system. Currently, some of the laws affecting immigrants in this country vary from state to state and are immensely complex.

²⁰⁷ *De Canas v. Bica*, 424 U.S. 351, 353 (1976) (citing CAL. LAB. CODE § 2805 (West, Westlaw through 2012 legislation and ballot propositions); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995)).

²⁰⁸ *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 532 (M.D. Pa. 2007), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted, judgment vacated sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011); *see Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655, 662 (E.D. Va. 2004).

²⁰⁹ Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 403(a), 110 Stat. 3009, 3009-659 (1996); *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1975 (2011); *What is E-Verify?*, *supra* note 26 and accompanying text.

²¹⁰ *Lozano*, 496 F. Supp. 2d at 532; *Cortez*, *supra* note 165, at 64.

²¹¹ *DORIS MEISSNER ET AL.*, *supra* note 113; *WESTAT CORP.*, *supra* note 117.

²¹² *E-Verify for Employers: The Verification Process*, *supra* note 27; *E-Verify for Employees: E-Verify Overview*, *supra* note 29.

²¹³ *BRUNO*, *supra* note 118, at 17; *Rosenblum*, *supra* note 117, at 5.

For these reasons alone, widespread immigration reform is needed.²¹⁴ Nathan Cortez summed up these concerns when he stated, “[t]hus, state and local attempts to place the burden of determining immigration status on state agents, local landlords, or employers fail to grasp the complexities of our immigration system.”²¹⁵ The problems with current laws must be addressed, including concerns about the strain placed on state and local officials. The Court in *Whiting* placed a large amount of trust in the ability of state and local governments to implement systems of work-authorization verification. This level of trust is troubling when state governments mandate the use of a federal system, E-Verify, which has documented flaws and is not even mandatory for all federal employers. Another concern is the *Whiting* majority’s disregard of the strong possibility that employers will discriminate against workers. In addition to E-Verify’s issues, the message from recent cases and congressional hearings is that short-term, enforcement-only solutions serve solely as a temporary fix for a flawed system in desperate need of repair.

²¹⁴ See Ashley Parker, *Senators Call Their Bipartisan Immigration Plan a Breakthrough*, N.Y. TIMES (Jan. 28, 2013), <http://www.nytimes.com/2013/01/29/us/politics/senators-unveil-bipartisan-immigration-principles.html> (discussing the most recent Congressional proposal for comprehensive immigration reform).

²¹⁵ Cortez, *supra* note 165, at 65.