Congressional Preemption of Work-Authorization Verification Laws: A Narrower Approach to Defining the Scope of Preemption

By Jaime Walter*

Introduction

IN THE LAST SEVERAL YEARS, states have begun to pass laws regulating the employment of undocumented workers within their borders. Traditionally, such immigration-related matters were thought to be within the purview of the federal government. Challenges to these laws are plentiful. Business organizations and immigrants-rights groups alike eagerly anticipate a decision in Chamber of Commerce of the United States v. Candelaria.1 Candelaria marks the first, and thus far only, of the many cases in the federal court system having to do with state and local work-authorization verification laws to reach the United States Supreme Court.2 The Court will consider whether federal law preempts the Legal Arizona Worker’s Act (“LAWA”) under the doctrine of implied field occupation.3 LAWA requires employers

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1. 558 F.3d 856 (9th Cir. 2009), cert. granted, 78 U.S.L.W. 3065 (U.S. June 28, 2010) (No. 09-115).

2. Work-authorization verification laws have to do with an employer’s obligations in checking an employee’s employment-eligibility status. See generally Work Authorization, U.S. Citizenship & Immigration Services, http://www.uscis.gov/portal/site/uscis/menuitem.cb1d4c2a3ec5b9ac89243c6a7543f6d1a/?vgnextoid=820a0a5659083210VgnVCM100000082ca60aRCRD&vgnextchannel=820a0a5659083210VgnVCM100000082ca60aRCRD (last visited Aug. 2, 2010) (explaining that employers must verify that their employees are allowed to work in the United States).

3. Petition for Writ of Certiorari at 20–21, Candelaria, 558 F.3d 856 (No. 09-115), 2009 WL 2331990.
to verify new employees’ work-authorization statuses using an electronic verification system.

Specifically, the Petitioners assert that there exists a comprehensive federal scheme for regulating the employment of undocumented noncitizens, necessitating a finding of field preemption. Such a finding would affect the ability of states and localities to enforce employment-related immigration laws, such as LAWA.

This Comment suggests a framework for how the United States Supreme Court should address the issues in Candelaria. It argues that Congress occupies the field of work-authorization verification; thus, federal law preempts state and local laws related to work-authorization verification. This field is narrower than the field defined by the Petitioners in Candelaria, who instead define the field broadly as the employment of undocumented noncitizens. This Comment’s more narrow framing is more consistent with the Immigration and Nationality Act’s (“INA”) express statutory language. Additionally, this Comment argues that federal preemption of laws related to work-authorization verification is desirable. Ultimately, this Comment intends to persuade the Court to address the issue of preemption in Candelaria by narrowing the scope of the field occupied.

Part I provides the necessary background for understanding the issues at hand. This Comment first addresses federal statutory law related to work-authorization verification. It then provides an overview of the trend toward subfederal immigration regulation (regulation at the state and local level). The Comment then provides background on the litigation challenging the subfederal immigration regulation. Part II argues that under the field preemption doctrine, federal law preempts state and local laws related to work-authorization verification. Part III explains the desirability of a finding of field preemption, given the INA’s statutory language and the significant interests at hand.

4. Although Petitioner’s writ of certiorari and the Immigration and Nationality Act refer to people who are not nationals of the United States as “aliens,” this Comment will instead use the word “noncitizens.” As thoughtfully explained, “[m]any feel that the term ‘alien’ connotes dehumanizing qualities of either strangeness or inferiority . . . and that its use builds walls, strips human beings of their essential dignity, and needlessly reinforces an ‘outsider’ status.” Stephen H. Legomsky & Cristina M. Rodríguez, Immigration and Refugee Law and Policy 1 (5th ed. 2009).

5. Petition for Writ of Certiorari, supra note 3, at *20–21.

6. See infra Part II.
I. The Controversy Over Who Regulates Immigration

Recent state and local regulation of employment-related immigration laws, and the lawsuits challenging those laws, have resulted in a significant amount of scholarly debate and media attention. This section provides a background for understanding the debate. It provides a summary of federal employment-related immigration laws. It also describes the trend towards subfederal regulation and the lawsuits challenging state and local laws.

A. Federal Statutory Law Related to Work-Authorization Verification

The INA of 1952, since amended several times, is “the basic statute dealing with immigration and nationality.” The Act established that a noncitizen seeking to enter the United States would be deemed an “immigrant” unless he or she established his or her nonimmigrant status. Thirty-four years later, the Immigrant Reform and Control Act (“IRCA”) established four broad employment-related provisions. The Act established a prohibition on the knowing employment of foreign nationals who are not authorized to work in the United States, created an employment eligibility verification system, established sanctions for both hiring unauthorized foreign workers and for failing to properly conduct employment eligibility verification, and established anti-discrimination provisions.

With IRCA, the federal government began requiring employers to conduct work-authorization verification. The term “work-authorization verification” is defined in the Immigration and Nationality Act (INA) as the process of verifying the identity and employment eligibility of an employee. The INA requires employers to verify the identity and employment eligibility of all employees through a process known as “work-authorization verification.” This process involves the employer checking the employee’s Social Security number and photograph on the employee’s Social Security card against the employee’s name on the Social Security card, verifying the employer’s Social Security number in the Social Security Administration’s database, and obtaining a copy of the employee’s birth certificate or other documents that prove the employee’s identity and nationality.

7. See generally Monica Davey, City in Nebraska Torn as Immigration Vote Near, N.Y. TIMES, June 18, 2010, at A1; Cristina M. Rodríguez, The Significance of the Local in Immigration Regulation, 106 MICH. L. REV. 567 (2008).
8. LEGOMSKY & RODRIGUEZ, supra note 4, at 1.
9. Id. at 17.
10. Id.
11. Id.
13. Id. § 1324a(a)(1)(A).
14. Id. § 1324a(b).
15. Id. § 1324a(e)(4)–(f).
16. Id. § 1324a(e)(5).
17. Id. § 1324b.
18. Id. § 1324a(b)(1)(A).
"Employment verification" describes the process an employer takes to verify whether the federal government has authorized the individual to work in the United States. This process consists of one step for most employers. Under IRCA, within three days of hiring a new employee, an employer must verify that the new employee is not an unauthorized noncitizen. The employer verifies the employee’s status by examining certain documents provided by the employee. Acceptable documents include, but are not limited to, social security cards, passports, driver’s licenses, and permanent resident cards. After examining the documents, the employer then attests, under penalty of perjury, that it has conducted the required verification. The employer uses a standardized form, titled “Form I-9, Employment Eligibility Verification” (“Form I-9”). Strict document retention laws also apply.

For at least a decade, work-authorization verification primarily consisted of this one step. However, in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), “one of the most sweeping immigration reform packages ever enacted . . . ,” opened up other avenues for verifying an employee’s status. IIRIRA established three pilot programs to confirm employment eligibility: the Basic Pilot Program (now called Electronic Employment Verification or, most commonly, E-Verify), the Citizen Attestation Pilot Program, and the Machine Readable Document Pilot Program. Of these three, only the E-Verify program still exists.

Although federal law does not require most employers to utilize E-Verify, federal agencies, the legislative branch, and certain immigration violators must participate in the program. As of January 16,
2010, 182,516 employers were registered E-Verify users. Collectively, these employers represented 679,434 worksites. After logging into a secure website, the employer enters certain identifying information about the employee. Usually “within seconds,” the program confirms an employee’s work authorization. Confirmation is made by cross-checking the information entered by the employer against the databases of the Social Security Administration (“SSA”) and the Department of Homeland Security (“DHS”). If a match is not made, the employer receives a tentative non-confirmation. Upon such receipt, the employer must notify the employee of the tentative non-confirmation. If the employee does not contest the non-confirmation, the employer may terminate the employee or otherwise face a rebuttable presumption that the employer has violated the law.

If the employee chooses to contest the non-confirmation, the employee must correct the discrepancies in the record with the appropriate agency. To contest a tentative non-confirmation from the SSA, he or she must visit an SSA field office within eight working days. If the employee wants to contest a tentative non-confirmation from the DHS, he or she must contact DHS within eight working days. The federal government must then relay a final decision to the employer within ten working days. If DHS issues a final decision of non-confirmation, the employer may terminate the employee or otherwise face a rebuttable presumption that the employer has violated the law. Participating employers must still complete and retain the Form I-9, even when E-Verify confirms employment eligibility.

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32. Id.
34. Illegal Immigration Reform and Immigrant Responsibility Act § 404(e)–(f).
35. Id. § 404(b).
36. Id. § 403(a)(4)(B)(i).
37. Id. § 403(a)(4)(C)(iii).
39. Id.
40. Id.
41. Illegal Immigration Reform and Immigrant Responsibility Act § 404(c).
42. Id. § 403(a)(4)(C)(iii).
43. Id. § 403(a)(1).
E-Verify or some sort of electronic verification system will likely become federally mandated for all employers in the near future. Originally set to expire four years after it went into effect, the federal government has extended the program five times, with the current expiration date set for September 30, 2012. Members of Congress have attempted to mandate use of an electronic verification system on several occasions. Before President Obama signed the $787.2 billion stimulus package on February 17, 2009, the House of Representatives proposed a stimulus bill containing E-Verify provisions that would have mandated use of E-Verify by federal contractors hired under the stimulus. The final package, however, omitted such requirements. On December 15, 2009, Representative Luis Gutierrez, an Illinois Democrat, announced the Comprehensive Immigration Reform for America’s Security and Prosperity Act of 2009. The bill would eventually require employers to check the work-authorization status of all new hires. Similarly, on January 21, 2010, a bipartisan group of freshmen House members introduced a resolution calling for the mandatory use of E-Verify.

E-Verify appears to have the support of the Obama administration. Secretary of Homeland Security Janet Napolitano recently said, “E-Verify is absolutely where we are going in terms of incentivizing


47. Obama Signs Economic Stimulus Into Law, supra note 45.


49. Id.

employers and making sure we are using a legal work force.”\textsuperscript{51} She also stated that she “hopes to keep driving the immigration system as a whole toward more use of E-Verify.”\textsuperscript{52} In 2009 alone, United States Citizenship and Immigration Services (”USCIS”), the branch of the DHS responsible for adjudication of immigration-related benefits, conducted 125 live E-Verify presentations, attended 15 conferences, and conducted 140 webinars.\textsuperscript{53}

\textbf{B. The Trend Toward Subfederal Immigration Regulation}

In addition to federal law, a clear trend toward subfederal immigration regulation exists. In 2005, 300 bills were introduced at the state level.\textsuperscript{54} In 2006, 2007, 2008, and 2009, that figure climbed from 300 to 570, 1562, 1305, and 1500 respectively.\textsuperscript{55} In 2008, the only states that did not introduce immigration-related legislation were states that had no legislative session.\textsuperscript{56} The following year, all fifty states considered such legislation.\textsuperscript{57} 2009 saw the greatest number of enacted immigration-related state laws ever, with a total of 222.\textsuperscript{58} These numbers do not even take into account legislation introduced at the local level (by towns, cities, and counties); in recent years, over 100 local governments have enacted immigration-related ordinances.\textsuperscript{59}

State and local legislation falls into two broad categories: measures designed to prevent or diminish unauthorized immigration, and measures designed to limit the authority and ability of local and state authorities to cooperate with federal officials in the enforcement of immi-

\begin{itemize}
\item \textsuperscript{52} \textit{Napolitano Defends Worksite Enforcement Policy, Calls for Immigration Overhaul Bill}, 3 WORKPLACE IMMIGR. REP. 663, Dec. 14, 2009.
\item \textsuperscript{53} Id.
\item \textsuperscript{55} Id.
\item \textsuperscript{57} \textit{States Enacted 21 Employment-Based Immigration Laws in 2009, NCSL Finds}, supra note 54.
\item \textsuperscript{58} Id.
\end{itemize}
migration laws. Measures designed to prevent or diminish unauthorized immigration include three types: (1) direct enforcement measures, (2) indirect enforcement measures, and (3) benefit restriction measures.\textsuperscript{60} Direct enforcement measures include decisions by state and local law enforcement to cooperate with the federal government pursuant to section 287(g) of the Immigration and Nationality Act, which authorizes states and localities to enter into agreements with the federal government, which in turn authorize local and state officials to arrest and detain individuals for immigration violations . . . .\textsuperscript{61}

Direct enforcement also includes measures “to verify the status of those who have come into [police] custody . . . .”\textsuperscript{62}

Indirect enforcement measures generally include actions designed to deter the employment of unauthorized noncitizens and actions designed to prevent landlords from knowingly renting to illegal immigrants.\textsuperscript{63} Of the 1500 immigration bills introduced at the state level in 2009, twenty-one were employment-related immigration laws, and another three were omnibus laws that included employment provisions.\textsuperscript{64} As of February 2010, twenty-six states had enacted laws designed to deter the employment of unauthorized workers.\textsuperscript{65} Four states require all employers to conduct additional steps beyond completion of Form I-9 to verify the work-authorization status of new hires.\textsuperscript{66} Sixteen states condition the receipt of public monies upon completion of work-authorization verification steps that go beyond Form I-9 completion or upon an employer’s certification of compliance with immigration law.\textsuperscript{67} In addition, seven states impose sanctions on businesses that employ unauthorized workers.\textsuperscript{68} This trend of indirect state enforcement shows no sign of slowing. For instance, on February 10, 2010, the Kentucky legislature passed H.B. 321, which, if

\begin{itemize}
\item \textsuperscript{60} Rodríguez, \textit{supra} note 7, at 591.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id. at 592.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} \textit{States Enacted 21 Employment-Based Immigration Laws in 2009, NCSL Finds, supra} note 54.
\item \textsuperscript{65} \textit{State Immigration Employment Compliance Handbook, supra} note 59, § 1:2.
\item \textsuperscript{66} Id. These states include Arizona, Colorado, Mississippi, and South Carolina. Id.
\item \textsuperscript{67} Id. Colorado, Georgia, Minnesota, Missouri, Oklahoma, Rhode Island, and Utah all require use of E-Verify. Arkansas, Idaho, Iowa, Massachusetts, Nebraska, Pennsylvania, Tennessee, Texas, and Virginia all require an employer’s certification of compliance with federal law. Id.
\item \textsuperscript{68} Id.
\end{itemize}
enacted, would require public agencies and their contractors to use E-Verify.\(^69\)

The same pattern occurs at the local level. As of January 1, 2010, the city of Lancaster, California required all local businesses to use E-Verify.\(^70\) Similarly, Clark County, Washington requires use of E-Verify by all county contractors awarded either a public works contract or a service contract of $1 million or more.\(^71\)

Benefits-restriction measures seek to deny illegal immigrants access to a variety of state-sponsored services and institutions. Examples of denied benefits include health care and in-state college tuition.\(^72\)

The second broad category of enacted legislation involves “statutes, resolutions, and executive orders that limit the authority and ability of local and state authorities to cooperate with federal officials in the enforcement of immigration laws.”\(^73\) Among other cities and states, San Francisco, Los Angeles, Seattle, and New York City have all enacted what can broadly be described as either non-cooperation or sanctuary laws.\(^74\) San Francisco, for example, prohibits officers and employees of the City and County of San Francisco from using “any City funds or resources to assist in the enforcement of federal immigration law” and from gathering or disseminating “information regarding the immigration status of individuals . . . unless such assistance is required by federal or State statute, regulation or court decision.”\(^75\)

A variety of reasons drive city and state legislatures to enact these laws. Some state and city officials cite a fear that illegal immigrants will forgo notifying police after the occurrence of a crime out of fear that officials will inquire into their immigration status.\(^76\) Officials also worry that many immigrants will avoid seeking necessary medical at-
tention for the same reason.\textsuperscript{77} This fear is well founded.\textsuperscript{78} For example, afraid that officials would discover their immigration status, the parents of a two-month-old boy in Tulsa, Oklahoma chose not to seek medical help for their son shortly before he died from a ruptured intestine.\textsuperscript{79}

The trend toward subfederal immigration regulation, specifically in the employment arena, comes at a time when enforcement of employer sanctions by the federal government is at a high.\textsuperscript{80} In 2007, U.S. Immigration and Customs Enforcement (“ICE”) made more than 4900 arrests in connection with worksite investigations.\textsuperscript{81} Eight hundred sixty three involved criminal violations, representing a forty-five-fold increase in criminal worksite arrests since fiscal year 2001.\textsuperscript{82} ICE Director John Morton said recently that there will be a “national strategy to reinvigorate the use of civil fines as well as criminal penalties, not just worksite raids, against employers.”\textsuperscript{83}

Despite the rekindled attention paid by the federal government recently, state and local legislative activity continues to rise. Several factors help explain this seemingly counterintuitive action by state and local legislatures. First, as of 2006, approximately two-thirds of an estimated 11.5 million unauthorized immigrants in the United States entered the country in the previous ten years.\textsuperscript{84} Such a massive influx of unauthorized immigrants has the potential of both benefitting and


\textsuperscript{78} A 2001 study by San Francisco State University found that low-income female immigrants avoid seeking prenatal care, frequently to the detriment of their own health, out of fear of detrimental immigration consequences. Press Release, Public Affairs Office at San Francisco State University, Lakeview Center, New Study Shows Low-Income Immigrant Pregnant Women Still Afraid to Seek Health Care (Apr. 18, 2001), available at http://www.sfsu.edu/~news/prsrelea/fy00/079.htm.


\textsuperscript{80} Legomsky & Rodríguez, supra note 4, at 1163 (explaining that enforcement of sanctions peaked in the 1990s, dwindled, and is now peaking again).


\textsuperscript{82} Id.


burdening the communities in which they chose to live. Second, recent immigrants are rapidly moving into communities that traditionally did not host large numbers of foreign nationals. “From 1990 to 2004, the proportion of undocumented immigrants who reside in the top six states dropped from 88% to 61%.” While the majority remain in California, Texas, New York, Arizona, New Jersey, and Illinois, a growing number of immigrants are settling in the Southeast. These communities now face the challenging question of how best to manage their changing populations. Third, at least ten of the nineteen terrorists involved in the attacks on September 11, 2001 were in the United States in violation of U.S. immigration laws. Many states may seek to remedy this apparent failure of the federal government by enacting their own laws to manage immigrants. Fourth, the sheer imbalance between illegal immigrants and federal agents—with a ratio of 5000:1—has led Department of Justice officials, on more than one occasion, to encourage states to participate in the enforcement of immigration laws. Fifth, a weak national economy, combined with state and local governments that spend more on services for unauthorized immigrants than they receive from those immigrants in the form of state and local tax revenue, creates financial incentives to better regulate illegal migration. Ultimately, these circumstances—along with Congress’s utter failure to enact comprehensive immigration reform—makes the incentives all too great for local and state governments.

C. The Ongoing Controversy Over State and Local Laws Relating to E-Verify

The increase in state and local legislation has prompted numerous lawsuits. This Comment focuses on lawsuits aimed at challenging state and local laws mandating use of the E-Verify program or other similar work-authorization verification systems. In general, these suits

85. Legomsky & Rodríguez, supra note 4, at 1239.
86. Id. at 1143.
87. Id.
88. Id. at 1239.
90. See generally id. at 965–75 (explaining the surprise of many in 2002, after then–Attorney General John Ashcroft announced that the Department of Justice would ask state and local police to enforce immigration laws).
assert that federal law preempts state and local regulation under the conflict and field preemption doctrines. They seek to prohibit the enforcement of state and local laws that impose work-authorization verification requirements upon employers beyond the federally mandated completion of Form I-9.

1. Motives Behind the Suits

The debate over E-Verify laws has made strange bedfellows of immigrants and civil rights groups on one hand and business groups on the other. Although they share a common goal in minimizing E-Verify’s role, different interests motivate these groups. Civil rights and immigrant rights groups oppose E-Verify for several reasons. These groups worry about the effect E-Verify has on an authorized worker’s ability to obtain employment. For example, in a 2008 statement, the American Civil Liberties Union (“ACLU”) argued that E-Verify has the effect of forcing “citizens and legal residents to get permission slip[s] to work.” The ACLU has also said that

[i]n the middle of the toughest job market in decades, the Obama administration and the Senate have chosen to erect another roadblock to gainful employment for U.S. workers. The administration’s decision to expand E-Verify without correcting the defects in the database system will lead to unnecessary harm to U.S. workers. The Homeland Security and Social Security databases used by E-Verify have unacceptably high error rates involving U.S. citizens’ records.

E-Verify, according to the ACLU, creates a “No Work List’ ensuring millions of U.S. citizens will be denied jobs.”

Immigrant and civil rights groups also worry that mandatory state and local E-Verify laws seek to undermine the balance Congress struck between discrimination concerns and effective immigration control when it made E-Verify voluntary. They argue that tough employer sanctions lead to defensive hiring practices because employers fear

92. See e.g., Petition for Writ of Certiorari, supra note 3, at 27; Second Amended Complaint at paras. 107, 120, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06cv1586).


95. What’s Wrong with E-Verify?, supra note 93.

96. Brief for Asian American Justice Center et al. as Amici Curiae Supporting Petitioners at 8, 10, Chamber of Commerce v. Candelaria, No. 09-115 (U.S. Aug. 27, 2009), 2009 WL 2759755 [hereinafter Brief for Asian American Justice Center].
hiring illegal immigrants. Furthermore, due to system-wide problems with E-Verify, more problems arise for employers who hire foreign-born workers; the system falsely rejects 3% of foreign-born workers, compared to 0.1% of U.S.-born workers.\footnote{WESTAT, FINDINGS OF THE WEB BASIC PILOT EVALUATION, at xxv (2007), available at http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.}

“To avoid sanctions for employing unauthorized workers as well as to avoid the costs associated with resolving verification problems under E-Verify, employers may decline to consider or employ workers who they believe look or sound foreign . . . .”\footnote{Brief for Asian American Justice Center, supra note 96, at 7–8.}

Even if employers decide to hire foreign-born workers, the disparity in error rates affects foreign-born workers more than U.S.-born workers. “Although the rules of the program prohibit adverse action based on an initial finding that a particular worker may not be eligible for employment, 22 percent of employers restrict work assignments, 16 percent delay job training and two percent reduce pay while workers challenge errors . . . .”\footnote{Rebecca Smith et al., E-VERIFY/BASIC PILOT PROGRAM: STATES SHOULD NOT MAKE A FLAWED FEDERAL SYSTEM MANDATORY AT STATE LEVEL, NAT’L EMP. L. PROJECT, 2 (Jan. 2008), http://www.nelp.org/page/-/Justice/Everify_final_11708.pdf.}

Business groups, on the other hand, have great incentives to stall burdensome laws that add to the cost of doing business. In a 2006 report to the House Subcommittee on Workforce, Empowerment, and Government Programs of the Committee on Small Business, the U.S. Chamber of Commerce noted that the total cost of mandating E-Verify for all employers would be $11.7 billion;\footnote{ANGELO I. AMAEOR, STATEMENT OF THE U.S. CHAMBER OF COMMERCE ON IMMIGRANT EMPLOYMENT VERIFICATION AND SMALL BUSINESS 10 (2006), available at http://www.us-chamber.com/sites/default/files/testimony/060627_amador_employment_verification.pdf.} although this figure represents the total cost incurred by employers, employees, and the federal government, employers would bear “most of the costs.”\footnote{Id.}

Of course, many worry that the real interest for business groups lies in the continuing employment of undocumented immigrants, whose steady supply of labor helps depress wage rates, thereby providing cheap labor for employers.

Those in favor of tighter immigration control consistently argue that the federal government’s failure to enact comprehensive immigration reform affects the health, safety, and welfare of local communities.
Allowing millions of illegal immigrants to stay and take jobs away from citizens and legal immigrants is like giving a burglar a key to the house... Illegal immigrants currently hold about eight million jobs that could be filled by US citizens... We could cut the unemployment rate in half simply by enforcing immigration laws.102

E-Verify laws, they argue, compensate for the inadequate Form I-9 system, which provides for "paltry fines" for non-compliance that employers consider "just a cost of doing business."103

2. The Preemption Doctrine

Plaintiffs challenging subfederal immigration regulation primarily focus their analysis on statutory preemption, specifically arguing that federal law both expressly and impliedly preempts state and local laws.104 The preemption doctrine renders state and local laws invalid in certain situations. Federal courts derive the preemption doctrine from the Supremacy Clause of the United States Constitution.105 The Supremacy Clause provides that the laws of the United States are "the supreme Law of the Land; . . . any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."106

Courts look to legislative intent to determine whether federal law preempts state law. To determine whether Congress intended to preempt state and local law, courts first analyze whether the specific language in the federal statute

102. McKinney, supra note 48, at 29 (internal quotations omitted).


104. Statutory preemption deals with federal laws enacted by Congress, whereas constitutional preemption derives from the Constitution itself. For over one hundred years, courts have interpreted immigration law to fall exclusively within the purview of the federal government, to the extent that the law determines "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." DeCanas v. Bica, 424 U.S. 351, 355 (1976). The Supreme Court, in Chae Chan Ping v. United States, stated that on immigration, "the American people are one; and the government which is alone capable of controlling and managing their interest in all these respects, is the government of the Union." 130 U.S. 581, 605 (1889) (emphasis added). Federal exclusivity, said the Court in 1976, is "about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." Galvan v. Press, 347 U.S. 522, 531 (1954).

Because state and local laws dealing with E-Verify do not deal with which persons to admit into the country and the conditions under which they may remain, constitutional preemption does not play a role in the analysis.


106. U.S. CONST. art. VI, cl. 2.
expresses congressional intent. If the court finds such language, federal law expressly preempts state and local law.

Absent such language, courts may imply preemption. There are several ways a court may do so. Under the doctrine of conflict preemption, federal law preempts state and local law where either “(1) the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress or (2) it is impossible for a . . . party to comply with both state and federal law.” Courts will also find implied preemption under the doctrine of field preemption, “where the scope of the federal law at issue indicates that Congress intended federal law to occupy the field exclusively.” Three independent factors determine whether there is field preemption: first, whether the “pervasiveness of the federal regulation precludes supplementation by the States;” second, whether the “federal interest in the field is sufficiently dominant;” and third, whether “the object sought to be obtained by the federal law and the character of obligations imposed by it reveal the same purpose.”

Although opponents of subfederal immigration laws have asserted preemption on each ground, this Comment asserts preemption based on field preemption only.

3. Cases Weighing In on the Matter

Of the several courts to hear cases challenging state and local E-Verify provisions, only one has concluded that federal law preempts a subfederal law mandating use of E-Verify. In Lozano v. City of Hazleton, the court held that federal law both expressly and impliedly preempted an E-Verify law requiring use of the program in certain situations. As to implied preemption, the court explained that the Illinois Illegal Immigration Relief Act Ordinance (“IIRA”) regulated in a field occupied by Congress. The court defined that field as the employment of unauthorized workers. The court also said that federal law impliedly preempted IIRA under the doctrine of conflict preemp-

107. See Lozano, 496 F. Supp. 2d at 518.
108. Id.
109. Id. at 521.
110. Id. at 525 (internal quotations omitted).
111. Id. at 521 (internal quotations omitted).
112. LEGOMSKY & RODRIGUEZ, supra note 4, at 1263–64.
113. Lozano, 496 F. Supp. 2d at 523.
114. Id. at 521. The Hazleton ordinance requires participation in the program by all Hazleton city agencies and all businesses that seek a city contract or grant. Id. at 527.
115. Id. at 523.

Other courts have come to a different conclusion. In *Chicanos Por La Causa v. Napolitano*, one of two cases involving challenges to E-Verify laws that have reached the federal appellate courts, the Ninth Circuit held that an Arizona statute requiring use of E-Verify by all businesses in Arizona was neither expressly nor impliedly preempted by federal law. Holding that the Arizona law did not conflict with federal law, and therefore was not preempted under the doctrine of conflict preemption, the court noted that “while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory.” The court also stated that “[t]hough Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage. The [Legal Arizona Workers Act’s] requirement that employers participate in E-Verify is consistent with and furthers this purpose . . . .” This case, now known as *Candelaria*, is on appeal to the United States Supreme Court.

Similarly, in *Chamber of Commerce v. Edmondson*, the Tenth Circuit reversed an injunction on enforcement of the Oklahoma Taxpayer and Citizen Protection Act, to the extent that the injunction prohibited enforcement of a provision requiring use of E-Verify for all contractors and subcontractors entering into a contract with a public employer. The court said that although “E-Verify is voluntary (as of yet) at the national level, it is not reasonable to assume that a

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116. Id. at 526–27.
117. Id.
119. *Chamber of Commerce v. Edmondson* is the only other case to have reached the federal appellate level. 594 F.3d 742 (10th Cir. 2010).
120. Chicanos por la Causa v. Napolitano, 558 F.3d 856, 860–61 (9th Cir. 2009).
121. Id. at 866–67.
122. Id. at 867.
123. 558 F.3d at 856 (9th Cir. 2009), cert. granted, 78 U.S.L.W. 3065 (U.S. June 28, 2010) (No. 09-115).
124. 594 F.3d at 771.
mandatory program choice for state public contractors conflicts with Congressional purpose.”

The only court to hear a case involving a subfederal law prohibiting use of E-Verify by employers, the District Court for the Central District of Illinois, found that the Illinois Right to Privacy in the Workplace Act stood as an obstacle to the accomplishment of the full purposes and objectives of Congress. The federal government filed the case against the State of Illinois after Illinois passed a law prohibiting use of E-Verify by all employers. The court explained that “Congress intended that any employer should be able to participate in the Federal Program. The Illinois Act frustrates Congress’s purpose by prohibiting Illinois employers from participating in the Federal Program unless the Federal Program meets Illinois’s standard for accuracy and speed.” Summary judgment was granted in favor of the federal government.

Thus, out of all the cases dealing with the issue of E-Verify, none have turned on the issue of whether Congress occupies the narrowly defined field of work-authorization verification. Lozano, the only case that actually addressed the field preemption question, did so on broader grounds than work-authorization verification. The court defined the field as the “employment of unauthorized aliens.” The only court that came close to considering whether Congress occupied the more narrowly defined field of work-authorization verification was Edmondson. Because the court found a preliminary injunction on the Oklahoma Taxpayer and Citizen Protection Act warranted on other grounds, the court said it “need not address whether Congress has occupied the field of work authorization verification.”

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125. Id. at 772.
127. Id.
128. Id. at 3.
129. Id.
131. Id. at 525.
132. Chamber of Commerce v. Edmondson, 594 F.3d 742, 767 (10th Cir. 2010).
133. Id.
II. Under the Field Preemption Doctrine, Federal Law Preempts State and Local Laws Related to Work-Authorization Verification

The comprehensive scheme of work-authorization verification procedures established by Congress leaves no room for state and local laws. The two primary arguments in support of a finding that Congress occupies the field of work-authorization are: (1) Congress occupied the field with passage of IRCA in 1986, and (2) E-Verify provisions in IIRIRA and E-Verify’s continued expansion serve as evidence of Congress’s continued occupation.

A. Doctrine Prior to IRCA: DeCanas v. Bica

In 1976, prior to the passage of IRCA, the United States Supreme Court found that the field of work-authorization verification was not occupied by Congress. In De Canas v. Bica, the Court decided the validity of a California statute providing that “(n)o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.” The central issue was whether the Supremacy Clause and INA preempted the California statute.

The Court laid out a three-part test to determine the validity of state and local statutes that deal with noncitizens. First, does the law in question constitute an unconstitutional regulation of immigration? Second, has Congress intended to occupy the field in which the law attempts to regulate? Third, does the law in question conflict with federal law, making compliance with both impossible? If a court answers “yes” to any of these questions, then federal law preempts the law in question. Related to the second inquiry, the Court said that employment of unauthorized aliens remains within state police powers, and that immigration law at that time only focused on who should and should not be admitted into the country and the conditions under which a legal entrant may remain. “Without more,” said the Court, it could not conclude that the employment of unauthorized workers was the “central aim” of federal immigration law.

135. Id. at 352–53.
136. Id. at 354–56.
137. Id. at 358.
138. Id.
139. Id. at 355.
140. Id. at 359.
B. Congress Occupied the Field of Work-Authorization Verification with Passage of IRCA in 1986

Although DeCanas was likely correct at the time it was decided, Congress altered the analysis in DeCanas when it passed IRCA in 1986. Several reasons support this conclusion. In Lozano, the federal district court said that “[s]ince, DeCanas . . . Congress has passed IRCA. Instead of employment being only addressed in a proviso to one section of the INA, a complete statutory scheme has now been enacted that addresses the employment of unauthorized workers. Therefore, defendant’s reliance on DeCanas is misplaced.”141 Furthermore, the court said, “IRCA is a comprehensive scheme. It leaves no room for state regulation. . . . [A]ny additions added by local governments would be either in conflict with the law or a duplication of its terms—the very definition of field pre-emption.”142

The pervasiveness of federal regulations related to employment-eligibility verification make such a finding appropriate. With the passage of IRCA, Congress created a complete system for verifying employment.143 Congress specified at what point an employer must verify an employee’s work-authorization status, requiring verification to be done within three days of hire.144 Congress specified what documents could be used to verify employment.145 Congress even provided for the creation of a standardized document to be used in the process.146 Processes for re-verification of work-authorization status,147 document retention policies,148 sanctions for non-compliance,149 and possible defenses to the law150 were also established. In addition, Congress took steps to prevent discrimination by employers,151 specified to which department complaints should be filed152 and investigations handled,153 established the process for the government to follow in

142. Id. at 523.
146. Id. § 1324a(b)(1)(A).
147. 8 C.F.R. § 274a.2(b)(1)(vii).
149. Id. § 1324a(e)(5).
150. Id. § 1324a(b)(6).
151. Id. § 1324b.
152. 8 C.F.R. § 274a.9(a).
153. Id. § 274a.9(b).
the event of an inspection, and laid out the steps that must be taken before the Executive Branch makes any changes to the process.

In Hoffman Plastic Compounds, Inc. v. NLRB, the Supreme Court said that IRCA created “a comprehensive scheme prohibiting the employment of illegal aliens in the United States.” The Court also stated that

IRCA “forcefully” made combating the employment of illegal aliens central to “[t]he policy of immigration law.” It did so by establishing an extensive “employment verification system” designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States. This verification system is critical to the IRCA regime.

Notably, a presumption against preemption does not apply because states historically have not enacted laws dealing with work-authorization verification. Although states have attempted to gain some control over immigration law in the past, state laws have dealt with matters unrelated to work-authorization verification. These laws related to exclusion and deportation, civil and economic rights, exclusion from state natural resources, public works contracts, game hunting, certain trades, private employment, welfare benefits, medical benefits, and education benefits.

Despite its support of E-Verify, even the Executive Branch seems to doubt the validity of subfederal immigration regulation. While signing House Bill 2779, and thereby enacting the Legal Arizona Workers Act, then-Governor Napolitano said that “immigration is a federal responsibility, but I signed House Bill 2779 because it was abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reform our country needs.” Then-Senator Obama said, in response to the City of Hazleton’s ordinance, that Hazleton’s law was “unconstitutional,” and that immigration reform was

154. Id.
157. Id. at 147.
158. Id. at 147–48 (citations omitted).
160. STATE IMMIGRATION EMPLOYMENT COMPLIANCE HANDBOOK, supra note 59, § 1:1.
necessary so that states “do not continue to take matters into their own hands.”

C. Congress’s Establishment of the E-Verify Program Under IIRIRA and Continued Expansion of E-Verify Demonstrate Its Continued Occupation of the Field

When it passed IIRIRA in 1996, Congress demonstrated its continuing occupation of the field of work-authorization verification by establishing three pilot programs designed to confirm employment eligibility. IIRIRA, in essence, “sought to tighten IRCA’s scheme.” The federal government’s renewal of E-Verify, on five separate occasions since then, shows its continued interest in the field.

III. The Field Occupied by Congress Is Better Defined as the Field of “Work-Authorization Verification”

Unlike the Petitioner’s assertion in Candelaria, and unlike the cases that have weighed in on the E-Verify matter, the more appropriate framing of Congress’s field occupation is “work-authorization verification” rather than the “employment of undocumented noncitizens.” This narrower framing is both desirable and more consistent with the INA’s express statutory language.

A. The INA’s Express Statutory Language Supports a Narrower Framing of the Field

When evaluating whether preemption exists, the key question is the definition of the field ostensibly occupied by Congress. Courts first look to the statutory language. The term “employment of undocumented noncitizens” too broadly describes the field purportedly occupied by Congress. The INA makes clear that some state and local regulation of employment-related immigration matters is acceptable.


165. See supra note 44 and accompanying text.

It says “[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.” Thus, if a state or local law imposes sanctions in the form of license revocations, for example, no preemption occurs. Although the precise scope of this exception is currently debated, what is clear is that Congress intended for employers to be able to act in some capacity. It is therefore inappropriate to suggest that states and localities have no authority to act in all employment-related immigration matters. “‘Immigration’ is a capacious term that consists of many subsets, and delineating those subsets precisely is the only way to ensure that state interests are not trampled.”

B. Regardless of the Legal Status of State and Local Laws, Federal Exclusivity over Work-Authorization Is Desirable

In addition to a statutory language analysis, courts should also consider the policy justifications when defining the exact field occupied by Congress. Not only is the narrowly framed field of work-authorization verification in accord with the INA, it also allows a greater degree of deference to state and local legislation that will, at least in part, please most stakeholders. Under this framing, federal law would not preempt state and local legislation sanctioning employers for unauthorized hiring. Defining the field more broadly, as the employment of unauthorized noncitizens, would, however, preempt such subfederal legislation. Additionally, a narrowly defined field would not result in federal preemption of state and local non-cooperation or sanctuary legislation, thus alleviating the concerns of government officials concerned with the non-reporting of crime and medical emergencies by unauthorized noncitizens as well as immigrant rights activists.

Perhaps most importantly, preempting state and local laws that require employers to take steps beyond completion of Form I-9 would reduce the burdens felt by employers. Such an action would also better protect against the discriminatory effects caused by subfederal regulation.

169. Rodríguez, supra note 7, at 623–24.

Adding a multi-state approach to an already time consuming verification process results in undue burdens for employers. Although DHS estimates that completion of Form I-9 results in 12,700,000 annual burden hours to employers, some doubt the validity of that already-staggering number:

DHS’s estimate is quite conservative. DHS reached its estimate after concluding that both a new hire and the employer’s record keeper spend only a combined 12 minutes completing a Form I-9. This does not take into account time spent managing records, crafting compliance programs, training employees responsible for I-9 collection, or using Form I-9 for re-verification purposes.

When E-Verify costs are added to this figure, the process of work-authorization verification becomes even more expensive and time consuming. Problems with the system are costly for employers. E-Verify reports nearly one in ten naturalized citizens as non-work-authorized. These false non-confirmations invite frustration and cause delay. But still, a national approach to E-Verify would be less burdensome for employers than a locale-by-locale approach for employers operating in more than one town or city, who otherwise would have to navigate their way through the potentially-conflicting approaches adopted by the different jurisdictions in which they operate.

2. Federal Exclusivity Better Protects Against Discrimination

The federal exclusivity model better protects against discrimination by employers. When passing IRCA, Congress sought the system “least disruptive to the American businessman,” and because it “recognized that an overly aggressive approach to work verification by employers and threats of sanctions against employers could lead to widespread discrimination against foreign nationals in lawful status and even U.S. citizens,” Congress sought to “minimize the possibility of employment discrimination.” Senator Carl Levin said, in passing IRCA, “[w]e do not want people discriminated against because

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171. Adams & Rymer, supra note 81, at 31, 35 n.2.
174. STATE IMMIGRATION EMPLOYMENT COMPLIANCE HANDBOOK, supra note 59, § 1:4.
they look or sound foreign."176 Based on its concerns, Congress ensured that non-discrimination provisions were provided for in IRCA.177

A locale-by-locale approach to E-Verify would likely undermine Congress’s efforts. States and localities most impacted by illegal immigration have great incentive to invoke harsh penalties against employers. Faced with the threat of harsh penalties, employers “will simply avoid hiring individuals who even appear to pose a risk of an immigration violation, based on their race, ethnicity, or national origin.”178 On the other hand, in deciding whether to mandate E-Verify, Congress can better balance concerns over discrimination with concerns over immigration control.

Furthermore, resting the decision to make E-Verify mandatory with Congress alone provides greater incentive to Congress to improve E-Verify’s accuracy. Faced with possible constitutional challenges as a result of the discrepancy in error rates between U.S.-born workers and foreign-born workers, Congress would likely work to resolve the problems currently plaguing E-Verify.

Conclusion

Congress has established a comprehensive scheme to regulate work-authorization verification practices. This is apparent from the establishment of IRCA in 1986 and from the continued renewal of the E-Verify provisions in IIRIRA.179 This field is appropriately defined in terms of its scope as work-authorization verification rather than the employment of undocumented immigrants. IRCA expressly allows state and local governments to legislate through the imposition of licensing sanctions and thus does not occupy the employment of undocumented immigrants field.180 By narrowly framing the field of preemption, we do not “thwart what should be an ongoing dialogue about these issues at the state and local levels.”181 Furthermore, even absent agreement on the field occupation issue, federal exclusivity in this area is desirable in order to prevent a costly locale-by-locale approach for businesses and in order to better protect against discrimination by employers.

178. Petition for Writ of Certiorari, supra note 3, at *17.
179. See supra Part I.A.
180. See supra Part III.A.
181. Rodríguez, supra note 7, at 596.