

**TESTING THE LIMITS:
A FRAMEWORK FOR
ASSESSING THE LEGALITY OF
STATE AND LOCAL
IMMIGRATION MEASURES**

By

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Executive Summary

In 2007 alone, the 50 state legislatures have considered over 1,000 pieces of legislation regulating immigrants and immigration. At least 156 of these measures have become law. Over 100 local governments across the country also have enacted immigration-related ordinances in recent years. In this paper, we provide a framework for assessing the legal validity of five of the most common or high-profile measures that address unauthorized immigration specifically, though state and local immigration-related activity is by no means limited to the unauthorized phenomenon, nor is it all designed to deter immigration. The laws we consider include those that

- regulate employers who hire unauthorized workers;
- impose fines on landlords who rent to individuals without lawful status;
- direct state and local police to participate in immigration enforcement;
- prohibit solicitation of employment on public streets;
- require verification of the legal status of those seeking public benefits.

For over a century, conventional wisdom has held that the Constitution assigns the power to regulate immigration exclusively to the federal government. But, as the Supreme Court has made clear, not every state or local law related to immigrants is per se preempted. In most cases, to determine a state or local law's validity, a court should ask the following questions:

- (1) Has Congress expressly preempted the law?
- (2) If not, has Congress occupied the field in which the state regulates, thus ousting state authority?
- (3) If not, does the state or local law create an obstacle to the enforcement of federal law?

Because Congress has regulated extensively in the immigration context, many of the measures we consider are likely to interfere with federal regulatory regimes. Most of these measures also implicate bedrock constitutional principles, including the guarantees of equal protection and due process of law, and the rights to freedom of speech and association.

Our analysis includes, but is not limited to, the following observations:

- Many aspects of the employment-related laws likely conflict (either expressly or by implication) with the federal scheme of employer sanctions.
- The employment measures, as well as the landlord regulations, likely deprive individuals of property without due process of law.
- The federal government almost certainly must superintend participation by state and local police in immigration enforcement, though state and local police do have authority to inquire into immigration status if the inquiry is ancillary to ordinary law enforcement.
- Local antisolicitation ordinances targeted at day laborers infringe on protected speech, sometimes through content-based regulation. Even those regulations that constitute time, place, and manner restrictions do not provide alternative forums for the communication and are therefore invalid.

- Most laws that deny public benefits to unauthorized immigrants hew closely to the requirements of federal welfare law, particularly in light of the constructions given the laws by some state attorneys general.

Many of these measures also raise serious public policy concerns. State and local immigration policing, for example, threatens to give rise to racial profiling of Latinos and other minorities and to alienate immigrants, compromising effective law enforcement. The housing and employment ordinances can disrupt the lives and livelihoods of citizens and lawful immigrants, as well as the unauthorized, producing social cleavages in the process. The public benefits laws are proving costly to implement, with little return. Anecdotal evidence suggests that some of these state and local laws are leading lawful and unauthorized immigrants alike to leave their communities, and many towns and states consequently may begin to experience economic losses. These risks, combined with the threat of litigation, may ultimately lead state and local governments to reconsider their approaches to immigrants and immigration.

Introduction

For over a century, courts and commentators have regarded the power to regulate immigration as an exclusively federal power. Throughout US history, however, states and localities have played some role in the regulation of immigration. Before the Supreme Court clearly articulated the plenary scope of the federal immigration power in the 1880s, states imposed duties on migrants' entrance into their jurisdictions and used their inspection laws to control immigrant movement,¹ largely without constraint. In the 20th century, states occasionally adopted measures restricting immigrant access to welfare benefits² and public employment, and cracked down on employers who hired unauthorized workers.³ Courts evaluating these measures came to mixed conclusions on their legality. Despite holding that many of them exceeded the bounds of state authority, the Supreme Court also made clear that not all state and local immigration-related measures are illegal.⁴

In recent years, subfederal activity with respect to immigration has been uniquely contested, pervasive, and widely reported. Congress's inability to pass comprehensive immigration reform in 2006 and 2007, coupled with the scale of today's migration (legal and illegal) into the United States,⁵ has fueled the proliferation of state and local measures covering a wide swath of territory. In 2007 alone, the 50 states have considered over 1,000 different measures regulating immigrants; 156 of these measures have become law.⁶ A preliminary analysis of these measures is presented in a paper released in December 2007 by the Migration Policy Institute.⁷

The laws states and localities have debated in the last decade have included measures intended to help immigrants integrate into their communities through the extension of services and protections to authorized and unauthorized immigrants alike. But the trend to deter unlawful immigration by sanctioning employers and landlords who transact with unauthorized immigrants, as well as by limiting immigrant access to public and private goods, has received the most media attention. The Illegal Immigrant Relief Acts (IIRAs)

¹ See, e.g., GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAWS 23 (1996); STEPHEN LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 180-83, 189-90 (1987).

² For Supreme Court decisions assessing such measures, see, e.g., *Graham v. Richardson*, 403 U.S. 365 (1976) (striking down state laws restricting immigrant access to welfare benefits); *LULAC v. Wilson*, 997 F. Supp. 1244 (S.D. Cal. 1997) (striking down California's Proposition 187); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (upholding state law limiting certain civil service employment to citizens).

³ See *De Canas v. Bica*, 424 U.S. 351 (1976) (upholding employer sanctions measure adopted by California in era when no federal employer sanctions regime existed). See *infra* note 46 (listing state employer sanctions laws).

⁴ See *De Canas*, 424 U.S. at 355.

⁵ Studies of the current wave of migration indicate that, since 1990, more immigrants have entered the United States than at any other point in history, though immigrants today represent a smaller share of the total population than during the last major wave of migration between 1890 and 1920. For an example of the literature discussing these trends, see RICHARD ALBA & VICTOR NEE, REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION (2003). For a comprehensive portrait of the unauthorized population, see Jeffrey S. Passel, *The Size and Characteristics of the Undocumented Population in the United States* (Pew Hispanic Center, Mar. 7, 2006), available at <http://www.pewhispanic.org>.

⁶ Alexa Silver & Sirithon Thanasombat, *State Legislatures: Immigration Regulation 2007* (Migration Policy Institute Fact Sheet, Dec. 2007).

⁷ See *id.*

made famous by Hazleton, Pennsylvania, and passed by numerous localities around the country have attracted particular political and legal scrutiny.⁸

Though much of the breathless media coverage of IIRAs and their analogues at the state level may overstate the extent of the phenomenon, state and local activity certainly has escalated in recent years. Many supporters of newly enacted measures cite the federal government's failure to do its job as justification for state and local involvement in an area traditionally considered a strictly federal domain. Commentators have attributed the rapid spread of this phenomenon to conservative media's ability to tap into the frustration in local communities with immigration patterns that the public perceives to be out of control.

Despite the proliferation of subfederal measures, state and local authority to regulate immigrants and immigration in fact remains highly circumscribed. Many of the measures adopted of late, particularly with respect to unauthorized immigration, raise legal issues under the Constitution's Supremacy Clause. Because the principle that the federal government has exclusive responsibility over immigration control is firmly entrenched, litigation and commentary related to this trend has focused on whether state and local governments are exceeding constitutional bounds on their authority by interfering with federal laws and powers and disrupting federal enforcement efforts. This focus is both appropriate and important, because effective immigration regulation requires that the lines between federal, state, and local authority be demarcated clearly.

It is also important for advocates and policymakers to develop their understanding of how current state and local activity violates or threatens to undermine the rights of citizens and noncitizens alike. The full measure of state and local immigration regulation cannot be taken without considering the restraints it places on the individual's ability to exercise rights that the Constitution protects. Several of the most common state and local immigration measures passed of late either violate or create a climate hostile to bedrock constitutional protections, including the due process and equal protection guarantees of the Fourteenth Amendment and the free speech and association rights of the First Amendment. Even if state and local regulations mirror or re-enforce federal immigration law, such regulations may nonetheless compromise the rights and interests of immigrants in ways anathema to our constitutional values by authorizing arbitrary state action and encouraging such actions as racial profiling.

This paper provides a framework for assessing the legality of five of the most common measures enacted by states and localities in recent years to address unauthorized immigration:

- I. State and local laws denying licenses or contracts to employers who hire unauthorized workers
- II. Local ordinances imposing fines on landlords who rent to individuals without lawful status

⁸ See Udi Ofer, Legislative Counsel, New York Civil Liberties Union, Testimony: Proliferation of Local Anti-Immigrant Ordinances in the United States (May 12, 2007), available at <http://www.nyclu.org/node/1006>.

- III. State and local laws or regulations that direct state and local police to verify the immigration status of arrestees
- IV. Local antisolicitation laws intended to prevent workers from entering into employment contracts on public streets
- V. State and local laws requiring officials to verify the legal status of individuals seeking public benefits

Litigation against each type of measures is in various stages of completion, and trial courts have struck down measures of type (I), (II), and (IV), concluding that the laws either conflict with existing federal or state law or violate individual rights protections. Indeed, though states have some authority to enact laws that affect immigrants and immigration, many of the measures states and localities have passed of late are likely to fall to legal challenges. This reality is being brought to bear on state and local governments, leading some lawmakers to reconsider their regulatory efforts.

In addition to potential legal liability, the costs of implementing, enforcing, and defending these laws in court are pressuring states and localities to rescind or reformulate some of their provisions. Growing evidence suggests that these costs are high, as are the economic costs of driving authorized and unauthorized immigrants alike out of local communities. No systematic study of the full costs of any of these measures exists as of yet. But courtroom testimony, newspaper reports, and various statements of business and civic leaders, real estate agents, school officials, and clergy suggest that communities are feeling a perceptible and negative impact from these measures throughout the country. Some pragmatic politicians who initially favored such measures are having second thoughts as the legal and economic consequences of these laws become clear.⁹ These costs, along with the existing legal landscape, are likely to shape the extent to which states and localities continue in this regulatory vein.

The Preemption Framework

Before considering the legality of each of the above listed measures, we set out the basic legal framework for determining whether a state or local law is preempted by federal law. Because the validity of several of these measures will turn on whether, or the extent to which, they interfere with or contradict federal law, it is important to clarify the terms of existing law with respect to preemption in the immigration context.

⁹ Riverside, New Jersey, for example, has decided in the face of these costs to repeal its ordinance cracking down on employers and landlords. See Jill P. Capuzzo, *Town Pulls Back on Immigration Law*, N.Y. TIMES, Sept. 19, 2007 (noting that Riverside, New Jersey repealed its IIRA in light of “mounting legal costs and declining public outcry” and quoting local business owner observing that that law cost the town \$50,000 a week in lost business from Brazilians and Latinos).

The Supreme Court repeatedly has declared that “the power to regulate immigration is unquestionably exclusively a federal power.”¹⁰ The strongest version of this principle has been articulated by litigators challenging the IIRA passed by Hazleton, Pennsylvania. Citing Supreme Court precedent, they note that the Constitution reserves the power to regulate immigration to the federal government, “such that even if Congress has not legislated on the same subject matter, a state or local immigration law would be invalid.”¹¹ Though scholars are divided on whether justification exists for this sweeping a proposition of federal authority,¹² conventional wisdom holds that state and local authority in this area is narrowly circumscribed, and that states cannot constitutionally regulate immigration.¹³

The parameters of state and local authority in relation to immigration are most clearly set out in the Supreme Court’s decision in *De Canas v. Bica*, in which the Court upheld a California legislative scheme that imposed sanctions on employers who hired unlawful immigrants. In deciding the case, the Court noted that regulating immigration is the exclusive responsibility of the federal government.¹⁴ But the Court also made clear that not every state or local measure related to immigrants is per se preempted by this constitutional federal power, whether latent or exercised.¹⁵ The Court observed that “the fact that aliens are the subject of a state statute does not render it a regulation of immigration.”¹⁶ As was the case in *De Canas*, most cases involving state and local laws related to immigration are decided based on whether the law in question interferes with existing federal statutory.

Along these line, in *De Canas*, the Court concluded that a court may find “complete ouster” of state regulatory power to promulgate laws not in conflict with federal law only when

¹⁰ See *De Canas*, 424 U.S. at 354 (1976).

¹¹ See Memorandum of Law in Support of Plaintiffs’ Opposition to Hazleton’s Motion to Dismiss and Cross Motion for Summary Judgment at 32, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06cv 1586), available at 2007 WL 856626; see also *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (emphasizing that state power to regulate immigrants is constrained to “the narrowest of limits”).

¹² Compare Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. ___ (forthcoming 2008) (arguing that state and local immigration regulation is not constitutionally proscribed where it is not inconsistent with existing federal law), and Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. ___ (forthcoming 2007) (arguing that immigration exceptionalism does not have a strong constitutional basis), with Michael J. Wishnie, *Laboratories of Bigotry*, 76 N.Y.U. L. REV. 493 (2001) (arguing that federal government has exclusive control over immigration), and Michael A. Olivas, *Immigration-Related State Statutes and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 12 BENDER’S IMMIGRATION BULLETIN 901, 904 (July 15, 2007) (“State, county, and local statutes and ordinances aimed at regulating general immigration functions are unconstitutional as a function of exclusive federal preemptory powers.”).

¹³ What constitutes the regulation of immigration is, of course, the question posed by the state and local laws we consider in this paper. In *De Canas*, the Court notes that the regulation of immigration is “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *De Canas*, 424 U.S. at 355.

¹⁴ See *De Canas*, 424 U.S. at 354.

¹⁵ See *id.* at 355.

¹⁶ *Id.* at 355. The Court also notes that “even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.” *Id.* at 356. In *Toll v. Moreno*, decided in 1982, the Court reiterates the conclusion that states have no power to add or take away “from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states,” and that “[s]tate laws which imposed discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration.” *Toll v. Moreno*, 458 U.S. 1, 11 (1982) (striking down Maryland state law denying certain education benefits to class of nonimmigrants). The Court notes that states may not “treat aliens as they will” as long as they do not clearly encroach on exclusive federal power or clearly conflict with a federal statute. *Id.* at 11, n.16. Though the Court does not say so explicitly, it could be read as suggesting that state laws that affect immigrants may be invalid, even absent clear encroachment on federal territory.

Congress has shown its “clear and manifest purpose” to effectuate such an ouster.¹⁷ In upholding the state scheme regulating employers, the Court clearly contemplated that some state and local regulation simultaneously related to immigration and harmonious with federal law is permissible.¹⁸

De Canas was decided before Congress enacted the Immigration Reform and Control Act of 1986 (IRCA) and the federal scheme of employer sanctions, and the case’s outcome clearly would be different today. Congress passed IRCA, which, in addition to creating the sanctions regime also legalized a substantial segment of the unauthorized population then in the country, after several years of heated debate. Some members of Congress feared placing too heavy a burden on employers; others worried about document fraud and the risk that the regime would lead to the adoption of a national identity card; still others expressed concern that employers would inevitably discriminate against Latino, Asian, and other would-be employees who appeared or sounded foreign.¹⁹ In other words, IRCA instituted a comprehensive regulatory regime that carefully balanced a range of interests, thus shifting the terrain on which *De Canas* was decided.

Despite these dramatic changes, it is important to recognize that the Court in *De Canas* came to its conclusion even in the face of comprehensive congressional regulation in the field of immigration prior to IRCA. In other words, *De Canas* still suggests that state and local laws are not automatically prohibited simply by virtue of having immigration enforcement consequences. The legal validity of current state and local measures is thus likely to rise and fall on whether the measures are inconsistent with existing federal statutory law and therefore in violation of the Supremacy Clause of the Constitution. The relevant inquiry is three-fold. Is there (1) express preemption, (2) field preemption, or (3) conflict preemption? (see Sidebar 1)

Express preemption analysis is relatively straightforward and requires a clear statement from Congress of its intent to preempt a particular sort of state law. The scope of express preemption provisions can be difficult to define, to be sure, but when an express preemption

Sidebar 1. The Preemption Framework

Express preemption: Has Congress explicitly declared state regulation preempted?

Implied preemption:

- Field preemption: Has Congress occupied a regulatory field in a way that demonstrates intent to oust state authority?
- Conflict preemption:
 - Is it impossible for state and federal laws to operate simultaneously?
 - Does the state law create an obstacle to enforcement of federal law?
 - Does state law frustrate the purposes of federal law?

¹⁷ *Id.* at 357.

¹⁸ In upholding the California law, the Court also noted that evidence existed, “in the form of the Farm Labor Contractor Registration Act,” that Congress intended that states may “to the extent consistent with federal law, regulate the employment of illegal aliens.” See *De Canas*, 424 U.S. at 361. In *Toll*, the Court emphasized this aspect of *De Canas* and suggested in dicta that it rejected the preemption claim in *De Canas* not because of an absence of congressional intent to preempt, but because Congress intended that states be allowed to regulate the employment of unauthorized aliens, consistent with federal law. See *Toll*, 458 U.S. at 13, n.18. *But cf. De Canas*, 424 U.S. at 357 (suggesting that this evidence was only one factor in the holding).

¹⁹ See T. ALEXANDER ALEINIKOFF, DAVID MARTIN, & HIROSHI MOTOMURA, EDS., IMMIGRATION AND CITIZENSHIP LAW 1130-1133 (5th ed. 2003).

provision is clearly at issue, the preemption analysis is more likely to be consistent from court to court.

Because Congress cannot be expected to anticipate every state action that might interfere with its regulatory objectives, state and local law also can be preempted by implication. Implied preemption breaks down into two questions: whether a state statute is field preempted or conflict preempted. Field preemption requires an inquiry into whether the federal government has occupied the field such that there is no room for the exercise of state authority.²⁰ The Supreme Court defined field preemption most comprehensively in *Hines v. Davidowitz*, noting that, where the government has enacted a “complete scheme of regulation,” states cannot “conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.”²¹ Where Congress has occupied the field, even state regulations that purport to supplement the federal scheme are not permissible.

In *De Canas*, while echoing the observation that even state regulations in harmony with federal law might be preempted, the Court made clear that, to establish a claim of field preemption, it is not sufficient to point to the complex immigration schemes Congress has adopted generally to preempt all state and local regulation related to immigration. The definition of the field is not as broad as “immigration law” or “immigration enforcement.” It must be shown that Congress intended to oust state regulatory authority that intersects with the field Congress has occupied,²² which must itself be defined with a certain level of specificity — a level not precisely delineated in case law.²³

Again, most immigration preemption cases decided by the Supreme Court ultimately have been conflict preemption cases.²⁴ States and localities tend not to contravene express preemption provisions because of their clarity, and field preemption has become increasingly rare as a general matter, probably because of its malleability and capaciousness. Conflict cases can be framed in one of three ways: 1) is it impossible for the state and federal laws to be enforced simultaneously; 2) does the state law present an obstacle to the achievement of the federal objective; or 3) does the state law frustrate the purpose of the federal scheme?²⁵

Because proving impossibility itself is nearly impossible, very few, if any, conflict preemption cases turn on this standard. Instead, in the immigration context, as in all other contexts, most cases become obstacle preemption cases in which a court must determine whether a

²⁰ See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (defining field preemption as an inquiry into whether a regulatory scheme is “so pervasive” that “Congress left no room for the States to supplement it”); cf. *De Canas*, 424 U.S. at 357 (“there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause”).

²¹ *Hines*, 312 U.S. at 52.

²² See *De Canas*, 424 U.S. at 357.

²³ The Court notes in *De Canas* that “every act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.” *De Canas*, 424 U.S. at 360, n.8.

²⁴ In *Toll v. Moreno*, for example, though the Court includes a lot of dicta in its decision broadly discussing the federal immigration power and its preemption of state statutes that adversely impact aliens, its holding is a narrowly focused conflict preemption conclusion based on a series of treaties and statutes that concern the tax liability of certain nonimmigrants. See *Toll*, 458 U.S. at 13-17.

²⁵ Note that these formulations of conflict preemption are not without their critics and that conflict preemption analysis in the federal courts is a complicated and less than coherent affair. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

state law creates an obstacle to the effectuation of the federal regulatory scheme. In these instances, a finding of conflict depends on the particular facts of the case and the statutes at issue. As the Court observed in *De Canas*, state laws should be preempted only to the extent necessary to “protect the achievement of the aims of the federal law” in view of the fact that the “proper approach is to reconcile the operation” of the federal and state schemes.²⁶

Conflict analysis clearly requires courts to make judgments regarding the effects of state and local schemes that have not yet been implemented. The analysis can therefore be both complicated and speculative, particularly when the federal government is not a party to the case and therefore has not taken a position with respect to whether conflict exists. Courts do sometimes invoke the frustration of purpose standard, but the question of whether state law frustrates the purposes of a federal scheme requires even more speculation than the obstacle inquiry.

²⁶ *Id.* at 9238, n.5.

The Legality of Select State and Local Immigration Measures

I. State and Local Laws Targeting Employers

A. The Laws' Provisions

1. Prohibitions and sanctions

Sidebar 2. Types of State and Local Laws Regulating Employment of Unauthorized Workers

- Prohibiting hiring or employing of unauthorized immigrants
- Requiring employers to affirm that they do not hire unauthorized immigrants
- Prohibiting contractors who provide goods or services to state or local governments from employing unauthorized immigrants
- Requiring all employers to enroll in federal E-Verify program
- Making receipt of public contracts contingent on enrollment in E-Verify
- Suspending or revoking business licenses of employers who hire unauthorized immigrant
- Imposing civil fines on noncompliant employers.
- Creating new causes of action for damages for US citizens discharged by employers who employ unauthorized immigrants
- Prohibiting employers from enrolling in E-Verify

The state and local measures intended to prevent employers from hiring unauthorized workers have three key features in common, though they naturally differ somewhat in institutional design, and the application of preemption principles to them will depend on these details (see Sidebar 2). First, IIRAs passed by localities such as Hazleton, Pennsylvania, declare it unlawful to “knowingly recruit, hire for employment, or continue to employ...any person who is an unlawful worker.”²⁷ Similarly, Arizona,²⁸ Colorado,²⁹ Georgia,³⁰ and Oklahoma³¹ have passed laws that prohibit employers and/or contractors who provide services to the state from knowingly or intentionally employing an unauthorized alien. These prohibitions mirror language in §274A of IRCA, which establishes that “it is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien” is not authorized to be employed. The state and local provisions regulating employers also define “unlawful” with reference to federal law, or 8 U.S.C. §1324a(h)(3).

²⁷ See, e.g., Hazleton, Pa. Ordinance 2006-18, § 4(a), as amended by Ordinance 2007-6, available at http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf.

²⁸ 2007 Ariz. House Bill No. 2779.

²⁹ COLO. REV. STAT. § 8-17.5-101 (2006).

³⁰ 2005 Ga. Senate Bill No. 529. The legislature passed this bill in 2006, but the Georgia legislative session spans two years, and the bills are numbered based on the first year of the session.

³¹ 2007 Okla. House Bill No. 1804, §§ 7 & 9.

Second, IIRAs generally require city agencies to enroll in the federal government's E-Verify Program (formerly known as Basic Pilot),³² a database with which employers can verify whether an individual is authorized to work in the United States and that has been criticized as error prone.³³ The ordinances also make receipt of any city contracts or grants worth \$10,000 or more contingent on the contract recipient enrolling in E-Verify.³⁴ Similarly, the laws passed by Colorado, Georgia, and Oklahoma require state contractors and subcontractors to enroll in E-Verify as a condition of receiving state contracts. Arizona's HB 2779 goes a step further and requires all employers in the state to verify employee eligibility through E-Verify by December 31, 2007. By contrast, federal law makes the enrollment by employers in E-Verify voluntary³⁵ and provides a list of documents on which employers can rely to verify a worker's eligibility for employment.³⁶

Some of the state and local employment measures also attach consequences to the knowing violation of the prohibition on hiring unlawful workers. Hazleton's IIRA, for example, calls for enforcement actions to be initiated by any city official, business entity, or resident through a written complaint to the Hazleton Code Enforcement Office. In response to a complaint, the Enforcement Office must verify the status of the workers in question through consultation with the federal government. The office is authorized to suspend temporarily the permits of business entities that do not comply with requests for identity information, as well as business entities that do not cure any violations found by the office.

Similarly, Arizona HB 2779 requires the attorney general or the county attorneys of Arizona to investigate complaints from individuals that an employer is knowingly or intentionally employing an unauthorized alien. State agents are required to verify an individual's work authorization through consultation with the federal government.³⁷ Employers found to have committed a first violation may have their business licenses suspended, and employers found to have committed a second violation may have their licenses permanently revoked.

2. Prohibitions on Participation in E-Verify

At least one state has taken a different approach to the regulation of employer hiring. In 2007, the state of Illinois passed a law prohibiting employers from enrolling in E-Verify until the Social Security Administration and the Department of Homeland Security (DHS) can essentially certify that the database is 99 percent accurate.³⁸ The concern motivating the law, shared by the governor and the Illinois General Assembly, is that E-Verify is too error prone

³² E-Verify is administered by the US Customs and Immigration Service (USCIS) in cooperation with the Social Security Administration (SSA). Employers may use it to verify the eligibility of newly hired workers. Employers voluntarily enter the program by entering into a memorandum of understanding with USCIS. *See* 8 U.S.C. § 1324a.

³³ *See infra* notes 39-40, 64 and accompanying text.

³⁴ *See* Hazleton, Pa. Ordinance 2006-18 at §§ 4(C) & (D).

³⁵ *See* Note following 8 U.S.C. § 1324a.

³⁶ *See* 8 C.F.R. § 274a.2(a) (I-9 employment eligibility form). Under federal law, employers who verify potential employees' documents have a good-faith defense against a finding of liability if it turns out they have hired unauthorized workers.

³⁷ Such requests are made pursuant to 8 U.S.C. § 1373(c) (providing that "The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information").

³⁸ *See* 2007 Ill. House Bill No. 1744, an act amending the Right to Privacy in the Workplace Act, 820 Ill. Comp. Stat. 55/1, Ill. Public Act 095-0138.

and therefore leaves workers and potential employees subject to abuse and mistaken identification. The United States has filed suit in federal court seeking a permanent injunction against the law, contending that the law erects an obstacle to the full accomplishment and execution of federal law — a claim discussed below.³⁹

B. Applying Preemption Principles to State and Local Regulation of Employers

1. Express Preemption

Analysis of the state and local licensing provisions must begin with the text of IRCA to determine whether Congress has preempted the measures at issue expressly. Congress has provided that “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, recruit or refer for a fee for employment, unauthorized aliens.”⁴⁰

The state and local laws here at issue impose a variety of consequences on employers for failure to comply with the law, including fines, loss of public contracts, and vulnerability to suit by discharged citizen workers. Only those regulations that amount to “sanctions” are expressly preempted. A standard legal definition of “sanction” is “a penalty or coercive measure that results from failure to comply with a law, rule or order,”⁴¹ or a penalty “used to provide incentives for obedience with the law or with rules and regulations.”⁴² We consider, in turn, whether each of the consequences imposed by the state or local employment laws constitutes a sanction preempted by Congress (see Sidebar 3).

Sidebar 3. Selected Legal Issues Raised by State and Local Employment Laws

- To what extent does IRCA contemplate allowing states to use their licensing authority to regulate employment of unauthorized immigrants?
- Can state or local officials find conclusively that an employer has hired an unlawful worker? Or, must the imposition of state or local licensing sanctions be preceded by a federal determination that an employer has violated IRCA?
- Do employers have a meaningful opportunity to contest a complaint? Do state and local governments provide sufficient procedural safeguards to protect employers’ property interests?
- Can state or local governments make the otherwise voluntary federal E-Verify program mandatory for employers within their jurisdiction?
- Do state or local laws disturb the existing “balance” struck by the federal government between penalizing employers, limiting regulatory burdens, and protecting workers from overbroad enforcement?
- Do state and local employer mandates overburden the E-Verify system and interfere with the federal enforcement scheme?
- Do laws that bar employer use of the E-Verify system frustrate the federal government’s ability to evaluate the program’s efficacy? To enforce its own laws?

³⁹ Compl., United States v. Illinois, No. 07-3261, ¶ 31 (C. D. Ill. Setp. 24, 2007), *available at* 2007 WL 3092965.

⁴⁰ 8 U.S.C. § 1324a(h)(2).

⁴¹ BLACK’S LAW DICTIONARY (8th ed. 2004).

⁴² BLACK’S LAW DICTIONARY (6th ed. 1990).

a. Fines

The definition of sanction clearly encompasses civil and criminal fines, as well as imprisonment. Some states, including Oklahoma and Tennessee,⁴³ have considered adopting laws that would fine employers directly for hiring unauthorized workers. In 2007, West Virginia went so far as to enact an employer sanctions provision that mandates a \$5,000 fine for a second violation of the statute's prohibition on the hiring of an unlawful worker.⁴⁴ These measures, as fines or penalties, are clearly and expressly preempted by federal law.⁴⁵ Indeed, at the time that Congress passed IRCA, the 12 states that had employer sanctions laws on their books all imposed civil or criminal fines on employers who hired unauthorized workers, underscoring that Congress had such penalties in mind when it enacted IRCA's express preemption clause.

b. Licensing-related Sanctions

The suspension or revocation of a business permit is easily categorized as a sanction or penalty. But in preempting the imposition of sanctions with IRCA, Congress included an exception, or savings clause, that permits state and local governments to impose licensing and other similar sanctions on employers. Congress clearly contemplated leaving state and local governments with some authority to regulate employers who hire unauthorized aliens.

Because many of the state and local laws under consideration here impose licensing-related sanctions, the express preemption inquiry requires that we determine the scope of authority Congress intended to leave state and local governments. Does the authority to impose a licensing or similar sanction on an employer include the authority to suspend or revoke a business license or permit if an employer knowingly hires an unauthorized alien?

From the face of the federal statute, it is difficult to determine how precisely Congress thought states should be permitted to use their licensing power. The legislative history of the statute provides virtually no guidance on this question. As noted above, at the time Congress passed IRCA, at least 12 states had laws on the books imposing fines on employers who hired unlawful workers,⁴⁶ but none of these laws included licensing-related sanctions. Courts determining whether a state or local licensing regulation falls within IRCA's savings clause, therefore, likely will have to resort to a common-sense interpretation of "licensing and similar laws."⁴⁷

⁴³ See 2007 Tenn. House Bill No. 729 and 2007 Tenn. Senate Bill No. 202.

⁴⁴ 2007 W. Va. Senate Bill No. 70.

⁴⁵ The attorney general of Tennessee reached this conclusion in response to whether the proposed State Senate Bill 202, which would have imposed fines of up to \$50,000 on employers who knowingly hired "illegal aliens," is preempted by federal law. See Op. Att'y Gen., No. 07-64 (Tenn. May 10, 2007).

⁴⁶ See Cal. Labor Code § 2805 (1984); CONN. GEN. STAT. ANN. § 31-51k (1972); DEL. CODE. ANN. § 705 (1977); FLA. STAT. ANN. §448.09 (1973); KAN. STAT. ANN. §21-409 (1977); MAINE REV. STAT. ANN. §871 (1977); MASS. GEN. LAWS ANN. §19 (1976); MONT. CODE ANN. § 39 (1977); N. HAMP. STAT. ANN. §275-A:4-a (1976); N.J. STAT. ANN. §34:9-1 (1977); VER. STAT. ANN. §444a (1977); VA. CODE §40.1-11.1 (1977).

⁴⁷ One possible interpretation of "licensing and similar laws" is that they constitute laws that impose conditions on applicants seeking permission to engage in particular occupations or trades. In the legislative history of the preemption provision, Congress noted that "[T]he penalties contained in this legislation...are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provision in this legislation. Further, the Committee does not intend to preempt

Assuming a common-sense interpretation means that a state or local government can suspend or revoke the license of an employer who hires an unauthorized worker,⁴⁸ the question becomes who determines that an employer has knowingly violated the law? Can a state or local government itself determine that the employer has violated the statute by knowingly hiring an unauthorized immigrant and subsequently impose a licensing-related sanction? The legislative history of the express preemption clause contains only one reference to the licensing provision and declares that the provision is “not intended to preempt . . . state or local processes concerning . . . a license to any person who *has been found to have violated* the sanctions provisions” of IRCA.⁴⁹ The question both the statute and its history raise is what it means “to have been found” to have violated the sanctions provisions. Must a state’s use of its power be preceded by a determination by the federal government that an employer has violated the provisions?

On the face of the statute, no mention is made of the need for a federal determination of liability before a state can use its licensing authority. The federal statute simply authorizes state and local governments to impose licensing-related sanctions on employers who have hired unauthorized aliens. The state laws here at issue define unauthorized alien with reference to federal eligibility standards, creating no new standards of their own. A state or locality that imposes a licensing sanction upon finding that an employer has hired workers ineligible for employment as a matter of federal law appears to be acting within the express terms of the statute.

But can state and local officials accurately determine that an employer has violated federal law? Again, neither IRCA itself nor its legislative history provides a direct answer to this question. At first glance, given that IRCA permits an employer to base his or her hiring decisions on consultation either with E-Verify or a simple document check, it is intuitive that a state or local government may similarly determine that a worker is unauthorized.

However, an E-Verify finding that an individual cannot be confirmed as eligible to work is not the final word on whether the employer has violated IRCA. Under federal law and practice, employees can contest a finding of nonconfirmation. Employers also have a right to contest allegations that they have violated the statute, and only after a statutorily specified hearing before an administrative law judge can penalties be imposed on an employer for knowingly violating the statute.⁵⁰ The state and local laws that impose licensing sanctions

licensing or ‘fitness to do business laws,’ such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.” H.R. Rep. No. 99-682(I), at 5633. The licensing sanctions adopted by states such as Arizona arguably are different in kind from the examples Congress lists in the legislative history.

⁴⁸ The district court in *Lozano* reasoned that suspending an entity’s business permit is tantamount to the “ultimate sanction,” because such action threatens to force the entity out of business. Since this ultimate sanction is far more severe than the imposition of fines or penalties, which Congress chose to preempt, the court concluded that Congress could not have intended to permit use of local licensing authority as Hazleton had used it. *See Lozano v. Hazleton*, 496 F.Supp.2d 477 (M.D. Pa. 2007). Yet, Congress clearly contemplated that state and local governments could use their licensing authority to penalize employers who hire unlawful workers. If this permission does not give such governments the authority to make receipt of a license conditional on an entity’s compliance with conditions related to the hiring of unauthorized workers, it is difficult to imagine what Congress could have meant. What is more, measures such as Hazleton’s IIRA only temporarily suspend a business entity’s license until that entity comes into compliance with federal law on hiring. The severity of this sanction is arguably better addressed under the rubric of due process, because nothing in IRCA suggests that there are limitations on the force with which a state or local government may use its licensing authority.

⁴⁹ H.R. REP. No. 99-682(I), at 5662 (emphasis added).

⁵⁰ *See* 8 U.S.C. § 1324a(e)(3).

arguably target employers who have not been determined definitively to have hired unauthorized aliens, in contravention of the express preemption clause.

Some of the state and local employment laws do establish procedures for employers to follow to contest a finding that they have hired an unauthorized worker. The Arizona law requires the investigating state official to give the employer notice that E-Verify has not confirmed a worker's eligibility for employment. The statute also gives the employer three business days to correct the violation, either by dismissing the unauthorized worker,⁵¹ or by acquiring additional information from the employee to prove eligibility to work, using E-Verify. The employer also has the opportunity to submit an affidavit swearing that a violation has been cured in order to secure reinstatement of a license. The Hazleton IIRA gives business entities three days after receiving a complaint to provide identity information to the city and permits business entities to submit sworn affidavits that a violation has been cured to have their licenses reinstated.⁵² The ordinance also provides that a business permit will not be suspended if the business entity verified work authorization through E-Verify prior to the date of the violation.⁵³

While it is not clear that state procedures such as these could *never* be sufficient to ensure that a licensing sanction is imposed only on employers who are in violation of the law, the procedures state and local governments actually have adopted essentially amount to a parallel system of determining liability under IRCA, likely to produce results different from the outcomes of the federal process. Following this line of reasoning, only the federal government can determine conclusively that a violation of the law has occurred. State and local governments would have the power to impose licensing sanctions only when the federal government has itself determined that an employer has hired an unauthorized alien.⁵⁴

More specifically, to the extent that the Arizona sanction hinges on the outcome of a status verification check with Immigration and Customs Enforcement (ICE) pursuant to 8 U.S.C. §1373(c) and/or an E-Verify consultation, the state statute's procedures are likely not sufficient to determine that an employer has violated the law, particularly given the fact that E-Verify is not conclusive. And, because neither the Arizona statute nor the Hazleton ordinance provides employers with a meaningful opportunity to contest a complaint, they run the risk of imposing licensing sanctions on entities that are not actually in violation of IRCA, thus contravening the express preemption clause.

c. Contracting Provisions

Several of the recently passed state and local employment laws condition receipt of state and local government contracts either on a contractor's participation in E-Verify or its affirmation that it does not hire unauthorized workers. These provisions do not involve use

⁵¹ The law contemplates that a termination might be contested in superior court and tolls the required three business days. *See* Hazleton, Pa. Ordinance 2006-18 at § D.1.

⁵² *Id.* at § B(6).

⁵³ *Id.* at § B(5).

⁵⁴ *Cf.* note 48 (discussing claim that suspension or revocation of business licenses is not what Congress intended in giving states authority to impose licensing sanctions).

of state and local licensing authority and therefore do not obviously fall within the savings clause of IRCA's express preemption provision.

Is the denial of a public contract for failure to comply with conditions set out in state or local law a "civil or criminal sanction" and therefore expressly preempted?⁵⁵ On the one hand, denying a business a public contract for failure to comply with certain criteria can be characterized as a "coercive" measure, because the conditions imposed by law are designed to induce particular behavior from employers. Unlike the application of state workers' compensation laws to unauthorized immigrants, which courts have found are not preempted by or in conflict with IRCA,⁵⁶ the contracting provisions states and localities have adopted are arguably intended to punish employers.

But governments condition the receipt of public funds and contracts on a range of criteria without denying businesses the opportunity to operate, and characterizing the contract provisions as coercive arguably is tantamount to claiming that all regulation is coercive and therefore constitutes sanctions. In enacting their contracting provisions, states and localities can be said to be acting as market participants⁵⁷ instead of as enforcement-like entities. Under this view, the contracting provisions are not penalties; rather, they reflect the states' and localities' preferences to do business with entities who meet certain criteria.

That said, in *Wisconsin v. Gould*, the Supreme Court found that a state law prohibiting state procurement agents from purchasing products known to have been made by entities that violated the National Labor Relations Act (NLRA) was preempted despite the fact that the law was based on the state's purchasing power, rather than its regulatory power.⁵⁸ In analysis that could easily be applied to the employer contracting provisions here at issue, the Court noted that, because the state procurement provision was clearly intended to deter violations of federal labor law, it constituted a supplemental sanction for violations of federal law.⁵⁹ The possibility that these state contracting provisions interfere with the federal government's enforcement of IRCA is explored in general terms below. But, as far as the express preemption clause of IRCA is concerned, a strong claim can be made that contracting provisions are tantamount to sanctions and therefore are expressly preempted, thus obviating the need for a conflict inquiry.

d. New Private Causes of Action

Several of the state and local laws that regulate employment, including the Hazleton ordinance and the Oklahoma statute, go beyond the use of state licensing authority. They create new causes of action for US citizens who have been discharged by an employer. The measures authorize US citizens to pursue discrimination or unfair business practice claims

⁵⁵ Cf. *Balbuena v. IDR Realty, L.L.C.*, 845 N.E.2d 1246, 1256 (N.Y. Ct. App. 2006) (finding that IRCA's express preemption clause "was intended to apply only to civil fines and criminal sanctions imposed by state or local law").

⁵⁶ See *id.*

⁵⁷ See, e.g., *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

⁵⁸ See *Wisconsin v. Gould*, 475 U.S. 282, 289 (1986); cf. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) (striking down Massachusetts law restricting state agencies from purchasing goods and services with corporations that did business with Myanmar, on preemption grounds).

⁵⁹ See *Wisconsin*, 475 U.S. at 289-90 (noting that the market participant doctrine is inapposite because NLRA was designed to entrust the administration of labor law to a centralized agency, and "we cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration.'").

against the employer if it can be shown that the employer hired an unauthorized worker to perform the job of the US citizen. The Hazleton ordinance in particular authorizes a treble damages award.

In the most straightforward sense, these causes of action and the potential monetary liability they impose on employers are not civil sanctions, in that they are not fines directly imposed on employers by state or local authorities. Moreover, liability does not arise simply as the result of an employer's decision to hire an unauthorized worker.

That said, because they may give rise to monetary penalties against employers imposed by a judge or a jury, these causes of action can be characterized as functional equivalents of the sanctions Congress has preempted expressly. Given that Congress was very specific in delineating the licensing exception to the express preemption provision, any form of monetary sanction, whether imposed directly or indirectly, is likely preempted by IRCA.

2. Implied Preemption

Even if the penalties state and local governments have legislated are not expressly preempted, the laws may be impliedly preempted.

a. Field Preemption

A field preemption challenge against the state and local employment provisions would be based on the observation that Congress, when it passed IRCA, enacted a comprehensive scheme regulating employer hiring, thus occupying the field of employment-related immigration enforcement and leaving no room for the states to supplement the scheme.⁶⁰ IRCA is indeed comprehensive, leaving little room for state and local regulation. But a field preemption claim is nonetheless difficult to defend. IRCA's express preemption clause clearly contemplates some enforcement role for state and local governments. As noted above, that role may be limited; depending on the outcome of the express preemption analysis, state and local governments may be authorized to impose licensing-related sanctions only after a federal finding that an employer has violated the law, or they may be limited to licensing sanctions that stop short of suspension or revocation of business permits. But the existence of the express preemption clause and its savings clause indicates that Congress did not intend the total ouster of state and local authority in the context of immigration-related employment regulation. The inquiry must proceed to conflict preemption.

⁶⁰ *Cf. Hines*, 312 U.S. at 52 (1941) (observing that states do not have the power to supplement comprehensive federal regulatory schemes).

b. Conflict Preemption

The state and local regulations of employers here at issue share a common goal with IRCA: to prevent employers from hiring individuals ineligible to work in the United States under federal law. Each of the state and local measures carefully defines employment eligibility with reference to federal law. Indeed, the requirement that agencies, contractors, and employers participate in the federal E-Verify program is intended to ensure that the licensing penalties apply only to employers who have hired workers who are not eligible to work as defined by the federal government.

The pursuit of a common goal, however, does not mean that the state and local laws at issue do not conflict with federal law. If states and localities adopt implementation mechanisms that conflict with federal law, their measures are preempted by operation of the Supremacy Clause. The question becomes whether and in what sense there is conflict.

It seems clear that existing state and local laws do not run afoul of the impossibility version of conflict preemption. It is not impossible for the federal government to enforce IRCA in the presence of this state and local regulation. The fact that the state and local measures use different procedures to identify and punish violators does not create conditions of impossibility.

The closest the state and local laws come to creating impossibility is by failing to align the definition of what it means to hire an unauthorized worker with federal law. Though the state and local employment laws define unlawful status with reference to IRCA itself, an important difference between IRCA and the state and local laws here at issue is that the former has been interpreted administratively to not require employers to verify the status of casual domestic workers and independent contractors,⁶¹ whereas the latter draw no such distinctions.⁶² This discrepancy represents a direct conflict with the federal determination of whose status must be verified. To the extent that the state and local laws do not draw this distinction, they are in conflict with federal law.

The case that the state and local measures as a whole create an obstacle that impedes the federal government's enforcement of its laws is much stronger than the impossibility claim. The relevant question is what constitutes interference with implementation of IRCA? The mere fact that the state and local licensing schemes contain different features from the federal law that pursues the same objectives — preventing the hiring of unlawful workers — should not be dispositive in favor of preemption, particularly if the distinction is one without a difference. A finding of conflict preemption requires more than that the state and federal laws have different features. As the Court suggested in *De Canas*, preemption must be based on more than the fact that the laws being assessed address the same subject matter.⁶³

But there is play in the joints of obstacle preemption analysis. It is generally not difficult to define a state law that regulates in the same territory as federal law as an obstacle to the full enforcement of federal law, particularly in an area such as immigration where the federal

⁶¹ 8 C.F.R. §2741a.1(f), (h), (j).

⁶² See, e.g., ARIZ. REV. STAT. § 23-211(3).

⁶³ See *De Canas*, 424 U.S. at 357.

regulatory scheme is tremendously complex. As a result, it is not difficult, under the parameters of current law, to find that a state scheme that adopts enforcement mechanisms different from IRCA presents an obstacle to the enforcement of IRCA. Whether a court strikes down a particular state or local measure on conflict preemption grounds will depend on the degree of conflict that the court expects to see. To understand the nature of the obstacle preemption inquiry, it is helpful to consider a few instances in which state and local licensing laws diverge from IRCA.

i. Preemption and E-Verify

There is a strong case to be made that state and local laws requiring employers and contractors to participate in E-Verify are preempted. By making E-Verify voluntary, the federal government gives employers a choice about whether to participate in the program. Whether the decision, at the state and local level, to mandate E-Verify conflicts with federal law depends on what the federal government's purpose was in making E-Verify voluntary. That purpose arguably was to promote experimentation with different means of verifying workers' status without provoking the employer backlash that likely would result from making participation mandatory. The decision whether to participate in E-Verify, under this formulation, is a federally protected choice made available to advance the effective federal enforcement of IRCA — a choice a state government likely cannot take away without conflicting with federal law.⁶⁴ In addition, among the probable reasons E-Verify began as a pilot project was to ensure that the database was accurate, rather than error-prone, before universalizing its use.

This conflict claim is strongest as applied to the Arizona law, which requires all employers to participate in E-Verify, thus removing the choice whether to participate from all employers in the state. The requirement that contractors enroll before receiving grants from the state or city poses a slightly more difficult question. These requirements may be taking a choice contemplated by the federal government away from entities seeking contracts, but state and local governments are taking this action in the process of doling out grants and other monetary benefits different in kind from the license to do business. Of course, in light of the express preemption analysis above, according to which the contracting provisions amount to sanctions, the requirement that entities enroll in E-Verify to receive state contracts can be said to impose a requirement that Congress intended to be a matter of choice. The same analysis likely would not apply to requirements that city and state agencies enroll in the program, because the entity that has passed such a law has simply acted in its capacity as employer and has directed its agents or subdivision to enroll.

All of that said, the federal government does seek broad-based participation in E-Verify. In its recently filed lawsuit against the state of Illinois, the United States has emphasized that “[i]n order for the US Government to accurately evaluate the Basic Pilot Program's efficacy

⁶⁴ *Cf.* *Geier v. American Honda Motor Co.*, 529 U.S. 861, 886 (2000) (finding state tort suit preempted by Department of Transportation regulation making adoption by automakers of air bags voluntary, on the grounds that the agency sought “a gradually developing mix of alternative passive restraint devices” and that the application of state tort law, by forcing automakers into a particular choice, created an obstacle to the effectuation of the scheme).

and design, the Program must have participation from a wide range of employers in all parts of the United States.”⁶⁵ The requirement that all employers participate in E-Verify arguably furthers the federal scheme. Presumably the federal government stands by the accuracy of its database, though critics have emphasized its unreliability. As a result, it is possible that the federal government’s goals are not actually impeded by mandatory participation in E-Verify.

ii. Preemption and Enforcement Priorities

Even if federal law limits the authority of state and local governments to require participation in E-Verify, other aspects of the state laws at issue could still survive a conflict preemption challenge. State and local laws that simply prohibit the knowing hire of unauthorized workers without attaching any consequences, as well as laws that simply require employers to affirm that they have not knowingly hired unlawful workers, would not seem to present an obstacle to the enforcement of federal law. These measures simply reinforce the obligations employers already possess under IRCA without imposing any consequences on employers that might result in a discrepancy with federal enforcement priorities. In addition, state and local governments may still be able to adopt enforcement schemes that require state agencies to verify workers’ status in response to complaints, and to suspend or terminate an employer’s permit upon a proper finding that the employer has hired an unauthorized alien.⁶⁶

The strongest conflict preemption argument against the state laws that impose sanctions (namely licensing or similar sanctions) on employers who violate the law is that the enforcement priorities such laws set interfere with or upset the federal government’s effectuation of its own priorities.⁶⁷ With IRCA, Congress struck a balance between penalizing employers who hire unauthorized workers and not burdening employers unduly while protecting the rights of workers from overbroad enforcement. The federal government’s use of its discretion to prosecute some employers and not others reflects its efforts to effectuate this balance. If state and local governments are permitted to use their licensing authority against employers the federal government has not decided to prosecute, those governments arguably upset the enforcement balance the federal government has struck, particularly if the weight of the penalties the state governments apply to employers far exceeds the penalties prescribed by federal law.

A second type of conflict claim that could be advanced is that the means of verification the state and local laws set up interfere with the federal bureaucracy. If it can be demonstrated, for example, that the heightened use of E-Verify by state and local governments seeking

⁶⁵ Compl. United States v. Illinois, No. 07-3216, at ¶ 31.

⁶⁶ See *supra* notes 49-54 and accompanying text (discussing what constitutes a proper finding).

⁶⁷ Cf. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) (striking down Massachusetts law regulating corporations that conducted business in Myanmar and noting that the fact that it would be possible to comply with both state and federal regulatory schemes on the same subject does not mean that the state law does not interfere with the federal government’s determination of the “right degree of pressure to apply” on the subject). One limitation of this claim is that, if Congress has expressly authorized the sorts of state licensing sanctions in IRCA’s express preemption clause, it may be difficult to argue that imposition of the licensing sanctions interferes with federal enforcement since Congress contemplated such sanctions. In other words, the relevance of this argument may turn on the outcome of the express preemption provision. It could be argued, in response, that the comprehensiveness of the licensing sanctions, or their severity, nonetheless creates conflict with federal enforcement.

verification of workers' status compromises the ability of the federal government to maintain and use E-Verify effectively by overburdening the system, then a claim of obstacle preemption may well succeed. That is, if it can be shown through expert testimony, representations by federal officials themselves, or even by reasoned argument that the state and local schemes, by requiring all complaints to be investigated, are interfering with, or creating an obstacle to, the federal government's ability to use its own enforcement mechanisms for its own purposes, then there is a basis for finding a conflict between federal and state or local law.⁶⁸ Of course, as noted above, the federal government has an interest in broad participation in E-Verify. Ultimately, whether the breadth of participation generated by state and local E-Verify requirements is too much for the system to handle is a fact-dependent determination that requires elaboration in litigation.

It may be that the federal government would welcome states and localities supplementing their immigration enforcement capacities. And even if the federal government has decided to underenforce IRCA, as some critics charge, state and local regulations that penalize employers who knowingly hire workers ineligible for employment under federal law using licensing or similar laws (whatever that may mean) appear to be fully consistent with federal law on its face. Particularly if state authority to impose licensing sanctions is limited to instances in which the federal government has found an employer in violation of IRCA, the obstacle to federal enforcement becomes more difficult to identify.⁶⁹ But by intervening in an area in which the federal government has carefully calibrated its regulatory priorities, the state and local governments that have adopted employer sanctions schemes are arguably creating obstacles to the implementation and effective enforcement of federal law.

c. Restrictions on E-Verify Participation

The Illinois act prohibiting participation in E-Verify is also susceptible to conflict preemption. As the United States has argued, the Illinois act conflicts with the congressional decision that the E-Verify program be available as a means for employers to comply with their federal obligations to verify worker status. The Illinois law thus proscribes employers from choosing an option Congress expressly has provided should be available to them as a means of complying with IRCA.⁷⁰ Congress could have mandated participation in E-Verify (of private employers, at least), but it chose to adopt a less coercive strategy, in part to test the feasibility of E-Verify, and probably also to avoid backlash from employers.⁷¹ What is more, Illinois was designated by the federal government as one of the initial states in which to introduce the program because of the estimated high number of unauthorized immigrants living in Illinois,⁷² thus suggesting that Congress thought participation by some Illinois employers was important to implementing the program. The Illinois act thus creates an

⁶⁸ Compl. United States v. Illinois, No. 07-3261, at ¶ 31.

⁶⁹ Though, again, the severity of the state penalty could itself create a conflict with federal enforcement strategy.

⁷⁰ See H.R. Rep. 108-304(I), 108th Cong., 1st Sess., at 7 (noting that the 2003 extension and expansion of E-Verify modify federal law "to allow any employer to ch[o]ose to participate in the pilot program, regardless of what state it is located in.").

⁷¹ Cf. *Geier*, 529 U.S. at 861 (2000).

⁷² See Compl., United States v. Illinois, no. 07-3261, at ¶¶ 14-16 (noting that Congress originally required Basic Pilot to be available in five of the seven states with the highest estimated population of illegal aliens and that INS guidelines, 62 Fed. Reg. 48,309 (Sept. 15, 1997), identified Illinois as being one of five states with the highest estimated population of unauthorized immigrants and therefore solicited participation by employers in Illinois).

obstacle to the implementation of the federal E-Verify scheme, because it precludes the experimentation Congress sought in developing its pilot program.

Another way to conceptualize the conflict preemption claim is to regard the Illinois law as an attempt by the state to regulate a federal program by imposing standards of participation that differ from those of the federal government. By preventing Illinois employers from participating in the program, the Illinois statute frustrates the federal government's ability to evaluate the efficacy of E-Verify, which depends on broad participation by employers across the country, and therefore erects an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress in creating" E-Verify.⁷³ The federal government also may be concerned that other states will follow Illinois's lead, further undermining the program's efficacy. It is certainly the case that, in light of the Illinois law, if Congress wanted to secure the participation of Illinois employers, it would have to meet the standards set out in state law. This factor supports the claim that Illinois is regulating a federal program and making compliance with federal law illegal as a matter of state law.

Given that Congress has made participation in E-Verify voluntary, this claim may be rebuttable; participation by Illinois employers is not an inherent part of the federal scheme. Illinois has not made it illegal for employers to comply with federal law, because federal law does not require participation in the program. Congress, even in the absence of the state law, could not guarantee participation by employers in Illinois. That said, over 750 employers in the state currently do participate, and the Illinois law therefore compromises the efficacy of E-Verify as it is currently constituted. In addition, it is reasonable to assume that when a program designed to make the verification of status easier is made available, some employers in any given state will enroll, particularly when the federal government has targeted that state.

⁷³ See *id.* at ¶50.

d. Due Process Considerations

In addition to raising preemption issues, the employer sanction provisions, along with several of the other state and local laws discussed in this paper, raise important individual rights considerations (see Sidebar 4).

Sidebar 4. An Individual Rights Framework

The due process, equal protection, and free speech guarantees of the Constitution apply to all people, regardless of status.

The Due Process inquiry:

- Does a state or local law deprive employers, landlords, workers, or tenants of a property interest?
- Are individuals provided with notice of the charge and an opportunity to contest the charge?

The Equal Protection Inquiry:

- Does a state or local law, neutral on its face, nonetheless reflect intent to discriminate on the basis of race or ethnicity?
- Is there evidence that the law has a disparate impact on the basis of race? Of voter or official statements that could be construed as discriminatory? Is the evidence sufficient to prove intent?
- Is the law motivated purely by animus?

The Free Speech Inquiry:

- Do antisolicitation laws targeted at day laborers regulate protected speech? Of what kind: commercial speech, associational speech?
- Is the prohibition of solicitation for work a content-based regulation or a content-neutral, time, place, and manner regulation?
- If the regulation is content based, is it justified by a compelling interest?
- If the regulation is content neutral, has the state made an alternative forum for the communication, such as a worker center, available? Is that forum available to all, or is it open only to those with lawful status?

The licensing laws passed by states and localities ultimately deprive employers and workers of property interests — their permits to conduct business and their jobs, respectively. The Fourteenth Amendment prohibits states and their political subdivisions from depriving all persons, regardless of status,⁷⁴ of life, liberty, or property without due process of law, which is understood to require individuals facing deprivation of their property to be given notice and the opportunity to be heard. Because the state and local licensing laws here at issue provide minimal procedural protections before denying business owners their licenses, or workers their jobs, they are vulnerable to a due process-based challenge.

IRCA sets out a procedural scheme to protect the property interests of employers. The federal government investigates only those complaints that, “on their face, have a substantial

⁷⁴ See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

probability of validity.”⁷⁵ After the investigation, the government issues the employer a warning Notice of Intent to Fine, which must include the basis for the charges, the provisions of the law violated, and the penalty to be imposed. The notice must also inform the employer of his rights to counsel and the right to a hearing. IRCA gives employers the right to request an administrative hearing, subject to appellate review. At the hearing, the employer has the right to present evidence and cross-examine witnesses.

To comply with the requirements of due process, state and local governments need not follow the precise details of IRCA. But the gap between what federal law protects and what measures such as Hazleton’s IIRA and Arizona HB 2779 provide underscores that the state and local licensing laws do not provide adequate procedural protections for the property interests at stake.

The Hazleton IIRA, for example, does not provide employers with the opportunity to contest complaints against them, either through a hearing or in writing, before suspending the employer’s business permit. The ordinance does give the employer three days to correct a violation before suspension, and it allows for the termination of a suspension if a legal representative of the business entity submits a sworn affidavit to the city that the violation has ended. But the ordinance provides for no hearing before the initial suspension.

Arizona HB 2779 is similarly deficient. The statute does not require the issuance of a notice to the employer or employee that an investigation has been initiated. The only evidence the attorney general and county attorneys may consider in determining whether a license should be suspended or revoked is the federal government’s response to inquiries into a worker’s status pursuant to 8 U.S.C. §1373(c), which authorizes ICE to respond to a request for status verification by state and local officials. In any court proceedings related to the imposition of penalties, the only evidence that may be considered is the federal government’s determination of status. Employers have no opportunity to call witnesses or cross-examine witnesses for the government. No procedure exists under the law for employers to challenge erroneous determinations. At best, the Arizona law permits employers to submit an affidavit testifying to their compliance with the law only after a license has been suspended.

Because these state and local laws do not appear to provide employers or employees with adequate notice or opportunity to be heard before depriving them of their property interest, they very likely do not provide due process of law.

⁷⁵ 8 U.S.C. § 1324a(c)(1)(B).

II. The Regulation of Landlords

Many of the local ordinances passed between 2006 and 2007 include “harboring” provisions that prohibit landlords from knowingly renting to an unlawful alien. Such harboring provisions have been passed by Hazleton, Pennsylvania;⁷⁶ Valley Park, Missouri;⁷⁷ Farmers Branch, Texas;⁷⁸ and the state of Oklahoma, among other jurisdictions.⁷⁹ Congress has not enacted a comprehensive regulatory scheme related to housing, as it has with employment, and so the assessment of these laws will involve less intricate statutory interpretation. Whether these landlord provisions are preempted will turn, however, on the same consideration as in the employment context: whether they interfere with the federal government’s ability to enforce its immigration laws. Due process and equal protection-based claims may well also lie against these ordinances. As with the employer sanctions laws, these ordinances vary in their design, and the analysis of their legality will depend on the particular details of each ordinance.

Regardless of their legality, these provisions, of all recent state and local activity, impose the harshest human rights consequences on noncitizens because they deny individuals one of the most basic of human needs — shelter. As we will explain, the severity of these housing measures also threatens to produce social cleavages that counsel strongly against their adoption, regardless of their legality. Perhaps in recognition of these dangers, some major jurisdictions have rejected housing-oriented ordinances as means of addressing unlawful immigration. On October 10, 2007, for example, California Governor Arnold Schwarzenegger signed the first-ever state measure prohibiting cities from requiring landlords to determine whether tenants are in the country legally.⁸⁰ What is more, though the housing ordinances have attracted the national media spotlight, it is important to keep in mind that they have been passed by a relatively small number of localities.

A. The Laws’ Provisions

Under Hazleton’s harboring provision, it is unlawful for a person or business entity that owns a dwelling unit to harbor an illegal alien “knowing or in reckless disregard” of the fact that the alien is in violation of federal immigration law.⁸¹ An enforcement action commences when an official, business entity, or resident submits a written complaint to the Hazleton Code Enforcement Office.⁸² The office then verifies the alien’s status with the federal

⁷⁶ See Hazleton, Pa. Ordinance No. 2006-18; *see also* Hazleton, Pa. Ordinance No. 2006-40, *available at* http://www.aclu.org/pdfs/immigrants/hazleton_thirdordinance.pdf (amending 2006-18 by adding Implementation and Process section); Ordinance 2007-6 (amending 2006-40 during trial to remove the words “solely or primarily” from the section on complaints on the basis of national origin, ethnicity, or race).

⁷⁷ Valley Park, Mo. Ordinance No. 1715, *available at* http://www.aclu.org/pdfs/immigrants/valleypark_amendedordinance.pdf.

⁷⁸ Farmers Branch, Tx. Ordinance No. 2892, *available at* http://www.aclu.org/pdfs/immigrants/farmersbranch_ordinance.pdf.

⁷⁹ 2007 Okla. House Bill 1804, *available at* <http://webserver1.lsb.state.ok.us/WebBillStatus/main.html>.

⁸⁰ 2007 Cal. Ass. Bill 976, *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0951-1000/ab_976_bill_20071010_chaptered.pdf. *See also* Randal Archibold, *State Strikes Balance on Immigration*, N.Y. TIMES, Oct. 14, 2007, *available at* <http://www.nytimes.com/2007/10/14/us/14calif.html>.

⁸¹ Hazleton, Pa. Ordinance 2006-18 at § 5.A.

⁸² Hazleton, Pa. Ordinance at § 5.B.

government under the authority granted in 8 U.S.C. §1373(c).⁸³ If the verification reveals that the owner is in violation of the harboring provisions, and the owner fails to correct the violation within five business days of notification, the Enforcement Office shall deny or suspend the owner’s rental license. Upon a second violation, the owner shall be subject not only to suspension of his license, but also to a fine of \$250 for each separate violation.⁸⁴

B. Applying Preemption Analysis

1. Field Preemption

A field preemption claim against the landlord provisions would depend either on demonstrating that the landlord provisions are tantamount to an admissions and removal system — a field Congress clearly has occupied — or that Congress has occupied the field of interior enforcement without authorizing the regulation of landlords. The landlord provisions resemble the direct regulation of immigration in that denying immigrants abode can amount to denying them the right to be present in the country. To the extent that state and local housing regulations are intended to force immigrants out of the country, they operate like removal orders and thus intrude into a field the federal government clearly has occupied: the field of determining whom may be admitted and remain inside the United States.⁸⁵

De Canas can be read to have rejected claims of this variety. The Supreme Court upheld the California employer sanctions law, despite the fact that an extensive federal scheme of admissions, removal, and enforcement existed.⁸⁶ Since *De Canas*, the major change in federal law has been the enactment of IRCA. It could be argued that, because IRCA represents Congress’s first attempt to regulate third parties and their interactions with immigrants in a comprehensive manner by imposing affirmative duties on third parties, it reflects Congress’s intention to occupy the field of interior enforcement as it relates to the conduct of third parties. Congress determined that the appropriate means through which to regulate immigration in the interior was to reduce the primary incentive for unlawful immigration and therefore to regulate employers, not to regulate third parties such as landlords. Under this view, the landlord provisions represent a parallel or auxiliary system of interior enforcement and are therefore preempted.

⁸³ *Id.* See also 8 U.S.C.A. § 1373(c) (1996) (“Obligation to respond to inquiries: 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.”).

⁸⁴ Hazleton, Pa. Ordinance at § 5.B.(4) & 5.B.(8). Each adult illegal alien harbored on each separate day that they are harbored is considered a separate violation. *Id.* at § 5.A.(2).

⁸⁵ This field preemption claim also could be articulated in constitutional terms. *Cf.* notes 13-16 and accompanying text (discussing *Toll v. Moreno*, *De Canas v. Bica*, and the constitutional preemption of state laws that regulate the terms under which aliens lawfully admitted to the United States may reside in the United States).

⁸⁶ Federal law at the time of *De Canas* did make clear that the existing harboring provision did not apply to employers. A proviso to 8 U.S.C. 1324 made clear that “employment . . . shall not be deemed to constitute harboring.” *De Canas*, 424 U.S. at 360. But the federal enforcement scheme was still broader than the harboring provision.

This field preemption claim could be strengthened by pointing to §274 of the Immigration and Naturalization Act (INA), which establishes that it is a violation of the law to “conceal, harbor, or shield from detection” unauthorized aliens.⁸⁷ There have been scattered prosecutions of employers and landlords for harboring unlawful immigrants, but they have required knowledge of a person’s status and, in some cases, have involved individuals known to run safe houses or “havens” for unlawful immigrants.⁸⁸ Perhaps most importantly, these prosecutions have been few and far between.⁸⁹ As a result, it can be surmised that INA’s harboring provision is clearly not intended to regulate a garden variety landlord-tenant relationship.⁹⁰ Indeed, the courts of appeals opinions reviewing prosecutions under the statute do not suggest that the statute requires a landlord or potential unwitting “harborer” to actively inquire into an individual’s immigration status before providing him or her with housing. By maintaining this provision and applying it in a very small number of cases involving landlords, the federal government arguably has rejected the comprehensive regulation of landlords as a means of enforcing federal law with respect to who can and cannot enter or remain in the United States. Even if this conclusion does not justify a field preemption of the housing ordinances, it establishes that the housing ordinances are in direct conflict with the federal government’s chosen mechanisms of enforcement, a claim discussed in more detail below.

This field preemption claim has limitations. First, it is in tension with *De Canas*. Though *De Canas* was decided before Congress passed a comprehensive interior enforcement scheme, the Court in that case was very clear that a field preemption claim can only be justified by a demonstration of Congress’s “clear and manifest purpose” to work a complete ouster of state power to enact even harmonious regulation.⁹¹ States and localities in enacting the landlord provisions are exercising their police powers to regulate the terms and conditions of

⁸⁷ 8 U.S.C. §1324. Congress enacted the original antecedent to this provision in 1907 and prohibited only the smuggling or unlawful bringing of aliens into the United States. Congress amended the provision in 1917 to add the concealment or harboring of illegal aliens as a crime. In 1952, Congress incorporated this provision in the INA as § 274. Although Congress did not define the term “harbor,” the legislative history of the section indicates that its purpose was “to strengthen the law generally in preventing aliens from entering or remaining in the United States illegally.” See H. Rep. 82-1377 (1952). In debates over whether Congress should specify that the statutory prohibition applies only to those who “willfully and knowingly” conceal or harbor illegal aliens, Congress appears to have assumed that one providing shelter with knowledge of the alien’s illegal presence would violate the act. For a discussion of this history, see *United States v. Lopez*, 521 F.2d 437, 439 (2nd Cir. 1975).

⁸⁸ See *Lopez*, 521 F.2d, at 437 (upholding harboring conviction of defendant who knowingly used several homes as “havens” for illegal immigrants and concluding that merely providing shelter with knowledge of illegal presence is sufficient to constitute harboring).

⁸⁹ See, e.g., *United States v. Ramirez*, 2007 WL 2909567 (5th Cir. 2007) (unpub. slip op.) (upholding conviction in light of substantial evidence that defendant attempted to conceal unauthorized immigrants and noting that harboring statute requires knowledge or reckless disregard that aliens entered or remained in the United States in violation of the law, and a showing that defendant’s conduct tended to substantially facilitate the aliens’ remaining in the United States in violation of the law); *United States v. Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir. 1982) (circumstantial evidence sufficient to show knowledge of illegal presence); *United States v. Acosta de Evans*, 531 F.2d 428 (9th Cir. 1976) (upholding conviction of defendant who knowingly sheltered aliens unlawfully in the country).

⁹⁰ The provision of the Personal Responsibility and Work Reconciliation Act (PRWORA) that prohibits state and local governments from denying unlawful immigrants certain basic federal benefits might also be relevant to this analysis. In 8 U.S.C. § 1611(b), Congress provides a list of federal benefits, mostly related to emergencies and basic life necessities, that cannot be denied to even unlawful immigrants. Of course, the list refers specifically to federal benefits and does not list rental permits. But it also allows the attorney general to specify benefits to which unqualified aliens must have access, including in-kind services provided by public or private entities at the community level. Whether a state or local rental permit could constitute an “in-kind” benefit, it does not appear that the attorney general has included rental permits in his list of benefits.

⁹¹ *De Canas*, 424 U.S. at 347.

the landlord-tenant relationship, a routine form of state regulation.⁹² It is by no means clear that IRCA was intended to oust all state regulatory powers that might incidentally affect immigrant movement. Moreover, the federal harboring provision does not clearly intend to occupy a field that includes the landlord-tenant relationship in a way that prohibits states from enacting regulations of that relationship that might affect immigrant movement.

The second limitation of the field preemption claim is that it presumes that the intention of the landlord regulations is to remove unlawful immigrants from the country. It may well be that the landlord provisions lead some immigrants to leave the United States, but the same could be said of the California employer sanctions scheme upheld in *De Canas*. Though inability to secure an abode may be more likely to force an individual to leave the country than inability to secure employment, these differences are arguably ones of degree, not kind. What is more, immigrants who may be forced to leave cities such as Hazleton may be relocating to other parts of the United States, and the landlord provisions neither require landlords to report unlawful immigrants to ICE nor attempt formal removal of any kind.

2. Conflict Preemption

If the field preemption claim fails, the relevant question becomes whether the landlord provisions are conflict preempted, or whether they stand as an obstacle to federal superintendence of the field covered by INA.⁹³ There are at least two ways of conceptualizing the conflict.

First, as the district court found in *Lozano v. Hazleton*,⁹⁴ the landlord provisions conflict with federal law because they embody enforcement priorities that may be at odds with federal priorities. The local ordinances impose affirmative duties on landlords to inquire into potential renters' status — a requirement the federal government arguably has rejected, given the way in which it has applied its harboring provision to landlords. Moreover, the housing ordinances are based on the assumption that the federal government seeks the removal of all aliens who lack legal status, and that ““a conclusive determination by the federal government that an individual may not remain in the United States can somehow be obtained outside of a formal removal hearing.””⁹⁵ As the court points out, there are several categories of persons who are not technically lawfully present but whom the federal government allows to remain in the United States, and these persons would be denied housing under Hazleton's IIRA.⁹⁶ According to this view, the complexity of status determinations and federal immigration rules regarding removal underscore that such determinations cannot be made outside the context of a formal hearing provided by the federal government.⁹⁷ That is, the landlord

⁹² *Cf. id.* at 356-57 (“States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state. . . . These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico.”).

⁹³ *See id.* at 363.

⁹⁴ *Lozano*, 496 F.Supp.2d at 477.

⁹⁵ *Id.* at 530.

⁹⁶ As noted above, this claim also sounds in constitutional preemption to the extent that it adds burdens or conditions to the terms under which aliens (that the federal government has determined can remain in the United States) reside. *Cf.* notes 13-16, 85 and accompanying text.

⁹⁷ *Id.* at 531-32.

ordinances prevent the federal government from effectuating its enforcement priorities by leading to the removal of noncitizens the federal government does not intend to remove.

The limitation of this version of conflict preemption is that, like the field preemption claim, it is based on the assumption that the housing ordinances are tantamount to removal provisions. As noted above, the fact that noncitizens are denied housing in one community does not preclude them from resettling elsewhere in a vast country. Of course, the federal government may have an interest in preventing the proliferation of such housing ordinances, which, if adopted on a large scale, could become functional equivalents to removal orders. But the same effects and risks could be said to have flowed from the California employer sanctions provision upheld in *De Canas*. Indeed, the Court appears to have implicitly rejected this sort of analysis in *De Canas* when it cited the authority of states to address local problems in the absence of clear congressional intent to oust that authority.⁹⁸

Another way in which the landlord ordinances might present obstacles to federal enforcement efforts is if the ordinances spark the overuse of federal verification systems. It could be that large numbers of requests for status verification from state and local housing authorities could overtax the federal system, or at least distract federal authorities from efficiently pursuing the enforcement priorities set by the federal government. What is more, the federal government's status verification systems are prone to error, and state and local reliance on them could lead to the mistaken rejection of potential renters, which could lead to the self-deportation of noncitizens the federal government has no intention of removing. Of course, the same claim could be made with respect to employers' use of E-Verify, but the claim is much stronger when the good being denied is housing — the most basic of life necessities.

C. Due Process Protections

The landlord ordinances, like the employer licensing ordinances, deprive both renters and landlords of property interests,⁹⁹ in most cases with very limited process. Generally, the ordinances do not provide sufficient notice or legitimate opportunity to be heard before the denial or revocation of a rental permit. Further, the federal government's verification systems, including Systematic Alien Verification for Entitlements (SAVE) database, may not be prepared to handle such high demand. Tenants and landlords thus face the possibility of being deprived of their property based on erroneous status determinations. Finally, the landlord provisions generally provide insufficient opportunity for renters and landlords to contest determinations by the relevant housing authorities.

Whether and the extent to which a given local ordinance is deficient as a matter of process will depend on the specific details of the ordinance. But the representative examples of

⁹⁸ *De Canas*, 424 U.S. at 356. But see the claim in *dicta* in *Toll v. Moreno* that the Court based its decision in *De Canas* on congressional authorization of state regulation of employers. 458 U.S. at 13, n.18.

⁹⁹ See *Lindsey v. Normant*, 405 U.S. 56, 72 (1972) (“It cannot be disputed that tenants have a property interest in their apartments for the term of their lease.”). The claim that tenants and landlords have been deprived of a property interest is clearly more tenable with respect to existing tenants than would-be tenants.

harboring provisions that states and localities have enacted all possess process flaws. In *Lozano v. Hazleton*, for example, the district court found that the procedures established by the Hazleton ordinance were not sufficient to satisfy the requirements of due process because the ordinance did not provide any notice to a tenant subject to a challenge. The ordinance also did not specify the nature of the identity data that an owner had to consult to verify the tenant's immigration status and provided for judicial review in a court system that lacked jurisdiction to review such a claim.¹⁰⁰

D. Equal Protection Claims

Challenges to the landlord ordinances based on the Equal Protection Clause may be the most difficult to support, but the equality concerns to which these ordinances give rise are significant.

1. The Legal Argument

The housing ordinances are facially neutral, and most of the ordinances include clauses indicating that localities may not bring enforcement actions solely on the basis of national origin, ethnicity, or race. Many localities, including Hazleton, did not include such a provision in their original ordinances but have amended their laws to prevent civil rights violations from occurring and insulate themselves from equal protection scrutiny.

To establish that the laws violate the Equal Protection Clause, individuals challenging the law would have to show that the laws are animated by discriminatory purpose or intent despite their facial validity. The claim that the landlord ordinances will have a disparate impact on Latinos and other racial minorities that bear a resemblance to immigrant populations, while highly plausible, is not sufficient to make out an equal protection claim absent a finding that the ordinances were intended to have such an effect.

Establishing that the housing ordinances are motivated by discriminatory purpose or intent will be difficult. In *Lozano v. Hazleton*, the district court declined to hold that the amended ordinance violated the Equal Protection Clause. According to the court, the plaintiffs failed to provide evidence that “the ordinances, despite their facially neutral form, were motivated by a discriminatory purpose.”¹⁰¹ The court concluded that levying penalties against those who provide housing for unauthorized persons is “rationally related to the aim of limiting the social and public safety problems caused by the presence of people without legal authorization to be in the City.”¹⁰²

Demonstrating that a facially neutral law was motivated by discriminatory intent is notoriously difficult, but a case can be built based on evidence of racially disparate impact and statements made during debate and discussion over the law that reflect animus or

¹⁰⁰See *Lozano*, 496 F. Supp. 2d. at 537-38.

¹⁰¹*Id.* at 541.

¹⁰²*Id.* at 542.

hostility toward a suspect class.¹⁰³ Given its fact-dependent nature, this inquiry as applied to the harboring ordinances will differ from case to case. The state actor, in the face of evidence of discriminatory intent, still has the opportunity to show that it would have reached the same decision, even if the intent to discriminate had not been present.¹⁰⁴ But, depending on the contours of the public debate preceding a particular harboring law's passage, sufficient evidence of intent to discriminate may exist.¹⁰⁵ Even in the absence of an admission by a city official that a harboring provision is intended to target individuals on the basis of race or ethnicity, or to target immigrants generally, without regard to their lawful status,¹⁰⁶ evidence from public debates over the ordinance could be used to help prove intent to discriminate.

In late 2006, the Southern District of New York decided a case that provides an example of how discriminatory intent can be shown. The court found that the town of Mamaroneck, New York, had violated the Constitution's Equal Protection Clause by conducting an intense law enforcement campaign designed to reduce the number of day laborers in the city. The court found that the city was historically tolerant of day laborers when they were Caucasian but had become hostile to the day laborer presence once they became predominantly Latino. The court also concluded that the city had inflated the number of day laborers in the town's park, and that its claims that day laborers disrupted the quality of life were "entirely specious." The court treated as relevant negative and stigmatizing statements by city council members about day laborers, including that they were "locusts." Finally, clear evidence that the city conducted a traffic ticketing campaign enforced almost entirely against Latinos and individuals seeking to hire Latino day laborers helped confirm that the city was motivated by discriminatory intent.¹⁰⁷

2. The Impact on Race Relations

Simply demonstrating that the landlord ordinances have a disparate impact on lawful immigrants and Latinos is not sufficient to establish an Equal Protection claim. But growing

¹⁰³ *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (listing factors for court to consider when determining whether governmental decision was motivated by intent to discriminate). Other relevant factors include the historical background of the decision, the sequence of events leading up to the decision, and whether the state actor departed from normal procedures. *See id.* at 266-68.

¹⁰⁴ *See id.*

¹⁰⁵ Another equal protection argument that could be developed would be based on the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996) and would involve demonstrating that the housing ordinances are motivated exclusively by animus against unauthorized immigrants. Such a claim would not require establishing that unauthorized immigrants are a suspect class, which the Supreme Court has made clear they are not. *See Plyler*, 457 U.S. at 202. Nor would it require demonstrating that the ordinances are motivated by intent to discriminate on the basis of race or ethnicity. Instead, a *Romer*-type claim would depend on showing that none of the purported rational reasons for adopting the housing ordinances, namely preventing the crime and economic costs associated with unauthorized immigration, are sincere or established as a matter of fact. Under standard rational basis review, a state actor need not demonstrate that its reasons for adopting a law are unassailable. But, if those legitimate reasons can be shown to be demonstrably false, i.e., if proponents of the measures can point to no evidence that unauthorized immigrants cause crime to escalate or impose fiscal and economic costs on the city, then it may be possible to demonstrate that animus is the true motivation behind the laws. This sort of claim, while difficult to make, would be bolstered by record evidence of statements from ordinance supporters and public officials that attack unauthorized immigrants purely on the basis of status and not because of the harms they impose.

¹⁰⁶ *Cf. Graham v. Richardson*, 403 U.S. 365 (1971) (applying heightened scrutiny under the Equal Protection Clause to alienage classification).

¹⁰⁷ *See Doe v. Village of Mamaroneck*, 462 F. Supp.2d 520, 547-49 (S.D.N.Y. 2006).

anecdotal evidence of that very impact underscores that the immigration-related measures of the type surveyed in this paper are nonetheless in tension with the spirit of civil rights laws and threaten to poison race relations in communities across the country. The housing ordinances, in particular, have resulted in an unsettling exodus of large sections of immigrant communities in many parts of the country. The Latinos and others who are leaving these towns and states are not just the unauthorized, but also legal residents. Many of the families that have decided to leave their homes are of mixed immigration status.¹⁰⁸

In Riverside, New Jersey, for example, hundreds, if not thousands of Brazilian and Latino immigrants have left the township since the introduction of the immigration ordinance.¹⁰⁹ In Hazleton, people began moving away soon after the ordinance was passed¹¹⁰ and continued to leave even after the district court struck down the ordinance. The Archdiocese of St. Louis helped relocate more than 30 families when they fled the city after Valley Park, Missouri, enacted its own version of IIRA.¹¹¹ In Sosa, Arizona, homes went on the market soon after Governor Janet Napolitano signed Arizona HB 2779.¹¹² A senior minister of the Tabernacle of Atlanta and churches across Atlanta have reported the departure of a number of parishioner families.¹¹³ In Colorado, many lawful residents have left, fearing harassment and actions against their unauthorized relatives.¹¹⁴

Some real estate agents have attributed Latinos' and immigrants' decisions to leave their communities to feelings that they are unwelcome.¹¹⁵ In Georgia, for example, real estate agents report that Latinos are wary of making homeownership commitments in the state.¹¹⁶ In Hazleton, the charged atmosphere surrounding the ordinance's enactment in Hazleton has caused some Latinos to feel that all of them — citizens, legal immigrants, and the unauthorized — have been branded together as undesirable.¹¹⁷ In Carpentersville, Illinois, speakers at town meetings observed that the debate on an "English only" measure was less a debate on illegal immigration than a condemnation of Hispanic culture. The town's president was emphatic that the only result of the measure would be to send a message that Carpentersville was not a welcoming town.¹¹⁸ The Prince William Human Rights Commission has warned that the Virginia county's tough new policies on illegal immigration could lead to racial discrimination¹¹⁹ and concluded that the county has been fractured by the local debate in ways not seen since the 1950s.¹²⁰

¹⁰⁸ Stephen Deere, *Archdiocese Helps Families Flee Valley Park Over Immigration Law*, ST. LOUIS DISPATCH, Aug. 17, 2007.

¹⁰⁹ Ken Belson & Jill Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, available at <http://www.nytimes.com/2007/09/26/nyregion/26riverside.html>. Stores that catered to these populations have seen their revenues decline by up to 50 percent. Some businesses have laid off most of their employees, and several have closed. Riverside's many streets now have a deserted look.

¹¹⁰ Emily Bazar, *Illegal Immigrants Moving Out*, USA TODAY, Sept. 26, 2007.

¹¹¹ Deere, *supra* note 108.

¹¹² See Bazar, *supra* note 110.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ Alex Kotlowitz, *Our Town*, N.Y. TIMES MAG., Aug. 5, 2007.

¹¹⁶ Nicholas Riccardi, *Immigration Hard-Liners on a High*, L.A. TIMES, July 12, 2006.

¹¹⁷ Testimony of Jose Molina, *Lozano v. Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06cv 1586) at 2: 44 (March 13, 2007).

¹¹⁸ See Kotlowitz, *supra* note 115.

¹¹⁹ Nick Miroff, *Rights Panel Decries Pr. William County Immigration Laws*, WASH. POST, Oct. 2, 2007, at B1.

¹²⁰ Nick Miroff, *Citing Costs, Prince William County Delays Immigrant Measures*, WASH. POST, Oct. 3, 2007, at A1.

At least one community has rescinded its illegal immigration measure in the face of developments like these. Soon after the *Lozano v. Hazleton* decision came down, Riverside, New Jersey, withdrew its ordinance.¹²¹ In the long run, it may be that the most serious cost of these measures will be their rending of the social fabric of the communities that have adopted them. As the mayor of Riverside has suggested, it may take years to overcome the emotional impact of the ordinance that “put us on the national map in a bad way.”¹²²

E. State Law Claims

Some of these local housing ordinances may conflict with state landlord tenant law. In March 2007, a Missouri state judge struck down the housing ordinance passed in Valley Park, Missouri, on state law grounds. The court found that the ordinance was preempted by state law, because Valley Park had exceeded its power as a fourth-class city in passing it.¹²³ Missouri state law only authorizes a fourth-class city to impose fines of less than \$500 or 90 days imprisonment. But under the first harboring provision passed by Valley Park, a violator could be penalized with a fine of not less than \$500 and the loss of a business permit. In the second incarnation of the ordinance, the harboring provision authorized the town to impose penalties for violations not authorized by state law, such as suspending existing occupancy provisions and prohibiting the collection of rent. Further, state landlord-tenant law requires an owner who plans to evict a tenant to give at least one month notice prior to eviction, and, if the owner removes a tenant without judicial process, he is deemed guilty of forcible entry.

¹²¹ See Belson & Capuzzo, *supra* note 109.

¹²² *Id.*

¹²³ Reynolds v. City of Valley Park, No. 06-CC-3802, ¶¶ 10–11 (Cir. Ct. Mo. Mar. 12, 2007).

III. The Enforcement of Federal Immigration Law by State and Local Police

Though the federal government is chiefly responsible for enforcing its immigration laws, state and local governments increasingly are taking positions on whether their police forces should engage in immigration enforcement. Some state and local governments have entered or are seeking to enter cooperative agreements with the federal government that would enable their police forces to enforce federal immigration law directly. A number of jurisdictions also have passed laws requiring police to inquire into the immigration status of individuals arrested or detained for serious crimes. At the same time, several associations of chiefs of police warn that becoming involved in immigration enforcement compromises law enforcement generally. Some jurisdictions have eschewed cooperation and passed measures that would restrain the authority of public officials, including police, to inquire into immigration status. These positions all raise constitutional and statutory preemption questions (see Sidebar 5).

A. Direct Enforcement

The threshold question in the law enforcement context is whether states possess the constitutional authority to authorize state and local police to make arrests for violations of federal immigration law. Courts have not spoken at length or with much clarity on this issue. In 1983, the Ninth Circuit concluded that Congress has not occupied the field of *criminal* immigration enforcement but that the *civil* provisions of federal immigration law constitute a pervasive regulatory scheme that field preempts state and local civil arrest authority.¹²⁴ In 1996, Congress enacted major immigration reforms, including a provision that authorizes state and local governments to participate in the enforcement of immigration law under federal supervision. Since those reforms, the Ninth and Third Circuits have declared the scope of state and local authority uncertain.¹²⁵

¹²⁴ See *Gonzales v. City of Peoria*, 722 F. 2d 468, 474-75 (9th Cir. 1983); see also *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984) (finding criminal arrest authority). See also INT'L ASS'N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 13 (July 2007) ("There is no general agreement as to whether state and local law enforcement officers have the authority to make arrests for federal civil offenses related to the Immigration and Naturalization Act.")

¹²⁵ See *Mena v. City of Simi Valley*, 332 F.3d 1255, 1265 n.15 (9th Cir. 2003); *Carrasca v. Pomeroy*, 313 F.3d 828, 827 (3d Cir. 2002).

Sidebar 5. Law Enforcement

Whether state and local police have inherent authority to perform immigration-related arrests, Congress has spoken:

1. The scope of civil enforcement is defined by INA § 287(g), authorizing states and localities, pursuant to an agreement with DHS, to:
 - designate officers to receive training and perform immigration functions
 - detain individuals for immigration violations
 - investigate immigration cases

All under federal supervision

2. Criminal enforcement authority is specified in:
 - INA § 274, authorizing police to enforce the prohibition of smuggling and trafficking
 - INA § 276, authorizing police to enforce the prohibition on illegal reentry following removal

State and local police may inquire into an individual's immigration status if

1. The inquiry is ancillary or incidental to the performance of ordinary law enforcement duties
2. Custodial questioning does not extend the duration of detention beyond what is necessary for criminal law enforcement purposes

If states and localities seek to limit enforcement, the relevant questions are

1. Does the state or locality prohibit its officers from reporting immigration status to the federal government?
2. Does the state or locality have a general confidentiality policy?

In 2002, the Office of Legal Counsel (OLC) of the Department of Justice (DOJ) issued an opinion concluding that state and local police *do* have inherent authority to enforce both the criminal and civil immigration laws and therefore need not wait for delegated authority from the federal government to participate in enforcement.¹²⁶ OLC based this conclusion on the states' status as "sovereign entities,"¹²⁷ the assumption that state police have authority to make arrests for general federal criminal violations,¹²⁸ and the conclusion that it would be irrational for the federal government to deprive itself of assistance from the states.¹²⁹ In coming to this conclusion, OLC contradicted three previous OLC memos finding the absence of inherent authority. Claims of inherent authority, like the 2002 OLC memo, remain controversial today.

This constitutional confusion aside, most enforcement-related controversies can be resolved on statutory grounds. Whether the Constitution confers inherent authority on state and local police to make immigration-related arrests, Congress almost certainly has impliedly

¹²⁶ See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Attorney General John Ashcroft (Apr. 2, 2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>.

¹²⁷ *Id.* at 2.

¹²⁸ *Id.* at 3.

¹²⁹ *Id.* at 8.

preempted state and local authority to make both criminal and civil arrests. The federal government clearly has contemplated and expressly and narrowly defined the terms under which state and local police can participate in enforcement.

In 1996, Congress added § 287(g) to INA,¹³⁰ authorizing states and localities to enter into agreements with the federal government that would give local and state officials authority to arrest and detain individuals for immigration violations and to investigate immigration cases.¹³¹ The states and localities that enter into the § 287(g) agreements may designate officers to receive training and supervision by ICE. By enacting § 287(g), Congress clearly sought to superintend state and local enforcement of federal immigration law. In other words, state and local authority to enforce immigration law must be preceded by federal authorization and accompanied by federal supervision.¹³² A number of state and local governments have enacted laws directing state and local police to enter into § 287(g) agreements with the Department of Homeland Security (DHS).

Though state and local police are generally thought to have the authority to enforce federal criminal laws, in the immigration context, strong statutory evidence exists that Congress intended to circumscribe this authority. Congress explicitly has authorized state and local police to arrest violators of two criminal immigration provisions: §274 of INA, which prohibits the smuggling, transporting, or harboring of illegal immigrants,¹³³ and § 276, which establishes criminal penalties for illegal reentry following removal.¹³⁴ Section 274 authorizes ICE and “all other officers whose duty it is to enforce the criminal laws” to make arrests for violations of § 274,¹³⁵ and § 276 provides that “state and local law enforcement officials are authorized to arrest and detain” aliens in violation of § 276.¹³⁶ The specific grants of authority to state and local police in these provisions suggest that Congress understood all other forms of criminal immigration enforcement to be off-limits to nonfederal law enforcement.

Given these statutory provisions, then, state and local measures that purport to authorize police to enforce federal immigration law without federal authorization or supervision are likely preempted. Any attempts at immigration enforcement that are not ancillary to regular law enforcement (as discussed below) or otherwise expressly authorized by federal law have been preempted based on Congress’s determination that the federal government should supervise state participation in this area. Not surprisingly, no state or locality appears to have

¹³⁰ 8 U.S.C. § 1357(g). According to information publicly available, ICE has entered into 287(g) agreements with at least 13 jurisdictions: the Alabama Department of Public Safety/State Police, the Arizona Department of Corrections, the Florida Department of Law Enforcement, and the counties of Maricopa, Arizona; Los Angeles, Orange, Riverside, and San Bernardino, California; Cobb, Georgia; Alamance, Gaston, and Mecklenberg, North Carolina; and Davidson, Tennessee. US Immigration and Customs Enforcement, Delegation of Immigration Authority: Section 287(g) Immigration and Nationality Act, <http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogover.htm> (last visited Oct. 20, 2007).

¹³¹ 8 U.S.C. § 1357(g) (2000). There is a considerable literature on the wisdom of entering into these agreements. See, e.g., Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

¹³² The claim that Congress has preempted state and local enforcement authority is strengthened by the existence of §103(a)(8) of INA, which gives the attorney general emergency powers to authorize “any State or local law enforcement officer” to enforce federal immigration law in response to “an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border.” 8 U.S.C. § 1103 (a)(8) (2000).

¹³³ 8 U.S.C. §1324a(a)(1)(A)(i) to (iii) (2000).

¹³⁴ 8 U.S.C. §1252c(a)(2000).

¹³⁵ 8 U.S.C. §1324(c).

¹³⁶ *Id.*

passed such a measure, though bills purporting to give state and local law enforcement arrest authority outside the confines of a 287(g) agreement have been introduced in Arizona.¹³⁷

Though Congress has provided a channel for state and local government to participate in immigration enforcement, federal law does not require participation. Indeed, any such mandate likely would constitute commandeering of state executive officials, which the Supreme Court declared in *United States v. Printz*¹³⁸ to be a violation of the principles of federalism embodied in the Tenth Amendment. Some state and local governments have eschewed cooperation altogether by prohibiting the disclosure of immigration status information.¹³⁹ Whether state and local governments can take this step remains a source of debate, and some state legislatures have sought to preempt localities from passing these so-called noncooperation laws.

In 1996, Congress addressed the noncooperation phenomenon by adopting two provisions that prohibited state and local governments from preventing their employees from voluntarily conveying information regarding an individual's immigration status to federal authorities.¹⁴⁰ In the last year, numerous states have contemplated adopting similar laws to restrain their localities from prohibiting disclosure of immigration status information.¹⁴¹ In the mid-1990s, the City of New York challenged the congressional provisions, arguing that the measures interfered with its authority to direct the operations of its own officials and thus constituted unconstitutional commandeering¹⁴² — a claim unavailable to a locality seeking to challenge a state law prohibiting noncooperation, given that localities lack the independent constitutional status possessed by states. The Second Circuit rejected New York City's challenge to the 1996 laws, but suggested that, were the City to adopt a general confidentiality policy (the policy Mayor Michael Bloomberg eventually adopted), the city might be able to substantiate its claim that federal preemption amounts to an unconstitutional intrusion on the city's power to regulate the duties of its officials.¹⁴³

¹³⁷ 2006 Ariz. Senate Bill No. 1157 (criminalizing unlawful entry into the state); 2006 Ariz. House Bill No. 2582 (authorizing officers to "investigate, apprehend, detain or remove aliens").

¹³⁸ 521 U.S. 898 (1997); *see also* *Reno v. Condon*, 528 U.S. 141 (2000) (upholding a federal law that prohibited states from disclosing personal information of drivers license applicants because the law did not require state officials to help enforce federal laws).

¹³⁹ For an in-depth discussion of these measures, *see* Rodríguez, *supra* note 12.

¹⁴⁰ Section 434 of the Welfare Reform Act, 8 U.S.C. § 1644 (2000), provides that "[N]o State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States," and § 642 of the Illegal Immigration Reform and Immigrant Responsibility Act, 8 U.S.C. § 1373, provides that governments may not prevent their employees from "[e]xchanging such information with any other Federal, State, or local government entity."

¹⁴¹ *See, e.g.*, 2006 Colo. Senate Bill No. 90, § 1 (prohibiting state or local government from enacting legislation that impedes cooperation with federal officials); 2006 Ohio Senate Bill No. 9; 2006 Minn. Senate File No. 2771; 2001 N.Y. Senate Bill No. 2716 (prohibiting state and local governments from impeding law enforcement cooperation with federal authorities); *see also* 2006 Ind. House Bill No. 1383; Ariz. Proposition 200 (2004) (requiring enforcement officers to report suspected immigration law violations to the federal government); 2006 Ga. Senate Bill No. 529; 2006 N.M. House Bill No. 855; 2005 Ariz. House Bill No. 2386 (declaring that the police shall (or may) cooperate with DHS or ICE to enforce immigration laws).

¹⁴² *See* *City of New York v. United States*, 971 F. Supp. 789 (S.D.N.Y. 1997) (holding that federal statute was not a violation of Supreme Court's commandeering doctrine because it did not require city officials to provide information to federal government), *aff'd*, 179 F.3d 29 (2d Cir. 1999).

¹⁴³ *See* *City of New York v. United States*, 179 F.3d 29, 36 (1999).

B. Enforcement Ancillary to Routine Policing

The most common law enforcement provisions to address state and local authority directly are those measures that require law enforcement to question individuals arrested and detained for driving under the influence offenses, felonies, and/or particularly serious crimes. Pursuant to measures enacted by jurisdictions such as Georgia, Oklahoma, and Prince William County, Virginia, if an arrestee is determined upon questioning (in some cases conducted only if police have probable cause to believe the individual is unlawfully present) to be a foreign national, police are directed to consult DHS to determine if the individual is lawfully present in the United States. If not, police are instructed to report the individual to ICE.¹⁴⁴ Under Colorado's recently passed law,¹⁴⁵ and pursuant to an executive order recently issued by the attorney general of New Jersey, if police have probable cause to believe an individual arrested on other grounds is present unlawfully, the law directs police to report the arrestee to ICE.¹⁴⁶

These measures, though they raise serious policy concerns, are not susceptible to legal challenge on their face and are reflective of standard practice. For the reasons cited above, state and local police have virtually no authority to stop, arrest, or detain an individual solely for immigration-related reasons. State and local police may, however, inquire into an individual's immigration status if the inquiry is ancillary to the performance of ordinary law enforcement duties. If the inquiry is conducted while a suspect is in custody, which is the case with most if not all of the laws that have passed, the questioning cannot extend the duration of the detention beyond what is necessary for criminal law enforcement purposes — a specification that most states and localities have written into their measures. As with any police questioning, individuals have the right to refuse to answer police questions, and those in custody have the right to request an attorney.

If, during an otherwise lawful investigatory stop or detention, state and local police uncover information regarding a removal order against or the unauthorized status of the person in

¹⁴⁴ The language of the Georgia Security and Immigration Compliance Act is as follows:

(a) When any person charged with a felony or with driving under the influence . . . is confined, for any period . . . a reasonable effort shall be made to determine the nationality of the person so confined.

(b) If the prisoner is a foreign national, the keeper of the jail . . . shall make a reasonable effort to verify that the prisoner has been lawfully admitted to the United States. . . . through a query to the Law Enforcement Support Center (LSEC) of the United States Department of Homeland Security If the prisoner is determined not to be lawfully admitted to the United States, the keeper of the jail or other officer shall notify the United States Department of Homeland Security.

2006 Senate Bill No. 529 § 5(a)-(b); *see also* 2007 Okla. House Bill No. 1804 § 5 (requiring that police make a “reasonable effort” to determine the status of persons in custody charged with driving under the influence or with a felony); Res. Offered by Supervisor John T. Stirrup (Prince William County, Va. June 26, 2007) (text on file with authors) (“County Police Officers shall inquire into the citizenship or immigration status of any person detained for a violation of a state law or municipal ordinance . . . the Police Department shall verify whether of [sic] not the person is lawfully present in the United States . . .”).

¹⁴⁵ 2006 Colo. Senate Bill No. 90, § 1 (requiring officers to report suspected unlawful immigrants to ICE).

¹⁴⁶ *See* Attorney General Law Enforcement Directive No. 2007-3 (N.J. 2007), *available at* <http://www.nj.gov/oag/newsreleases07/pr20070822a.html>.

their custody, police may (and routinely do) inform ICE. In general, state and local police cannot detain an individual for civil immigration purposes longer than the time appropriate or necessary for the original criminal arrest, traffic stop, or other nonimmigration law enforcement purpose.¹⁴⁷ Federal authorities may place a detainer on a suspect, asking state officials to keep the suspect in custody pending a determination of his or her status. Whether ICE may authorize state and local police to detain an individual for immigration purposes beyond the time necessary for the original law enforcement purpose that brought the individual into state or local custody remains unresolved. Such detention could be unlawful on the ground that it utilizes a civil, administrative justification to prolong detention precipitated by criminal law enforcement.¹⁴⁸

It might be possible to mount an obstacle preemption claim against the questioning statutes, depending on what follows from police officers' attempts at verification. As with the employer sanctions provision, if the state and local requests for status verification overtax the system by which these determinations are made or result in a high error rate,¹⁴⁹ thus compromising efficient and effective enforcement of immigration law, then a conflict preemption argument could be made.

More likely, legal challenges to these measures will have to proceed on an as-applied basis, citing particular instances of police violating the civil or constitutional rights of arrestees. Legal challenges may also be viable against policies of this sort adopted by local governments if the local government has exceeded the authority granted to it by the state. These challenges necessarily will depend on the details of state law.

C. The Risk of State and Local Immigration Enforcement

The limits of the legal channels aside, strong policy arguments in opposition to overzealous use of this questioning authority, as well as to the § 287(g) agreements, have been expressed by immigrant advocates and law enforcement officials alike. The arguments are familiar and compelling. In its guide to police chiefs on immigration issues, the International Association of Chiefs of Police emphasizes that effective law enforcement depends on building trust in immigrant communities, where suspicion of police is often present as the result of immigrants' experience with corrupt and violent law enforcement in their home countries.¹⁵⁰ Lack of trust leads to underreporting of crimes, particularly domestic violence, sexual assault, and gang-related crimes. As the Immigration Committee of the Major Cities Chiefs (MCC) has cautioned, immigration enforcement by local police “would likely negatively effect and undermine the level of trust and cooperation between local police and

¹⁴⁷ *See* *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 991 F. Supp. 895 (N.D. Ohio 1997).

¹⁴⁸ *Cf.* *Abel v. United States*, 362 U.S. 217, 230 (1960) (noting in dicta that it would be impermissible for an administrative warrant on a deportation matter to be used as an “instrument of criminal law enforcement to circumvent the latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding).

¹⁴⁹ *Cf.* Hannah Gladstein, Annie Lai, Jennifer Wagner, & Michael Wishnie, *Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using the National Crime Information Center Database, 2002-2004* (Migration Policy Institute 2005) (documenting the high numbers of false positives related to removal orders entered into the National Crime Information Center (NCIC) law enforcement database).

¹⁵⁰ Police Chiefs Guide to Immigration Issues, *supra* note 124, at 21.

immigrant communities,” thus leading immigrants to avoid contact with police for fear that they or their family members might be deported.¹⁵¹

MCC also has emphasized that police are ill-equipped to deal with the complexity of immigration law. In a world of limited resources, immigration enforcement is likely to be too great a fiscal burden to justify extensive state and local involvement.¹⁵² In addition, the potential for racial profiling and violating the civil rights of Latinos and other minority groups is high and pernicious when state and local police become involved in immigration enforcement. Many of these claims have been echoed by local chiefs of police, including the chief of police of Prince William County in a letter to the Board of County Supervisors in July 2007.¹⁵³

Notably, the New Jersey executive order calling for police to question suspects in custody about their immigration status also explicitly restricts law enforcement from inquiring into or investigating the immigration status of any victim, witness, or person requesting assistance from the police.¹⁵⁴ The order recognizes that “the overriding mission of law enforcement” is to “enforce the state’s criminal laws and to protect the community that they serve,” which “requires the cooperation of, and positive relationships with, all members of the community.” According to the attorney general of New Jersey, “public safety suffers if individuals believe that they cannot come forward to report a crime or cooperate with law enforcement.”¹⁵⁵ Whether legal or not, then, state and local participation in immigration enforcement raises serious policy concerns that should give state and local public officials pause.¹⁵⁶

IV. Local Antisolicitation Ordinances

For at least a decade, localities across the country have attempted to address the rising numbers of day laborers who gather on street corners and in Home Depot parking lots seeking work, primarily in construction and landscaping. Day laborers are prevalent in cities, but their presence has become a hot-button political issue primarily in some suburbs and small towns.

¹⁵¹ MCC Immigration Committee, *Recommendations for Enforcement of Immigration Laws by Local Police Agencies*, at 5-6 (2006); see also Tim McGlone, *Immigration Panel Shies from Push for Police to Make Arrests*, THE VIRGINIAN-PILOT, Sept. 27, 2007 (noting that the Virginia Illegal Immigrant Task Force warned Prince William County, Virginia, of the danger of alienating immigrant communities).

¹⁵² *Id.* at 6-7.

¹⁵³ Letter from Charlie T. Deane, Chief of Police, Prince William County, Va. to Craig S. Gerhart, County Executive 3 (July 10, 2007) (noting that police resources should be focused on “crime control and public safety” and that the county has limited detention facilities) (on file with authors).

¹⁵⁴ Directive No. 2007-3 at 4.

¹⁵⁵ *Id.* at 1.

¹⁵⁶ For a thorough assessment of the pros and cons of state and local participation in enforcement, see Lisa M. Seghetti, Stephen R. Vina, & Karma Ester, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, CONGRESSIONAL RESEARCH SERVICE REPORT (Aug. 14, 2006).

Whereas many local communities have responded to the expansion of the day labor phenomenon by opening worker centers or hiring halls,¹⁵⁷ other communities are subjecting day laborers to hostile action. As noted in Part II, the Southern District of New York found that racially discriminatory intent motivated the town's enforcement campaign against day laborers who used a public park, given the sorts of statement town residents made during the debate over how to crack down on the day laborers.¹⁵⁸ Local government officials also sometimes fine and arrest day laborers, and community activists sometime report day laborers and those who hire them to ICE or the Internal Revenue Service (IRS). Researchers have documented a generally hostile climate toward day laborers, marked by physical assaults, robberies, and threats by merchants and strangers.¹⁵⁹

Among the measures favored by localities seeking to crack down on day laborers is the antisolicitation ordinance, which essentially prohibits individuals from congregating on public streets to solicit work. In 2004, the city of Glendale, California, passed an ordinance providing that “no person shall stand” on any public street or roadway and “solicit or attempt to solicit, employment, business contracts or contributions of money or property from the occupant of any vehicle.”¹⁶⁰ In 2005, Herndon, Virginia, passed an even more targeted ordinance making it unlawful for “any person, while occupying as a pedestrian any portion of a highway, sidewalk, driveway, parking area, or alley to solicit or attempt to solicit employment.”¹⁶¹ At least three federal district courts have struck down antisolicitation laws on First Amendment grounds.

There exists substantial justification for treating the solicitation of work by day laborers congregated on street corners and in parking lots as speech protected by the First Amendment. First, the solicitation arguably amounts to associational speech. Street corners are primary meeting places where day laborers make friends, acquire tips about jobs, decide how to set their wages, and connect with other laborers and potential employers.¹⁶² Second, the congregation of day laborers amounts to expressive conduct “sufficiently imbued with elements of communication”¹⁶³ to receive First Amendment protection. Job seekers who announce or hold up signs advertising their availability are clearly engaging in speech. Even those day laborers who use hand gestures or simply make themselves visible to the public

¹⁵⁷ According to one estimate, as of January 2006, approximately 63 formal day labor worker centers existed in the United States. See Abel Valenzuela, Jr., *Working on the Margins: Immigrant Day Labor Characteristics and Prospects for Employment* 7 (Ctr. for Comparative Immigration Studies, Univ. Cal., San Diego, Working Paper Nov. 22, 2000).

¹⁵⁸ *Doe v. Village of Mamaroneck*, 462 F. Supp. 2d 520 (S.D.N.Y. 2006).

¹⁵⁹ Gregory M. Maney, Elizabeth Campisi, Nadia Marin Molina & Carlos Canales, *Protecting Human Rights in a Global Economy: The Impact of Government Responses to Day Labor Markets* 14 (Ctr. for Study of Labor & Democracy, Hofstra Univ., Working Paper No. 11, 2006).

¹⁶⁰ See Glendale, Ca. Mun. Code at § 9.17.030 (2004).

¹⁶¹ Sec Herndon, Va. Mun. Code at § 42-136 (2005). The remainder of the ordinance prohibits solicitation by “any person occupying or traveling in any vehicle, or who temporarily exits a vehicle” of “employment from a person who is a pedestrian on a highway, sidewalk, driveway, parking area, or alley,” and declares that a person who violated the ordinance is guilty of a class 2 misdemeanor.

¹⁶² Gabriela Garcia Kornzweig, *Commercial Speech in the Street: Regulation of Day Labor Solicitation*, 9 S. CAL. INTERDISC. L. J. 499, 499 (200). Restrictions on this form of speech receive strict scrutiny, regardless of the beliefs sought to be advanced through the association. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958) (“it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny”).

¹⁶³ *Spence v. Washington*, 418 U.S. 405, 409 (1974) (holding that the display of an upside-down American flag with a peace symbol affixed classified as speech protected under the First Amendment because there was an intent to convey a particularized message and the surrounding circumstances made it likely that the message would be understood by those who viewed it — the factors that must be satisfied to determine that conduct qualifies as speech).

early in the morning, dressed for manual labor, and in a particular area — generally near a home repair or construction site — engage in expressive conduct. Day laborers soliciting work intend to convey the particularized message that they will work for a negotiated wage,¹⁶⁴ and passersby looking to hire them understand that they have gathered to solicit work — an assumption difficult to deny given the context in which it is made, or given the rise of the day labor phenomenon in the United States today.¹⁶⁵

Assuming that the solicitation of work by day laborers constitutes protected speech, the question becomes whether local governments may regulate or prohibit the speech. The First Amendment analysis of the regulation depends on whether it is content based or content neutral. A regulation is content based if it distinguishes between favored speech and disfavored speech on the basis of the ideas or views expressed,¹⁶⁶ or prohibits public discussion on an entire topic and with reference to the content of the topic.¹⁶⁷ Such content-based regulation is presumptively invalid under the First Amendment because it raises “the specter that the government may drive certain ideas or viewpoints from the marketplace.”¹⁶⁸ By contrast, content-neutral regulations confer benefits or impose burdens without reference to ideas or views expressed.¹⁶⁹ Even if such regulations have an incidental effect on some speakers but not others,¹⁷⁰ they are evaluated under intermediate scrutiny¹⁷¹ because they simply regulate the time, place, and manner of speech.

The Herndon, Virginia, ordinance specifically targets the solicitation of employment on public streets, as opposed to solicitation generally, and therefore amounts to content-based regulation that must be defended by a compelling state interest¹⁷² — an interest that must be

¹⁶⁴ Kornzweig, *supra* note 162, at 505.

¹⁶⁵ Even if the solicitation of work does not amount to associational speech or expressive conduct, it is clearly commercial speech because it proposes a commercial transaction. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S., at 748 762 & *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973) (“the core notion of commercial speech [is] ‘speech which does ‘no more than propose a commercial transaction.’”). *See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (defining commercial speech more broadly as “expression related solely to the economic interests of the speaker and its audience.”). Day labor solicitation is an advertisement (that the worker will work for a negotiated wage); it refers to a specific product (the labor that the worker will perform); and the speaker has an economic motivation (to receive payment for his work). *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983). While the Court has not extended strict scrutiny to commercial speech, Court doctrine does require courts to give commercial speech a heightened form of protection under the First Amendment that resembles strict scrutiny. *See Central Hudson*, 447 U.S. at 563–64 (1980) (requiring that a regulation of commercial speech seek to implement a substantial government interest; directly advance the government interest; and be the most limited restriction on commercial speech). Note that some justices believe “there is no philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial speech,’” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Thomas, J., concurring).

¹⁶⁶ *Turner Broadcasting System v. F.C.C.*, 512 U.S. 622, 643 (1994).

¹⁶⁷ *See, e.g., State v. Petersilie*, 334 N.C. 169, 183 (1993).

¹⁶⁸ *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372, 2381 (U.S. 2007) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991)).

¹⁶⁹ *Turner*, 512 U.S. at 643.

¹⁷⁰ *See, e.g., Goldrush II v. City of Marietta*, 267 Ga. 683, 690 (1997).

¹⁷¹ *See, e.g., Phillips v. Borough of Keyport*, 107 F.3d 164, 172 (3d Cir. 1997).

¹⁷² *Cf. Hill v. Colorado*, 530 U.S. 703, 708 (2000) (upholding as content neutral a law that prohibits approaching within eight feet of people seeking access to a health clinic for the purposes of leafleting or distributing signs, or engaging in oral protest, education, or counseling, without regard for the content of the communication). Whereas the law at issue in *Hill* regulated all leaflets and communication without reference to their content, ordinances such as Herndon’s prohibit only the solicitation of employment. It is also worth noting that the Court’s holding that the Colorado law in *Hill* was content neutral occasioned vociferous dissent. In his dissent, Justice Scalia writes: “This Colorado law is no more targeted at used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries than French vagrancy law was targeted at the rich. We know what the Colorado legislators, by their careful selection of content . . . were taking aim at, for they set

of greater significance than the ordinary public health and safety justifications that support content-neutral time, place, and manner regulation. The Glendale ordinance is more difficult to characterize as content-based, because it prohibits solicitation not just of employment, but of contributions of property of any kind.¹⁷³ On its face, then, the Glendale ordinance hews more closely to its stated aim of reducing traffic congestion because of its general applicability. In other words, the case that it constitutes a time, place, and manner regulation is stronger.

To date, all of the courts that have considered challenges to local antisolicitation ordinances have treated them as content neutral. Though some of these courts, namely the Fairfax County Court, may have erred in not treating the ordinances as content based, the courts have struck down the ordinances nonetheless. The courts have found, on the one hand, that the localities' primary purpose in passing them is not to suppress the speech of solicitation, but to alleviate the secondary effects of the speech, namely the disruptions caused by day labor solicitation to traffic flow, driver and pedestrian safety, and general quality of life.¹⁷⁴ But, on the other hand, the courts have made clear that to limit the time, place, and manner of content-neutral speech in a public forum, the government must leave open ample alternative channels for the speech.¹⁷⁵ It is on this prong that the court has struck down the antisolicitation ordinances.

In each instance in which an antisolicitation ordinance has been challenged, a district court has enjoined implementation of the ordinance on First Amendment grounds, because of the local government's failure to provide an alternative avenue for individuals to solicit work.¹⁷⁶ The Fairfax County court that struck down the Herndon antisolicitation ordinance found that the antisolicitation law was narrowly tailored to serve a significant community interest, but enjoined its implementation on the ground that the hiring site adopted by the town was not an adequate alternative forum for communication because of its temporary nature. Similarly, the court that enjoined the Redondo Beach, California, ordinance concluded that permitting workers to congregate in private parking lots did not provide an adequate alternative channel for communication.

The story of day labor in Herndon highlights the legal and political difficulties presented by the day labor phenomenon. In December 2005, the City Council of Herndon opened a publicly funded day labor hiring site, which functioned well for several months. In May 2006, however, voters ousted the city officials who advocated opening the center.¹⁷⁷ In August 2007, the city delivered the one-two punch to day laborers ultimately declared unconstitutional by the Fairfax County court. The council first dismissed the nonprofit entity

it forth in the statute itself: the 'right to protest or counsel against certain medical procedures' on the sidewalks and streets surrounding health care facilities." *See* Hill, 530 U.S., at 744 (Scalia, J. dissenting). Similarly, there is little doubt that even the generally worded antisolicitation ordinances passed by localities are targeted specifically at day laborers.

¹⁷³ *See* Glendale, Ca. Mun. Code at § 9.17.030(B)(2004).

¹⁷⁴ *See* Town of Herndon v. Thomas, MI-2007-644 (Va. Cir. Ct. Aug. 29, 2007); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952, 962 (C.D. Cal. 2006); *Comite de Jornaleros de Glendale v. City of Glendale*, No. CV 04-3521-SJO (C.D. Cal. May 16, 2005).

¹⁷⁵ *See, e.g.*, *Acorn v. Phoenix*, 798 F.2d 1260, 1267 (9th Cir. 1986); *cf. Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

¹⁷⁶ *See* Town of Herndon v. Thomas, MI-2007-644 (Va. Cir. Ct. Aug. 29, 2007).

¹⁷⁷ Karin Brulliard, *Herndon Day Labor Center Declares Its First Year a Success*, WASH. POST, Feb. 25, 2007, at T5.

that had been operating the center,¹⁷⁸ seeking to transfer control over the site to a private employment company that would be required to check the documentation of workers, thus effectively excluding unauthorized workers from the site. The council then passed the antisolicitation ordinance, ensuring that unauthorized immigrants had no public space in which to solicit work.

On September 14, 2007, the city closed the center, unable to find a company to perform document checks. It preferred closing the site to complying with the Fairfax County court's order requiring that the center be open to all workers to prevent a First Amendment violation.¹⁷⁹ Herndon officials elected not to appeal the court's decision, citing the costs of protracted litigation.¹⁸⁰ Other cities have responded similarly to litigation losses. On August 16, 2007, for example, the town of Baldwin Park, California, unanimously repealed its antisolicitation ordinance.¹⁸¹ When it comes to the day labor phenomenon, then, many localities find themselves back at square one, without a solution to an arguable public health and safety issue, because of their refusal to address the issue in a constitutional manner.

V. Public Benefits

Laws restricting immigrant access to public benefits have been in place since the founding of the republic. California attracted considerable notoriety in 1994 when voters passed Proposition 187, which would have denied virtually all state-funded benefits to unauthorized immigrants in California.¹⁸² Prominent examples of similar laws passed in recent years include Arizona Propositions 200¹⁸³ and 300,¹⁸⁴ the Colorado Restrictions on Public Benefits Act,¹⁸⁵ the Georgia Security and Immigration Compliance Act,¹⁸⁶ the Oklahoma Taxpayer and Citizen Protection Act of 2007,¹⁸⁷ and a resolution in Prince William County, Virginia,¹⁸⁸

¹⁷⁸ Sandhya Somashekhar and Nick Miroff, *Herndon Wrestles With Where Day Laborers Will Go*, WASH. POST, Aug. 17, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/16/AR2007081602585.html>.

¹⁷⁹ Karin Brulliard, *What We Had Here Was a Family; As Herndon's Day-Laborer Center Closes, Job Seekers Band to Find Another Site*, WASH. POST, Sept. 15, 2007, at B1.

¹⁸⁰ Bill Turque, *Officials Face Constitutional Complexities*, WASH. POST, Sept. 7, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/06/AR2007090602482.html>. The mayor of Herndon has emphasized that the town maintained the center only so that it could enforce the now enjoined antisolicitation law, and officials now vow to use zoning laws to achieve the goal of the illegal antisolicitation ordinance.

¹⁸¹ *Baldwin Park Repeals Day Laborer Limitation Law*, CBS NEWS, Aug. 16, 2007, available at http://cbs2.com/topstories/local_story_228172104.html.

¹⁸² Proposition 187, Cal. Ballot Pamphlet General Election (Nov. 8, 1994), available at http://library.uchastings.edu/ballot_pdf/1994g.pdf.

¹⁸³ Proposition 200, Ariz. 2004 Ballot Propositions (Nov. 2, 2004) (requiring proof of citizenship for voting and access to a range of public services), available at <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.pdf>.

¹⁸⁴ Proposition 300, Ariz. 2006 Ballot Propositions (Nov. 7, 2006) (denying in-state tuition to those who cannot prove their documentation), available at <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop300.htm>.

¹⁸⁵ See COLO. REV. STAT. § 24-76.5-103 (2006) (requiring every "agency" or "political subdivision of this state" to "verify the lawful presence in the United States of any natural person 18 years of age or older who has applied for state or local public benefits," except in cases where services are needed to treat emergency medical conditions . . .); available at http://www.leg.state.co.us/Clics2006B/csl.nsf/fsbillcont3/36D7026300C10B13872571A40059E05F?Open&file=1023_cnr.pdf.

¹⁸⁶ GA. CODE ANN. §50-36-1 (2006), available at http://www.legis.state.ga.us/legis/2005_06/pdf/sb529.pdf.

¹⁸⁷ 2007 Okla. House Bill No. 1804, available at <http://webserver1.lsb.state.ok.us/WebBillStatus/main.html>.

¹⁸⁸ Prince William County, Va. Resolution 07-894, available at <http://www.pwcgov.org/docLibrary/PDF/007029.pdf>.

each of which requires proof of citizenship or lawful status for receipt of public benefits (see Sidebar 6).

Sidebar 6. Selected State and Local Measures Restricting Benefits

Arizona Proposition 200

--State agencies must verify the identity and eligibility of applicants before they receive state or local benefits or receive a ballot.

--State employees who discover a violation of federal immigration law must report to the federal officials or be risk being charged with a misdemeanor.

Arizona Proposition 300

--Only citizens, lawful permanent residents, and others lawfully present are eligible to receive family literacy, adult education, in state tuition, financial aid, and child care.

Colorado Restriction on Public Benefits Act

--All state agencies and political subdivisions must verify the legal status of anyone applying for state or public benefits.

Prince William County 2007 Resolution

--Bars services to unauthorized immigrants, including adult services allowing disabled and elderly to remain in their homes, aging in-home services, and elderly/disabled tax relief.

For reasons discussed below, it will be difficult to challenge these measures on either constitutional or statutory grounds. In particular, in 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),¹⁸⁹ a complex regulatory framework that governs the extent to which states can grant and/or deny benefits to noncitizens. The state legislatures that have enacted public benefits restrictions have been careful to craft their laws within the parameters set by PRWORA. In some states, such as Arizona, state attorneys general have issued opinions interpreting the new laws narrowly to avoid preemption and vagueness challenges.¹⁹⁰

A. The Federal Legal Landscape

As the following discussion will make clear, Congress effectively occupied the field of public benefits eligibility in 1996 when it passed PRWORA. PRWORA defines who constitutes an alien qualified to receive benefits and under what circumstances unqualified aliens can receive benefits. It also delineates the circumstances under which states may deny or extend benefits to qualified and unqualified aliens alike.

¹⁸⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996).

¹⁹⁰ See, e.g., Op. Att'y Gen., No. I-04-010 (R04-036) (Ariz. Nov. 12, 2004), available at <http://www.azag.gov/opinions/2004/I04-010.pdf>; Op. Att'y Gen., No. I05-009 (R04-0400) (Ariz. Dec. 29, 2005), available at <http://www.azag.gov/opinions/2005/I05-009.pdf>; Memorandum Regarding the Implementation of House Bill 1023 from Cynthia Coffman, Chief Deputy Att'y Gen. & Jason Dunn, Deputy Att'y Gen., Colo. Office of the Att'y Gen., to Jon Anderson, Chief Counsel of the Governor, State of Colo. (July 19, 2006), available at <http://www.ago.state.co.us/pdf/Implementation%20of%20HB%201023.pdf>.

1. Defining Eligibility

PRWORA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹⁹¹ defined certain categories of immigrants as “qualified” to receive federal benefits, namely lawful permanent residents, refugees, asylees, and others.¹⁹² The laws also denied federal public benefits, with a few notable exceptions, to all immigrants not qualified. Congress defined “federal public benefits” broadly¹⁹³ but left further specification to each benefit-granting federal agency.¹⁹⁴ Congress also enumerated the federal benefits that are exempt from the eligibility restrictions and that cannot be withheld from immigrants, regardless of whether they are qualified or lawfully present. These benefits include emergency Medicaid, noncash emergency disaster relief, and in-kind assistance, such as soup kitchens and short-term shelter provided by public and private entities and determined by the attorney general to be necessary for the protection of life or safety.¹⁹⁵

In PRWORA, Congress gave states two forms of authority with respect to determining eligibility. First, it authorized states to determine the eligibility of qualified aliens for particular joint federal-state programs, namely Temporary Assistance to Needy Families (TANF) and Medicaid.¹⁹⁶ Second, Congress authorized states to determine qualified aliens’ eligibility for state benefits,¹⁹⁷ with certain exceptions,¹⁹⁸ and permitted states “to require an

¹⁹¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Defense Department Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3008 (Sept. 30, 1996).

¹⁹² U.S.C. § 1611(a) & § 1641(b) (2006). Even immigrants who are “qualified” were originally barred from “federal means-tested benefits,” such as Medicaid, SCHIP, TANF, Food Stamps, and SSI, during the five years after they secured qualified status, if they entered the United States after Aug. 22, 1996. *See* 8 U.S.C. § 1613 (2006). Since 1996, Congress has restored significant public benefits for selected immigrants, refugees, and long-term residents, including Medicaid, SSI, and Food Stamps privileges. *See* American Bar Association, “2002 Legislative and Governmental Priorities,” available at <http://www.abanet.org/poladv/priorities/immigration.html>. For an in-depth analysis of the federal laws dictating immigrants’ access to public benefits and what they require of states, *see* Tanya Broder, “Overview of Immigrant Eligibility for Federal Programs,” NATIONAL IMMIGRATION LAW CENTER (July 2007), available at http://www.nilc.org/immspbs/special/overview_immeligfedprograms_2007-07.pdf. *See generally* NATIONAL CONFERENCE OF STATE LEGISLATURES, “Verification of Citizenship and Immigrant Status Required of All Applicants for Public Benefits,” available at <http://www.ncsl.org/programs/immig/Verification.htm>; NATIONAL CONFERENCE OF STATE LEGISLATURES, “Q&A on Immigration Benefits,” available at <http://www.ncsl.org/programs/immig/QandAIB.htm>.

¹⁹³ “(c) “Federal public benefit” defined

(1) Except as provided in paragraph (2), for purposes of this chapter the term “Federal public benefit” means—(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.” 8 U.S.C. § 1611(c) (2006).

¹⁹⁴ In 1998, for example, the Department of Health and Human Services (DHHS) issued a notice indicating which of its services classified as a “federal public benefit.” DHHS Notice, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PWORA) “Interpretation of ‘Federal Public Benefit,’” 63 FR 41658-61 (Aug. 4, 1998). The DHHS Notice identified 31 specific programs or sources of funding as “federal public benefits” that are generally not available to unauthorized immigrants.

¹⁹⁵ *See* 8 U.S.C. § 1611(b). The attorney general’s list of in-kind services necessary to protect life or safety, which have no individual income qualification include child and adult protective services; programs addressing weather emergencies and homelessness; shelters, soup kitchens, and Meals on Wheels; medical, public health, and mental health services necessary to protect life or safety; disability of substance abuse services necessary to protect life or safety; and programs to protect the life or safety of workers, children and youths, or community residents. US Department of Justice Notice, “Final Specification of Community Programs Necessary for Protection of Life or Safety under Welfare Reform Legislation,” A.G. Order No. 2353-2001, published in FR 3613-16 (Jan. 16, 2001).

¹⁹⁶ 8 U.S.C. 1512(b)(1) & (3).

¹⁹⁷ In the wake of the 1996 reforms, more than half of all states chose to cover at their own expense one or more public benefits no longer funded by the federal government. *See* NATIONAL IMMIGRATION LAW CENTER, “Immigration reform and

applicant for state and local public benefits to provide proof of eligibility.”¹⁹⁹ Congress also barred all unqualified aliens from receiving state and local benefits, again with exceptions for emergency and related benefits.²⁰⁰ Congress did provide that a state may affirmatively choose to provide benefits to aliens not lawfully present, but required states to enact a statute after August 22, 1996, providing for such eligibility.²⁰¹

2. Verifying Eligibility

Congress did not define in PRWORA the procedures and documents state and local agencies should use to verify a potential recipient’s eligibility for benefits. But, shortly after PRWORA was enacted, DOJ issued interim guidance suggesting possibilities. DOJ suggested²⁰² asking applicants to provide documentary evidence of lawful presence; accepting a written declaration, under penalty of perjury and possibly subject to later verification, from an applicant as to lawful status; or accepting a written declaration from a third party who has a reasonable basis for personal knowledge of the applicant’s lawful status.²⁰³

DOJ declined to subject benefits-granting agencies to universal procedures, leaving each agency to determine the verification methods appropriate to its particular programs.²⁰⁴ But the DOJ guidance did impose some limitations on the methods state and local agencies may use to verify eligibility. Some agencies are required to verify status through DOJ’s Systematic Alien Verification for Entitlements (SAVE) Program.²⁰⁵ In addition, benefits-administering agencies must first determine whether the alien is otherwise eligible for the program before embarking on status verification.²⁰⁶ They may seek information only about the person applying for benefits, not his or her family members, even if the family members may also

access to public benefits: The return of an uneasy coupling,” *available at* <http://www.nilc.org/immlawpolicy/CIR/cir014.htm>.

¹⁹⁸ 8 U.S.C. § 1622 (2006).

¹⁹⁹ 8 U.S.C. § 1625 (2006).

²⁰⁰ 8 U.S.C. § 1621(a)(2006).

²⁰¹ 8 U.S.C. § 1621 (2006).

²⁰² DOJ, “Interim Guidelines on Verification of Citizenship: Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,” 62 Fed Reg. 61344 (Nov. 17, 1997) [hereinafter Interim Guidance], *available at*

http://www.legalmomentum.org/IWPpubs//PubBank_Access/GovernmentRegulations/InterimGuidanceonVerification.pdf. *See also* DOJ, “Verification of Eligibility for Public Benefits,” 63 FR 41662-86 (Aug. 4, 1998) (proposed regulations drawing heavily on the interim guidelines and SAVE program). PRWORA required that DOJ issue final regulations by 1998, whereupon states would have two years to put into effect a verification system that complied with those regulations. *See* Interim Guidance at 61345. But DOJ has not issued final regulations. *See* Broder, *supra* note 192, at 8, n. 49.

²⁰³ Interim Guidance at 61347-48. In laying out these options, DOJ distinguished between procedures that should be used for US citizens or noncitizen nationals and those that should be used for qualified aliens. *Id.* at 61347-49.

²⁰⁴ *Id.* at 61347 (“The appropriate method of verifying an applicant’s citizenship will depend upon the requirements and needs of the particular program, including, but not limited to, the nature of the benefits to be provided, the need for benefits to be provided on an expedited basis, the length of time during which benefits will be provided, the cost of providing the benefits, the length of time it will take to verify based on a particular method, and the cost of a particular method of verification.”).

²⁰⁵ *Id.* at 61345. Further, the Interim Guidance lays out what a state agency should do if, based on the documents presented, it is considering concluding that the alien is not qualified. In September 2000, INS released the SAVE Program User Manual, which lays out how programs using SAVE must verify immigration status. DOJ, “Systematic Alien Verification for Entitlements (SAVE) Program User Manual,” at 1-1, 2-3 (Sept. 2000), *available at* <http://dhfs.wisconsin.gov/em/pdf/SAVEManual.pdf>.

²⁰⁶ *Id.* at 61346-47.

use the benefits.²⁰⁷ Further, state and local officials may not use procedures that violate civil rights or privacy laws.²⁰⁸ Finally, the guidelines exempt nonprofit charitable organizations from verification requirements.²⁰⁹

3. Post-PRWORA Litigation and Alienage Classifications

The constitutional framework for determining whether a law limiting noncitizens' access to benefits is constitutional was established by the Supreme Court in two cases decided in the 1970s. In *Graham v. Richardson*, the Supreme Court invalidated a state law that denied public benefits to lawfully present noncitizens.²¹⁰ In so doing, the Court found that noncitizens constituted a suspect class. Noncitizens pay taxes and are subject to the draft but cannot vote and closely resemble the discrete and insular minorities for whom the protection of strict scrutiny was devised. As a result, according to the Court, administrative convenience and saving money do not constitute compelling justifications for treating noncitizens unequally as compared to citizens.²¹¹ In *Mathews v. Diaz*,²¹² the Court applied a different standard to the federal government, requiring that federal laws that discriminate against noncitizens pass rational basis review or be reasonably related to a legitimate state interest.

In light of *Mathews*, the provisions of PRWORA that deny noncitizens access to federal benefits have been upheld uniformly by the courts.²¹³ Though given the authority to do so by PRWORA, few states have elected to deny benefits to qualified aliens.²¹⁴ The legality of the restrictions that states have chosen to impose pursuant to PRWORA has been assessed using the framework set by *Graham* and *Mathews*. The few courts that have addressed state benefits restrictions have come to mixed conclusions when applying this framework. Some courts have found that state laws or regulations that deny lawful permanent residents and other legal immigrants benefits violate the Equal Protection Clause,²¹⁵ regardless of the authority given by PRWORA, on the theory that Congress cannot authorize states to violate the Constitution.²¹⁶ Other courts have found PRWORA's authorization sufficient to support

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 61346.

²⁰⁹ *Id.* at 61345.

²¹⁰ See *Graham*, 403 U.S. at 376–80 (1971) (striking down an Arizona law that made noncitizens eligible for welfare only if they had lived in the United States for 15 years on grounds that the law violated equal protection and exceeded state authority).

²¹¹ *Id.* at 376.

²¹² 426 U.S. 67, 84–85 (noting that “it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens”).

²¹³ See, e.g., *City of Chicago v. Shalala*, 189 F.3d 598 (7th Cir. 1999); *Rodriguez v. United States*, 169 F.3d 1342 (11th Cir. 1999).

²¹⁴ *Cf. Doe v. Comm’r of Transitional Assistance*, 773 N.E.2d 404, 526 (Mass. 2002) (“[Strict scrutiny] does not apply . . . to State laws that merely adopt uniform Federal guidelines regarding the eligibility of aliens for benefits”); *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (upholding under rational basis review PRWORA restrictions on alien eligibility for state-administered prenatal Medicaid benefits).

²¹⁵ See *Aliessa v. Novello*, 96 N.Y.2d 418 (N.Y. 2001) (invalidating New York social services law limiting lawful immigrants' access to state Medicaid); *Ehrlich v. Perez*, 908 A.2d 1220 (Md. 2006) (holding that failure to appropriate funds to medical benefits program for resident alien children and pregnant women fails strict scrutiny required of state alienage classifications).

²¹⁶ See *Aliessa*, 96 N.Y. 2d at 434; *Perez*, 908 A.2d at 1239 (“It is not disputed that the federal government may authorize States to legislate concurrently in subject areas in which it has acted; yet, it is less evidence to this Court that the federal government expressly may transfer its authority (and thus justify a relaxed level of scrutiny of the resultant State action) to

state decisions to deny lawful immigrants access to benefits²¹⁷ on the theory that a state's exercise of discretion in allocation of benefits can effectuate a national policy, which, in the immigration context, is subject to the deferential rational basis standard.²¹⁸

This framework is not directly on point with regard to the most recent measures that deny benefits to immigrants. On their face, the laws here at issue deny benefits only to *unlawful* immigrants; they require proof of lawful status and not just of citizenship. Such denials do not present the same equal protection problems under current law, because the Supreme Court has declined to treat unauthorized immigrants as a suspect class. In 1982, in *Plyler v. Doe*, the Supreme Court struck down a state law that denied the children of unauthorized immigrants access to the public schools, but it did so without declaring unlawful immigrants to be a suspect class. The Court observed that unauthorized immigrants' presence in the United States "in violation of federal law is not a constitutional irrelevancy."²¹⁹ As a result, outside the context of public primary and secondary education, a state or local government's denial of benefits to unauthorized migrants need only be rationally related to a legitimate state interest.

State and local governments arguably have reasonable justification for denying benefits to the unauthorized, such as saving money and reducing the incentives for illegal immigration — justifications that need only be rational, not empirically proven. Indeed, the Supreme Court has pointed to reasons states might want to address the costs associated with unauthorized immigration in cases such as *De Canas*. The relevant legal inquiry, then, is whether the state laws here at issue are consistent with federal statutory law.

B. The New State Laws

1. Arizona Proposition 200

In 2004, Arizona voters passed Proposition 200, which requires state agencies to verify the identity and eligibility of applicants before they can receive state and local public benefits or register to vote and receive a ballot.²²⁰ Unless applicants show a form of identification that proves their immigration status, state agencies must deny their applications. In addition, state employees who discover a violation of federal immigration law must make a written report

the States in order to regulate in the area of immigration in a manner that would be . . . unconstitutional if carried out by an individual State").

²¹⁷ See *Soskin v. Reinertson*, 353 F.3d 1242 (10 th Cir. 2004) (rejecting *Aliessa* court's analysis of the equal protection issue and upholding denial by Colorado of Medicaid benefits to lawful permanent residents); *Doe*, 437 N.E.2d at 411-15 (upholding six-month residency requirement for an immigrant-only state supplemental cash assistance program, on the grounds that the restriction does not distinguish between citizens and LPRs, but among noncitizens on the basis of residency, which justifies giving the provision only rational basis review).

²¹⁸ See *Soskin*, 353 F.3d at 1255-56.

²¹⁹ See *Plyler*, 457 U.S. at 202. In *Plyler*, the Court reasoned that discriminating against unauthorized immigrant children could hardly be characterized as rational given the associated costs, including the potential of such restrictions to give rise to an illiterate underclass, thus burdening children for the unlawful conduct of their parents and threatening the creation of social dysfunctions.

²²⁰ Proposition 200, Ariz. 2004 Ballot Propositions (Nov. 2, 2004), available at <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.pdf>.

to federal immigration authorities or risk being charged with a misdemeanor.²²¹ Almost certainly with a view to federal law on the subject, Proposition 200 neither defines “state and local public benefits” nor indicates which class of noncitizens is eligible and which should be excluded from these benefits.

Shortly after voters approved Proposition 200, the state attorney general issued a number of limiting opinions interpreting the act narrowly and in a manner consistent with federal law. The attorney general defined “state and local benefits” to encompass those state programs that qualify as state and local benefits under PRWORA.²²² He also addressed potential preemption and vagueness arguments by interpreting Proposition 200 to implement the eligibility requirements of PRWORA for “state and local benefits.”²²³ In so doing, he referenced the successful preemption challenge against California’s Proposition 187, which made clear that the only regulations states can promulgate after PRWORA are regulations that implement the federal act. According to the attorney general, the language of Proposition 200 supports this “implementation” interpretation by establishing no eligibility requirements for any programs; rather, this void is filled by the eligibility requirements that PRWORA establishes.²²⁴

To ensure compliance with the provision of PRWORA that prohibits states from denying certain benefits to unauthorized immigrants, the Arizona attorney general also identified a number of programs that would not be subject to Proposition 200’s identification requirements, including programs identified as federal public benefits by the Department of Health and Human Services; programs identified in PRWORA as exceptions to the alienage eligibility restrictions; and community-based programs that the US attorney general has identified as necessary for the protection of life or safety.²²⁵ According to the Arizona attorney general, since Proposition 200 only applies to state and local benefits that are “not mandated by federal law,” it does not apply to the state and local benefits that appear as exceptions in Section 1621 of PRWORA.²²⁶

The verification and reporting requirements of Proposition 200 ultimately went into effect on December 22, 2004, after a federal district court denied a request for a preliminary injunction.²²⁷ The court found that Proposition 200 was “harmonious” with the federal welfare law in that it did not alter immigrants’ eligibility for benefits.²²⁸ In reaching this conclusion, the court cited the Arizona attorney general opinions’ interpretations of the law and determined that the interpretations were consistent with the text and intent of the voter

²²¹ *Id.*

²²² 2004 Ariz. Op. Att’y. Gen. No. I04-010 (2004), available at <http://www.azag.gov/opinions/2004/I04-010.pdf>. According to the attorney general, the proposition did not amend Title 36, which governs public health programs, Title 1, which establishes principles applicable throughout state law, or Title 38, which establishes general requirements of public officers in state and local government. *Id.* at 8, 10.

²²³ *Id.* at 10.

²²⁴ *Id.* at 10-11.

²²⁵ 2005 Ariz. Op. Att’y Gen. No. I05-009 (2005), available at <http://www.azag.gov/opinions/2005/I05-009.pdf>.

²²⁶ *Id.* at 6-9.

²²⁷ See *Friendly House v. Napolitano*, CV 04-649 TUC DCG (D. Ariz. 2004) (unpub. op.); see also Tanya Broder, *Arizona allowed to implement Prop. 200's verification and reporting requirements as litigation continues*, NATIONAL IMMIGRATION LAW CENTER, 19 IMMIGRANTS' RIGHTS UPDATE 1 (Feb. 10, 2005), available at <http://www.nilc.org/immspbs/vr/verifreptg008.htm>.

²²⁸ See *id.*

initiative.²²⁹ On August 9, 2005, a three-judge panel of the Ninth Circuit dismissed the appeal on standing grounds.²³⁰

On its face, and particularly in light of the Arizona attorney general's constructions, Proposition 200 appears consistent with federal law and therefore legally sound. Depending on how the law is implemented, as-applied challenges contesting application of the law in particular cases might be available, particularly if state implementing agencies adopt verification methods that are discriminatory, vague, or inappropriate to the specific benefits program, or that deviate from guidance set out by the federal government in its implementation of PRWORA.

2. Arizona Proposition 300

In 2006, Arizona voters passed Proposition 300, which establishes that only citizens, legal residents, and others lawfully present in the United States are eligible to receive the state benefits of family literacy programs, adult education classes, in-state tuition and financial aid at public colleges and universities, and child care assistance.²³¹ This initiative appears to fall within the provision of PRWORA that permits states to determine eligibility for state benefits; the list of benefits covered by Proposition 300 does not appear to conflict with the exceptions laid out in PRWORA.

In addition, in his interpretation of Proposition 300, the Arizona attorney general cited the methods of verifying eligibility suggested in the DOJ interim guidelines and noted that the guidelines advised that the appropriate verification method would depend on the specific circumstances of different programs. Unlike his specific guidance in defining "state and local benefits" and identifying programs that states could not deny, the attorney general declined to restrict the department to a set of procedures for verifying eligibility.

Though federal law delegates to states the authority to determine eligibility for certain state programs, it might be possible to bring an as-applied challenge to the implementation of Proposition 300 if the Arizona Department of Education uses verification methods that are discriminatory, vague, or inappropriate to the specific benefits program.

3. Colorado

In July 2006, the Colorado legislature passed the Restriction on Public Benefits Act. The statute requires every "agency" or "political subdivision of this state" to verify the lawful

²²⁹ Attorney general opinions are advisory, not binding, in Arizona. See Ariz. Att'y Gen. Terry Goddard, available at <http://www.azag.gov/opinions/> ("Opinions of the Attorney General are advisory, and do not have the same effect as decisions of a court of law.").

²³⁰ See *Friendly House v. Napolitano*, 419 F.3d 930 (9th Cir. 2005); see also Linton Joaquin, *9th Circuit dismisses challenge to Arizona's Prop. 200 and vacates district court ruling denying injunction*, NATIONAL IMMIGRATION LAW CENTER, 19 IMMIGRANTS' RIGHTS UPDATE 5 (Oct. 5, 2005), available at <http://www.nilc.org/immspbs/vr/verifrepts009.htm>.

²³¹ Proposition 300, Ariz. 2006 Ballot Propositions (Nov. 7, 2006), available at <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop300.htm>; 2007 Ariz. Op. Att'y Gen. No. I07-005 (2007), available at <http://www.azag.gov/opinions/2007/I07-005.pdf>.

presence of anyone over 18 who has applied for state or local public benefits. Exceptions to this requirement apply in cases where services are needed to treat emergency medical conditions; for short-term, noncash emergency disaster relief; for assistance for immunizations; and for services such as soup kitchens, crisis centers, and short-term shelter — the exceptions Congress articulated in PRWORA.

Unlike the Arizona legislature, however, Colorado has defined the specific verification methods that state agencies must use to determine eligibility.²³² Rather than leave verification methods up to the agencies implementing them, Colorado law requires that every applicant for public benefits produce one of the following: a Colorado driver's license or nondriver ID, a US military ID, Merchant Marine card, or Native American tribal document. In addition, the applicant must execute an affidavit saying that he or she is a citizen, a lawful permanent resident, or is otherwise lawfully present.²³³ The state must then verify the legal status of those who submit affidavits using the federal SAVE program.²³⁴

As with the Arizona law, the Colorado statute appears, on its face, to hew closely to the parameters laid out in PRWORA. With respect to implementation, though the DOJ guidance regarding eligibility verification documents is not binding, benefits applicants might argue that the law frustrates the federal policy of allowing benefits-providing agencies to craft procedures specific to the needs of particular programs.²³⁵

4. Prince William County, Virginia

On October 16, 2007, the Prince William County Board of Supervisors approved Resolution 07-894. In addition to the law enforcement component discussed in Part III, the resolution denies certain county services to unauthorized immigrants.²³⁶ The measure passed after the county enacted a resolution calling for extensive study of which services can legally be denied unlawful immigrants under federal law.²³⁷ The board ultimately elected to restrict eight services: adult services allowing the elderly and disabled to remain in homes; aging in-home services; sheriff adult-identification services; rental and mortgage assistance programs; certain substance abuse programs; an elderly/disabled tax relief program; and a tax exemption for renovation or rehabilitation of residential properties.²³⁸

Whether this provision passes legal muster depends on whether it is consistent with applicable Virginia law, and with the provision of PRWORA that restricts states and localities from denying benefits of certain types. It may be possible to characterize certain

²³² 2006 Colo. House Bill No. 06S-1023, *available at* http://www.leg.state.co.us/Clics2006B/csl.nsf/fsbillcont3/36D7026300C10B13872571A40059E05F?Open&file=1023_enr.pdf.

²³³ *Id.* at 3-4.

²³⁴ *Id.* at 4.

²³⁵ *Cf. Geier*, 529 U.S. at 886 (2000).

²³⁶ Prince William County, Va. Resolution 07-894, *available at* <http://www.pwcgov.org/docLibrary/PDF/007029.pdf>.

²³⁷ PRINCE WILLIAM COUNTY GOVERNMENT, ANALYSIS OF COUNTY SERVICES ILLEGAL IMMIGRATION OCTOBER 2, 2007, *available at* <http://www.pwcgov.org/documents/bocs/agendas/2007/1002/6-A.pdf>.

²³⁸ Prince William County, Va. Resolution 07-894, Attachment A, *available at* <http://www.pwcgov.org/docLibrary/PDF/007029.pdf>.

adult services to the elderly as health care items necessary for the treatment of emergency medical conditions, or as programs necessary for the protection of life and safety, and therefore as protected by federal law.²³⁹ Actions that result in the denial of services protected by federal law also might serve as bases for as-applied challenges to this resolution's application.

5. The Costs of Implementation

State and local laws regulating unauthorized immigrants' access to benefits are the least vulnerable to challenge of the laws surveyed in this paper. Legislatures have effectively stayed within the bounds set by the 1996 welfare laws, and courts have allowed and are likely to continue to accept narrowing constructions offered by state attorneys general to "save" state provisions that potentially conflict with federal law.

But while the battle over restricting public benefits continues in places like Prince William County, public officials throughout the country are beginning to observe that these laws are costing states money without reducing services.²⁴⁰ In Prince William County, Virginia, for example, the county's board of supervisors initially delayed the implementation of its new policies in early October after learning that it would cost \$14.2 million over five years just to put into operation the police enforcement portion of the policy.²⁴¹ The Joint Budget Committee of the Colorado legislature asked the executive departments to report on how much each department was spending on enforcing the new law, and how much the department was saving as a result of the restrictions of the new law. Eighteen departments reported no savings but documented additional costs of \$2.03 million to implement their new mandates.²⁴²

In the end, states and localities may well find themselves concluding that laws that require proof of lawful status for the receipt of public benefits create more trouble than they are worth, underscoring that unauthorized immigrants are not surreptitiously gaining access to public benefits programs to which they are not entitled by existing federal law or constitutional requirement.

²³⁹ See 8 U.S.C. §1621 (2006).

²⁴⁰ See Mark Couch, *Immigration Laws Stymied*, THE DENVER POST, Aug. 6, 2007, available at http://www.denverpost.com/news/ci_6552322 ("The landmark bill of the session — House Bill 1023 — imposed tougher ID requirements to get state aid. Instead, state departments have reported spending \$2 million to comply with the law, without showing a reduction in the demand for services.")

²⁴¹ Nick Miroff, *Citing Costs, Prince William County Delays Immigrant Measures*, WASH. POST, Oct. 3, 2007, at A1; Christy Goodman, *Immigration Policing's Cost is a Concern*, WASH. POST, Sept. 19, 2007, at B4.

²⁴² See Couch, *supra* note 240. Reports from Colorado suggest that last year's anti-immigrant measures are imposing more than just fiscal costs. Colorado's newly aggressive posture on immigration has coincided with rising labor shortages in important sectors of the economy. Journalists have reported that crops in some fields have rotted as agrobusiness has been unsuccessful in replacing the many immigrant workers who moved away from Colorado after the state enacted tough new immigration measures in the fall of 2006. Other low-wage industries reliant on immigrant workers are facing similar labor shortages, and many businesses have had to turn down work.