

## Comment

### **Aliens in a Foreign Field: Examining Whether States have the Authority to Pass Legislation in the Field of Immigration Law**

#### I. INTRODUCTION

There is no question that immigration regulation is primarily a national issue. The federal government regulates when people can come into the country, how long they can stay, and what they can do while they are here.<sup>1</sup> The United States Supreme Court has continually reaffirmed Congress's plenary power to create and regulate immigration laws.<sup>2</sup> Any comprehensive immigration reform law must come from Congress. The recent laws passed by Arizona, Georgia, and Alabama cannot be classified as immigration reform laws. Instead, these are immigration "related" laws. The question then becomes just how far can the states go in passing laws that are related to immigration? Unfortunately for the state legislatures, there is no bright-line answer, but the courts' adjudicative challenges to these state laws have started to provide some clarity. So far it seems the states are allowed to focus immigration statutes in areas where they have traditional police powers,

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1. *See* Kleindienst v. Mandel, 408 U.S. 753, 765-66 (1972).

2. *See id.*

such as employment relationships. However, lingering questions remain as to whether states may enforce federal immigration law through their police powers and what type of role the states have in shaping foreign policy.

Ultimately, it seems that the states have a limited role in passing immigration-related laws, especially ones that interfere with federal immigration law. This Comment attempts both to explain why the states are so limited in their ability to pass immigration-related laws and to examine alternative options the states do have to participate in combating illegal immigration. Part II discusses generally what role the federal government plays in creating and enforcing immigration law. Part II also discusses what role the states can play in enforcing immigration policy. Part III addresses why it will be difficult for states to overcome the preemption doctrine. Generally, the preemption doctrine is used by the courts to analyze whether federal and state laws can coexist.<sup>3</sup> Because the United States Constitution establishes that laws passed by Congress are the supreme law of the land, courts must strike down a state law if it conflicts with federal law.<sup>4</sup> Part III also examines why state level immigration laws are inconsistent with both established police powers and foreign policy jurisprudence. Part IV discusses what types of immigration-related laws the states are legitimately able to pass. In addition, Part IV analyzes current developments in the relationship between the United States Department of Homeland Security and state level police officers while encouraging more cooperation between the federal and state governments.

## II. THE REGULATION AND ENFORCEMENT OF IMMIGRATION POLICY

The federal government has plenary power over the regulation of immigration, while the states have the ability to pass laws that merely affect immigration.<sup>5</sup> But just how far the states can go in passing laws that affect immigration is a recurring question, continually raised as different states pass laws that regulate alien registration requirements, the exclusion of aliens from entry to a state, and even aliens' eligibility to work or receive local benefits in a particular state.<sup>6</sup> The recent laws passed by Arizona, Georgia, and Alabama all have a direct effect on immigration law enforcement because these laws, among other things, allow state officers to check a suspect's immigration status, thereby

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3. See *infra* Part II.A.

4. *Id.*

5. See *infra* Part II.A-B.

6. See Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 942 (1995).

informing the Department of Homeland Security of that suspect's presence in the country.<sup>7</sup> In order to understand the courts' treatment of these recent state laws, it is helpful to briefly examine both the accepted roles of the federal government and the states in regulating immigration.

A. *The Federal Government's Role in Regulating Immigration Policy*

The federal government alone has the plenary power to prescribe rules determining which aliens may enter the country and which aliens may stay.<sup>8</sup> In *Lung v. Freeman*,<sup>9</sup> an 1875 case dealing with immigration regulation, the Supreme Court expressly stated that Congress alone has the authority to pass laws regulating the admission of immigrants into the United States.<sup>10</sup> The Court held that a California law, which allowed state officials to classify immigrants and fine them on the basis of that classification, was unconstitutional because immigration regulation affects international relations, and the national government is responsible for defining American foreign policy.<sup>11</sup> The Court also expressed the fear that if a state passes an immigration law that harms foreign relations so significantly that it starts a war with another nation, then the United States, and not the individual state, would have to fight that war.<sup>12</sup> Sixty-five years later, in *Hines v. Davidowitz*,<sup>13</sup> the Court held that the national power of foreign affairs, including immigration, naturalization and deportation, belongs to the federal government.<sup>14</sup> There, the Supreme Court ruled that the Federal Alien Registration Act<sup>15</sup> preempted Pennsylvania alien registration provisions.<sup>16</sup> In reaching its decision, the Court stated that areas of law—like immigration—that affect foreign relations should be uniform and dealt with on a

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7. See Ariz. S.B. 1070, Reg. Sess. (2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>; Ga. H.R. Bill 87, Reg. Sess. (2011), available at [http://www1.legis.ga.gov/legis/2011\\_12/falltext/hb87.htm](http://www1.legis.ga.gov/legis/2011_12/falltext/hb87.htm); Ala. H.R. Bill 56, Reg. Sess. (2011), available at <http://alisondb.legislature.state.al.us/axas/ACASLoginIE.asp?SESSION=1058>.

8. U.S. CONST. art. I, § 8, cl. 3-4.

9. 92 U.S. 275 (1875).

10. *Id.* at 280 (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”).

11. *Id.* at 276, 279-80.

12. *Id.* at 279-80.

13. 312 U.S. 52 (1941).

14. *Id.* at 62.

15. Act of June 28, 1940, ch. 439, 54 Stat. 673 (repealed 1952).

16. *Hines*, 312 U.S. at 74.

national level and, when Congress regulates immigration, any state action must be subordinate to the supreme national law.<sup>17</sup>

In the second half of the twentieth century, Congress passed many different and important pieces of immigration legislation. Passed in 1952 and later amended in 1990, the Immigration and Nationality Act (INA)<sup>18</sup> sets forth the systematic scheme of federal immigration law.<sup>19</sup> The INA defines alien classifications and sets forth the conditions required for entry and residency in the United States according to each classification.<sup>20</sup> Legal aliens must be classified either as a nonimmigrant, immigrant, and/or refugee, and each classification has separate requirements that the alien must satisfy to stay in the country.<sup>21</sup> Of course, if an alien is in the country illegally, he is subject to removal.<sup>22</sup> Removal proceedings are initiated and governed by the Department of Homeland Security, and these proceedings require that the alien have a hearing before an immigration judge.<sup>23</sup>

Regarding employment, Congress passed the Immigration Reform and Control Act (IRCA)<sup>24</sup> in 1986, which regulates employer compliance requirements and penalties.<sup>25</sup> IRCA makes it unlawful for an employer to hire an illegal alien “or to hire anyone . . . without complying with the work authorization verification system created by the [Act].”<sup>26</sup> The verification system requires that an employer and employee complete and sign a United States Citizenship and Immigration Services (USCIS) form I-9, and that the employer examine and attest to the examination of certain documents that verify a potential employee’s identity and authorization to work legally in the country.<sup>27</sup> IRCA also allows for prosecution and sanctions against employers who do not comply with the Act’s requirements.<sup>28</sup> IRCA also expressly preempts states from imposing similar sanctions and penalties against employers.<sup>29</sup>

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17. *Id.* at 62-63, 68.

18. 8 U.S.C. §§ 1101-1537 (2006 & Supp. IV 2010).

19. *See* United States v. Alabama, 813 F. Supp. 2d 1282, 1294-96 (N.D. Ala. 2011) (citing *Lozano v. City of Hazleton*, 620 F.3d 170, 196-98 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011)).

20. *Id.* at 1294.

21. *Id.* at 1294-95.

22. *Id.* at 1295.

23. *Id.*

24. 8 U.S.C. § 1324a (2006).

25. *Alabama*, 813 F. Supp. 2d at 1296-97.

26. *Id.* at 1296; 8 U.S.C. § 1324a(a)(1)-(2).

27. *Alabama*, 813 F. Supp. 2d at 1296; 8 U.S.C. § 1324a(b).

28. *Alabama*, 813 F. Supp. 2d at 1297; 8 U.S.C. § 1324a(e)(1)-(6).

29. *Alabama*, 813 F. Supp. 2d at 1297; 8 U.S.C. § 1324a(h)(2).

In 1996, Congress added more verification requirements on employers when it passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA).<sup>30</sup> One of the most important provisions in IIRIRA established the E-Verify system, which allows an employer to authenticate I-9 documents provided by a potential employee.<sup>31</sup> The employer enters the information from the documents into an online system, and the federal government will respond and inform the employer if the documents are authentic or fake.<sup>32</sup> It is important to note that federal law generally leaves the decision to use the E-Verify system up to the individual employer.<sup>33</sup> The employer instead can opt to simply review the I-9 documents without using E-Verify.<sup>34</sup>

### B. *The States' Role in the Field of Immigration Law*

While the power to regulate immigration belongs to the federal government, the states do have some authority to enact laws that might affect immigration through their inherent police powers, provided that the state laws are constitutional and not preempted by federal law.<sup>35</sup> For example, in *De Canas v. Bica*,<sup>36</sup> the Supreme Court ruled that while the power to regulate immigration is a federal power, the states do have the power to regulate the employment relationships of immi-

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30. Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, 28, 42 U.S.C.).

31. *Alabama*, 813 F. Supp. 2d at 1298; see Basic Pilot Program Extension And Expansion Act of 2003, Pub. L. No. 108-156, §§ 2-3, 117 Stat. 1944, 1944. The United States Citizenship and Immigration Services' website lists the purpose of I-9 documents as follows:

All U.S. employers must complete and retain a Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. On the form, the employer must examine the employment eligibility and identity document(s) an employee presents to determine whether the document(s) reasonably appear to be genuine and relate to the individual and record the document information on the Form I-9.

*I-9, Employment Eligibility Verification*, USCIS.GOV, <http://www.uscis.gov/i-9> (last visited Mar. 9, 2012).

32. *Alabama*, 813 F. Supp. 2d at 1298.

33. *Id.* at 1299 ("Federal government employers and certain employers previously found guilty of violating IRCA are currently required to use E Verify; all other employers remain free to use the system of their choice.").

34. See *id.* One possible reason for the employer verifying the documents themselves is that there could be a possibility of false reports, problems when a woman marries and changes her name, or other extenuating circumstances.

35. See Manheim, *supra* note 6, at 971-73. In general, police power is a state's authority "to protect the lives, health, morals, comfort, and general welfare of the people." *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

36. 424 U.S. 351 (1976).

grants in their state.<sup>37</sup> Moreover, in *John Doe No. 1 v. Georgia Department of Public Safety*,<sup>38</sup> the United States District Court for the Northern District of Georgia upheld a Georgia state law prohibiting undocumented immigrants from obtaining drivers' licenses because it "mirror[ed] federal objectives and further[ed] a legitimate state goal."<sup>39</sup> But there are times when states go too far and try to regulate immigration in an impermissible way.<sup>40</sup> In the late 1800s, California had a statute on the books that allowed the California Supreme Court to order a group of Chinese women to be deported on the basis that they were "lewd and debauched."<sup>41</sup> The Supreme Court struck down this law as unconstitutional because, among other concerns, the law had negative foreign policy implications.<sup>42</sup> Also, as noted above, states cannot have their own alien registration systems because that is completely regulated by the federal government.<sup>43</sup>

While states cannot implement their own immigration policies, there are times when state actors may enforce federal immigration law through the state's inherent police powers.<sup>44</sup> The United States Court of Appeals for the Tenth Circuit recognized that state officers have implicit authority to conduct investigations and make arrests for violations of federal immigration law.<sup>45</sup> The Tenth Circuit has also held that state police officers can inquire into a person's immigration status when the officer has reasonable suspicion that the person has violated federal immigration law.<sup>46</sup>

In addition to the inherent state authority to enforce federal immigration law, Congress has enacted laws that expressly allow states to

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37. *Id.* at 356. It is important to note that the particular type of employment regulation in *De Canas* (punishing an employer by fines for hiring an illegal immigrant) was declared preempted by the IRCA in *Chamber of Commerce of U.S. v. Whiting*. See 131 S. Ct. 1968, 1975 (2011). But it seems the general principle that the states have inherent power to place restrictions on the employment of undocumented immigrants is still valid where the laws are not preempted.

38. 147 F. Supp. 2d 1369 (N.D. Ga. 2001).

39. *Id.* at 1376 (quoting *Plyler v. Doe*, 457 U.S. 202, 225 (1982)).

40. See *Manheim*, *supra* note 6, at 968-74.

41. *Id.* at 970 (quoting *Chy Lung v. Freeman*, 92 U.S. 275, 276 (1875)).

42. *Id.* at 971.

43. See *supra* Part II.A.

44. See *Manheim*, *supra* note 6, at 974-75; see also LISA M. SEGHETTI ET AL., CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 5 (2009), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf>.

45. *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001).

46. *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984). No other circuits have specifically adopted the Tenth Circuit's holding on this proposition or the proposition set forth in *Santana-Garcia*.

cooperate with the federal government to enforce immigration law.<sup>47</sup> As noted above, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) in 1996, which amended Immigration and Nationality Act (INA) § 287 (8 U.S.C. § 1357(g)).<sup>48</sup> This amendment allows the Secretary of Homeland Security to enter into agreements with states or the political subdivisions of states where state officers could be trained to perform immigration enforcement duties.<sup>49</sup> These duties include “investigation, apprehension, or detention of aliens in the United States.”<sup>50</sup> These agreements can be tailored to meet local needs and do not require local law enforcement officers to stop their current duties.<sup>51</sup> The local officers must have adequate knowledge of federal law and must also receive training regarding the appropriate enforcement of immigration laws.<sup>52</sup>

The IIRIRA also amended § 103(a), 8 U.S.C. § 1103(a),<sup>53</sup> of the INA to allow the attorney general to utilize state and local police in an immigration emergency.<sup>54</sup> The section defines an emergency as an “actual or imminent mass influx of aliens arriving off the coast.”<sup>55</sup> After the attorney general declares an immigration emergency, state police officers may make civil or criminal arrests pursuant to federal immigration law.<sup>56</sup> But state police officers can make these arrests only when they are expressly authorized to do so by the attorney general and when they have the consent of the head of the state or local law enforcement agency.<sup>57</sup>

Congress gave express authority for state officers to enforce immigration law when it enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>58</sup> One important amendment passed with the Act was § 439, codified in 8 U.S.C. § 1252c,<sup>59</sup> which allows state and local police officers to arrest aliens who reentered the United States after

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47. See SEGHETTI ET AL., *supra* note 44, at 10.

48. 8 U.S.C. § 1357(g) (2006).

49. *Id.* Under the original language of the statute, it is the attorney general who enters into the § 287(g) agreements with the states. SEGHETTI ET AL., *supra* note 44, at 12.

50. 8 U.S.C. § 1357(g)(1).

51. SEGHETTI ET AL., *supra* note 44, at 12.

52. 8 U.S.C. § 1357(g)(2).

53. 8 U.S.C. § 1103(a) (2006).

54. *Id.*; SEGHETTI ET AL., *supra* note 44, at 12.

55. 8 U.S.C. § 1103(a)(10) (2006).

56. *Id.*

57. *Id.*; SEGHETTI ET AL., *supra* note 44, at 13.

58. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of U.S.C.).

59. 8 U.S.C. § 1252c (2006).

a previous deportation following a felony conviction in the United States.<sup>60</sup> The law was meant “to overcome a perceived federal limitation on the ability of state and local officers to arrest [a known and dangerous] alien.”<sup>61</sup> Finally, the plain language of INA § 274, codified at 8 U.S.C. § 1324(c),<sup>62</sup> suggests that all law enforcement officers, including state and local ones, have the authority to arrest those people violating § 274.<sup>63</sup> The statute establishes criminal penalties for the smuggling, transporting, concealing, and harboring of illegal aliens, and subsection (c), entitled the “Authority to Arrest,” states that “all other officers whose duty it is to enforce criminal laws” may make arrests under the statute.<sup>64</sup> Therefore, while states historically have not been allowed to enact systematic immigration regulations, Congress has carved out a specific role for state level enforcement of immigration laws in some limited contexts.

### C. *Recent State Acts Related to Immigration*

The recent laws passed by the states are a new era of immigration-related laws testing what authority states have in enforcing federal immigration law. Unauthorized immigration is a serious concern in Arizona, and it is not surprising that Arizona was the first state to enact one of these new-era immigration-related laws.<sup>65</sup> The stated purpose for enacting Arizona S.B. 1070<sup>66</sup> was to “make attrition through enforcement the public policy of all state and local government agencies in Arizona.”<sup>67</sup> Attrition through enforcement appears to mean that the state wanted to reduce the number of people coming into and staying in Arizona illegally by enforcing both established federal immigration law and the new laws enacted by the Arizona legislature. To achieve attrition through enforcement, the law creates immigration-related offenses and defines how Arizona state and local police officers can enforce federal immigration law.<sup>68</sup> However, before Arizona’s act came into effect, the United States Department of Justice sued Arizona in an

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60. *Id.*; 8 U.S.C. § 1252(a).

61. SEGHETTI ET AL., *supra* note 44, at 13.

62. 8 U.S.C. 1324(c) (2006).

63. SEGHETTI ET AL., *supra* note 44, at 14.

64. 8 U.S.C. § 1324(c).

65. See Brady McCombs, *Nearly 1,700 Bodies, Each One a Mystery*, ARIZONA DAILY STAR, Aug., 22, 2010, [http://azstarnet.com/news/local/border/article\\_d8972316-b63a-5e4aad01-8518b0012730.html](http://azstarnet.com/news/local/border/article_d8972316-b63a-5e4aad01-8518b0012730.html).

66. Ariz. S.B. 1070, Reg. Sess. (2010).

67. *Id.* § 1.

68. *United States v. Arizona*, 641 F.3d 339, 343-44 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11-182).

attempt to enjoin the Act.<sup>69</sup> The Department of Justice argued that many provisions of the Act were preempted by the INA.<sup>70</sup> The United States District Court for the District of Arizona granted the Department of Justice's motion for preliminary injunction in part by holding that four sections of the law were likely preempted by federal law.<sup>71</sup> The United States Court of Appeals of the Ninth Circuit affirmed the district court's decision to enjoin each of these sections.<sup>72</sup> Currently, the Supreme Court has granted the State of Arizona's petition for certiorari and will hear the case in 2012.<sup>73</sup> The four enjoined sections of the law (1) allow Arizona state law enforcement officers to check the immigration status of a lawfully stopped suspect when the officer has reasonable suspicion the suspect is an illegal alien; (2) make it a state crime to violate a federal law requiring aliens to complete and carry their registration documents; (3) make it unlawful for an illegal alien merely to seek work; and (4) allow an Arizona law enforcement officer to arrest a person when the officer believes that person has committed a crime punishable by deportation.<sup>74</sup>

Like Arizona before it, the Georgia legislature enacted its own immigration-related law in 2011, H.B. 87,<sup>75</sup> which was "designed to address the very serious problem of illegal immigration in the State of Georgia."<sup>76</sup> The plaintiffs in *Georgia Latino Alliance for Human Rights v. Deal*<sup>77</sup> were nonprofits, businesses, and individuals who claimed that two sections of the law were preempted by federal law.<sup>78</sup> The Northern District of Georgia agreed with the plaintiffs and enjoined enforcement of both sections.<sup>79</sup> The sections would (1) allow Georgia state police officers to check the immigration status of a person suspected of a crime and (2) make it a state crime to transport, conceal, or harbor an illegal alien in Georgia.<sup>80</sup>

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69. *Id.* at 344.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Arizona v. United States*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11-182).

74. Ariz. S.B. 1070, § 2(B), 3, 5(c), 6 (codified in ARIZ. REV. STAT. §§ 13-1509, 13-2928, 13-3883 (2012), available at <http://www.azleg.gov/ArizonaRevisedStatutes.asp>).

75. Ga. H.R. Bill 87, Reg. Sess. (2011).

76. *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1322 (N.D. Ga. 2011) (citation and internal quotation marks omitted).

77. 793 F. Supp. 2d 1317 (N.D. Ga. 2011).

78. *Id.* at 1322-23.

79. *Id.* at 1340.

80. Ga. H.R. Bill 87 §§ 8, 7 (codified in scattered sections of O.C.G.A. tits. 16, 17).

In June 2011, the Alabama legislature enacted H.B. 56,<sup>81</sup> aimed at discouraging illegal immigration.<sup>82</sup> The United States moved to enjoin ten sections of the Alabama law, and the United States District Court for the District of Alabama agreed to enjoin four sections.<sup>83</sup> Also, in response to a lawsuit filed by a group of private plaintiffs, the district court agreed to enjoin five more sections of the law.<sup>84</sup> Subsequently, the Department of Justice and several private plaintiffs filed motions for injunctions before the United States Court of Appeals for the Eleventh Circuit.<sup>85</sup> The Eleventh Circuit granted the plaintiffs' motions and completely enjoined § 10 (where the district court only enjoined a subsection) and § 28.<sup>86</sup> The ten enjoined sections and subsections (1) make it illegal for anyone unlawfully present in the United States to attend a postsecondary (college or university level) educational institution in this state;<sup>87</sup> (2) make it a state crime to violate federal registration document laws by not carrying proper identification;<sup>88</sup> (3) make it a crime for an illegal alien to both look for and have a job (similar to Georgia's law);<sup>89</sup> (4) limit the type of immigration evidence an alien can use in court when they are accused of either looking for or having a job;<sup>90</sup> (5) make it a crime to impede traffic while trying to pick up a day laborer;<sup>91</sup> (6) make it a crime to get into to a car stopped on a public roadway in order to be hired by an occupant of that car;<sup>92</sup> (7) make it a crime to conceal, harbor, shield, or transport an illegal alien, or even to encourage an illegal alien to come into the State of Alabama (again similar to Georgia's law);<sup>93</sup> (8) penalize any employer who attempts to

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81. Ala. H.R. Bill 56, Reg. Sess. (2011).

82. *Id.* § 2.

83. *See Alabama*, 813 F. Supp. at 1292-93.

84. *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11 CV 2484 SLB, 2011 WL 5516953, at \*53-54 (N.D. Ala. Sept. 28, 2011).

85. *United States v. Alabama*, 443 F. App'x 411, 414 (11th Cir. 2011).

86. *Id.* at 19-20.

87. Ala. H.R. Bill 56 § 8 (codified at ALA. CODE § 31-13-8 (2012), available at <http://www.alisondb.legislature.state.al.us/acas/ACASLoginIE.asp>).

88. *Id.* § 10 (codified at ALA. CODE § 31-13-10 (2012), available at <http://www.alisondb.legislature.state.al.us/acas/ACASLoginIE.asp>).

89. *Id.* § 11(a) (codified at ALA. CODE § 31-13-11(a) (2012), available at <http://www.alisondb.legislature.state.al.us/acas/ACASLoginIE.asp>).

90. *Id.* § 11(E) (codified at ALA. CODE § 31-13-11(e) (2012), available at <http://www.alisondb.legislature.state.al.us/acas/ACASLoginIE.asp>).

91. *Id.* § 11(f) (codified at ALA. CODE § 31-13-11(f) (2012), available at <http://www.alisondb.legislature.state.al.us/acas/ACASLoginIE.asp>).

92. *Id.* § 11(g) (codified at ALA. CODE § 31-13-11(g) (2012), available at <http://www.alisondb.legislature.state.al.us/acas/ACASLoginIE.asp>).

93. *Id.* § 13 (codified at ALA. CODE § 31-13-13 (2012), available at <http://www.alisondb.legislature.state.al.us/acas/ACASLoginIE.asp>).

claim money paid to an unauthorized alien as a deductible business expense for any state or business purpose in Alabama;<sup>94</sup> (9) give employees and applicants the ability to sue their employers when they are fired or simply not hired while the employer knowingly employs an illegal alien;<sup>95</sup> and (10) require that elementary schools and secondary schools verify the immigration status of entering students.<sup>96</sup>

### III. HAVE THE STATES GONE TOO FAR?

This year the Supreme Court will address *United States v. Arizona*,<sup>97</sup> and the Court's decision will most likely affect the constitutionality of Georgia's and Alabama's laws as well.<sup>98</sup> In order to determine the constitutionality of Arizona's immigration-related laws, the Court will determine whether these laws are preempted by federal law.<sup>99</sup> This analysis will help the states understand the scope of their authority to enact immigration-related laws. The Court's preemption analysis will likely involve multiple legal doctrines and policies affecting the immigration field. For one, the states' immigration-related laws raise questions of just how far their police powers extend.<sup>100</sup> Also, these laws have a significant impact on foreign policy, which could be a determining factor in whether or not the laws are constitutional.<sup>101</sup> Ultimately, it seems the states will have a difficult road in arguing that their laws are not preempted by federal law because of the multiple ways that a law can be preempted. Furthermore, it appears that the Court would have to extend both police power and foreign policy jurisprudence past established precedent in order to uphold the states' immigration-related laws.

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94. *Id.* § 16 (codified at ALA. CODE § 31-13-16 (2012), available at <http://www.alison.db.legislature.state.al.us/acas/ACASLoginIE.asp>).

95. *Id.* § 17 (codified at ALA. CODE § 31-13-17 (2012), available at <http://www.alison.db.legislature.state.al.us/acas/ACASLoginIE.asp>).

96. *Id.* § 28 (codified at ALA. CODE § 31-13-28 (2012), available at <http://www.alison.db.legislature.state.al.us/acas/ACASLoginIE.asp>).

97. 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11-182).

98. In fact, the attorneys general of eleven states, including Georgia and Alabama, submitted an amici curiae brief to the Supreme Court in support of Arizona's law, signifying the impact of the Court's future decision on their own laws. Brief for Arizona et al. as Amici Curiae Supporting Petitioners, *Arizona v. United States*, 132 S. Ct. 845 (2011) (No. 11-182), 2011 WL 4073071.

99. *See infra* Part III.A.

100. *See infra* Part III.A.1.

101. *See infra* Part III.B.

### A. Preemption

Current challenges to state immigration legislation focus on whether the state laws are preempted by federal law.<sup>102</sup> In general, the preemption arguments are based on the idea that the new state laws cannot coexist with the federal immigration laws already in place.<sup>103</sup> For example, some argue that the new laws will overly burden the federal immigration system, that the state regulations create obstacles to already existing federal immigration programs, and that Congress chose to regulate certain aspects of immigration law so completely that there is no room for state action.<sup>104</sup> The battles about the states' immigration-related laws will be won and lost in the arena of preemption and, therefore, a general understanding of the preemption doctrine is necessary to understand both why the different courts ruled like they did and why the states have very limited power to pass immigration-related laws.

The Supremacy Clause<sup>105</sup> of the United States Constitution states that the laws of the United States shall be the "supreme Law of the Land."<sup>106</sup> This has led courts to recognize that when federal and a state law conflict with one another, the federal law trumps the state law. There are three recognized types of preemption: express preemption, (implied) field preemption, and conflict preemption.<sup>107</sup> Express preemption arises when Congress explicitly removes specified powers from the states.<sup>108</sup> Field preemption occurs when Congress legislates

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102. See, e.g., *Arizona*, 641 F.3d 339; *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010); *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011). The United States also argued that Arizona S.B. 1070 violated the Dormant Commerce Clause, but the United States District Court for the District of Arizona found no violation on those grounds. *Arizona*, 703 F. Supp. 2d at 1004. Also, Georgia H.B. 87 was challenged on Equal Protection and Due Process grounds, but the United States District Court for the Northern District of Georgia was not persuaded by those arguments and dismissed them in short order. *Georgia Latino Alliance*, 793 F. Supp. 2d at 1338-39.

103. See, e.g., *Arizona*, 641 F.3d at 345; *Arizona*, 703 F. Supp. 2d at 991; *Ga. Latino Alliance*, 793 F. Supp. 2d at 1328-30.

104. See, e.g., *Arizona*, 641 F.3d at 345; *Arizona*, 703 F. Supp. 2d at 991; *Ga. Latino Alliance*, 793 F. Supp. 2d at 1328-30.

105. U.S. CONST. art. VI, cl. 2.

106. *Id.* ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")

107. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000).

108. *Id.*

in a field of law so pervasively—or creates a comprehensive scheme of legislation—that it implies that Congress did not want the states legislating in the same area.<sup>109</sup> Conflict preemption exists when the federal and state laws cannot coexist or be enforced at the same time.<sup>110</sup> Conflict preemption has two types: 1) Impossibility conflict preemption, where it is impossible to comply with both laws at once, and 2) obstacle conflict preemption, where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>111</sup> Furthermore, the Supreme Court recently stated that there are two guiding cornerstones courts should follow when they analyze whether a law is preempted: first, “the purpose of Congress is the ultimate touchstone”; and second, there is a presumption against preemption when “Congress has legislated . . . in a field which the States have traditionally occupied.”<sup>112</sup> Briefly examining the lower courts’ decisions interpreting the states’ immigration-related laws reveals that courts are using these different types of preemption analyses to enjoin the state laws.<sup>113</sup>

**1. Express and Conflict Preemption Analysis.** The lower courts have found instances of express preemption. In *United States v. Alabama*,<sup>114</sup> the District Court for the Northern District of Alabama found that two sections of Alabama’s H.B. 56<sup>115</sup> were expressly preempted by federal law.<sup>116</sup> The court found that § 16, which penalizes any employer attempting to deduct the payment of an unauthorized alien as a business expense in Alabama, is a state sanction that is prohibited under 8 U.S.C. § 1324a(h)(2).<sup>117</sup> Because the court found that § 16 created a sanction, the section was expressly preempted by federal law.<sup>118</sup> The court also struck down § 17, which purports to give fired employees and unsuccessful applicants the right to sue the

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109. *Id.* at 227.

110. *Id.* at 228.

111. *Id.* (footnote and internal quotation marks omitted).

112. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

113. It should be noted that these different types of preemption categories are terms that are not always expressly used by courts. The Author is using these categories to organize the lower courts’ analysis.

114. 813 F. Supp. 2d 1282 (N.D. Ala. 2011).

115. Ala. H.R. Bill 56, Reg. Sess. (2011).

116. *Alabama*, 813 F. Supp. 2d at 1339, 1342.

117. *See id.* at 1337-38; 8 U.S.C. § 1324a(h)(2) (2006). (“[C]ivil or criminal sanctions upon those who employ, or recruit or refer for a free employment, unauthorized aliens.”).

118. *Alabama*, 813 F. Supp. 2d at 1338-39.

employer if it is knowingly employing an illegal alien.<sup>119</sup> Again, the court found that the cause of action constituted an expressly preempted sanction based on the employment of an authorized alien.<sup>120</sup>

Additionally, the lower courts are relying on conflict preemption analysis. As noted above, there are two categories of conflict preemption.<sup>121</sup> The first category exists when it is impossible for two laws to operate at the same time, and the second category exists when a state law stands as an obstacle to federal law.<sup>122</sup> The Northern District of Georgia relied on obstacle-conflict preemption analysis to decide whether certain sections of H.B. 87<sup>123</sup> were preempted.<sup>124</sup> Georgia's law, H.B. 87 § 8, provides that "when [an] officer has probable cause to believe that a suspect has committed a criminal violation, the officer shall be authorized to seek to verify such suspect's immigration status when the suspect is unable to provide one of [five specified identity documents]."<sup>125</sup> The district court began its preemption analysis by observing that because enforcement of civil immigration offenses is not a field traditionally occupied by states, there is no presumption against preemption.<sup>126</sup> Here, the court found that when the states attempt to enforce immigration, it undermines the immigration enforcement priorities and strategies set by the executive branch.<sup>127</sup> The court was also concerned that giving state officers both the discretion about when to conduct the investigation of an illegal alien as well as "reasonable

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119. See *id.* at 1339-42. The court summarized the language of § 17 as follows:

Section 17(b) creates a cause of action in favor of a United States citizen or a lawfully-present alien against a business entity or employer. This cause of action arises when a business entity/employer fails to hire or terminates the citizen or authorized alien at a time when it has an employee that it knows or should know is unlawfully present according to federal law, irrespective of considerations such as cause for the termination or qualification for the position. Damages for a violation of Section 17(a) are limited to compensatory damages and costs, including attorneys' fees.

*Id.* at 1339-40 (citations omitted).

120. *Id.* at 1342.

121. See Nelson, *supra* note 107, at 228.

122. *Id.*

123. Ga. H.R. Bill 87, Reg. Sess. (2011).

124. See *Ga. Latino Alliance*, 793 F. Supp. 2d at 1331-33.

125. Ga. H.R. Bill 87 § 8 (codified in O.C.G.A. § 17-5-100(b) (Supp. 2011)). Those documents include: (1) a "secure and verifiable document as defined in Code Section 50-36-2"; (2) a "valid Georgia driver's license"; (3) a "valid Georgia identification card issued by the Department of Driver Services"; (4) a valid license from another state or a valid identification document issued by the federal government; and (5) a "document used in compliance with paragraph (2) of subsection (a) of Code Section 40-5-21." *Id.*

126. See *Ga. Latino Alliance*, 793 F. Supp. at 1330.

127. *Id.* at 1331-32.

means” in conducting that investigation would create a risk of inconsistent civil immigration policies.<sup>128</sup> How the immigration status of criminal suspects is verified would not only vary state to state but also from county to county in Georgia.<sup>129</sup> Such a system would detract from the uniform system established by Congress.<sup>130</sup> Ultimately, the court found that § 8 stands as an obstacle to the accomplishment of the objectives of Congress in the field of enforcing civil immigration offenses and is therefore preempted.<sup>131</sup>

**2. Field-Preemption Analysis.** The lower courts have also used field-preemption analysis to enjoin states’ immigration-related laws. In *United States v. Arizona*,<sup>132</sup> the Ninth Circuit held that § 3 of Arizona S.B. 1070,<sup>133</sup> which makes it a state crime to violate the federal registration law, was preempted because Congress fully intended to occupy the field of immigrant registration and left no room for the states to complement the rules with auxiliary regulations.<sup>134</sup> The Ninth Circuit observed that nothing in the text of the Immigration and Nationality Act (INA)<sup>135</sup> shows that Congress intended the states to participate in the punishment of violations of federal immigration registration rules, and therefore, preemption is favored.<sup>136</sup>

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128. *Id.* at 1332.

129. *Id.*

130. *Id.*

131. *Id.* at 1333. In analyzing a very similar section in Alabama’s law, the Northern District of Alabama rejected this reasoning and found that Congress intended for state officials to assist in checking the immigration status of aliens, and that the plain language of the Immigration and Nationality Act (INA) shows that local officials do have some inherent authority to assist in the enforcement of federal immigration law so long as the state official cooperates with the federal government. *Alabama*, 813 F. Supp. 2d at 1327-28. The court found that Alabama’s law reflects intent to cooperate with the federal government because all determinations of immigration status must be finalized by the federal government. *Id.*

132. 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11-182).

133. Ariz. S.B. 1070, Reg. Sess. (2010).

134. *Arizona*, 641 F.3d at 355-56. Under Immigration Registration laws, when an alien enters the U.S. he is required to fill out documents declaring:

(1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the police and criminal record, if any, of such alien; and (5) such additional matters as may be prescribed.

8 U.S.C. § 1304(a) (2006). The federal statutes also include penalties if an alien fails to carry his registration documents. *See id.* § 1304(e) (2006).

135. 8 U.S.C. §§ 1101-1537 (2006 & Supp. IV 2010).

136. *Arizona*, 641 F.3d at 356.

Intertwined with the different courts' field-preemption analysis is a discussion about the states' inherent police powers. While state law must yield to federal law when these laws interfere with one another, individual state governments still retain great authority to pass laws to protect "the lives, limbs, health, comfort, and quiet of all persons."<sup>137</sup> This authority is known as a state's inherent police power.<sup>138</sup> Furthermore, a state has the ability to make arrests and govern employment relationships in its own state pursuant to its police powers.<sup>139</sup> When the Supreme Court decides whether different states' laws are field-preempted, the Court may also need to analyze if the states even have the authority to enforce their proposed laws.

One unresolved police power question is whether state police officers have the authority to enforce federal immigration law. Section 6 of Arizona S.B. 1070 provides that "[a] peace officer, without a warrant, may arrest a person if the officer has probable cause to believe [. . .] [t]he person to be arrested has committed any public offense that makes the person removable from the United States."<sup>140</sup> The Ninth Circuit determined that § 6 allows a person to be arrested without a warrant when "there is probable cause to believe the person committed a crime in another state that would be considered a crime" in Arizona and such crime would make the person removable from the United States.<sup>141</sup> Turning to whether § 6 was consistent with Congressional intent, the Ninth Circuit examined 8 U.S.C. § 1252c<sup>142</sup> (a section of the INA defining the extent to which state and local law enforcement officers may arrest illegal aliens) and concluded that nothing in the statute's language permitted warrantless arrests.<sup>143</sup> Instead, the court observed that warrantless arrests are allowed by Department of Homeland Security (DHS) agents only when there is a fear that the detained immigrant might escape before the agent can obtain a warrant.<sup>144</sup> The

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137. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quoting *Lohr*, 518 U.S. at 475).

138. *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

139. *Kelly v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniform police force to aid in the accomplishment of that purpose."); *De Canas v. Bica*, 424 U.S. 351, 356, 359 (1976), *superseded by statute*, Immigration Reform and Control Act, 8 U.S.C. § 1324a(h)(2) (2006).

140. Ariz. S.B. 1070 § 6 (codified at ARIZ. REV. STAT. § 13-3883 (2012), *available at* <http://www.azleg.gov/ArizonaRevisedStatutes.asp>).

141. *Arizona*, 641 F.3d at 361 (quoting *Arizona*, 703 F. Supp. 2d at 1005 (emphasis omitted)).

142. 8 U.S.C. § 1252c (2006).

143. *Arizona*, 641 F.3d at 361.

144. *Id.* at 361-62.

court found both that Arizona cannot transform state and local law enforcement officers into “a state-controlled DHS force,” and that states lack the inherent authority to enforce civil provisions of federal immigration law.<sup>145</sup>

The court concluded that the federal government has the sole authority to decide which illegal aliens are arrested on the basis of their immigration status and that § 6 interferes with the federal government’s enforcement of civil immigration offenses.<sup>146</sup> The court held that § 6 is preempted because Congress established a comprehensive federal scheme for making arrests with which Arizona’s law interferes.<sup>147</sup> In other words, there is no room for Arizona’s law in this particular subfield of immigration law. In reaching its decision, the Ninth Circuit acknowledged that it was rejecting the Tenth Circuit’s holding in *United States v. Vasquez-Alvarez*<sup>148</sup> that states do have the inherent authority to make arrests for civil violations of federal immigration law.<sup>149</sup>

It is important to note that there are differences in civil violations of federal immigration law and criminal violations of federal immigration law.<sup>150</sup> For example, civil violations include illegal presence in the country, whereas criminal violations include entering the country illegally or harboring illegal aliens.<sup>151</sup> Violators of the criminal provisions can be prosecuted in federal court.<sup>152</sup> In S.B. 1070, § 6 deals with a civil violation of federal immigration law: illegal presence in the country.<sup>153</sup> In *Vasquez-Alvarez*, the Tenth Circuit held that 8 U.S.C. § 1252c does not destroy states’ inherent authority to enforce federal immigration law for both criminal and civil violations but instead “merely creates an additional vehicle for the enforcement of these federal immigration law[s].”<sup>154</sup> But the Ninth Circuit disagreed and held that Congress specifically enacted 8 U.S.C. § 1252c in order to give state officers the authority to aid in enforcing federal immigration law.<sup>155</sup> The court reasoned that Congress would not pass a law granting states the authority to make arrests for violations of federal immigration law

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145. *Id.* at 362.

146. *Id.* at 365.

147. *Id.* at 365-66.

148. 176 F.3d 1294 (10th Cir. 1999).

149. *Arizona*, 641 F.3d at 363 (quoting *Vasquez-Alvarez*, 176 F.3d at 1295).

150. SEGHETTI ET AL., *supra* note 44, at 4.

151. *Id.*

152. *Id.*

153. *Arizona*, 641 F.3d at 362.

154. 176 F.3d at 1295.

155. *Arizona*, 641 F.3d at 364.

if Congress believed that the states already possessed that exact authority.<sup>156</sup>

*United States v. Arizona* is not the first time the Ninth Circuit has analyzed whether a state police officer can enforce federal immigration law. In fact, the Ninth Circuit previously held that state police officers do not have the authority to make arrests for civil violations of federal law. In *Gonzales v. City of Peoria*,<sup>157</sup> the Ninth Circuit held that state officers have the ability to enforce federal immigration law for criminal violations but not civil ones, and until recently, that was the Department of Justice's policy as well.<sup>158</sup> But in 2002, the Department of Justice (DOJ) released an opinion stating that state police officers can arrest illegal aliens solely on the basis of deportability, a civil violation of immigration law.<sup>159</sup> In that opinion, the DOJ concluded that state police officers do have the authority to arrest an illegal alien violating a civil violation of federal law, that is, illegal presence in the country.<sup>160</sup> The DOJ argued that it is unreasonable to assume that Congress would intend to deprive the federal government of whatever assistance the states can provide in identifying and detaining people who violate federal law.<sup>161</sup> Therefore, federal statutes should not be presumed to preempt the states' inherent authority to make arrests for violations of federal immigration law.<sup>162</sup> At the conclusion of the opinion, the DOJ forecasted that someone, or some court, might argue that Congress would not pass 8 U.S.C. § 1252c if it felt the states already had the authority to enforce federal immigration law (similar to the reasoning used by the Ninth Circuit).<sup>163</sup> The DOJ even forecasted that someone might object that their reading of the 8 U.S.C. § 1252c would render it meaningless.<sup>164</sup> But the DOJ noted that if a court finds that states do not have the authority to enforce civil provisions of federal immigration law then 8 U.S.C. § 1252c "would operate to ensure

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156. *Id.*

157. 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999).

158. *Id.* at 476; Assistance by State and Local Police in Apprehending Illegal Aliens, Op. O.L.C. (1996), *available at* <http://www.justice.gov/olc/immstopola.htm>.

159. Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations, Op. O.L.C. 7 (2002) [hereinafter 2002 DOJ Opinion], *available at* <http://www.axlu.org/FilesPDFs/ACF27DA.pdf>; *see generally* DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 56 (6th ed. 2011).

160. 2002 DOJ Opinion, *supra* note 159, at 13.

161. *Id.*

162. *Id.*

163. *See id.* at 11.

164. *Id.*

that state police at least retained the authority to make such arrests of aliens who had previously been convicted of a felony and had been deported or had left the United States after such conviction.<sup>165</sup> In short, the DOJ articulated that state officers do have the inherent authority to arrest non-citizens for civil violations of federal law, and that 8 U.S.C. § 1252c does not preempt that authority. It is unclear how the Supreme Court will rule on the issue of whether a state officer can arrest an immigrant for illegal presence in the country or whether that decision should be left in the hands of federal immigration enforcement agencies. But, as displayed by the split in judicial and advisory opinions, this is an issue that could affect both the Supreme Court's field-preemption analysis and how states legislate in the field of immigration law for years to come.

Another open question about the states' police powers is what authority they have to regulate the employment relationship between employers and immigrant employees. Section 5(c) of Arizona S.B. 1070 provides that "It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state."<sup>166</sup> As written, the section criminalizes unauthorized work.<sup>167</sup> In regard to this section, the Ninth Circuit started its analysis in *Arizona* by noting that, through the Immigration Reform and Control Act (IRCA),<sup>168</sup> Congress has legislated in the area of undocumented workers' immigrant employment and has attempted to deter illegal immigration by making jobs less available—not by punishing those who attempt to find work.<sup>169</sup> Further, the court reasoned that the text of the IRCA shows there are many examples of Congress being willing to punish the employer for hiring an undocumented worker but nothing about punishing the undocumented worker themselves.<sup>170</sup> The court also found it persuasive that the IRCA provided protections to undocumented workers, showing that Congress had no intention to criminalize work.<sup>171</sup> Here, it was Congress's *inaction* of not criminalizing work and not punishing the workers

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165. *Id.*

166. Ariz. S.B. 1070 § 5(c) (codified at ARIZ. REV. STAT. § 13-2928(C) (2012), available at <http://www.azleg.gov/ArizonaRevisedStatutes.asp>).

167. *Arizona*, 641 F.3d at 357.

168. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of U.S.C.).

169. *Arizona*, 641 F.3d at 357 (quoting Nat'l Ctr. for Immigrants' Rights, Inc. v. I.N.S., 913 F.2d 1350, 1367-68 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991)).

170. *Id.* at 358.

171. *Id.*

under the IRCA that convinced the court that any state attempt to do otherwise cannot be allowed.<sup>172</sup>

Similar to Arizona's law, § 11(a) of Alabama's H.B. 56 makes it a crime for an unauthorized worker to both look for a job and work in the State of Alabama.<sup>173</sup> Before it came into effect, Alabama's Act was also enjoined on the grounds that many of its provisions were preempted.<sup>174</sup> Similar to the analysis by the Ninth Circuit, the Northern District of Alabama found that the text of the IRCA is clear, that Congress attempted to deter the employment of unauthorized aliens by using civil and criminal sanctions against employers, not employees.<sup>175</sup> Ultimately, the district court agreed with the Ninth Circuit in *Arizona*, finding that § 11(a) was preempted because Congress intended to punish employers and not employees.<sup>176</sup>

Certainly, state governments have the authority to govern employment relationships in their state.<sup>177</sup> But what both the states and courts should keep in mind is that there are specific policy reasons for punishing an employer of undocumented workers rather than punishing the worker directly. In *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>178</sup> the Supreme Court held that while undocumented workers are considered employees under the National Labor Relations Act (NLRA),<sup>179</sup> they cannot receive backpay as a remedy for an NLRA violation because such a remedy would conflict with the purposes of the IRCA.<sup>180</sup> The case is not necessarily important for its holding but instead for the Court's rationale in deciding that undocumented workers are not entitled to backpay or reinstatement under the NLRA.<sup>181</sup> In reaching this decision, the Court elevated the policy of reducing illegal

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172. *Id.* at 359.

173. *Alabama*, 813 F. Supp. 2d at 1311.

174. *Id.* at 1292.

175. *Id.* at 1312.

176. *Id.* at 1315.

177. *De Canas*, 424 U.S. at 356.

178. 535 U.S. 137 (2002).

179. 29 U.S.C. §§ 151-169 (2006).

180. *Hoffman*, 535 U.S. at 140, 144, 151.

181. In fact, in *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, Catherine Fish and Michael Wishnie wrote that the case "did not break new doctrinal or theoretical ground"; instead, the article suggests that the importance of the case comes from the fact that the majority found that immigration policies trump labor policies. Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 351, 389 (Cooper & Fisk eds., 2005), available at [http://scholarship.law.duke.edu/faculty\\_scholarship/1243](http://scholarship.law.duke.edu/faculty_scholarship/1243).

immigration over the policy of protecting workers' rights to unionize.<sup>182</sup> The majority concluded that allowing the National Labor Relations Board (NLRB) to award backpay or to reinstatement to illegal aliens when they break the law to get their job would "condone[] and encourage[] future violations" of the IRCA.<sup>183</sup> But the dissent, written by Justice Breyer, argued that immigration and labor laws can work together and urged the Court to defer to the NLRB, which decided backpay and reinstatement were appropriate remedies for an undocumented worker even when he used false documents to obtain his job.<sup>184</sup> For one, Justice Breyer noted that the purpose of the employment provisions in the IRCA was to "diminish the attractive force of employment, which like a 'magnet' pulls illegal immigrants toward the United States," and that allowing NLRB to give backpay to undocumented workers would not increase that magnetic force, or encourage more people to enter the country illegally.<sup>185</sup> Justice Breyer reiterated that undocumented workers come into the country with the hope of finding a job not with the hope of being protected by our laws.<sup>186</sup> In fact, Justice Breyer argued that not allowing undocumented workers to receive backpay or reinstatement could actually increase illegal immigrants in the workforce because companies would now have an incentive to hire undocumented workers because there would be a lower cost for an initial labor law violation.<sup>187</sup> In fact, the reasoning utilized in Justice Breyer's dissent—that punishing employers instead of undocumented workers will decrease illegal immigration—has been followed in many subsequent immigration employment law decisions.<sup>188</sup>

Even though state governments have the ability to regulate employment relationships in their state, they should remember that punishing the employer, instead of the undocumented worker, was a specific decision made by Congress, a decision that is backed by the policy of reducing illegal immigration. If immigration laws did not punish employers, then these employers would have an incentive to find undocumented workers who could not enforce legal rights for any violations committed by the employer. Of course, the Supreme Court

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182. *See id.* at 389.

183. *Hoffman*, 535 U.S. at 150.

184. *See id.* at 153 (Breyer, J., dissenting).

185. *Id.* at 155.

186. *Id.*

187. *See id.* at 155-56.

188. *See, e.g., E.E.O.C. v. Rest. Co.*, 490 F. Supp. 2d 1039, 1047 (D. Minn. 2007); *Rosa v. Partners in Progress, Inc.*, 868 S.2d 994, 1000 (N.H. 2005); *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604, 617 (2007).

might determine that there is enough room to allow states to punish employees in conjunction with the employer.

This brief examination of states' immigration-related laws shows that the Court has multiple ways to analyze, and strike down, these laws under the preemption doctrine. This examination also demonstrates that it is very difficult for states to legislate in the immigration field because there are many ways that a state law can conflict with a federal one. Furthermore, the federal government has legislated pervasively in the immigration field pursuant to its plenary power. Additionally, the Supreme Court might be unwilling to extend state police powers so far as to allow states both to enforce federal immigration law and to regulate immigrant employment relationships that Congress chose to regulate through federal law. In light of these obstacles, a state government will not be able to pass a true immigration reform legislative scheme; instead, that type of reform will have to come from Congress.

#### B. Foreign Policy Implications

Immigration regulation and enforcement is completely intertwined with foreign policy.<sup>189</sup> When a state, or a local government, takes action to regulate immigration, the effect is felt on a national level.<sup>190</sup> On the whole, foreign policy decisions are made at the federal level; these decisions include going to war, ratifying treaties between nations, taxing foreign imports, and authorizing sanctions against another country.<sup>191</sup> Foreign policy is also determined by the executive branch when the President creates executive agreements with foreign nations, appoints ambassadors to other foreign nations, and exchanges information with foreign nations as well.<sup>192</sup> This is not to suggest that states have no role in foreign policy; instead, states and local governments interact with foreign countries on a regular basis in ways that could influence foreign policy.<sup>193</sup> For example, American cities enter into sister city agreements with foreign cities.<sup>194</sup> Philadelphia has even passed a proclamation affirming a United Nations Act to ensure equality

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189. See *Arizona*, 641 F.3d at 367 (Noonan, J., concurring) ("That immigration policy is a subset of foreign policy follows from its subject: the admission, regulation and control of foreigners within the United States.").

190. See *id.* at 368.

191. *Id.*

192. See *id.*

193. Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 616 (2008).

194. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1641 (2006).

for women when the United States government would not ratify the Act.<sup>195</sup> But immigration is a delicate issue, and the Supreme Court recognized that immigration implicates both foreign policy and national security.<sup>196</sup> Because immigration is such a delicate issue state, involvement must be done carefully.

The debate surrounding the states' immigration-related laws and foreign policy often focuses on whether the country should "speak with one voice" on immigration-related matters.<sup>197</sup> Proponents of the singular voice argue that the United States cannot have fifty different states with fifty different immigration policies.<sup>198</sup> Instead, national foreign policy, which includes immigration regulation, must be uniform and be governed at the federal level.<sup>199</sup> However, critics of this viewpoint argue that public discourse on immigration must involve "multiple voices."<sup>200</sup> Additionally, the fact that national immigration reform happens only every ten years or so suggests that the nation cannot sustain a conversation on immigration for very long.<sup>201</sup> Instead, these critics argue that immigration has a direct influence on local communities, and immigration should include input from these local voices as well.<sup>202</sup> This Comment cannot definitely state which approach is correct, but there is a danger when state and local governments ignore the foreign policy implications of their decisions while listening to the concerns of their citizens.

There is little doubt that the states' immigration-related laws were passed in part because people believe that the federal government is not doing its job to enforce federal immigration law.<sup>203</sup> It is unknown whether the Arizona legislators who passed S.B. 1070 had foreign policy in mind; but it is apparent that the law received a negative response from the international community.<sup>204</sup> The leaders of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil,

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195. *Id.*

196. *See* Chae Chan Ping v. United States, 130 U.S. 581, 605-06 (1889).

197. *See U.S. Reps Visit Alabama to Talk About Immigration Law*, SAND MOUNTAIN REP. (Albertville, Ala.), Nov. 22, 2011, [http://www.sandmountainreporter.com/news/state\\_news/article\\_02aea4d4-151f-11e1-937b-001cc4c03286.html](http://www.sandmountainreporter.com/news/state_news/article_02aea4d4-151f-11e1-937b-001cc4c03286.html).

198. *See Arizona*, 641 F.3d at 368 (Noonan, J., concurring).

199. *See id.*

200. Rodriguez, *supra* note 193.

201. *Id.* at 616-17.

202. *See id.* at 617.

203. *See Georgia Latino Alliance*, 793 F. Supp. 2d at 1335; *see also* Alia Beard Rau & Mary Jo Pitzl, *Momentum Built Up Over Years Led to New Immigration Law*, AZCENTRAL.COM (May 9, 2010 12:00AM), <http://www.azcentral.com/news/articles/2010/05/09/20100509-immigration-law-momentum.html#ixzz1hNEM7JFZ>.

204. *Arizona*, 641 F.3d at 353.

Colombia, Honduras, and Nicaragua; and the United Nations have all publicly criticized Arizona's law.<sup>205</sup> Even Deputy Secretary of State, James B. Steinberg, publicly stated that S.B. 1070 threatens U.S. foreign relations.<sup>206</sup> Certainly, a state government should listen to the concerns of its citizens, but when it comes to immigration, state governments must be aware that their actions affect more than just their state.

Besides a general warning to be cautious, conflicts with foreign policy have led courts to find that states' immigration-related laws are preempted because they offend or infringe on established foreign policy.<sup>207</sup> For example, when the Ninth Circuit ruled that part of Arizona's law was preempted from authorizing state police officers to check immigration status, it supported that preemption decision by noting that the provision harms the United States' foreign relations.<sup>208</sup> The Ninth Circuit cited the standard established by the Supreme Court that preemption is required when "even . . . the *likelihood* that state legislation will produce something more than *incidental* effect" on the nation's foreign policy.<sup>209</sup> Ultimately, the Ninth Circuit determined that the provision hinders the "[e]xecutive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs."<sup>210</sup> This shows that if the states want to pass workable immigration-related laws, they should seek to cooperate with the federal government to try to form an immigration policy that both comports with national foreign policy (that is, allows the nation to speak with one voice) and addresses the concerns of citizens in local communities who are affected by illegal immigration.

#### IV. IF THE LAWS ARE PREEMPTED, WHAT ARE THE STATES LEFT WITH?

Even if the Supreme Court holds that the enjoined sections of Arizona's law are preempted and the Eleventh Circuit also determines that the challenged provisions of Georgia's and Alabama's laws are preempted, these states still have some ability to combat illegal immigration. For example, many of the provisions of the states' laws

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205. *Id.*

206. *Id.*

207. *See id.* at 352; *see also Georgia Latino Alliance*, 793 F. Supp. 2d at 1333.

208. *See Arizona*, 641 F.3d at 352.

209. *Id.* (alteration in original) (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003)).

210. *Id.* at 354.

were not enjoined.<sup>211</sup> Also, until recently the states were able to enter into agreements with the federal government to help enforce federal immigration law.<sup>212</sup> But the federal government appears to be phasing this program out thereby decreasing cooperation between the federal and state governments.<sup>213</sup> As it stands right now the ability of states to enforce immigration law is in flux. But no matter what role the states ultimately play in enforcing federal immigration law, state legislators should be mindful that passing immigration-related laws can lead to unintended consequences.<sup>214</sup>

*A. What Worked? Immigration-Related Laws That Were Not Enjoined*

Even though four provisions of Arizona S.B. 1070<sup>215</sup> were enjoined, many provisions were not. Arizona is enacting laws that encourage, and in some instances require, state officials to enforce immigration laws. For instance, the District of Arizona upheld a law which “prohibit[ed] Arizona officials, agencies, and political subdivisions from limiting enforcement of federal immigration laws.”<sup>216</sup> Also, the court upheld a section requiring “state officials [to] work with federal officials with regard to unlawfully present aliens.”<sup>217</sup> The court also upheld a law giving citizens of Arizona the right “to sue any state official, agency, or political subdivision [if they adopt] a policy . . . restricting [the] enforcement of federal immigration law[.]”<sup>218</sup> States who want to increase enforcement of federal immigration law can legally mandate state officials, agencies, and political subdivisions to enforce federal immigration law to its full extent.

Arizona was able to pass new laws further regulating the employment of undocumented workers. For example, the district court upheld provisions of the Act that created stronger punishment for knowingly

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211. See *infra* Part IV.A.

212. See *infra* Part IV.B.

213. See *infra* Part IV.B.

214. See *infra* Part IV.C.

215. Ariz. S.B. 1070, Reg. Sess. (2010).

216. *United States v. Arizona*, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010); Ariz. S.B. 1070 § 2(A) (codified at ARIZ. REV. STAT. § 11-1051(A) (2012), available at <http://www.azleg.gov/ArizonaRevisedStatutes.asp>).

217. *Arizona*, 703 F. Supp. 2d at 986; Ariz. S.B. 1070 § 2(C)-(F) (codified at ARIZ. REV. STAT. § 11-1051(C)-(F) (2012), available at <http://www.azleg.gov/ArizonaRevisedStatutes.asp>).

218. *Arizona*, 703 F. Supp. 2d at 986; Ariz. S.B. 1070 § 2(A), (G)-(L) (codified at ARIZ. REV. STAT. § 11-1051(A), (G)-(L) (2012), available at <http://www.azleg.gov/ArizonaRevisedStatutes.asp>).

employing undocumented workers.<sup>219</sup> Also, the court upheld Arizona's law that created stricter compliance standards for the E-Verify employment verification process.<sup>220</sup> Even though the United States sought to enjoin S.B. 1070 as a whole, the court found that the Act was severable (some sections of the Act created new statutes while other portions amended existing statutes) and enjoined the portions of the bill that were preempted by federal law.<sup>221</sup> While the court did not expressly state why certain provisions were upheld, it is most likely because the states do have the inherent power to regulate business licensing and employment regulations.

Similar to Arizona S.B. 1070, many provisions of Georgia H.B. 87<sup>222</sup> were not challenged, again showing that states do have the inherent authority to regulate business licensing, employment verification, and criminal law even if these laws have provisions specifically dealing with illegal immigrants. For example, the Georgia General Assembly successfully enacted a law that requires stricter compliance by employers with the federal work authorization program in order to verify the employment eligibility of all new hires.<sup>223</sup> Furthermore, the General Assembly was able to enact another employment law that makes it a crime to use fictitious information to obtain employment.<sup>224</sup> The General Assembly also enacted two laws that make it easier for state actors to enforce federal immigration law. The first law attempts to encourage more cooperation between state and federal officers by immigration enforcement regulation and even goes so far as granting immunity from damages to any law enforcement officer or government official or employee who acts in good faith to enforce immigration laws pursuant to an agreement with federal authorities.<sup>225</sup> The other law creates financial incentives offsetting any financial burdens local law enforcement agencies might face if they choose to partner with the

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219. *Arizona*, 703 F. Supp. 2d at 986; Ariz. S.B. 1070 § 7 (codified at ARIZ. REV. STAT. § 23-212 (2012), available at <http://www.azleg.gov/ArizonaRevisedStatutes.asp>). Section 7 states that when an employer violates this provision they must fire all their unauthorized employees and the employer will be subject to a probationary period. Ariz. S.B. § 7(F)(1)(a)-(b) (codified at ARIZ. REV. STAT. § 23-212(F)(1)(a)-(b)). Further, if the employer has a second violation, they will have their business licence revoked. *Id.* § 7(F)(2) (codified at ARIZ. REV. STAT. § 23-212(F)(2)).

220. *Arizona*, 703 F. Supp. at 987; Ariz. S.B. 1070 § 9 (codified at ARIZ. REV. STAT. § 23-214 (2012), available at <http://www.azleg.gov/ArizonaRevisedStatutes.asp>).

221. *Arizona*, 703 F. Supp. at 986.

222. Ga. H.R. Bill 87, Reg. Sess. (2011).

223. See O.C.G.A. § 13-10-91 (Supp. 2011).

224. See *id.* § 16-9-121.1 (2011).

225. *Id.* § 35-1-17 (Supp. 2011).

Department of Homeland security to enforce federal immigration laws.<sup>226</sup>

The Georgia General Assembly also enacted a law that creates a new governmental entity that exists to ensure that immigration laws are enforced.<sup>227</sup> This law establishes “[T]he Immigration Enforcement Review Board,” which will serve as the reviewing body for the regulations developed in H.B. 87.<sup>228</sup> The Board will have the power to investigate any claims against employers not complying with either the verification or registration requirements of the Bill.<sup>229</sup> Further, the Board has the power both to fine and sanction anyone who violates the provisions of the Act.<sup>230</sup> A continuing trend is that states may pass laws encouraging stricter compliance with the *preexisting* federal immigration law. While states may not be able to pass wholesale immigration reform, they should be encouraged to cooperate with federal immigration enforcement agencies.

Alabama’s H.B. 56<sup>231</sup> is arguably the toughest of any state immigration bill passed so far, and yet some of its most controversial provisions were not challenged. For example, the Alabama legislature successfully enacted a law that prevents any alien not lawfully present in the United States from receiving any state or local public benefits.<sup>232</sup> It is likely that this law was not challenged and successfully enacted because Alabama controls local public benefits, and therefore Alabama should be allowed to limit access to these services even when they affect undocumented immigrants. Ultimately, the fact that so many provisions of the different states’ acts were upheld or not challenged shows that the states do have authority to pass immigration-related laws. But going forward, states should only pass laws that give them authority to act under their

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226. *Id.* § 35-6A-10 (Supp. 2011).

227. *See id.* § 50-36-3 (Supp. 2011).

228. *Id.*

229. *Id.* § 50-36-3(e).

230. *Id.* § 50-36-3(h).

231. Ala. H.B. 56, Reg. Sess. (2011).

232. Ala. H.B. 56 § 7(b) (codified at ALA. CODE § 31-13-7(b) (2012), available at <http://www.alisondb.legislature.state.al.us/acas/ACASLoginIE.asp>). State and local benefits are defined under 8 U.S.C. § 1621(c) as

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; 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 a State or local government or by appropriated funds of a State or local government.

8 U.S.C. § 1621 (c)(1)(A)-(B) (2006).

historic police powers and merely encourage cooperation between state and federal actors.

*B. ICE's Enforcement of Immigration Law and the Chilling of Cooperation Between the Federal Government and the States*

U.S. Immigration Custom and Enforcement (ICE) is the “principal investigative arm” for the Department of Homeland Security.<sup>233</sup> ICE has more than 20,000 employees in all fifty states and is primarily responsible for enforcing federal immigration laws as well as laws governing border control, customs, and trade.<sup>234</sup> One of the reasons the states’ immigration-related laws were passed is because people felt that ICE was not doing enough to keep illegal aliens from coming into the country.<sup>235</sup> In response, the states decided to act. But as displayed by the courts’ treatment of these laws, the states may have legislated in an area where they did not have the room, or the legal authority, to do so. In *Georgia Latino Alliance for Human Rights v. Deal*,<sup>236</sup> before concluding his preemption discussion of Georgia’s immigration-related law, Judge Thrash made it a point to dispel the myth that ICE is not doing anything about illegal immigration.<sup>237</sup> He noted that, in 2010, immigration offenses were prosecuted in federal courts more than any other offense, and that the federal government makes it a priority to prosecute and remove illegal immigrants who have previously been deported for serious criminal offenses.<sup>238</sup> Judge Thrash also observed that while local and national enforcement priorities might differ, it is only because the federal government has the difficult task of balancing the interests of protecting the public, securing the borders, and protecting national security.<sup>239</sup>

Further, recent analysis shows that ICE is deporting illegal aliens from the United States at record numbers.<sup>240</sup> In fact, under the Obama administration, ICE deported 396,906 people in the last fiscal

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233. *ICE Overview*, ICE.GOV, <http://www.ice.gov/about/overview/> (last visited Mar. 12, 2012).

234. *Id.*

235. See *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1335 (N.D. Ga. 2011); see also Rau & Pitzl, *supra* note 203.

236. 793 F. Supp. 2d 1317 (N.D. Ga. 2011).

237. *Id.* at 1335.

238. *Id.*

239. *Id.* at 1335-36 (quoting *United States v. Arizona*, 641 F.3d 339, 352 (2011)).

240. Jeremy Redmon, *ICE Deported Record Number of Noncitizens in Fiscal '11*, ATLANTA J. CONST., Oct. 18, 2011, <http://www.ajc.com/news/georgia-politics-elections/ice-deported-record-number-1204728.html>.

year, which is the largest number of people ever deported in one year.<sup>241</sup> Of that group, nearly fifty-five percent were convicted of felonies and misdemeanors.<sup>242</sup> Within the past year, ICE has made it a priority to deport aliens who pose either a danger to national security or a risk to public safety.<sup>243</sup> In the face of an “increasing number of criminal aliens who . . . come to ICE’s attention,” the agency implemented the priority system out of a need to exercise discretion.<sup>244</sup> Furthermore, ICE focused on creating a smart and effective way to enforce immigration laws, and in a “world of limited resources,” a priority system allows them to get the most out of the resources they do have.<sup>245</sup> The increase in deportations (both of illegal aliens overall and of dangerous aliens) shows that ICE’s new system is producing results.

As part of ICE’s enforcement duties, the agency claims to work closely with state and local governments.<sup>246</sup> In fact, ICE still encourages the use of its ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security) program, which provides local communities different options to team up with ICE to “combat specific challenges in their communities.”<sup>247</sup> One of those options is forming agreements between ICE and local governments. Codified at 8 U.S.C. § 1357(g),<sup>248</sup> these are commonly referred to as 287(g) agreements, named for their section number in the Immigration and Nationality Act (INA).<sup>249</sup> These agreements allow state police officers to become certified to perform the duties of a federal immigration officer, including investigation, apprehension, and detention of illegal aliens.<sup>250</sup> The goal of these

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241. *Id.*

242. *Id.*

243. Memorandum from John Morton, Dep’t of Homeland Security to Immigration & Customs Enforcement Employees (Mar. 2, 2011), *available at* <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

244. *Id.* at 4.

245. Redmon, *supra* note 240 (internal quotation marks omitted).

246. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, ICE.GOV, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Mar. 12, 2012) [hereinafter *ICE Fact Sheet*].

247. *Id.*

248. *See* 8 U.S.C. § 1357(g) (2006).

249. 8 U.S.C. §§ 1101-1537 (2006 & Supp. IV 2010); SEGHETTI ET AL., *supra* note 44, at 14.

250. 8 U.S.C. § 1357(g)(1).

Notwithstanding section 1342 of title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to

agreements is to ensure that state and local police officers receive proper training on how to enforce immigration law.<sup>251</sup> Also, under these agreements, state officers are subject to direction by the attorney general.<sup>252</sup> This arrangement ensures that the state officers will receive appropriate supervision in enforcing immigration law, but it also means that the federal authorities “hold the reins” under 287(g) agreements.<sup>253</sup> Recently, however, the Department of Homeland Security decided to drastically decrease funding for the 287(g) program.<sup>254</sup> While ICE will continue to fund some 287(g) programs that are already established, it will not enter into any new agreements and will cease funding for some of the “least productive” 287(g) agreements around the nation.<sup>255</sup> The Department of Homeland Security cited budget concerns as the reason for cutting the program, believing that there are other programs to enforce immigration law that are more cost effective.<sup>256</sup>

Practically, these agreements were created by a state entering into a memorandum of understanding with ICE; these memorandums set out the scope of authority local governments have pursuant to their agreement with ICE.<sup>257</sup> These memorandums also set out the training requirements local officers must complete to be able to enforce federal immigration law.<sup>258</sup> In general, ICE required that these officers complete a four-week course at the Federal Law Enforcement Training Program at the ICE Academy.<sup>259</sup> The training included: teaching the officers the scope of their authority under federal law; cross-cultural issues; and the proper use of force.<sup>260</sup> The training also covered civil rights law and liability issues, and it even covered the Vienna Convention on Consular Relations.<sup>261</sup> Even with these established safeguards

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detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

*Id.*

251. *See id.* § 1357(g)(2).

252. *Id.* § 1357(g)(3).

253. Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1780 (2011).

254. Alan Gomez, *Immigration Enforcement Program to be Shut Down*, USA TODAY, Feb. 17, 2012, <http://www.usatoday.com/news/nation/story/2012-02-17/immigration-enforcement-program/53134284/1>.

255. *Id.*

256. *See id.*

257. *See ICE Fact Sheet*, *supra* note 246.

258. *See* SEGHETTI ET AL., *supra* note 44, at 15-18.

259. *See ICE Fact Sheet*, *supra* note 246.

260. SEGHETTI ET AL., *supra* note 44, at 15.

261. *Id.*

in place, the 287(g) program was criticized in Homeland Security inspector general reports, which stated that the local officers were not being properly trained and there was not enough oversight in place to prevent the possibility of racial profiling.<sup>262</sup>

It is disappointing that ICE is phasing out the 287(g) program. For one, even in the face of criticism, the program did produce some positive results. For example, the 287(g) agreement program saw some success in Harris County, Texas.<sup>263</sup> The Harris County Sherriff's Office started its 287(g) program on August 18, 2008, and after only one year, the task force was able to place 10,102 detainees.<sup>264</sup> When an illegal alien is detained by local law enforcement, the law enforcement office will then contact ICE, which then has forty-eight hours to assume custody of that alien.<sup>265</sup> One example of the 287(g) agreement's successes is that through a sherriff's office's Automated Biometric Identification System (IDENT) program, officers were able to identify and apprehend a suspect who was wanted for two murders in Mexico.<sup>266</sup> This IDENT program allows officers in the sheriff's department to search a federal database of wanted and dangerous illegal aliens.<sup>267</sup> In 2009, the Harris County Sherriff's Office was adding six terminals that would allow them to quickly identify foreign-born prisoners who may need to be transferred into ICE's custody.<sup>268</sup> This sharing of information between federal and state law enforcement agencies may have been one of the 287(g) agreement program's greatest successes because it encouraged cooperation between federal and local authorities.

The Whitfield County Sherriff's Office in Georgia is another example of how the 287(g) agreement program was successful in enforcing federal immigration policy on a state and local level. The Whitfield County Sherriff's Office started its 287(g) program in February 2008, and it is

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262. Gomez, *supra* note 254. However, the Governmental Oversight Committee audited a number of different 287(g) programs around the nation and found that at least until 2009 there had been no substantiated claims of racial profiling during the enforcement of the 287(g) programs. Interview with Jessica Vaughn, Director of Policy Services, Center for Immigration Studies, *Local Enforcement of Federal Immigration Law and 287(g)*, LEAPS.TV (July 28, 2009), slide 51, <http://www.cis.org/articles/2009/leaps/index.htm>.

263. Vaughn, *supra* note 262, at slide 25-29.

264. *Id.* at slide 26.

265. *Enforcement, Detainers: Challenging the Use of ICE Immigration Detainers*, LEGALACTIONCENTER.ORG, <http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-detainers> (last visited Mar. 12, 2012).

266. Vaughn, *supra* note 262, at slide 27.

267. *See id.*

268. *Id.* at slide 29.

exclusively a jail enforcement officer program.<sup>269</sup> Through their program, the Whitfield County Sherriff's Office has detained multiple dangerous illegal aliens, leading to their prosecution or deportation.<sup>270</sup> Another benefit of the program is removing illegal aliens who were repeat criminal offenders.<sup>271</sup> The removal of these aliens has substantially decreased the financial strain on the county caused by the housing, medical, legal, and other costs of processing repeat offenders.<sup>272</sup> For example, one particular individual was arrested thirteen times since coming to the county in 1997, and the sherriff's office estimated that the individual cost the county around \$20,000 in incarceration expenses alone.<sup>273</sup> But because the sherriff's office was able to identify him as an illegal alien, the officers were able to remove him from the county, thus saving tax payers any further costs.<sup>274</sup>

The Collier County Sherriff's Office in Florida is one more example of a successful 287(g) program. The Collier County program consists of a jail identification program similar to the one in Texas and Georgia, and an Investigative Task Force program.<sup>275</sup> The program was started in 2007, and just one day after the program started, the Investigative Task Force made its first arrest.<sup>276</sup> The Task Force was investigating a person suspected of murdering his eight-month-old daughter, and who also had a warrant out for his arrest for raping a child in California, but for different reasons, the officers could not make the arrest on those two grounds.<sup>277</sup> However, after bringing the man to the police station for an interview, the officers ran an immigration check through their 287(g) program, and they discovered he used false documents to enter the country.<sup>278</sup> The officers were able to make an immigration arrest, and eventually the state was able charge him for the other crimes.<sup>279</sup> The Collier County program has also had successful collaborative efforts with ICE and was even commended by the Department of Homeland Security for running an efficient program and refraining from tactics like racial profiling.<sup>280</sup>

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269. *Id.* at slide 30.

270. *See id.* at slide 31.

271. *See id.* at slide 32.

272. *Id.*

273. *Id.* at slide 33-34.

274. *Id.* at slide 34.

275. *Id.* at slide 36.

276. *Id.* at slide 37.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

Perhaps the biggest disappointment associated with the loss of the 287(g) program is that it signals a step backwards in collaboration between federal and local authorities. As noted above, one of the reasons the states passed their immigration-related laws is because they felt the federal government was not doing enough to enforce federal immigration law.<sup>281</sup> Now it seems that the federal government is ostracizing the states even more by refusing to enter into any more 287(g) agreements. When the states passed their immigration-related laws, they attempted to give their local police officers the authority to enforce federal immigration laws by creating state criminal penalties for breaking federal immigration laws.<sup>282</sup> Based on the different courts' treatment of these provisions, it seems the states exceeded their police powers by passing those types of laws. Before the 287(g) program's budget was decreased, courts could at least point to a better alternative where ICE and the states worked together to enforce federal immigration law. Now, if the states' laws are struck down, they will be left with few alternatives other than deferring to the federal government. It is possible that it will not be long before the states pass new versions of their immigration-related laws and will continue to do so until national immigration reform is passed.<sup>283</sup>

### C. *Avoiding Unintended Consequences of New Legislation*

The passing of the states' immigration-related laws certainly affects how far state officers can go in enforcing immigration law, but unfortunately the laws have had unintended consequences outside of the courtroom. For one, these laws have affected the economies of Arizona, Georgia, and Alabama.<sup>284</sup> In response to Arizona's law, many people protested by boycotting Arizona-based businesses, and multiple groups cancelled their plans to visit the state, leading to lost revenue for

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281. See Rau & Pitzl, *supra* note 203.

282. See *Arizona*, 641 F.3d at 344.

283. See PRATHEEPAN GULASEKARAM, AMERICAN CONSTITUTION SOCIETY FOR LAW AND PUBLIC POLICY, ISSUE BRIEF: NO EXCEPTION TO THE RULE: THE UNCONSTITUTIONALITY OF STATE IMMIGRATION ENFORCEMENT LAW (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2002369](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2002369).

284. See Erin Kelly, *Arizona's Immigration Law Has Ripple Effect*, ARIZ. REPUBLIC, Apr. 28, 2010, <http://www.azcentral.com/arizonarepublic/news/articles/2010/04/28/20100428-arizona-immigration-law-impact.html>; see also Redmon, *supra* note 240; Jeanne Bonner, *Crop Losses Could Top \$1B*, GPB.ORG (June 23, 2011), <http://www.gpb.org/news/2011/06/23/crop-losses-could-top-1b>; *Alabama Forum Explores Immigration Law Labor Shortage*, MSNBC.COM (Dec. 6, 2011), [http://www.msnbc.msn.com/id/45575504/ns/us\\_news/t/alabama-forum-explores-immigration-law-labor-shortage/](http://www.msnbc.msn.com/id/45575504/ns/us_news/t/alabama-forum-explores-immigration-law-labor-shortage/) [hereinafter *Alabama Labor Shortage*].

Arizona hotels and other local businesses.<sup>285</sup> In Georgia, the state has suffered a substantial loss to its agricultural workforce, which was likely caused by the legislature passing Georgia H.B. 87.<sup>286</sup> When the law passed, there was a mass “exodus” of undocumented workers, leaving Georgia farmers with a severely reduced workforce.<sup>287</sup> Because there are not enough workers to harvest crops, Georgia fruit and vegetable farmers could lose upwards of \$300 million dollars in crop sales.<sup>288</sup> Alabama is facing the same problem. In response to Alabama’s H.B. 56, many undocumented workers left the state, and others are too afraid to try to find work with local farmers.<sup>289</sup> The shortage has left local community leaders scrambling to find ways to fill the labor shortage in time for the 2012 harvest.<sup>290</sup>

Besides economic impact, the recent state laws can potentially create a “culture of fear” for illegal aliens in these states.<sup>291</sup> Unfortunately that is already the case in Alabama where there have been reports that women will not go to the hospital to have their babies because they are afraid of being deported.<sup>292</sup> Also, crime victims are afraid to call the police, and parents are too scared to send their children to school.<sup>293</sup> Basically, people without immigration documents are no longer able to participate in society.<sup>294</sup> Furthermore, in *Georgia Latino Alliance for Human Rights v. Deal* the court attached a declaration by Lewis Smith, the chief of police for Uvalda, Georgia.<sup>295</sup> In that declaration, Mr. Smith stated that, while he had a good relationship with the Hispanic community, he also believed that Georgia’s law would erode that relationship.<sup>296</sup> The states have to be very careful because when a group of people are shut out of the official system, it creates an unofficial system outside of society’s rules. Even though the states’ laws were passed with the purpose of “attrition through enforcement,” every illegal alien is not going to leave. Furthermore, stricter enforcement of

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285. See Kelly, *supra* note 284.

286. See Bonner, *supra* note 284.

287. *Id.*

288. *Id.*

289. See *Alabama Labor Shortage*, *supra* note 284.

290. See *id.*

291. Sally Kohn, *Arizona Immigration Law: Painful Lessons from Oklahoma*, CHRISTIAN SCI. MONITOR, Apr. 28, 2010, <http://www.csmonitor.com/Commentary/Opinion/2010/0428/Arizona-immigration-law-painful-lessons-from-Oklahoma>.

292. Editorial, *Alabama’s Shame*, N.Y. TIMES, Oct. 3, 2011, <http://www.nytimes.com/2011/10/04/opinion/alabamas-shame.html>.

293. *Id.*

294. See *id.*

295. 793 F. Supp. 2d at 1340-43.

296. *Id.* at 1341-42.

immigration laws could cause the people who stay to be distrustful of the police and also cause them to withdraw from public places.<sup>297</sup> In sharp contrast, though, under the cooperative 287(g) program utilized by the Whitfield County Sherriff's Office, there was a substantial outreach effort to the community ensuring them that the sherriff's office was only detaining potential illegal aliens who commit crimes and not victims of crimes.<sup>298</sup> In fact, that program actually led to aliens coming to the sherriff's office to ask questions about immigration law issues.<sup>299</sup>

#### V. CONCLUSION

As it stands, there are too many obstacles for states to pass comprehensive immigration reform. The states also have to be careful when they pass immigration-related laws. Besides the risk that these laws will be preempted, they could also conflict with established precedent on foreign policy and state police powers. These laws might also lead to unforeseen consequences that will be harmful to both citizens and non-citizens. But states that want to combat illegal immigration are not without options. The states can pass laws that regulate employment in their state, and they can also pass laws that encourage cooperation between state and federal officers. Unfortunately, the federal government seems to be phasing out the programs that facilitated this very type of cooperation. It seems the 287(g) program had too many challenges, making it difficult for the Department of Homeland Security to operate both effectively and efficiently. But cooperation between the federal government and the states should be encouraged when it comes to enforcing immigration law. Instead of fifty different states trying to pass immigration laws that will ultimately conflict with one another, the federal government and the states should work together to find a cooperative and uniform system of enforcement.

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297. See RANDY CAPPS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 38 (2011), available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>.

298. Vaughn, *supra* note 262, at slide 46.

299. *Id.*