THE RESOLUTION OF THE "SHOW ME YOUR PAPERS" CIRCUIT SPLIT: CONSTITUTIONALITY AND CONSEQUENCES OF ENFORCING STATE AND LOCAL IMMIGRATION LAWS

ERICA L. SHARP*

I. INTRODUCTION

In January 2010 the Department of Homeland Security ("DHS") estimated that 10.8 million unauthorized immigrants were living in the United States.[1] The population of illegal immigrants in the United States increased by twenty-seven percent between 2000 and 2010.[2] Although immigration is traditionally a federally regulated area, state and local governments are carrying the burden of the presence of illegal immigrants. In providing public services for illegal immigrants, state and local governments are spending more money than the illegal population is contributing through state and local taxes.[3] Federal efforts to regulate immigration have become increasingly more desperate for state and local cooperation.[4] Despite federal efforts, some states have expressed their dissatisfaction by creating their own immigration enforcement statutes, which authorize state and local law enforcement officers to enforce federal immigration laws.[5]

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1. Michael Hoefer et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, U.S. DEPARTMENT OF HOMELAND SECURITY (Feb. 2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf. The unauthorized resident immigrant population is defined as "all foreign-born non-citizens who are not legal residents." *Id.* "Most unauthorized residents either entered the United States without inspection or were admitted temporarily and stayed past the date they were required to leave." *Id.*

2. *Id.* at 1–2.

3. MELISSA MERRELL, ET AL., CONGRESSIONAL BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 1–2, (Loretta Lettner ed., 2007), *available at* http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf. Federal assistance programs are often denied to illegal immigrants, while the federal government requires that states and localities provide public services (i.e., medical and educational services) to illegal immigrants regardless of their immigration status or ability to pay. *Id.*

4. *See generally* 8 U.S.C. § 1357(g) (2006) (authorizing state officers and employees to perform the functions of federal immigration officers).

5. *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-1051 (2012); 2011 Ala. Acts 2011-535, *available at* http://www.ncsl.org/documents/statefed/AlabamaH56.pdf. Some states have taken a very different approach and have created even more stringent limitations on the duties that state and local officials are authorized to perform in the area of immigration through the use of sanctuary laws. *See infra* note 56.

Courts have grappled with state-level involvement in an area of law so traditionally and exclusively controlled by the federal government. Therein lies the question of whether state law in the immigration context is preempted by Congressional schemes designed to regulate and enforce immigration laws. The preemption debate created a split among the Federal Circuit Courts of Appeals, in which Congressional intent was interpreted in contradictory ways. As a basic Constitutional principle, Congress has the power to prohibit states from legislating in any given area of law.[6] Congress has not expressly preempted states from legislating in the area of immigration and, more importantly, has made efforts to seemingly *encourage* state cooperation in enforcement of the federal laws, and as a result, courts have been forced to make a preemption determination based solely on Congressional intent.

This note discusses the approaches that federal circuit courts have taken to determine whether federal law preempts state immigration laws that authorize or require local and state law enforcement officials to verify a person's immigration status during a lawful traffic stop, arrest, or detention. The scope of the state laws at issue is limited to *identification* of illegal immigrants and does not include the investigation, apprehension, detention, or removal of such persons. There existed a split of authority among the circuits that was recently addressed by the United States Supreme Court.[7] Prior to the Supreme Court ruling, the Ninth Circuit Court of Appeals held in *United States v. Arizona* that Congress, in creating a federal scheme of regulation, intended to preempt state legislation in the field of immigration law.[8] However, in *United States v. Vasquez-Alvarez,* the Tenth Circuit Court of Appeals held in favor of state participation, at least with regard to identifying illegal immigrants.[9] In October 2011, the Eleventh Circuit Court of Appeals joined the split, seemingly in agreement with the Tenth Circuit and firmly in disagreement with the Ninth Circuit.[10]

For years the Supreme Court declined to address the issue, leaving the federal circuit courts with the task of delving into preemption analyses and ultimately arrive at conflicting views. In December 2011, the Court granted certiorari to decide whether the State of Arizona was overstepping its legislative capacity.[11] The Supreme Court issued its opinion on June 25, 2012,

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

7. *See generally* Arizona v. United States, 132 S. Ct. 2492 (2012).

8. United States v. Arizona, 641 F.3d 339, 352 (9th Cir. 2011), *rev'd in part*, 132 S. Ct. 2492 (2012). The Ninth Circuit found that Arizona's S.B. 1070 section 2(B) served as an obstacle to the Congressional purpose expressed in the Immigration and Nationality Act ("INA"). *Id.*

9. United States v. Vasquez-Alvarez, 176 F.3d 1294, 1300 (10th Cir. 1999).

10. *See* United States v. Alabama, 443 F. App'x 411, 416–17, 420 (11th Cir. 2011) (denying the United States' motion for injunction pending appeal as to the sections regarding preemption of state immigration legislation for failing to show a likelihood of success on the merits of the appeal).

11. Arizona v. United States, 132 S. Ct. 845 (2011).

in which the Court addressed the issue of state mandate of officers to verify the immigration status of any person stopped or detained for any reason.[12] As explained below in greater detail, the Court held that Arizona was not prohibited from creating such a law.[13]

The presence of illegal immigrants is weighing heavily on the states and it is illogical to prohibit the states from contributing to the achievement of a national goal: decreasing and deterring the presence of persons illegally residing in the United States. This is not to say that *all* aspects of immigration regulation should be shared between federal and state governments, but certainly some areas of immigration regulation are better handled at the state level.[14] This note supports the claim that Congress not only intended, but also encouraged, the states' participation in identifying illegal aliens in an effort to further the purpose of the federal scheme. Both the statutory language and the overwhelming burden that illegal immigrants place on states suggest that regulation, at least with respect to identification, at a federal level alone is not effectively achieving that purpose. There is a need for more state involvement and when state and local law enforcement are willing to cooperate with the federal scheme, state legislation should not be preempted solely because immigration is, in a broad sense, a federally controlled area of law.[15]

While there is evidence that state involvement in the area of immigration law is encouraged and perhaps even necessary, there exists a world of uncertainty. Some states, like Arizona, were prepared to enforce state laws even before the Supreme Court gave the green light.[16] The challenges to Arizona's immigration laws presented on appeal were based primarily on constitutional principles, largely resting on the preemption doctrine.[17] The Court itself acknowledged that, while the statute was construed in a way that

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12. Arizona v. United States, 132 S. Ct. 2492, 2507–11 (2012).

13. *Id.* at 2509; *see infra* Part III.B.

14. Areas of immigration law, such as entry and removal of aliens, are best suited for federal authorities. The nature of such areas are so rooted in foreign policy that allowing states to participate would lead to a never-ending host of problems, such as entry and removal of aliens within state borders and restriction on the flow of interstate commerce. Those areas are best regulated by a uniform federal scheme. There are, however, areas of immigration regulation, such as identification of illegal aliens, which are more efficiently handled at a state level because state and local law enforcement are given more frequent opportunities to verify a person's immigration status than federal immigration officers are given. *See* United States v. Arizona, 641 F.3d 339, 377 (9th Cir. 2011) (Bea, J., concurring in part and dissenting in part) (explaining that just because state officers are not authorized to remove illegal aliens does not mean that the state officers cannot participate in achieving the alien's removal), *rev'd in part*, 132 S. Ct. 2492 (2012).

15. "Cooperate" here does not mean through the use of 8 U.S.C. § 1357(g)(2011) agreements, discussed *infra,* but rather refers to state legislation that is not associated with any express or written agreement with federal immigration officers.

16. JJ Hensley, *Arizona agencies prepare to enforce SB 1070*, AZCENTRAL.COM (June 26, 2012, 10:59 PM), http://www.azcentral.com/news/articles/2012/06/26/20120626arizona-agencies-prepare-enforce-sb-1070.html.

17. *Arizona*, 132 S. Ct. at 2498.

did not create a conflict with federal law, the application of the statute once in effect might very well present other constitutional challenges.[18]

II. BACKGROUND: THE LIMITS IMPOSED ON STATE EFFORTS TO ENFORCE IMMIGRATION LAWS

The Supreme Court has stated that "[f]ederalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect."[19] The United States Constitution, however, leaves no question as to the hierarchy of the country's various government systems; it clearly provides that federal laws are superior to state laws. While states are free to enact legislation, they do so with limitations. That immigration regulation is within the reign of the federal government is a basic constitutional concept, evidenced in three clauses of the United States Constitution.[20] Despite traditional federal control over immigration, states, in conjunction with the federal government and on their own, have made efforts to expand their authority to enforce both federal and state immigration laws.

The Preemption Doctrine

The Supremacy Clause of the United States Constitution vests with Congress the power to divest states of certain legislative rights.[21] It expressly states that federal laws "shall be the supreme Law of the Land . . . [the] Laws of any State to the Contrary notwithstanding."[22] Thus, Congress has the power to prohibit the enactment of state or local laws that run afoul of Congressional purpose or intent.[23] Further, Congress has the power to invalidate otherwise valid preexisting state or local laws by enacting new federal laws.[24]

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18. *Arizona*, 132 S. Ct. at 2510. The Court stated that the current opinion would not "foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect." *Id.*

19. *Id.* at 2500.

20. U.S. CONST. art.I, § 8, cls. 3-4, § 9, cl. 1.

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

22. *Id.*

23. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210–11 (1824).

24. Yule Kim, *The Limits of State and Local Immigration Enforcement and Regulation*, 3 ALB. GOV'T L. REV. 242, 244 (2010).

Preemption can be either express[25] or implied.[26] If Congress decides that it does not want states legislating in any particular area of law, it is authorized by the Constitution to expressly prohibit the states from doing so.[27] When there is no expressly stated preemption, Congressional intent to preempt may be inferred in two ways: field preemption and conflict preemption.[28] Field preemption may be inferred when "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation"[29] or when the regulation involves a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[30] Conflict preemption may be inferred when the state law makes it impossible for compliance with both the federal and the state laws[31] or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[32]

When Congress has provided no express terms preempting state legislation, courts are guided by "two cornerstones of . . . preemption jurisprudence" to determine if the state law at issue is in fact preempted.[33] The first is that "the purpose of Congress is the ultimate touchstone in every pre-emption case."[34] The second is that in "all preemption cases, and particularly those in which Congress has legislated . . . in a field which the States have traditionally occupied," courts begin their analyses with a presumption against preemption.[35] Because immigration is not one such field, courts do not presume that Congress intended to leave room for state legislation.

Immigration Regulation is Traditionally a Federal Power

Federal power to regulate and control immigration is expressly granted in three clauses of the Constitution.[36] The Commerce Clause vests with Congress the power to "regulate [c]ommerce with the foreign [n]ations[.]"[37] The Naturalization Clause gives Congress the power to establish a "uniform

25. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

26. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) (conflict preemption); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (field preemption); Hines v. Davidowitz, 312 U.S. 52, 66 (1941) (field preemption).

27. *See Jones*, 430 U.S. at 525.

28. *See, e.g.*, Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 712–13 (1985).

29. *Id.* at 713 (quoting *Rice*, 331 U.S. at 230).

30. *Id.* (quoting *Hines*, 312 U.S. at 66).

31. *Florida Lime & Avocado*, 373 U.S. at 142–43.

32. *Hines*, 312 U.S. at 67.

33. Wyeth v. Levine, 555 U.S. 555, 565 (2009).

34. *Id.* (citation omitted).

35. *Id.* at 565 (citations omitted).

36. United States v. Arizona, 703 F. Supp. 2d 980, 991 n.4 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part*, *rev'd in part*, 132 S. Ct. 2492 (2012).

37. U.S. CONST. art. I, § 8, cl. 3.

[r]ule of [n]aturalization[.]"[38] The Migration and Importation Clause grants the power to regulate matters concerning immigration.[39] Congress used its constitutional authority to enact a federal scheme of immigration regulation called the Immigration and Nationality Act (INA) of 1952, which authorizes various federal agencies to enforce federal immigration laws.[40] The INA establishes certain rights granted to aliens lawfully in the country, while simultaneously deterring and decreasing the presence of unlawful aliens.[41] Deterrence is sought through a variety of mechanisms employed by the INA's uniform scheme.[42]

Despite Congressional authority to control the area of immigration law, Congress has expressly authorized state and local participation in the enforcement of federal immigration laws under certain conditions.[43] Congress amended the INA in 1996 with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"), which provides various methods by which state and local governments may cooperate with federal enforcement.[44] Title 8, section 1252c authorizes state law enforcement officers to arrest any prior deportee with a criminal record after the officer obtains confirmation of the alien's illegal status.[45] Section 1357(g) provides states with the option of entering into written agreements with Immigration and Customs Enforcement (ICE).[46] The written agreement, formally called a Memorandum of Agreement (MOA) and often simply referred to as a "287(g) agreement," grants authority to state or local officials to perform, under the supervision of the Attorney General, the functions of federal immigration officers.[47] However, section 1357(g)(10) grants authority for state officials to inquire with federal agencies into a person's immigration status, even where no MOA has been formed.[48] Section 1373(c) creates an obligation on the part of

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38. U.S. CONST. art. I, § 8, cl. 4.

39. *Id.* § 9, cl. 1. *See* Lopez v. INS, 758 F.2d 1390, 1392 (10th Cir. 1985) (explaining that the broad grant of authority to regulate matters relating to immigration is exclusive to Congress).

40. *E.g.,* 8 U.S.C. §§ 1103, 1104 (2012).

41. Kim, *supra* note 24, at 245.

42. *Id.* (deterrence under this scheme includes "employer sanctions, criminal penalties, civil sanctions, and removal from the country").

43. *See* 8 U.S.C. § 1357(g) (2006).

44. Marissa B. Litwin, *The Decentralization of Immigration Law: The Mischief of § 287(g)*, 41 SETON HALL L. REV. 399, 402 (2011); *see* 8 U.S.C. § 1357(g) (2006); 8 U.S.C. §§, 1373(c), 1252c (2006).

45. 8 U.S.C. § 1252c(a).

46. Immigration and Nationality Act, 8 U.S.C. § 1357(g) (2012).

47. 8 U.S.C. § 1357(g)(1)-(9). State and local authorities are able to negotiate the terms of the MOA so the functions that the officers are authorized to perform are specific to protecting their communities. *Forcing Our Blues into Gray Areas: Local Police and Federal Immigration Enforcement*, APPLESEED 1, 18 (Jan. 2008), *available at* http://appleseednetwork.org/wp-content/uploads/2012/05/Forcing-Our-Blues-into-Gray-Areas.pdf.

48. 8 U.S.C. § 1357(g)(10).

Department of Homeland Security (DHS) officers to respond to inquiries made by state and local officers seeking to verify an individual's immigration status.[49]

State Efforts to Enforce Immigration Laws

Many states have expressed their dissatisfaction with federal efforts to regulate immigration and reduce the population of those unlawfully present in the United States.[50] In recent years, many state legislatures have taken the issue of immigration into their own hands.[51] Some states have encouraged state and local cooperation with the federal government by entering into MOAs.[52] Others have taken the view that all areas of immigration law are best regulated by a uniform scheme and have restricted their state and local law enforcement officers' ability to enforce immigration laws.[53] Others, however, have gone outside the realm of the 287(g) program and enacted their own legislation authorizing state and local officers to enforce federal immigration laws.[54] Challenges to states' more expansive grant of authority have raised issues of preemption in various state and federal courts.

1. A Case Study of Oklahoma's State and Local Authority to Enforce Federal Immigration Laws: *United States v. Vasquez-Alvarez*[55]

In 1998, defendant-appellant Vasquez was arrested and charged with illegally reentering the United States after being deported.[56] Prior to Vasquez's arrest, a federal Immigration and Naturalization Service ("INS") agent who

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49. 8 U.S.C. § 1373(c).

50. *See generally*, JAN BREWER, SCORPIONS FOR BREAKFAST (2011) (Arizona governor Jan Brewer criticizes the federal government's failure to effectively control the population of illegal immigrants in Arizona and argues that the state should not be responsible for providing public services to immigrants who do not contribute to state funding through taxes.).

51. DIRK HEGEN, NAT'L CONF. OF STATE LEGS., STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION 1 (Ann Morse, ed., 2008). As of June 2008, 190 bills were passed in 39 states. *Id.* Only 3 were vetoed, 175 were passed, and 12 were pending. *Id.* at 2. Eight states enacted laws that dealt with law enforcement functions, such as detention, bail determinations, and responsibilities of state and local officers. *Id.* at 15.

52. In 2010, ICE reported that it had entered into written agreements with thirty-nine law enforcement agencies in nineteen states. U.S. Immigr. & Customs Enforcement, *Fact Sheet: Updated Facts on ICE's 287(g) Program*, ICE, http://www.ice.gov/news/library/factsheets/287g-reform.htm (last visited June 20, 2013).

53. Some cities and states have enacted formal sanctuary laws, which preclude the enforcement of immigration laws, even with respect to identification, by state and local law enforcement officers. Huyen Pham, *The Constitutional Right Not To Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382–84 (2006). Typically, these statutes are grounded in idea that promoting the enforcement of federal immigration laws on a state level will lead to a general distrust of police and racial profiling. *Id.*

54. *See*, *e.g.*, 2011 Ala. Acts 2011-535, *available at* http://www.ncsl.org/documents/statefed/AlabamaH56.pdf.

55. United States v. Vasquez-Alvarez, 176 F.3d 1294, 1295 (10th Cir. 1999).

56. *Id.*

suspected that Vasquez was unlawfully in the country contacted a local police officer in Edmond, Oklahoma.[57] The officer was asked to arrest Vasquez if he "came in contact with him and found that he was, in fact, in the country illegally."[58] The officer learned from Vasquez's employer that he was indeed illegally in the country and Vasquez was subsequently arrested.[59] When the INS agent interviewed Vasquez at the Edmund Police Department, Vasquez admitted to his prior felony convictions and deportations.[60]

Vasquez moved to suppress his post-arrest statements regarding his prior convictions and deportations and claimed that under 8 U.S.C. § 1252c the local officer was not authorized to make an arrest because he had not confirmed Vasquez's prior criminal convictions and deportations with the INS at the time of arrest.[61] The Tenth Circuit Court of Appeals agreed that section 1252c did not authorize the arrest in this particular case, but nevertheless held "that [section] 1252c does not limit or displace the preexisting *general authority* of state or local police officers to investigate . . . immigration laws."[62] Rather, section 1252c grants state and local officers *additional* authority for enforcing federal immigration laws.[63]

2. Arizona's Senate Bill 1070: The "Support Our Law Enforcement and Safe Neighborhoods Act"

Arizona enacted Senate Bill 1070 (S.B. 1070), the "Support Our Law Enforcement and Safe Neighborhoods Act," in April 2010.[64] Shortly thereafter, a set of amendments to S.B. 1070 was enacted under House Bill 2162.[65] The relevant portion of S.B. 1070 is section 2(B), which requires an officer to "make a reasonable attempt to determine the immigration status of a person stopped, detained, or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States, and requir[es] verification of the immigration status of *any* person arrested prior to releasing that person."[66]

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57. *Vasquez-Alvarez*, 176 F.3d at 1295.

58. *Id.*

59. *Id.* at 1295–96.

60. *Id.* at 1296.

61. *Id.* at 1295, 1296. Section 1252c authorizes state and local officials to make an arrest when the arrestee is in the country illegally and has prior felony convictions or deportations, "but only after the State or local [officers] obtain appropriate confirmation . . . of the [arrestee's] status . . . ." 8 U.S.C. § 1252c (2006).

62. *Vasquez-Alvarez*, 176 F.3d at 1295(emphasis added).

63. *Id.*

64. United States v. Arizona, 641 F.3d 339, 343 (9th Cir. 2011), *rev'd in part*, 132 S. Ct. 2492 (2012).

65. *Id.*; ARIZ. REV. STAT. ANN. § 11-1051(B) (2012). This note refers to Senate Bill 1070 and House Bill 2162 collectively as "S.B. 1070."

66. United States v. Arizona, 703 F. Supp. 2d 980, 987 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part*, *rev'd in part*, 132 S. Ct. 2492 (2012) (quoting § 11-1051(B)) (emphasis added).

The United States challenged the constitutionality of the newly enacted legislation, arguing that immigration regulation is an exclusive federal power and that section 2(B) of S.B. 1070 was preempted by federal law.[67] Specifically, the United States argued that the most logical interpretation of section 2(B) imposed a mandatory immigration status determination upon arrest, which would result in racial profiling and wasted resources.[68] Arizona argued that the United States incorrectly interpreted the provision and that section 2(B) only mandated verification of immigration status when the arresting officer had a reasonable suspicion that the person was in the country illegally.[69] Both the district court and the Ninth Circuit Court of Appeals agreed that the section could only be interpreted as mandating an "immigration status [determination] of *all* arrestees prior to release, regardless of whether or not a reasonable suspicion [of illegality existed.]"[70] The Ninth Circuit further affirmed the district court's holding that section 2(B) of S.B. 1070 was preempted by federal law.[71] Arizona appealed the decision to the United States Supreme Court and, in June 2012, the Court reversed the Ninth Circuit's holding with regard to section 2(B).[72]

3. Alabama's House Bill 56: The "Beason-Hammon Alabama Taxpayer and Citizen Protection Act"

Alabama enacted House Bill 56, the "Beason-Hammon Alabama Taxpayer and Citizen Protection Act" ("H.B. 56"), in June 2011.[73] Although H.B. 56 was to become effective on September 1, 2011, it was temporarily enjoined until September 29, 2011.[74] The relevant portions of H.B. 56 are sections 12(a) and 18. Section 12(a) is essentially the same as section 2(B) of Arizona's S.B. 1070, setting "forth circumstances under which state [and local] . . . law enforcement officers *must* attempt to verify the . . . immigration status of persons detained or arrested."[75] Section 18 adds that if an individual is unable to produce a valid license, a state or local police officer shall attempt to verify the person's immigration status pursuant to 8 U.S.C. section 1373(c).[76]

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67. *Arizona*, 703 F. Supp. 2d at 986. The United States challenged S.B. 1070 in its entirety, but the district court considered the challenge section by section because S.B. 1070 contained a severability clause. *Id.* This note only focuses on section 2(B).

68. *Id.* at 993.

69. *Id.* at 993–94.

70. United States v. Arizona, 641 F.3d 339, 347 (9th Cir. 2011), *rev'd in part*, 132 S. Ct. 2492 (2012); *Arizona*, 703 F. Supp. 2d at 994.

71. *Arizona*, 641 F.3d at 352.

72. Arizona v. United States, 132 S. Ct. 2492, 2507–10 (2012).

73. United States v. Alabama, 813 F. Supp. 2d 1282, 1292 (N.D. Ala. 2011), *aff'd in part*, 691 F.3d 1269 (11th Cir. 2011).

74. *Id.*

75. *Id.* at 1319 (emphasis added).

76. *Id.* at 1343. Section 18 amends Section 32-6-9, Code of Alabama 1975, which requires all licensees to "have his or her license in his or her immediate possession at all times when driving a motor vehicle . . . ." *Id.*

Sections 12(a) and 18 are considered together with regard to mandatory identification of an individual's immigration status.

The United States challenged Alabama's new law in district court the same way it challenged S.B. 1070; it argued that H.B. 56 was invalid by virtue of the preemption doctrine.[77] The United States moved to temporarily enjoin various sections of H.B. 56, including sections 12(a) and 18.[78] The district court granted in part the United States' motion to temporarily enjoin H.B. 56, including sections 12(a) and 18.[79] When the temporary injunction expired, the United States filed a motion for preliminary injunction and the district court denied the motion as to sections 12(a) and 18.[80] The United States then filed a motion for injunction pending appeal with the Eleventh Circuit Court of Appeals.[81] The Eleventh Circuit did not conduct a full preemption analysis while ruling on the motion, but rather relied on the record of the district court.[82] The United States' motion was denied as to sections 12(a) and 18.[83] It appeared as though the Eleventh Circuit had entered the circuit split by virtue of its holding.[84]

4. Other State Efforts to Expand State-Level Immigration Enforcement Authority

More states followed the trend set by Arizona and began legislating on the issue of immigration enforcement at state and local levels. Since S.B. 1070, there have been efforts to expand state enforcement authority in states such as South Carolina, Utah, Indiana, and Georgia.[85] Both the United States and private groups had requested that these state laws be blocked until the Supreme Court made a determinative ruling on the issue.[86] With the exception of Georgia, the federal courts agreed to hold off on making any further rulings on the constitutionality of individual state immigration laws until the Supreme

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77. *Alabama*, 813 F. Supp. 2d at 1292.

78. *Id.*

79. *Id.*

80. *Id.* at 1293.

81. United States v. Alabama, 443 F. App'x 411, 418 (11th Cir. 2011).

82. *Id.* at 419.

83. *Id.*

84. After the Supreme Court issued its opinion on Arizona's S.B. 1070, the 11th Circuit issued its opinion regarding Alabama's H.B. 56. The Circuit Court maintained that federal law did not preempt the state law. United States v. Alabama, 691 F.3d 1269, 1285 (11th Cir. 2012). The court did note, however, that the United States was not foreclosed from challenging the constitutionality of the law's application once in effect. *Id.*

85. Robert Barnes, *Supreme Court to Hear Challenge to Arizona's Immigration Law*, WASH. POST (Dec. 12, 2011), http://www.washingtonpost.com/politics/supreme-court-to-hear-challenge-of-arizonas-restrictive-immigration-law/2011/12/12/gIQA4UYepO_story.html.

86. *Id.*

Court set a more definitive precedent with its decision in *Arizona v. United States*.[87]

III. ANALYSIS: HOW INTERPRETING CONGRESSIONAL INTENT CAUSED CONFLICTING VIEWS AMONG THE CIRCUITS

The federal-state overlap of immigration law enforcement has blurred the lines between federal and state responsibilities.[88] The federal government maintains the position that states are overstepping their boundaries when they attempt to enforce immigration laws without the express authorization of federal agencies.[89] States, on the other hand, firmly contend that federal agencies are not getting the job done on their own and that state involvement only furthers the federal scheme and, thus, is not an attempt to usurp the federal power to regulate immigration.[90] Additionally, states firmly argue that they are not prohibited from creating and enforcing their own immigration laws so long as those laws do not contradict federal laws.[91] Without any expressly stated Congressional intent, courts have been forced to interpret relevant statutory language in order to figure out whether Congress intended to *completely* control the area of immigration law. Despite analyzing similar state laws in light of the same federal statutes, federal circuit courts have arrived at very different conclusions regarding Congressional intent.

A. The Tenth Circuit and Oklahoma's Expansive Enforcement Authority

In *United States v. Vasquez-Alvarez*, the Tenth Circuit Court of Appeals held that state and local law enforcement officers have the "general authority . . . to investigate and make arrests for violations of federal law, including immigration laws."[92] Additionally, the court found that the enactment of section 1252c was not Congress' way of limiting or preempting the states from exercising that general authority; rather, it broadened the scope of state authority.[93] To arrive at this conclusion, the court looked at the relevant federal and state laws, the different types of preemption, and Congressional action that followed the enactment of section 1252c.

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87. Jeremy Redmon, *Court Rejects Georgia's Request to Delay Immigration Law Case*, ATLANTA J.-CONST. (Dec. 22, 2011 3:40 P.M.), http://www.ajc.com/news/news/local-govt-politics/court-rejects-georgias-request-to-delay-immigratio/nQPk4/. *See also* Barnes, *supra* note 85.

88. Maria Fernanda Parra-Chico, *An Up-Close Perspective: The Enforcement of Federal Immigration Laws by State and Local Police*, 7 SEATTLE J. FOR SOC. JUST. 321, 324 (2008).

89. *E.g.*, Raul Grijalva, *Rep. Grijalva: Arizona's Immigration Law Would Lead to Chaos*, U.S. NEWS & WORLD REPORT (April 23, 2012), http://www.usnews.com/debate-club/is-arizonas-sb-1070-immigration-law-constitutional/rep-grijalva-arizonas-immigration-law-would-lead-to-chaos.

90. United States v. Alabama, 813 F. Supp. 2d 1282, 1321–22 (N.D. Ala. 2011), *aff'd in part*, 691 F.3d 1269 (11th Cir. 2011).

91. *Id.*

92. United States v. Vasquez-Alvarez, 176 F.3d 1294, 1295 (10th Cir. 1999).

93. *Id.*

The federal law at issue in *Vasquez-Alvarez* was section 1252c of Title 8 in the United States Code. Vasquez argued that his arrest was not authorized by section 1252c because, as the court stated:

> Section 1252c authorizes state and local . . . officers to arrest [and detain] illegal aliens if all of the following three conditions are met: (1) the arrest is permitted by state and local law; (2) the alien was deported or left the United States after a previous felony conviction; and (3) prior to arrest, the officer obtains "appropriate confirmation" of the alien's "status" from the INS.[94]

The Tenth Circuit agreed that the third element of section 1252c was not satisfied because the arresting officer had not confirmed with the INS Vasquez's immigration status prior to making the arrest.[95] The United States conceded to Vasquez's argument that the arrest was not authorized by section 1252c, but argued that state law *independently* authorized the arrest.[96]

The United States argued that a well established general rule and Oklahoma state law authorized state law enforcement officers to arrest any person committing an offense against the United States, including immigration laws, in the officer's presence.[97] Vasquez responded with the notion that the enactment of section 1252c displaced all preexisting state and local authority to make arrests for federal law violations.[98] Vasquez further argued that if an arrest was not authorized by section 1252c, then the arrest was prohibited by it.[99] The Tenth Circuit Court was then forced to delve into a preemption analysis.

To answer the question of whether section 1252c displaced existing authority for state and local officers to enforce federal immigration laws, the court looked to Congressional intent beginning with any evidence of express preemption.[100] The introductory portion of section 1252c contains two clauses: the first states "[n]otwithstanding any other provision of law" and the second states "to the extent permitted by relevant State and local law [.]"[101] The court held that the two clauses must be read together and not independent of each other.[102] Reading the clauses conjunctively, the court found no Congressional intent to preempt state and local authority to enforce

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94. *Vasquez-Alvarez*, 176 F.3d at 1296 (quoting 8 U.S.C. §1252c (1994)).

95. *Id.*

96. *Id.*

97. *Id.* at 1296–97. The Tenth Circuit, as well as other circuit courts, has long held that state and local officers are authorized to make arrests for federal violations so long as state law authorizes them to do so. *Id.*; *See generally* 1979 Okla. Att'y Gen., Op. 79-216 (discussing the State's power to have criminal jurisdiction over its citizens).

98. *Vasquez-Alvarez*, 176 F.3d at 1297.

99. *Id.*

100. *Id.*

101. 8 U.S.C. § 1252c (2012).

102. *Vasquez-Alvarez*, 176 F.3d at 1297–98.

federal immigration laws.[103] The court further stated that the first clause ensures only that "other *federal* laws [would] not be construed to restrict the [newly granted] authority" and the second clause "expressly negates any intent to preempt state-law limitations on state or local authority . . . ."[104] Additionally, the court noted that the statute's legislative history provided no indication of Congressional intent to displace preexisting authority for state enforcement of federal laws.[105]

Vasquez also argued that state and local authority was impliedly preempted because it created an obstacle to fulfilling the purpose of section 1252c.[106] This argument was based on the idea that when Congress enacted section 1252c, it granted state and local authority in *specific* circumstances and excluded that authority in all other circumstances.[107] The court again interpreted the text of section 1252c to mean that Congress has provided *additional* sources of authority for state and local police to enforce federal immigration laws, rather than creating an exclusive grant of authority under specific circumstances.[108]

The court found even more support for its holding in Congressional action following the enactment of section 1252c.[109] After enacting section 1252c, "Congress passed a series of provisions designed to *encourage cooperation between the federal government and the states in the enforcement of federal immigration laws*."[110] Among these provisions is section 1357(g), which allows the Attorney General to enter into written agreements with state and local officers to perform the duties of DHS officers.[111] More importantly though, Congress included section 1357(g)(10), which permits states to cooperate with the federal government in the "identification, apprehension, detention, or removal of [illegal] aliens" in the *absence* of such written agreements.[112] The Tenth Circuit held that Congress not only showed no intention of displacing preexisting state and local authority to enforce federal laws, but rather, it invited states to do so.[113]

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103. *Vasquez-Alvarez*, 176 F.3d at 1298.

104. *Id.*

105. *Id.* at 1298–99.

106. *Id.* at 1299.

107. *Id.*

108. *Id.* at 1299. The "specific circumstances" are the conditions required by § 1252c. The court rejected the argument that § 1252c was intended to displace preexisting authority and create even more stringent federal limitations. In fact, Representative Doolittle expressed his dissatisfaction with the federal limitations placed on state and local law enforcement and explained that the purpose of § 1252c was to eliminate such limitations. *Id.*

109. *Vasquez-Alvarez*, 176 F.3d at 1300.

110. *Id.* (emphasis added).

111. *Id.*

112. *Id.* (citing 8 U.S.C. § 1375(g)(10)).

113. *Id.*

B. The Ninth Circuit and Arizona's S.B. 1070

In *United States v. Arizona*, the Ninth Circuit Court of Appeals held that federal law preempted Arizona's state law authorizing state and local enforcement of immigration laws.[114] Specifically, the court read S.B. 1070 as a mandatory obligation on state and local law enforcement officers to verify immigration statuses.[115] The court held that such a mandatory obligation created an obstacle to the fulfillment of the purposes of federal immigration laws and S.B. 1070 was, therefore, preempted.[116] In order to arrive at this conclusion, the court interpreted the language of S.B. 1070, the language of the relevant federal immigration laws (including sections 1357(g) and 1373(c)), the different types of preemption, and Congressional action that encourages state involvement with immigration enforcement.

In determining whether the relevant sections of S.B. 1070 created a mandatory obligation, the court rejected Arizona's contention that the individual sentences of the section ought to be read conjunctively.[117] Arizona's interpretation of the section would require officers to verify immigration statuses only when a reasonable suspicion existed that the person was in the country illegally.[118] The court, however, read the section's sentences independently and subsequently found that the second sentence was unambiguously mandatory.[119] This initial determination led the court to believe that mandatory verification unavoidably required all persons whose immigration status was the subject of an inquiry to be detained until such status was verified.[120] Detention of such persons prompted the court to conduct a preemption analysis regarding section 2(B) of S.B. 1070.[121]

The court noted at the outset of its analysis that there is no presumption against preemption for section 2(B) of S.B. 1070 because "the states have not traditionally occupied the field of identifying immigration violations."[122] Pursuant to all preemption analyses, the court interpreted the relevant text of the INA to determine Congressional intent, beginning with sections 1357(g)(1)-(10), a section Congress titled "Performance of immigration officer functions by States officers."[123] The court interpreted sections (g)(1)-(9) as providing specific conditions under which the Attorney General may enter into written agreements with states and authorize state law enforcement

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114. United States v. Arizona, 641 F.3d 339, 352 (9th Cir. 2011), *rev'd in part*, 132 S. Ct. 2492 (2012).

115. *Id.* at 351.

116. *Id.*

117. *Id.* at 347.

118. *Id.*

119. *Id.*

120. *Arizona*, 641 F.3d at 348 n.7.

121. *Id.*

122. *Id.* at 348.

123. *Id.* (citing 8 U.S.C. § 1375(g) (2006)).

officers to carry out the duties and functions of federal immigration officers.[124] Further, section (g)(3) requires that *all* agreements be performed under the supervision of the Attorney General.[125]

However, section (g)(10) authorizes state and local enforcement officials to contact the Attorney General regarding *any* inquiries into a person's immigration status in the *absence* of any such written agreement.[126] The court rejected Arizona's argument that section (g)(10) should be considered in isolation from sections (g)(1)-(9), and instead found that section (g)(10) "does not operate . . . outside the restrictions set forth in [sections] (g)(1)-(9)."[127] The Ninth Circuit held that the text of section 1357(g), when read and considered in its entirety, authorizes state and local enforcement of federal immigration laws "only under particular conditions, including the Attorney General's supervision."[128] The court further stated that S.B. 1070 section 2(B)'s mandatory scheme "conflicts with Congress' explicit requirement" of federal supervision of all State employees performing federal immigration enforcement functions.[129]

Also relevant to the court's preemption analysis was the text of section 1373(c) (communication between government agencies and the INS). The section creates an obligation on DHS officers to respond to any state or local inquiries regarding verification of a person's immigration status.[130] Arizona argued that section 1373(c) encourages states to participate in immigration enforcement.[131] While the court agreed with that general idea, it refused to interpret section 1373(c) as Congress' intent to encourage states to assist in identifying illegal aliens through the use of *state* law.[132] Rather, the court viewed this section in light of section 1357(g) and concluded that section 1373(c) only applies within the "boundaries established in [section] 1357(g)."[133] The majority opinion reached a narrow interpretation of section 1373(c) in an effort to "determine how the many provisions of a vastly complex statutory scheme function together."[134]

Ultimately, the Ninth Circuit held that Congress intended for the federal scheme of regulating immigration to preempt any state law authorizing state and local law enforcement officers to perform the functions of federal immigration officers, including *identifying* aliens whose presence in the United

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124. *Arizona*, 641 F.3d at 348.

125. *Id.*

126. *Id.* at 349 (citing 8 U.S.C. § 1375(g)(10)).

127. *Id.*

128. *Id.*

129. *Id.* at 350 (citing 8 U.S.C. § 1357(g)(3)).

130. 8 U.S.C. § 1373(c) (2012).

131. *Arizona*, 641 F.3d at 350.

132. *Id.* at 350–51 (finding instead that § 1373(c) operates in conjunction with other federal laws and so it is limited by federal law rather than state law).

133. *Id.*

134. *Id.* at 351. The majority rejected the arguments presented by Arizona and by the dissent, which asserted that the separate provisions be considered "in stark isolation from the rest of the statute." *Id.*

States is illegal.[135] The court held that "S.B. 1070 [s]ection 2(B) 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' as expressed in [§§ 1357(g) and 1373(c)]."[136]

C. The Eleventh Circuit and Alabama's H.B 56

In *United States v. Alabama*, the Eleventh Circuit Court of Appeals denied the United States' motion for an injunction pending appeal.[137] The circuit court did not conduct a full preemption analysis; rather, it relied on the record of the District Court for the Northern District of Alabama. The district court also denied the United States' motion for preliminary injunction, holding that the United States was not likely to succeed on its claim that federal law preempted sections 12(a) and 18 of Alabama's H.B. 56, which authorize state and local law enforcement officers to verify an individual's immigration status upon arrest or detention.[138] The district court relied on the text of sections 1357(g) and 1373(c), as well as Judge Bea's dissenting opinion in *United States v. Arizona*.

The district court rejected Alabama's argument that a presumption against preemption should apply to sections 12(a) and 18 because setting forth "stop-and-arrest protocols" is purely state authority.[139] The court held that the relevant sections deal directly with the identification of illegal aliens, a field traditionally not occupied by the States.[140] Thus, pursuant to all preemption analyses, the court interpreted the relevant text of the INA to determine Congressional intent.[141] The court found "[n]othing in the text of the INA [which] expressly preempts states from legislating on the issue of verification of an individual's . . . immigration status" and nothing "which reflects Congressional intent that the United States occupy the field as it pertains to the identification of persons unlawfully present in the United States."[142] Finding no express preemption, the court only assessed whether sections 12(a) and 18 were implicitly preempted by serving as an obstacle to compliance with federal law.[143]

First, the district court interpreted the text of section 1357(g)(1)-(10). Unlike the Ninth Circuit, the district court (and the Eleventh Circuit) adopted the broad interpretation of section 1357(g) proposed by Judge Bea's dissenting

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135. *Arizona*, 641 F.3d at 352.

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

137. United States v. Alabama, 443 F. App'x 411, 419 (11th Cir. 2011).

138. United States v. Alabama, 813 F. Supp. 2d 1282, 1328, 1344 (N.D. Ala. 2011), *aff'd in part*, 691 F.3d 1269 (11th Cir. 2011).

139. *Id.* at 1321 (citation omitted).

140. *Id.* at 1321, 1343.

141. *Id.* at 1321–22, 1343.

142. *Id.* at 1321.

143. *Id.* at 1322.

opinion in *United States v. Arizona*.[144] Under the broad interpretation, like the narrow interpretation, sections (g)(1)-(9) are understood as setting forth the conditions under which the Attorney General can enter into written agreements with state governments and authorize state and local enforcement of federal immigration laws, including identification.[145] However, the broad interpretation does not make sections (g)(1)-(9) the "*exclusive* authority which Congress intended state officials to have in the field of immigration enforcement."[146] Rather, the broader interpretation of section 1357(g) considered section (g)(10) in *addition* to the first nine sections as "explicitly carv[ing] out certain immigration activities by state and local officials as *not* requiring a written agreement."[147] The district court held, and the Eleventh Circuit agreed, that section 1357(g) does not limit state cooperation of federal immigration enforcement, especially that of identification, to situations in which the state has been authorized by the Attorney General.[148]

Second, the district court interpreted Congressional intent with respect to section 1373(c) and again relied on Judge Bea's dissenting opinion in *United States v. Arizona*. The court held that section 1373(c) "demonstrates Congress' clear intent for state police to communicate with federal immigration officials in the first step of immigration enforcement—identification of illegal aliens."[149] The court found that, when read together, the Congressional intent found in sections 1357(g) and 1373(c) is clear: "state officials should assist federal officials in checking the immigration status of aliens."[150]

Ultimately, the district court held, and the Eleventh Circuit agreed, that Congress intended, anticipated, and even *encouraged* the assistance of state and local law enforcement officials with regard to federal immigration enforcement.[151] More specifically, Congress intended for states to aid in *identifying* persons illegally present in the United States.[152] Both courts held that sections 12(a) and 18 are consistent with the goals and purposes of the INA as expressed by Congress and that neither section creates a conflict or an obstacle to compliance with the federal scheme of regulating immigration.[153]

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144. *Alabama*, 813 F. Supp. 2d at 1323–24.

145. United States v. Arizona, 641 F.3d 339, 375–76 (9th Cir. 2011) (Bea, J., concurring in part and dissenting in part), *rev'd in part*, 132 S. Ct. 2492 (2012).

146. *Id.* at 375–76 (emphasis in original).

147. *Id.* (emphasis in original).

148. *Alabama*, 813 F. Supp. 2d at 1327–28.

149. *Id.* at 1325 (quoting *Arizona*, 641 F.3d at 374 (Bea, J., concurring in part and dissenting in part)).

150. *Id.* at 1324 (quoting *Arizona*, 641 F.3d at 372 (Bea, J., concurring in part and dissenting in part)).

151. *Id.* at 1328, 1343–44; United States v. Alabama, 443 F. App'x 411, 420 (11th Cir. 2011).

152. *Alabama*, 813 F. Supp. 2d at 1328, 1343–44; *Alabama*, 443 F. App'x at 420 .

153. *Alabama*, 813 F. Supp. 2d at 1328, 1344; *Alabama*, 443 F. App'x at 420.

IV. THE RESOLUTION OF THE CIRCUIT SPLIT

A. The Statutory Language Calls for More State Involvement

The threshold question, whether it is appropriate to apply a presumption against preemption, has a solid foundation in the history of preemption jurisprudence. The notion that Congress has the power to preempt state laws, especially when a state attempts to legislate in a field traditionally controlled on a federal level, lies at the core of the Supremacy Clause. The circuit split was the result of varying interpretations of what power Congress intended to leave to the states in a field of law traditionally governed at a federal level.

Congressional intent is often determined by the way the various provisions of an entire statutory scheme function together. The Ninth Circuit claimed to have read each provision of the INA within the boundaries established by all other provisions in order to reach its narrow interpretations of sections 1373(c) and 1357(g). The problem with this approach, as pointed out by Judge Bea's dissent, is that the provisions on their own lose meaning.[154] Judge Bea was concerned with the majority's understanding of section 1357(g)(10) with respect to section 1373(c). According to Bea, the majority's approach disregarded the natural reading of the provision, which set forth the conditions under which state and local officials may enforce federal immigration (specifically, identification) laws, in the *absence* of a written agreement provided by §§ (g)(1)-(9).[155] Why would Congress have included section (g)(10) at all if it intended for *all* state involvement to be expressly authorized in advance pursuant to a written agreement?

The approach taken by Judge Bea, the District Court in Alabama, and the Eleventh Circuit, which broadly interprets Congress' intent as *encouraging* a state role in identifying illegal aliens, has more force than the narrow interpretation followed by the Ninth Circuit. Similarly, the Tenth Circuit does not view section 1252c as Congressional intent to displace state law; rather, according to the Tenth Circuit, section 1252c grants *additional* authority to state officials. The authority that Congress has given to the states is not exclusive and dependent on specific circumstances. With regard to some programs, such as the 287(g) program, state authority is not automatic. But this is not always the case, as section 1357(g)(10) provides. States have *independent* authority to communicate with federal agencies in order to verify immigration statuses.

A competing view is that when states interfere with a federal scheme of regulation, federal enforcement is actually weakened.[156] This view takes the

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154. *Arizona*, 641 F.3d at 374–76 (9th Cir. 2011) (Bea, J., concurring in part and dissenting in part).

155. *Id.*

156. Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 35 (2007).

position that states are not looking at the big (national) picture and are more concerned with "localized conditions than with foreign relations."[157] The most forceful argument favoring preemption is that immigration is really an issue of foreign affairs—an issue with which the states should never be involved. But to say that state regulation of "*general* immigration functions are unconstitutional as a function of exclusive federal preemptory powers" completely shuts the door on every state effort to assist in or cooperate with a federal scheme.[158]

Certainly, there are areas of immigration law that are truly federal in nature and can only be effectively controlled by one uniform scheme, such as the removal of illegal aliens.[159] The removal of illegal aliens serves as part of Congress' purpose in enacting the INA. However, laws permitting or even requiring state officials to verify a person's immigration status can hardly be construed as conflicting with the purpose or goal of Congress. As stated in Judge Bea's dissent in *United States v. Arizona*, the fact that states are not permitted to remove illegal aliens "does not imply that the [states are] unable to cooperate with the federal authorities to achieve the alien's removal."[160] Identification is the initial step in achieving Congress' ultimate goal.

The natural reading of section 1357(g)(10) implies that Congress anticipated that states would play a role in the identification of illegal aliens. Moreover, section 1373(c) mandates that when states actively assist federal authorities by making an immigration status inquiry, the government agencies respond to state officers. The relationship between sections 1357(g)(10) and 1373(c) cannot be ignored. Plainly stated, when there is no written agreement authorizing state officers to perform the duties of a federal immigration officer and a state officer inquires into an individual's immigration status, the DHS is *required* to respond to the inquiry. Reading the two sections in any other way would render them ineffective and there would be essentially no reason for Congress to have written them at all.

B. The United States Supreme Court Finally Weighs In

In December 2011, the Supreme Court of the United States granted certiorari to review the challenge to Arizona's S.B. 1070.[161] The Court rejected the Justice Department's contention that it should wait to hear the case until similar lawsuits had worked their way through the courts.[162] States with similar laws were held in limbo until the Supreme Court issued a ruling regarding Arizona's laws. On June 25, 2012, Justice Kennedy delivered the opinion of

157. Olivas, *supra* note 156, at 31.

158. *Id.* at 34 (emphasis added).

159. *Arizona*, 641 F.3d at 349 (stating "removal is exclusively the purview of the federal government").

160. *Id.* at 377 (Bea, J., concurring in part and dissenting in part).

161. Arizona v. United States, 132 S. Ct. 845 (2011).

162. *Id.*

the Court.[163] The United States challenged four provisions of Arizona's S.B. 1070.[164] The Court examined each of the four provisions individually, but stated the that overall purpose of granting certiorari was to "resolve important questions concerning the interaction of state and federal power with respect to the law of immigration and alien status."[165]

Section 2(B) requires all "state officers to make a 'reasonable attempt . . . to determine the immigration status' of any person they stop, detain, or arrest . . . 'if *reasonable suspicion* exists that the person is an alien and unlawfully present in the United States'" and requires that "*any* person who is arrested shall have the person's immigration status determined before the person is released."[166] The Court noted the built-in limitations of section 2(B): (1) if a person produces a valid form of a identification there is a presumption that the person is lawfully in the country; (2) the officers are prohibited from considering "race, color or natural origin . . . except to the extent permitted" by law; and (3) section 2(B) must be "implemented in a manner consistent with federal law . . . ."[167]

The United States presented two concerns with Arizona's "show me your papers" provision. The first was the "mandatory nature of the status checks."[168] The Court considered Congressional intent with regard to communication between state officers and federal agencies, especially for the purpose of verifying immigration statuses.[169] The fact that Congress included section 1357(g)(10), authorizing communication between the state and federal governments in the absence of any written agreement, tends to suggest that the "federal scheme . . . leaves room for a policy requiring state officials to contact [the federal government] as a routine matter."[170] The Court concluded that having a mandatory, as opposed to a voluntary or discretionary, provision, does not create a conflict between the federal and state schemes.[171]

The second concern was that the latter portion of the provision would create prolonged detention in cases where a person was arrested and the officer was required to check the person's immigration status prior to release.[172] The Court very simply dealt with this concern by interpreting the provision in two different, constitutionally valid ways. First, the provision

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163. Arizona v. United States, 132 S. Ct. 2492, 2497 (2012). (Justice Kennedy was joined by Chief Justice Roberts, Justice Ginsberg, Justice Breyer, and Justice Sotomayor. Justices Scalia, Thomas, and Alito filed separate opinions and Justice Kagan did not participate in this decision.).

164. *Id.* at 2497–98. The only section at issue here is 2(B). The Court held that the three other sections (3, 5(C), and 6) were all preempted by federal law. *Id.* at 2510.

165. *Id.* at 2498.

166. *Id.* at 2507 (quoting ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (emphasis added)).

167. *Id.* at 2507–08.

168. *Id.* at 2508.

169. *Arizona*, 132 S. Ct. at 2508

170. *Id.*

171. *Id.* at 2508.

172. *Id.* at 2508–09.

could be read as requiring that the immigration status verification be *initiated*, though not necessarily completed, before release.[173] Under this interpretation, if the verification process would unnecessarily prolong the person's detention, the state officer could complete the verification after the person's release so long as the process was initiated while the person was in custody. Second, the provision could be read as requiring the state officer to *complete* the verification process while the person was in custody so that the person could be released only after the officer had verified the person's immigration status.[174] The Court said even under this interpretation there is no evidence that "the verification process would result in prolonged detention."[175]

Ultimately, the Court determined that section 2(B) would survive a preemption challenge.[176] The Court declined, however, to address the constitutionality of section 2(B)'s application once in effect; rather, it stated that the "Federal Government [had] brought suit against a sovereign State to challenge the provision even before the law [had] gone into effect" and the Court refused to interpret the language of 2(B) in a way that conflicted with federal law[177] The Court noted that, once the law was in effect and its application was presented, a constitutional challenge might then be appropriate.[178]

Justices Scalia, Thomas, and Alito, wrote separate opinions, all concurring in part and dissenting in part. All three opinions, however, agreed with the majority with respect to section 2(B). Justice Scalia simply stated that section 2(B) "merely tells state officials that they are authorized to do something that they were, by the Government's concession, already authorized to do."[179] Justice Thomas agreed with Justice Scalia, adding only that "[n]othing in the text of [section 2(B)] or any other federal statute prohibits Arizona from directing its officers to make immigration related-inquiries . . . ."[180] Justice Alito reached a similar conclusion and stressed that section 2(B) does not, in any way, expand the authority of state officers.[181] Moreover, the United States' argument that section 2(B)'s mandatory nature conflicts with federal law because state officers are not able to "consider the Federal Government's priorities before requesting verification of a person's immigration status" is unpersuasive.[182] As Justice Alito points out, no federal statutes require state

173. *Arizona*, 132 S. Ct. at 2509.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 2509–10.

178. *Id.* at 2510.

179. *Arizona*, 132 S. Ct. at 2515 (Scalia, J., concurring in part and dissenting in part) (state officials were authorized to contact federal DHS officers regarding immigration status checks even before section 2(B)).

180. *Id.* at 2522 (Thomas, J., concurring in part and dissenting in part).

181. *Id.* at 2525 (Alito, J., concurring in part and dissenting in part) (section 2(B) does not expand state officers' authority to stop persons, arrest persons, or inquire about immigration statuses).

182. *Id.* at 2526 (Alito, J., concurring in part and dissenting in part).

officers to consider federal priorities; as such, section 2(B)'s failure to require such consideration does not create a conflict.[183]

V. MOVING FORWARD

A. Theory Behind "Show Me Your Papers" Laws

Many state governors and legislatures have taken the position that the federal government alone is simply unable to control the population of illegal immigrants within the United States borders.[184] Arizona Governor Jan Brewer has publicly attacked the federal government's efforts to control illegal immigration, claiming that the government has failed to effectively address the issue of immigration.[185] Despite the Ninth Circuit's 2011 ruling against Arizona's strict immigration laws, Brewer maintained her commitment to regulating illegal immigration in Arizona.[186] She has continued to advocate for the citizens of Arizona and demand that the federal government not only address the nation's immigration problem, but also make it a priority to take action.[187] Following the Supreme Court's ruling in 2012, Brewer released a statement, calling the decision a "victory for the rule of law."[188]

Likewise, South Carolina Governor Nikki Haley has expressed her agreement with Brewer's position on immigration law enforcement at a state level.[189] Georgia Governor Nathan Deal stated that Georgia is yet another state that is in need of a "statewide solution" to prevent illegal immigration from continuing to "absorb [the] state's limited resources."[190] These and other states have felt the burden of expending state resources on illegal immigrants without gaining the contributions that citizens provide.[191]

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183. *Arizona*, 132 S. Ct. at 2527 (Alito, J., concurring in part and dissenting in part) (Justice Alito calls the United States' argument "remarkable" because it asks the Court to give agency policy preemptive force, which the Court refuses to do.).

184. *See* BREWER, *supra* note 50 and accompanying text.

185. *Securing our Border,* OFFICE OF THE ARIZONA GOVERNOR JANICE K. BREWER, http://www.azgovernor.gov/Priorities/AZBorderSecurity.asp (last visited June 25, 2013).

186. *Id.*

187. *Id.*

188. Press Release, Office of the Governor, Janice K. Brewer, *U.S. Supreme Court Decision Upholds Heart of SB 1070* (June 25, 2012), *available at* http://www.azgovernor.gov/dms/upload/PR_062512_SB107SCRuling.pdf.

189. *Immigration*, NIKKI HALEY, GOVERNOR OF S.C. (May 20, 2010) http://www.nikkihaley.com/issues/immigration.

190. *On the Issues*: *Public Safety*, GOVERNOR NATHAN DEAL, OFFICE OF THE GOVERNOR (April 6, 2013), http://gov.georgia.gov/issues-0#public.

191. *Id.*; *see also Governor Herber Issues Statement on Illegal Immigration Reform in Utah*, UTAH GOVERNOR GARY HERBERT (July 20, 2010), http://www.utah.gov/governor/news_media/article.html?article=3368. Herbert stated that "[a]bsent any meaningful leadership from the federal government on this issue, individual states are being forced to take up the charge." *Id.* He further expressed the need for the federal government to take responsibility so the taxpayers are not carrying the burden of illegal immigration. *Id.* Gov. Herbert uses six

State action has been the result of subpar federal response to the increasing illegal immigrant population. Generally, state involvement is aimed at effectuating the same purpose employed by the federal scheme. One scholar has proposed that many aspects of law enforcement in the context of immigration would be best accomplished through "subfederal regulation."[192] Using a subfederal framework would leave some aspects of immigration regulation, such as entry and removal, purely federal because those aspects touch on issues of foreign relations.[193] Other aspects, particularly including the identification of illegal immigrants, are best tackled at a local level.[194] This type of subfederal scheme would require the recognition of a concurrent authority to regulate immigration, as well as shared interests between the federal and state governments.[195]

If Congress adopted a scheme of immigration regulation that included both federal and state involvement, a standard preemption doctrine would necessarily apply in the immigration context.[196] As applied to *identification* laws, courts would have to recognize the subsets of immigration regulation.[197] The analyses for express and implied field preemption would remain largely intact, but the analysis for conflict preemption would require the courts to take a different approach.[198] State laws regarding immigration regulation that have been struck down were done so on the basis of conflict preemption, specifically the finding that the state laws create an obstacle to fulfilling the purpose of the federal laws.[199] Under a subfederal scheme, the inquiry in any conflict preemption analysis would be "whether the state [law] . . . interferes with an existing federal . . . scheme such that it makes effective implementation of that scheme substantially more costly or inefficient than it would be absent the state regulation."[200] Thus, any means used by states that are inconsistent with or thwart federal ends serve as a conflict and would be

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principles to combat illegal immigration: respect for the law; the federal government must take responsibility; private sector accountability; respect for the humanity of all people; efforts must be fair, colorblind and race-neutral; law enforcement must have appropriate tools; and relieve the burden on taxpayers. *Id.*

192. Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 640–41 (2008) (recognizing that some aspects, such as entry and removal, are best handled through a uniform federal scheme). It is important to acknowledge that the process of removal involves a series of steps, which occur at various levels of government; the initial trigger may be as simple as identification. *Id.* at 624.

193 *Id.* at 641.

194. *Id.* There are some aspects of immigration regulation that are almost purely local in nature so that the federal government is practically unable to manage it without state involvement (i.e., integrating immigrants into the "political and cultural identity of the United States"). *Id.*

195. *Id.* at 623.

196. *Id.* at 620.

197. *Id.* at 623–24. "Subsets" include entry, investigation, apprehension, identification, removal, etc.

198. Rodriguez, *supra* note 192, at 624–25.

199. *See supra* text accompanying notes 137–38.

200. Rodriguez, *supra* note 192, at 625.

preempted.[201] State laws that are consistent with federal ends would be constitutionally valid.

At the time of signing S.B. 1070, Arizona Governor Jan Brewer explained that the new law "is not intended to be the single solution to Arizona's extraordinary illegal immigration problems."[202] She has maintained that S.B. 1070 serves to protect Arizona citizens from the immigration "crisis [which the] federal government has refused to fix."[203] She also made clear that the state, while focused on enforcing immigration law, preserved the utmost concern for the civil rights of all citizens.[204] The state's concern for civil rights was so significant that Brewer issued Executive Order 2010-09, which implemented training policies for all law enforcement officers in preparation for the enforcement of S.B. 1070.[205] In 2012, Brewer issued a second order that called for redistribution of all training materials so that all officers would be prepared to properly and lawfully enforce S.B. 1070.[206]

B. Unintended Consequences of "Show Me Your Papers" Laws – Application

While heightened state involvement is seemingly necessary, an issue of equal importance is how quickly it could become a necessary evil. Certainly in theory—and perhaps in actuality—state law enforcement officers will be trained in such a way that discourages racial profiling. The concern for many, however, is that racial profiling already exists in areas with higher rates of undocumented immigrants.[207] Many Arizona residents, especially those in Latino communities, fear the consequences of local law enforcement's new authority to enforce the "show me your papers" provision of S.B. 1070.[208] Not only is there a fear of racial profiling, but also the "deterioration of trust between communities of color and local law enforcement."[209] It appears

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201. Rodriguez, *supra* note 192, at 625.

202. *Common Myths and Facts Regarding Senate Bill 1070*, OFFICE OF GOVERNOR JANICE K. BREWER, http://www.azgovernor.gov/documents/BorderSecurity/SB1070MythsandFacts.pdf (last visited June 12, 2013).

203. Press Release, Office of Governor Janice K. Brewer, (Apr. 23, 2010), *available at* http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf.

204. *Id.*

205. ESTABLISHING LAW ENFORCEMENT TRAINING FOR IMMIGRATION LAWS, EXEC. ORDER 2010–09 (Ariz. 2010), *available at* http://www.azgovernor.gov/dms/upload/EO_201009.pdf.

206. CONTINUED LAW ENFORCEMENT TRAINING FOR IMMIGRATION LAWS, EXEC. ORDER 2012-02, *available at* http://azmemory.azlibrary.gov/cdm/ref/collection/execorders/id/692.

207. Minerva Caraño, *On Immigration, Supreme Court Sends A Contradictory Message*, WASH. POST (June 26, 2012, 4:03 P.M.), http://www.washingtonpost.com/blogs/guest-voices/post/on-immigration-supreme-court-sends-a-contradictory-%20message/2012/06/26/gJQACCno4V_blog.html.

208. *Id.*

209. *Id.*

residents are less concerned with the state's immigration problem than they are with the "abuse of power of some in law enforcement."[210] Aside from harassment of Latinos, S.B. 1070 is literally designed to drive immigrants (both legal and illegal) out of Arizona.[211] Those who do not leave will likely try to avoid any and all contact with law enforcement.[212] Members of the Latino communities "[will not] ask for help and witnesses [will not] come forward[.]"[213] A heightened sense of fear, anxiety, and general distrust of law enforcement is already present since the Supreme Court upheld section 2(B).[214]

Problems exist on the other side of the spectrum as well. There is a very strong possibility that state and federal law enforcement will not be able to handle Arizona's mandate. Tucson Police Chief Roberto Villaseñor fears that the Police Department will not have the manpower to make the additional fifty thousand phone calls a year to ICE to verify immigration statuses.[215] The uncertainty leaves Police Departments wondering what direct impact the new law will have on their agencies as well as how the federal agencies will handle the amount of state inquiries.[216] Pima County Sheriff Clarence Dupnik added "[l]aw enforcement did not ask for this law, . . . [l]aw enforcement did not need this law."[217]

C. What to Expect in the (Very) Near Future

There is no doubt that the courts will see S.B. 1070 again and again. The Supreme Court welcomed challenges to the ways in which section 2(B) was implemented. On its face, section 2(B) withstood the challenges presented to the Supreme Court. In its application, however, the country may see a different outcome. In the interim, other states will follow Arizona's lead. The federal government is helping states to prepare state and local law enforcement officers by explaining the steps and factors federal agencies use to enforce immigration laws.[218] Hopefully training will be effective insofar as eliminating or at least limiting increased racial profiling and harassment. Optimism aside, it is likely that civil rights groups will continue to challenge S.B. 1070 until it lands back in court and a different outcome is achieved.

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210. Caraño, *supra* note 207.

211. Editorial, *Supreme Court's immigration reality check*, L.A. TIMES, June 26, 2012, at A10.

212. Michael Martinez & Mariano Castillo, *Arizona's 'show-me-your-papers' law rolls out a day after Supreme Court ruling*, CNN.COM, (June 27, 2012, 5:38 PM), http://edition.cnn.com/2012/06/26/us/arizona-immigration/index.html?hpt=us_t2.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. Hensley, *supra* note 18.

VI. CONCLUSION

Immigration is traditionally a federal territory because it relates to foreign affairs. There are, however, subsets of immigration that have a more direct impact on states and localities than they do on the nation. The federal government is not addressing the local issues caused by faulty immigration enforcement. To remedy the local burdens, states should be able to legislate in certain areas of immigration regulation. Certainly, some aspects of immigration law are wholly federal and should never be regulated on a state or local level (i.e., entry and deportation or removal of illegal immigrants). However, states should not be prohibited from making efforts to identify persons illegally residing within their borders. State and local officers are more frequently presented with opportunities to verify immigration status and it seems as though Congress anticipated and encouraged their cooperation and assistance by enacting sections 1357(g)(10) and 1373(c) of Title 8 of the United States Code. The Supreme Court agreed that state laws authorizing (even *mandating*) law enforcement officers to verify immigration statuses in certain circumstances are not unconstitutional. Nevertheless, the application of such laws may prove to be.

This country does have an outstanding problem with illegal immigrants making their way into the various states and, often times, slipping through the hands of law enforcement. Hopefully the newly granted authority for state and local officers to enforce immigration laws will not lead to increased racial profiling and a general distrust of law enforcement. While that result remains a possibility for some, as a country, we can only hope that what happens in Arizona will be a positive change and that any counter effect will not "seep through and affect the entire country."[219] More importantly, we can hope that our court system will not allow such constitutional laws to have unconstitutional consequences.

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219. Caraño, *supra* note 207.