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State Power to Regulate Immigration: Searching for a Workable Standard in Light of *United States v. Arizona* and *Keller v. City of Fremont*

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Note*

State Power to Regulate Immigration: Searching for a Workable Standard in Light of *United States v.* *Arizona* and *Keller v.* *City of Fremont*

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I. INTRODUCTION

“Like Nazism.”¹ A “fair measure,” aimed at people who “shouldn’t be here in the first place.”² “[A]n indispensable tool for the police.”³ A law “beyond the pale” that “appears to mandate racial profiling.”⁴ A measure that “takes the handcuffs off of law enforcement and lets them do their job.”⁵ A measure “necessary” to make up for “lax federal law enforcement.”⁶ This is just a sample of the widely divergent and highly charged political rhetoric surrounding two controversial immigration laws passed in 2010. Supporters of the laws were concerned about the problems caused by the presence of illegal aliens in their

1. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, THE N.Y. TIMES (Apr. 23, 2010), <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>.

2. Margery A. Beck, *Nebraska Immigration Law Passes: Special Election Held in Fremont to Ban Hiring or Renting Property to Illegal Immigrants*, THE HUFFINGTON POST (June 22, 2010, 9:10 PM), http://www.huffingtonpost.com/2010/06/22/nebraska-immigration-law_n_620528.html.

3. Archibold, *supra* note 1.

4. Nicholas Riccardi, *Arizona Passes Strict Illegal Immigration Act*, LOS ANGELES TIMES (April 13, 2010), <http://articles.latimes.com/2010/apr/13/nation/la-na-arizona-immigration14-2010apr14>.

5. *Id.*

6. Beck, *supra* note 2.

communities.⁷ Opponents feared the laws would fuel racial prejudices and discrimination.⁸ And some people, like Alfredo Velez, were concerned about the viability of their businesses and about the increased taxes the laws would cause.⁹

The Department of Homeland Security estimates that 10,750,000 unauthorized immigrants resided in the United States as of January 2009.¹⁰ Considering the United States' total population is about 309 million,¹¹ this figure indicates that unauthorized immigrants make up roughly 3.48% of this country's total population. Arizona, as a border state, is disproportionately affected by illegal immigration. The Department of Homeland Security estimates that the illegal alien population in the State of Arizona increased by an average of 20,000 unauthorized aliens per year from 2000 to 2009.¹² This has resulted in a 42% increase in the number of unauthorized aliens in Arizona—from 330,000 in 2000 to 460,000 in 2009.¹³ Considering Arizona's population of 6.39 million¹⁴ in 2010, unauthorized immigrants make up approximately 7.2% of Arizona's population.

This large population of unauthorized immigrants led to considerable resentment among Arizona citizens. Frustrated by what some perceived as the federal government's failure to adequately address the problems created by illegal immigration, Arizonans looked for other ways to address the problems within their own state. Responding to growing pressure from citizens to address illegal immigration, the Arizona Legislature passed the controversial Senate Bill 1070 ("S.B. 1070"), the "Support Our Law Enforcement and Safe Neighborhoods Act" in 2010.¹⁵ S.B. 1070 made "attrition through enforcement the public policy of all state and local government agencies in Arizona."¹⁶ S.B. 1070 furthers this policy by, among other methods, requiring police officers to inquire into the immigration status of individuals in

7. *Arizona Set to Appeal Judge's Ruling on Immigration Enforcement Law*, FOX NEWS (July 28, 2010), <http://www.foxnews.com/politics/2010/07/28/supporters-arizonas-immigration-law-solace-remaining-portions/>.

8. Archibold, *supra* note 1.

9. Beck, *supra* note 2.

10. MICHAEL HOEFER ET AL., U.S. DEP'T. OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 3 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

11. *USA QuickFacts from the US Census Bureau*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated June 7, 2012).

12. HOEFER ET AL, *supra* note 10, at 4.

13. *Id.*

14. *Arizona Quickfacts from the US Census Bureau*, U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/04000.html> (last updated June 7, 2012).

15. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), available at http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/sb1070o.asp&Session_ID=93.

16. S.B. 1070 § 1.

certain circumstances,¹⁷ criminalizing an alien's performance or solicitation of work as an employee or independent contractor,¹⁸ creating a state crime for an alien's failure to carry a registration card in violation of federal law,¹⁹ and authorizing police officers to arrest aliens without a warrant when they have probable cause to believe the alien committed a removable offense.²⁰ The legislature meant for the provisions of S.B. 1070 to "work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."²¹ The Arizona Legislature's consideration of S.B. 1070 attracted national media attention and criticism.²² Despite the controversy, Arizona Governor Jan Brewer signed S.B. 1070 into law on April 23, 2010.²³ Shortly thereafter, the Obama Administration pledged to challenge S.B. 1070 in court.²⁴

While S.B. 1070 attracted the most attention from national media, Arizona was not the only state considering laws meant to increase enforcement of immigration laws.²⁵ In Nebraska, residents of the City of Fremont grew concerned about the influx of unlawful aliens into their community, many drawn by jobs at two nearby meat-packing plants.²⁶ Concerned residents sought to pass an ordinance meant to deter unlawful aliens from living or working in the community.²⁷ The Fremont City Council initially rejected the proposed ordinance in 2008, but voters continued to pursue the matter with a city initiative petition.²⁸ The City challenged the validity of the initiative, but the Nebraska Supreme Court found the initiative procedurally proper and refused to render an advisory opinion on the substantive constitution-

17. S.B. 1070 § 2(B).

18. S.B. 1070 § 5(C).

19. S.B. 1070 § 3.

20. S.B. 1070 § 6.

21. S.B. 1070 § 1.

22. *See, e.g.*, Archibold, *supra* note 1.

23. *Id.*

24. *See, e.g.*, Brian Montopoli, *Senior Official: Obama Administration Will Challenge Arizona Immigration Law*, CBS NEWS (June 18, 2010, 3:56 PM), http://www.cbsnews.com/8301-503544_162-20008171-503544.html.

25. *See Nebraska Immigration Law Passes*, CNN NEWS (June 22, 2010), http://articles.cnn.com/2010-06-22/us/nebraska.immigration_1_immigration-policy-farmers-branch-ordinance?_s=PM:US (discussing anti-immigration ordinances in Fremont, Nebraska, Hazelton, Pennsylvania, and Farmers Branch, Texas); *see also* Lozano v. City of Hazelton, 620 F.3d 170, (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011) (striking down the Hazelton ordinance); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 701 F. Supp. 2d 835, (N.D. Tex. 2010) (striking down the Farmer's Branch ordinance); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, (S.D. Cal. 2006) (striking down similar ordinance).

26. Huma Kahn, *Midwest Town Mandates Immigration Check for Renters*, ABC NEWS (June 21, 2010), <http://abcnews.go.com/Politics/immigration-debate-heats-fremont-nebraska/story?id=10972180#.T77VExxa4c8>.

27. *Id.*

28. *Id.*

ality of the proposed ordinance.²⁹ On June 21, 2010, voters in the City of Fremont adopted the controversial Ordinance No. 5165 (the “Ordinance”) pursuant to a voter referendum.³⁰ The stated purpose of the Ordinance was to “prohibit the harboring of illegal aliens or hiring of unauthorized aliens” in the City of Fremont.³¹ It sought to achieve these goals by implementing occupancy and business licensing schemes requiring inquiry into individuals’ immigration status and providing penalties for non-compliance.³²

On July 6, 2010, the federal government made good on its promise to challenge S.B. 1070 and filed a lawsuit in the United States District Court for the District of Arizona, seeking “to declare invalid and preliminarily and permanently enjoin the enforcement of S.B. 1070.”³³ The federal government claimed S.B. 1070 is “preempted by federal law and therefore violates the Supremacy Clause of the United States Constitution.”³⁴ The United States specifically argued facial challenges to six of S.B. 1070’s provisions.³⁵ District Court Judge Susan R. Bolton granted in part the United States’ motion for preliminary injunction and enjoined enforcement of S.B. 1070 sections 2(B), 3, 5(C), and 6.³⁶ Arizona appealed the district court’s ruling, and the Ninth Circuit affirmed.³⁷ The United States Supreme Court granted Arizona’s petition for certiorari on December 12, 2011,³⁸ and heard oral arguments on April 25, 2012.

Similarly, opponents of the Fremont, Nebraska Ordinance filed suit in the United States District Court for the District of Nebraska on July 21, 2010, challenging the Ordinance’s constitutionality and seeking to enjoin its enforcement.³⁹ The City of Fremont then resolved to suspend implementation and enforcement of the ordinance pending the resolution of the litigation.⁴⁰ On February 20, 2012, Chief Judge of the United States District Court for the District of Nebraska, Lau-

29. *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010), *abrogated by* *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

30. *FREMONT, NEB., ORDINANCE 5165* (June 21, 2010), *available at* <http://fremontne.gov/DocumentView.aspx?DID=770>.

31. *Id.*

32. *Id.*

33. *Complaint at 1, United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10CV01413), 2010 WL 2653363.

34. *Id.*

35. *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2011) *cert. granted*, 132 S. Ct. 845 (2011) (citing *United States v. Arizona*, 703 F. Supp. 2d 980, 992 (D. Ariz. 2010)).

36. *Id.*

37. *Id.*

38. *See Arizona v. United States*, 132 S. Ct. 845 (2011) (mem.).

39. *Keller v. City of Fremont*, Nos. 8:10CV270, 4:10CV3140, 2012 WL 537527 at *3 (D. Neb. Feb. 20, 2012).

40. *See FREMONT, NEB., RESOLUTION 2010-140* (July 27, 2010), *available at* <http://www.fremontne.gov/DocumentView.aspx?DID=768>.

rie Smith Camp, entered a Memorandum and Order on cross motions for summary judgment.⁴¹ The court granted in part the plaintiffs' motions for summary judgment and permanently enjoined enforcement of section 1, Parts 2, 3.L, and 4.D of the Ordinance.⁴² The City of Fremont filed its notice to appeal on March 21, 2012.⁴³

This Note analyzes the Ninth Circuit's decision in *United States v. Arizona*,⁴⁴ as well as the United States District Court for the District of Nebraska's decision in *Keller v. City of Fremont*.⁴⁵ It will first discuss the background of the cases, including an overview of the general preemption standards the applied by the *Arizona* court, an overview of Supreme Court preemption decisions in the immigration context, and a summary of the *United States v. Arizona* and *Keller v. City of Fremont* decisions. The Note will then analyze the *Arizona* decision, concluding the *Arizona* court correctly upheld the district court's injunction of S.B. 1070. However, this Note will argue the *Arizona* court's reasoning was flawed because general preemption standards are an inadequate analytical tool for determining the constitutionality of state laws attempting to regulate immigration. Rather, S.B. 1070 is unconstitutional because the Constitution gives the federal government exclusive authority to regulate immigration and the enjoined sections of S.B. 1070 exceed the authority Congress has delegated to states to regulate immigration. Next, the Note will analyze the *Keller* decision in light of the Note's analysis of the *Arizona* decision, concluding the *Keller* court correctly enjoined portions of the Ordinance. Finally, this Note will conclude by offering insights into the implications of the *Arizona* and *Keller* decisions.

II. BACKGROUND

A. General Preemption Standards

The United States Constitution gives the federal government the power to preempt state law in certain circumstances. The Supremacy Clause provides, in pertinent part, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁴⁶ Thus, "[a] fundamental principle of the Constitution is that

41. *Keller*, 2012 WL 537527.

42. *Id.* at *19.

43. See *Keller v. City of Fremont*, Nos. 8:10CV270, 4:10CV3140, 2012 WL 537527 at *3 (D. Neb. Feb. 20, 2012), *appeal docketed*, Nos. 8:10CV270, 4:10CV3140 (8th Cir. Mar. 21, 2012).

44. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (2011).

45. *Keller*, 2012 WL 537527.

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

Congress has the power to preempt state law.”⁴⁷ When courts consider preemption challenges, “[t]he purpose of Congress is the ultimate touchstone.”⁴⁸ When Congress legislates in a field of law traditionally occupied by state law, courts “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”⁴⁹

Even in the absence of an express provision for preemption, state law will be preempted in two circumstances. First, “when Congress intends federal law to ‘occupy the field,’ state law in that area is preempted.”⁵⁰ Second, “even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.”⁵¹ These principles are commonly referred to as “field preemption” and “conflict preemption” respectively.

Field preemption occurs in two ways. First, courts will find preemption exists when Congress explicitly declares its intent for the federal regulation to be the exclusive authority in the field.⁵² Also, courts have found field preemption despite an absence of explicit Congressional intent by inferring such intent from the comprehensive nature of federal regulation.⁵³ Thus, “Congress’s intent to supersede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”⁵⁴

Conflict preemption also occurs in two circumstances. The first is when state and federal law conflict in such a way that “it is impossible for a private party to comply with both state and federal law.”⁵⁵ The second occurs when “under the circumstances of [a] particular case, the [challenged state law] stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.”⁵⁶ Thus, the focus of conflict preemption doctrine is on the incompatibility of state and federal law.

Plaintiffs seeking invalidation of state or local laws on the basis of preemption carry a heavy burden. While these field and conflict pre-

47. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

48. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

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

50. *United States v. Arizona*, 641 F.3d 339, 345 (9th Cir. 2011) (quoting *Crosby*, 530 U.S. at 372), *cert. granted*, 132 S. Ct. 845 (2011).

51. *Id.*; see *Gade v. Nat’l Solid Wastes Mgmt. Ass’n.*, 505 U.S. 88, 98 (1992).

52. *Fla. Lime & Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

53. *See id.*

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

55. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

56. *United States v. Arizona*, 641 F.3d 339, 345 (9th Cir. 2011) (quoting *Crosby*, 530 U.S. at 373).

emption standards are helpful, they are not necessarily definitive. There is not “an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.”⁵⁷ Plaintiffs seeking invalidation of a state or local law as unconstitutional based on preemption must therefore prepare an argument that will measure up to an uncertain legal standard. Additionally, plaintiffs challenging a law as unconstitutional on its face carry a heavy burden of persuasion: “the challenger must establish that no set of circumstances exists under which the Act would be valid.”⁵⁸

B. Preemption Doctrine in the Context of Immigration

The United States Supreme Court has previously found preemption of state laws regulating immigration. In *Hines v. Davidowitz*, the Court struck down a Pennsylvania law requiring aliens to register with the state and carry a state-issued registration card.⁵⁹ Similarly, in *Torao Takahashi v. Fish & Game Commission* the Court invalidated a California law precluding aliens not eligible for citizenship from obtaining commercial fishing licenses.⁶⁰ In *Plyler v. Doe*, the Court struck down a Texas law excluding illegal aliens from public schools.⁶¹ Finally, in *Toll v. Moreno*, the Court found preemption of a Maryland law denying in-state tuition to non-immigrant aliens.⁶²

But the Court has not always found preemption in cases involving state laws impacting immigration. In *DeCanas v. Bica*, the Court upheld a California law prohibiting the knowing employment of undocumented aliens.⁶³ Recently, the Court in *Chamber of Commerce of the U.S. v. Whiting* upheld an Arizona statute that allowed the suspension and revocation of business licenses from businesses employing unauthorized aliens and required every employer to use the E-Verify system.⁶⁴ Consequently, the extent of state power to regulate immigration is substantially uncertain.

57. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

58. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

59. *Hines*, 312 U.S. 52 (1941).

60. *Torao Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

61. *Plyer v. Doe*, 457 U.S. 202 (1982).

62. *Toll v. Moreno*, 458 U.S. 1 (1982).

63. *DeCanas v. Bica*, 424 U.S. 351 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1975 (2011).

64. *Whiting*, 131 S. Ct. 1968 (2011).

C. Summary of *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011)

In *United States v. Arizona*, the Ninth Circuit methodically considered the constitutionality of each of the four sections enjoined by the district court by applying general preemption standards. Ultimately, the Ninth Circuit affirmed the district court without exception, concluding federal law likely preempts each of the four sections.

1. S.B. 1070 Section 2(B)—Law Enforcement Cooperation Provisions

The *Arizona* court first considered the constitutionality of S.B. 1070 section 2(B), which requires Arizona law enforcement officials to cooperate and assist in the enforcement of Federal immigration laws.⁶⁵ The court concluded 8 U.S.C. § 1357(g) likely preempts section 2(B) by enumerating the exclusive circumstances under which a state law enforcement officer may perform functions of a federal immigration officer.⁶⁶ In doing so, it also concluded section 2(B) goes beyond the assistance contemplated by 8 U.S.C. § 1373(c)—which requires the Department of Homeland Security to respond to inquiries from state officials regarding individuals' immigration status⁶⁷—because it did not require mere inquiries, but furthered the state's own immigration policy.⁶⁸

2. S.B. 1070 Section 3—Alien Registration Document Carrying Requirement

The court next considered S.B. 1070 section 3, which creates a state crime for an alien's failure to carry an alien registration document in violation of federal law.⁶⁹ The court concluded that 8 U.S.C. §§ 1304(e) and 1306(a) likely preempt section 3 because Congress enacted those statutes as part of a comprehensive alien registration scheme that does not contemplate further state regulation.⁷⁰ To support its conclusion, the court cited the Supreme Court cases of *Hines v. Davidowitz*,⁷¹ which struck down a Pennsylvania alien registration law, and *Buckman Co. v. Plaintiffs' Legal Commission*,⁷² which found

65. S.B. 1070, 49th Leg., 2d Reg. Sess. § 2(B) (Ariz. 2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf>.

66. *United States v. Arizona*, 641 F.3d 339, 348–49 (9th Cir. 2011).

67. 8 U.S.C. § 1373(c) (2006).

68. *Arizona*, 641 F.3d at 350–51.

69. S.B. 1070 § 3.

70. *Arizona*, 641 F.3d at 355.

71. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

72. *Buckman Co. v. Plaintiffs' Legal Comm'n*, 531 U.S. 341 (2001).

preemption where a violation of federal law was a “critical element” in the state law claim.⁷³

3. *S.B. 1070 Section 5(C)—Penalty for Working or Soliciting Work*

The *Arizona* court then analyzed S.B. 1070 section 5(C), which criminalizes an unauthorized alien’s performance or solicitation of work as an employee or independent contractor.⁷⁴ The court, bound by its previous determination in *National Center for Immigrants’ Rights, Inc. v. INS*,⁷⁵ concluded 8 U.S.C. § 1324a likely preempts section 5(C). *National Center* found that Congress had considered punishing the *employee* to deter employment of unlawful aliens, but it rejected all such proposals and instead chose to do so by punishing individuals who employ unauthorized aliens.⁷⁶ Consequently, the *Arizona* court concluded section 5(C) is incompatible with Congress’s regulatory scheme and is therefore likely preempted by federal law.⁷⁷

4. *S.B. 1070 Section 6—Warrantless Arrest Authority*

Finally, the *Arizona* court considered S.B. 1070 section 6, which authorizes Arizona police officers to conduct warrantless arrests of aliens when the officer has probable cause to believe the alien has committed any removable offense.⁷⁸ The court concluded that 8 U.S.C. § 1252c likely preempts section 6 by enumerating the limited circumstances under which state police officers are authorized to arrest unauthorized aliens.⁷⁹ In so doing, it also concluded states lack inherent authority to enforce federal immigration laws,⁸⁰ explicitly rejecting the Tenth Circuit’s contrary conclusion in *United States v. Vasquez-Alvarez*⁸¹ and rejecting a possible interpretation of *Muehler v. Mena*.⁸²

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

74. S.B. 1070 § 5(C).

75. *Nat’l Ctr. For Immigrants’ Rights, Inc. v. Immigration & Naturalization Serv.*, 913 F.2d 1350 (9th Cir. 1990), *rev’d on other grounds*, 502 U.S. 183 (1991).

76. *See id.*

77. *Arizona*, 641 F.3d at 360.

78. S.B. 1070 at § 6.

79. *Arizona*, 641 F.3d at 361–63.

80. *Id.* at 365.

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

82. *Muehler v. Mena*, 544 U.S. 93 (2005).

D. Summary of *Keller v. City of Fremont*, Nos. 8:10CV270, 4:10CV3140, 2012 WL 537527 (D. Neb. Feb. 20, 2012)

The plaintiffs opposing the Fremont, Nebraska Ordinance challenged it on seven different grounds,⁸³ including violation of: (1) the Supremacy Clause;⁸⁴ (2) the Equal Protection Clause;⁸⁵ (3) the Due Process Clause;⁸⁶ (4) the Fair Housing Act;⁸⁷ (5) article XI of the Nebraska Constitution;⁸⁸ (6) the Civil Rights Act of 1866;⁸⁹ and (7) the Commerce Clause.⁹⁰ On February 20, 2012, Chief Judge of the United States District Court for the District of Nebraska, Laurie Smith Camp, entered a Memorandum and Order on cross motions for summary judgment.⁹¹ The court granted in part the plaintiffs' motions for summary judgment and permanently enjoined enforcement of portions of the Ordinance.⁹² In doing so, the court rejected all of the plaintiff's claims except the claims arising under the Supremacy Clause and Fair Housing Act.⁹³ The court then severed the offending provisions and allowed the remainder of the ordinance to stand.⁹⁴

1. Business Licensing Provisions

The *Keller* court first addressed plaintiffs' claim that the Supremacy Clause preempts the business licensing provisions of the Ordinance, concluding that they are valid and enforceable.⁹⁵ The court relied heavily on the recent Supreme Court decision of *Chamber of Commerce of the U.S. v. Whiting*.⁹⁶ The *Whiting* Court found enforceable an Arizona law requiring employers to use the E-Verify system and allowing the suspension and revocation of business licenses for employing illegal aliens.⁹⁷ Noting the obvious similarity between the Arizona law at issue in *Whiting* and the Fremont Ordinance, the *Keller* court concluded the Ordinance fell within the IRCA preemption provision's savings clause and therefore was not preempted.⁹⁸

83. *Keller v. City of Fremont*, Nos. 8:10CV270, 4:10CV3140, 2012 WL 537527 at *5 (D. Neb. Feb. 20, 2012).

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

85. U.S. CONST. amend. XIV.

86. U.S. CONST. amend. XIV.

87. 42 U.S.C. § 3601, *et seq.*

88. NEB. CONST. art. XI.

89. 42 U.S.C. § 1981.

90. U.S. CONST. art. I, § 8, cl. 3.

91. *Keller v. City of Fremont*, Nos. 8:10CV270, 4:10CV3140, 2012 WL 537527 at *5 (D. Neb. Feb. 20, 2012).

92. *Id.*

93. *Id.*

94. *Id.* at *19.

95. *Id.* at *7–8.

96. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

97. *Id.*

98. *Keller*, 2012 WL 537527, at *8.

2. *Occupancy Licensing Provisions*

The *Keller* court next considered the plaintiffs' claim that the Supremacy Clause preempts the occupancy licensing provisions of the Ordinance, concluding that some portions of the occupancy licensing provisions are unconstitutional.⁹⁹ The court observed that Congress enacted a "complex immigration scheme" that includes penalties for harboring illegal aliens,¹⁰⁰ but also noted "states do have some authority to act with respect to illegal aliens."¹⁰¹ The court concluded the Ordinance conflicts with the INA and is preempted to the extent it provides penalties for the harboring of unlawful immigrants, requires revocation of occupancy licenses, and provides penalties for leasing or renting dwelling units following occupancy license revocation.¹⁰² Consequently, the court held that Section 1, Parts 2, 3.L, and 4.D are preempted under the Supremacy Clause, but are severable from the rest of the Ordinance.¹⁰³

III. ANALYSIS OF UNITED STATES V. ARIZONA

The *Arizona* court correctly upheld the district court's preliminary injunction of S.B. 1070 sections 2(B), 3, 5(C), and 6. But while the court reached the correct conclusion, it started its analysis with a fundamentally flawed assumption that general preemption standards are the proper analytical tool with which to analyze the constitutionality of state laws regulating immigration. Federal law preempts S.B. 1070 because the Constitution gives the federal government exclusive authority to regulate immigration, and the enjoined sections of S.B. 1070 exceed the authority Congress delegated to the states to regulate immigration.

A. Inadequacy of General Preemption Standards in the Immigration Context

The *Arizona* court opened the discussion section of its opinion with a brief overview of the general preemption standards it applied to S.B. 1070 to reach its decision.¹⁰⁴ Conspicuously absent from this discussion, however, was any recognition of the unique Constitutional questions raised by the fact that S.B. 1070 purports to regulate

99. *Keller*, 2012 WL 537527, at *8–10.

100. *Id.* at *8.

101. *Id.* at *9 (quoting *Plyer v. Doe*, 457 U.S. 202 (1982)).

102. *Id.* at *9.

103. *Id.* The *Keller* court also found that Section 1, Parts 2, 3.L, and 4.D of the Ordinance violate the Fair Housing Act. *Id.* at *13–16. This Note focuses on the Constitutional questions presented by the Ordinance and will not endeavor to analyze the propriety of the *Keller* court's holding with respect to the Fair Housing Act.

104. *United States v. Arizona*, 641 F.3d 339, 344–46 (9th Cir. 2011).

immigration.¹⁰⁵ The court did not examine the roots of the power to regulate immigration, nor did the court attempt to review Supreme Court preemption decisions in the context of immigration.¹⁰⁶ Consequently, the *Arizona* court failed to appreciate that consideration of the constitutionality of state laws purportedly regulating immigration necessitates deviation from general preemption standards, which presuppose concurrent state and federal power. States possess *no* authority to regulate immigration *absent a Congressional delegation of authority* because the Constitution gives the federal government exclusive power to regulate immigration.¹⁰⁷

1. *The Federal Government Possesses Exclusive Authority to Regulate Immigration*

The United States Constitution gives Congress the power to regulate immigration by providing it the power “[t]o establish [a] uniform Rule of Naturalization.”¹⁰⁸ Implicit in this grant of power is the authority to regulate immigration.¹⁰⁹ The power to regulate immigration further derives from Congress’s power to regulate commerce with foreign nations and the federal government’s broad power in foreign affairs.¹¹⁰ Thus, the Constitution empowers Congress to exercise its legislative discretion to develop a uniform national policy regulating immigration, though the Constitution itself does not mention the term “immigration.”

The Naturalization Clause’s affirmative grant of power to the federal government carries with it a negative implication that states lack any concurrent power to regulate immigration. The founders’ use of the word “uniform” in the Naturalization Clause suggests the founders believed a single body of federal law should govern naturalization and, by extension, immigration. It would be nearly impossible for Congress to establish a “uniform” national policy if states possessed a concurrent power. Recognizing a similar concern in the context of the Commerce Clause, the Supreme Court has recognized that states may not create laws that burden interstate commerce even when Congress has not affirmatively acted to regulate a certain area.¹¹¹ The similar

105. *See id.*

106. *See id.*

107. *See* discussion *infra* subsection III.A.1.

108. U.S. CONST. art. I, § 8, cl. 4.

109. *See* Toll v. Moreno, 458 U.S. 1, 10 (1982).

110. *Id.*

111. *See generally* ERWIN CHEMEIRINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 430–66 (4th ed. 2011); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

negative implication of the Naturalization Clause's grant of authority is that "states are powerless to regulate immigration."¹¹²

This conclusion is further supported by the fact the Constitution gives the federal government exclusive control over foreign affairs. The Constitution grants Congress the power to declare war, raise and support armies, and provide and maintain a Navy.¹¹³ It also explicitly strips states of nearly all powers over foreign affairs, stating, "No State shall enter into any Treaty,"¹¹⁴ "lay any Imposts or Duties on Imports or Exports" without Congressional consent,¹¹⁵ "keep Troops, or Ships of War in time of Peace,"¹¹⁶ enter into an agreement with a foreign power,¹¹⁷ or "engage in War" unless the state is being invaded.¹¹⁸ Further, the President possesses broad authority over matters of foreign policy, including the power "to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress."¹¹⁹ Recognizing this broad federal power, the Supreme Court declared "even . . . the *likelihood* that state legislation will produce something more than incidental effect in conflict with the National Government's express foreign policy would require preemption of the state law."¹²⁰

It follows that states are powerless to regulate immigration because the regulation of immigration is inextricably linked to foreign affairs. This link is evidenced by the negative international reaction to the passage of S.B. 1070. At the time the *Arizona* decision was considered, the governments of Mexico, Bolivia, Ecuador, El Salvador, Guatemala, Brazil, Colombia, Honduras, and Nicaragua all publicly criticized the passage of S.B. 1070.¹²¹ Furthermore, several international organizations criticized the law, including six human rights experts from the United Nations, the Organization of American States, the Inter-American Commission on Human Rights, and the Union of South American Nations.¹²² This strong international reaction is not surprising considering the protection of a nation's citizens while they

112. Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 958 (1995) (arguing for recognition of a Dormant Naturalization Clause similar to the established Dormant Commerce Clause doctrine).

113. U.S. CONST. art I, § 8.

114. *Id.* § 10, cl. 1.

115. *Id.* cl. 2.

116. *Id.* cl. 3.

117. *Id.*

118. *Id.*

119. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 398 (2003) (citing *Dames & Moore v. Regan*, 453 U.S. 654, 679, 682–683 (1981)).

120. *Id.* at 398.

121. *United States v. Arizona*, 641 F.3d 339, 353 (9th Cir. 2011) *cert. granted*, 132 S. Ct. 845 (2011).

122. *Id.*

are abroad is “[o]ne of the most important and delicate of all international relationships” and can even lead to war.¹²³

Given this Constitutional background, the Supreme Court has consistently recognized the “[p]ower to regulate immigration is unquestionably exclusively a federal power.”¹²⁴ In *Hines v. Davidowitz*,¹²⁵ the Court declared, “the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law.”¹²⁶ And when the Court revisited the issue in *Torao Takahashi v. Fish & Game Commission*,¹²⁷ it took an even stronger position, concluding, “the Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. *Under the Constitution the states are granted no such powers.*”¹²⁸ Consequently, any power states have to regulate immigration must derive from the federal government’s delegation of such authority.

2. *General Preemption Standards Presuppose Concurrent State and Federal Power*

The paradigmatic preemption case involves a situation where the state and federal governments have *concurrent* authority to regulate in a given field. In *Gade v. National Solid Wastes Management Ass’n*,¹²⁹ the Court announced, “under the Supremacy Clause, from which our pre-emption doctrine is derived, ‘any state law, *however clearly within a State’s acknowledged power*, which interferes with or is contrary to federal law, must yield.’”¹³⁰ Thus, the *Gade* Court found preemption of Illinois occupational licensing laws that, but for Congress’s enactment of the Occupational Safety and Health Act of 1970, would have been entirely within the state’s powers.¹³¹ Similarly, in *Rice v. Santa Fe Elevator Corp.*¹³² the Court found preemp-

123. *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941); *see also* Manheim, *supra* note 110, at 956–57 (describing historical examples of immigration policy leading to international conflict).

124. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

125. *Hines*, 312 U.S. 52 (1941).

126. *Id.* at 68.

127. *Torao Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948).

128. *Id.* at 419 (emphasis added) (citation omitted).

129. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n* 505 U.S. 88 (1992).

130. *Id.* at 108 (emphasis added) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

131. *Id.* at 98–99.

132. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

tion of a state law regulating grain warehouses, a “field . . . the States have traditionally occupied.”¹³³

State laws purporting to regulate immigration, however, do not present such a scenario. Where a state law attempts to regulate immigration, courts weighing the constitutionality of the law are faced with a situation in which the federal government possesses *absolute* power. Thus, the fundamental assumption underlying general preemption standards—that courts must “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”¹³⁴—is plainly inapplicable. States, by definition, possess *no* “historic police power” to regulate immigration. Consequently, immigration is a “field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”¹³⁵

But even considering this, courts cannot assume state laws allegedly regulating immigration are ipso facto unconstitutional because “the fact that aliens are the subject of a state statute does not render it a regulation of immigration.”¹³⁶ Further complicating matters, Congress has seen fit to invite limited state participation in the regulation of immigration.¹³⁷ Consequently, states can, in limited circumstances, constitutionally regulate immigration pursuant to a Congressional delegation of authority. In light of this, courts still need a useful analytical tool for weighing the constitutionality of laws allegedly regulating immigration.

B. A Proper Legal Standard for Preemption of State Laws in the Context of Immigration

The United States Supreme Court has considered the constitutionality of state laws regulating immigration on several occasions and has often struck down the state laws as unconstitutional. But the most illuminating of these decisions is *DeCanas v. Bica*, a case in which the Court refused to strike down a California law prohibiting

133. *Id.* at 230.

134. *Id.*

135. *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941)); *Manheim*, *supra* note 110, at 960.

136. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976) *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

137. *See, e.g.*, 8 U.S.C. § 1357(g) (2006) (outlining procedures for state officers to carry out powers of immigration officials); *id.* § 1373(c) (requiring the federal government to respond to inquiries from state officials regarding any individual’s immigration status); *id.* § 1252c (authorizing state officers to arrest aliens in certain circumstances).

the knowing employment of undocumented aliens.¹³⁸ While the *DeCanas* Court's conclusion is no longer good law, its reasoning is still sound and provides illustrative guidance.¹³⁹ In *DeCanas*, the Court distinguished between state laws that permissibly affect immigrants and those that impermissibly regulate immigration.¹⁴⁰ At the time *DeCanas* was decided, federal immigration law did not significantly address employment of illegal aliens. "[A]t best," Congress had demonstrated "a peripheral concern with employment of illegal entrants."¹⁴¹ To the limited extent Congress had regulated employment of undocumented aliens, the Court concluded this legislation was persuasive evidence Congress did not intend to have "uniform federal regulations in matters affecting employment of illegal aliens."¹⁴² In fact, there was strong evidence "Congress intend[ed] that States may, to the extent consistent with federal law, regulate the employment of illegal aliens."¹⁴³ Thus, the Court concluded the law was a permissible exercise of the state's plenary powers to regulate employment,¹⁴⁴ and that its effects on illegal aliens were outside the scope of—and therefore consistent with—Congress's immigration policy.¹⁴⁵

The Court reaffirmed the *DeCanas* reasoning in *Plyler v. Doe*,¹⁴⁶ a case striking down a Texas law excluding illegal aliens from public schools on equal protection grounds.¹⁴⁷ The Court noted "[s]tates do have some authority to act with respect to illegal aliens, at least where

138. *DeCanas*, 424 U.S. at 365.

139. The *DeCanas* decision was abrogated by statute when Congress passed the Immigration Reform and Control Act of 1986, which created a comprehensive federal scheme meant to deter employment of unlawful aliens and expressly preempted state laws imposing similar penalties. See Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

140. *DeCanas*, 424 U.S. at 355.

141. *Id.* at 360.

142. *Id.* at 362.

143. *Id.* at 361 (citing 1974 amendments to the Farm Labor Contractor Registration Act, 88 Stat. 1652, 7 U.S.C. § 2041 *et seq.* (1970 ed., Supp. IV)); see also *Toll v. Moreno*, 458 U.S. 1, 13 n.18 (1982) ("We rejected the [*DeCanas*] pre-emption claim not because of an absence of congressional intent to pre-empt, but because Congress intended that the States be allowed, "to the extent consistent with federal law, [to] regulate the employment of illegal aliens.").

144. See *DeCanas*, 424 U.S. at 356.

145. *Id.* at 362–63.

146. *Plyler v. Doe*, 457 U.S. 202 (1982).

147. In *Toll v. Moreno*, 458 U.S. 1 (1982), the Court noted that cases striking down state immigration laws on equal protection grounds have been criticized by commentators and are better explained in preemption terms than equal-protection terms. *Id.* at 11 n.16 (citing Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060–65 (1979); David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069 (1979)). This Note also considers the equal protection decisions as being better conceptualized in terms of preemption derived from the federal government's exclusive power to regulate immigration.

such action mirrors federal objectives and furthers a legitimate state goal.”¹⁴⁸ Unlike the law at issue in *DeCanas*, however, the *Plyler* court found no national policy supporting Texas’s effort to exclude illegal aliens from public schools.¹⁴⁹ Consequently, the *Plyler* court struck down the Texas law, taking into consideration the law’s inconsistency with federal immigration policy and the fact it did not further a legitimate state interest.¹⁵⁰

This distinction between laws that impermissibly regulate immigration versus those that merely affect immigrants is consistent with other Supreme Court decisions involving preemption of state immigration laws. In *Hines v. Davidowitz*, the Supreme Court struck down Pennsylvania’s law requiring aliens to register with the state and carry a state-issued registration card.¹⁵¹ Congress had already provided a federal law creating “a complete system for alien registration,”¹⁵² so the Pennsylvania law imposed duplicitous registration requirements on aliens. Considering this, the Court found the state law to be preempted, despite the absence of express preemptive language in the federal statute.¹⁵³ In *Torao Takahashi v. Fish & Game Commission*, the Supreme Court ruled that a federal law preempted a California law precluding aliens not eligible for citizenship from obtaining commercial fishing licenses.¹⁵⁴ The Court broadly stated that states “can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.”¹⁵⁵ The Court invalidated the law, concluding it impermissibly imposed a discriminatory burden on lawful aliens inconsistent with federal laws.¹⁵⁶ Similarly, in *Toll v. Moreno*, the Court found preemption of a Maryland law denying in-state tuition to non-immigrant aliens.¹⁵⁷ Noting Congress’s decision to allow non-immigrant aliens to acquire domicile, the Court observed “the State’s decision to deny “in-state” status to [non-immi-

148. *Plyler*, 457 U.S. at 225 (emphasis added) (citing *DeCanas*, 424 U.S. 351).

149. *Id.* at 226.

150. *Id.* at 226–30.

151. *See Hines v. Davidowitz*, 312 U.S. 52, 74 (1941).

152. *Id.* at 70.

153. *Id.* at 74; *see also*, CHEMERINSKY, *supra* note 109, at 412–13 (Stating that *Hines* is an example of how preemption of a state regulation can occur even though the state regulation complimented federal law and the federal law itself did not contain explicit preemption language).

154. *Torao Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948).

155. *Id.* at 419. *DeCanas* limited this broad language, offering a more precise and workable statement: “[S]tate regulation *not congressionally sanctioned* that discriminates against aliens lawfully admitted to the country is impermissible *if it imposes additional burdens not contemplated by Congress.*” *DeCanas v. Bica*, 424 U.S. 351, 358 n.6 (1976) (emphasis added).

156. *Takahashi*, 334 U.S. at 419–20.

157. *Toll v. Moreno*, 458 U.S. 1 (1982).

grant] aliens, *solely* on account of the . . . alien's federal immigration status, surely amounts to an ancillary 'burden not contemplated by Congress' in admitting these aliens to the United States."¹⁵⁸ Thus, it concluded, "the University's policy frustrates these federal policies."¹⁵⁹

In each of these decisions invalidating state laws, Congress had—pursuant to its exclusive authority to regulate immigration—implemented a federal system of immigration regulation *within the specific field* the State was attempting to regulate and the states' actions were *inconsistent* with Congress's scheme. In contrast, in *Chamber of Commerce of the U.S. v. Whiting*, the Supreme Court upheld an Arizona law requiring businesses to participate in the E-Verify program and permitting the suspension or revocation of business licenses for businesses employing undocumented aliens because the state law was consistent with the Congressional regulatory scheme.¹⁶⁰ Thus, the Arizona law amounted to an exercise of Congressionally delegated power to regulate immigration.

Considering these preemption decisions in the context of immigration, the proper analysis for determining the constitutionality of state laws regarding immigration involves a three-level inquiry. First, a court must consider whether the state law attempts to regulate immigration. State laws attempting to impose burdens on, or deny benefits and privileges to, individuals based on immigration status are attempts to regulate immigration.¹⁶¹ Congressional regulation of immigration in the same field as the state law at issue is strong evidence the state law attempts to regulate immigration. If the law does not attempt to regulate immigration, then under the reasoning in *DeCanas*, it is Constitutionally permissible—assuming it is otherwise within the state's powers—because "the fact that aliens are the subject of a state statute does not render it a regulation of immigration."¹⁶²

If the state law does attempt to regulate immigration, courts must proceed to a second level of inquiry. They must next consider whether Congress has authorized state participation in the regulation of immi-

158. *Id.* at 14.

159. *Id.* at 16.

160. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

161. *See, e.g., id.* (imposing burden by preventing illegal aliens from obtaining work); *Plyler v. Doe*, 457 U.S. 202 (1982) (denying benefit of public education based on immigration status); *Toll*, 458 U.S. 1 (denying benefit of resident tuition on basis of immigration status); *DeCanas v. Bica*, 424 U.S. 351 (1976) (imposing burden by preventing illegal aliens from obtaining work); *Takahashi*, 334 U.S. 410 (denying privilege of obtaining fishing licenses on basis of immigration status); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (imposing burden of additional state alien registration system).

162. *DeCanas*, 424 U.S. at 355.

gration in the particular field the state law attempts to regulate. If Congress has not authorized state participation in the particular field the state law attempts to regulate, then the state law is unconstitutional. Congress possesses exclusive authority to regulate immigration and states possess no power to regulate immigration absent a specific congressional delegation of authority.¹⁶³

If Congress has authorized state participation in regulating immigration in the field the state law attempts to regulate, then courts must proceed to the third level of inquiry. A court must finally consider whether the state law is consistent with federal immigration policy. State laws inconsistent with federal immigration policy are unconstitutional because they exceed the power Congress delegated to the states to regulate immigration. State laws are inconsistent with federal immigration policy if they impose a burden not contemplated by Congress,¹⁶⁴ result in duplicitous state and federal regulation,¹⁶⁵ or otherwise frustrate federal immigration policy.¹⁶⁶

C. S.B. 1070 Exceeds the Limited Authority Congress has Given States to Participate in the Regulation of Immigration

Applying this three-level inquiry derived from the Constitution and Supreme Court preemption cases in the context of immigration to S.B. 1070 reveals that, despite its failure to consider the unique implications of the law's attempt to regulate immigration, the *Arizona* court nonetheless correctly concluded federal law preempts S.B. 1070 sections 2(B), 3, 5(C) and 6. Congress has enacted immigration regulations in the field that each of the four enjoined sections of S.B. 1070 attempt to regulate. Section 3 is unconstitutional because Congress has not invited states to participate in the registration of aliens. And while Congress has invited state participation in regulation of immigration in the areas regulated by sections 2(B), 5(C), and 6, these three sections are unconstitutional because they are inconsistent with Congress's delegation of authority.

1. S.B. 1070 Section 2(B)—Law Enforcement Cooperation Provisions

The *Arizona* court correctly found that S.B. 1070 section 2(B)¹⁶⁷ is likely preempted by federal law. Section 2(B) attempts to create a policy whereby Arizona law enforcement officials must cooperate and as-

163. See subsection III.A.1 *supra*.

164. *Toll*, 458 U.S. at 14.

165. *Hines*, 312 U.S. at 73–74.

166. See, e.g., *Plyler*, 457 U.S. at 226; *Toll*, 458 U.S. at 14.

167. S.B. 1070, 49th Leg., 2d Reg. Sess. § 2(B) (Ariz. 2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf>. The statute provides as follows:

sist in the enforcement of federal immigration laws. Its first sentence requires law enforcement officers to make a reasonable attempt to verify the immigration status of any person they stop, detain, or arrest when the officers reasonably suspect the individual is unlawfully present in the United States, unless doing so would be impracticable.¹⁶⁸ The second sentence is stronger though, stating that any person who is arrested “shall have [his or her] immigration status *determined*” before release.¹⁶⁹ Finally, the last sentence establishes a rebuttable presumption of lawful presence when a person presents certain forms of identification.¹⁷⁰

The *Arizona* court correctly construed section 2(B) to require officers to verify the immigration status of any arrested person before he or she is released “regardless of whether or not reasonable suspicion exists that the arrestee is an undocumented immigrant.”¹⁷¹ *Arizona* argued that the first two sentences of the statute were interrelated and therefore “officers are only required to verify the immigration status of an arrested person before release if reasonable suspicion exists that the person lacks proper documentation.”¹⁷² But as the majority correctly noted, the legislature’s use of “[t]he all-encompassing ‘any person,’ the mandatory ‘shall,’ and the definite ‘determined,’” in the

For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person’s immigration status determined before the person is released. The person’s immigration status shall be verified with the federal government pursuant to 8 United States Code § 1373(c). A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution. A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.
2. A valid Arizona nonoperating identification license.
3. A valid tribal enrollment card or other form of tribal identification.
4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

168. S.B. 1070 at § 2(B).

169. *Id.* (emphasis added).

170. *Id.*

171. *United States v. Arizona*, 641 F.3d 339, 347 (9th Cir. 2011) *cert. granted*, 132 S. Ct. 845 (2011).

172. *Id.*

second sentence is plainly inconsistent with the first sentence's use of the "qualified 'reasonable attempt . . . when practicable' and qualified 'reasonable suspicion.'"¹⁷³

Considering this construction, section 2(B) addresses executive enforcement of federal immigration law through the investigation, identification, and detention of undocumented aliens. Congress has regulated immigration in this field, creating a comprehensive statutory scheme for the enforcement of its immigration policies.¹⁷⁴ It vested most of the authority to enforce federal immigration law in the executive branch of the Federal government.¹⁷⁵ Congress gave the Attorney General significant power and executive discretion, and U.S. Immigration and Customs Enforcement ("ICE")—an agency within the Department of Homeland Security—handles the bulk of enforcement responsibilities.¹⁷⁶ Given Congress's executive enforcement scheme and the fact S.B. 1070 section 2(B) attempts to impose a burden on aliens by supplementing this congressional enforcement scheme, section 2(B) attempts to regulate immigration under the first level of inquiry outlined above.

In adopting this statutory framework, Congress also saw fit to invite limited state participation in the investigation, identification, and detention of undocumented aliens, as evidenced by the provisions within 8 U.S.C. §§ 1373(c)¹⁷⁷ and 1357(g).¹⁷⁸ Section 1373(c) requires the Department of Homeland Security to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual . . . for any purpose authorized by law . . ." ¹⁷⁹ The statute "does not limit the number of inquiries that state officials can make, limit the circumstances under which a state official may inquire, nor allow federal officials to limit their responses to state officials."¹⁸⁰ Similarly, section 1357(g) invites state participation in the regulation of immigration by enumerating the exclusive circumstances under which a state law enforcement officer may perform functions of a federal immigration of-

173. *Id.*

174. *See* 8 U.S.C. § 1357 (2006).

175. *See id.*

176. *See* Cornell Univ. Law Sch., *Immigration Law: An Overview*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/immigration> (last visited Nov. 2, 2011).

177. 8 U.S.C. § 1373(c) (2006).

178. *Id.* § 1357(g).

179. *Id.* § 1373(c). Note that the statute actually refers to the Immigration and Naturalization Service, which ceased to exist in 2003. The United States Immigration and Customs Enforcement—an agency within the Department of Homeland Security—now performs the functions previously performed by the INS. *See* <http://www.law.cornell.edu/wex/immigration>

180. *United States v. Arizona*, 641 F.3d 339, 373 (9th Cir. 2011) *cert. granted*, 132 S. Ct. 845 (2011).

ficier.¹⁸¹ Subsections (g)(1)–(9) specify the means by which a state may enter into a written agreement with the United States Attorney General whereby individual state officers can be authorized to perform the functions of federal immigration officers.¹⁸² Subsection (g)(10)¹⁸³ then states that none of section 1357(g)'s provisions should be construed to limit the ability of state and local law enforcement officers to communicate with Federal immigration authorities and cooperate in the enforcement of Federal immigration law.¹⁸⁴

Considering Congress's explicit statutory invitations for states to participate in the regulation of immigration in the field of executive enforcement, the constitutionality of S.B. 1070 section 2(B) hinges upon whether it is consistent with Congress's grant of authority for states to regulate immigration. Section 2(B) is consistent with Congress's invitation for state participation in the identification of undocumented aliens insofar as it requires state officers to inquire as to the immigration status of individuals and communicate with the federal government regarding an individual's status. In 8 U.S.C. § 1373(c), Congress commanded the Attorney General to respond to state officials' inquiries into the immigration status of individuals at all times of the day and night. It is absurd to think that Congress, in passing this statute, simultaneously intended to preclude state legislative and executive policies requiring state officials to inquire into an individual's immigration status. It would be incongruous for Congress to give the Attorney General the command to respond to inquiries that could only come from a state officer's *sua sponte* decision to inquire into an individual's immigration status independent of any established state or local policy.

However, section 2(B) is inconsistent with Congress's invitation for the involvement of state officials to the extent it requires state officials to perform the functions of a federal immigration officer without the formalities required by Congress's regulatory scheme. 8 U.S.C. § 1357 grants the bulk of immigration law enforcement powers to Department of Homeland Security officers at the direction of the Attorney

181. *See id.* at 348–49.

182. *See id.* at 348.

183. 8 U.S.C. § 1357(g)(10) (2006) reads:

Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

184. *Arizona*, 641 F.3d at 349–50.

General.¹⁸⁵ The statute gives few mandatory directives to the Attorney General, and so confers significant executive discretion upon the Attorney General and Department of Homeland Security to determine how best to enforce federal immigration policy.¹⁸⁶ In 8 U.S.C. § 1357(g), Congress provided explicit procedures by which state officers may perform the function of federal immigration officers. It authorizes state officers to perform these functions only in the narrow circumstance of a written agreement with the Attorney General.¹⁸⁷ This procedure creates a limited agency relationship between the federal executive branch and the state officer and authorizes the state officer to perform the functions of a federal immigration officer.¹⁸⁸ Subsection (g)(10), as the court correctly noted, is not a broad, alternative grant of authority.¹⁸⁹ Rather, it is Congress's recognition of the necessity and convenience of state officials cooperating with federal immigration officers in limited circumstances. This recognition must be viewed in the context of Congress's choice to charge the Attorney General with the primary responsibility for enforcing federal immigration law and creating the procedures by which a state officer may perform the functions of an immigration officer. Thus, any state cooperation under subsection (g)(10) must be consistent with the rest of section 1357(g) and deferential to the federal executive discretion conferred in the remainder of section 1357.

As the court correctly stated, S.B. 1070 section 2(B) requires more than mere inquiries into an individual's immigration status.¹⁹⁰ "[I]t required that people be detained until those inquiries are settled, and in the event of an arrest, the person may not be released until the arresting agency obtains verification of the person's immigration status."¹⁹¹ This "unavoidable consequence"¹⁹² of section 2(B)'s mandate to law enforcement officers infringes upon federal executive discretion and results in state officers taking on the role of federal immigration officers in a manner inconsistent with Congress's invitation for state involvement in the regulation of immigration.

In sum, S.B. 1070 section 2(B) amounts to state regulation of immigration through executive enforcement. Congress empowered states to participate in the executive enforcement of federal immigration law. But section 2(B) is inconsistent with Congress's invitation for state participation in the regulation of immigration through executive enforcement of federal immigration law. Therefore, section 2(B) is an

185. *Id.* at 351; see 8 U.S.C. § 1357.

186. *Arizona*, 641 F.3d at 351; see 8 U.S.C. § 1357.

187. *Id.* § 1357(g).

188. See *id.* § 1357(g)(3).

189. *Arizona*, 641 F.3d at 349–50.

190. *Id.* at 348 n.7.

191. *Id.*

192. *Id.*

unconstitutional infringement on federal authority to regulate immigration.

2. *S.B. 1070 Section 3—Alien Registration Document Carrying Requirement*

The *Arizona* court also correctly upheld the preliminary injunction of S.B. 1070 section 3. Section 3 makes it a state crime for immigrants to willfully fail to carry an alien registration document in violation of federal law.¹⁹³ Congress has created a comprehensive federal scheme for the registration of aliens.¹⁹⁴ This system includes penalty provisions meant to ensure conformance with the registration requirements.¹⁹⁵ It is a violation of federal law for an immigrant eighteen years of age or older to not carry an alien registration receipt card.¹⁹⁶ Section 3 attempts to regulate immigration under the first level of inquiry because it imposes an additional burden on aliens who fail to carry a registration document.

In creating its regulatory scheme, Congress did not invite states to participate in the registration of aliens. As the *Arizona* court correctly noted, “[n]othing in the text of the INA’s registration provisions indicates that Congress intended for states to participate in the enforcement or punishment of federal immigration registration rules.”¹⁹⁷ This conclusion is bolstered by the fact the Supreme Court struck down a state immigrant registration law in *Hines v. Davidowitz*.¹⁹⁸ In so doing, the *Hines* court declared that states cannot “curtail or complement” Congress’s comprehensive regulatory scheme for the registration of aliens.¹⁹⁹ Therefore, Arizona lacks constitutional power to regulate immigration through the creation of state alien registration penalties.

Considering Congress’s complete regulatory scheme for the registration of aliens, the lack of congressional interest in state participation in alien registration, and the Supreme Court’s decision to strike down a state registration system in *Hines*, it is apparent S.B. 1070

193. S.B. 1070, 49th Leg., 2d Reg. Sess. § 3 (Ariz. 2010) (“In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code Section 1304(e) or 1306(a).”).

194. See 8 U.S.C. §§ 1301–1306 (2006).

195. See *id.* § 1306.

196. See *id.* § 1304(e).

197. *Arizona*, 641 F.3d at 355; see 8 U.S.C. §§ 1301–1306.

198. *Hines v. Davidowitz*, 312 U.S. 52 (1941); see also *Buckman Co. v. Plaintiff’s Legal Comm.*, 531 U.S. 341, 353 (2001) (holding that parties could not assert state fraud claims when the existence of the federal law is “a critical element in their case”).

199. *Arizona*, 641 F.3d at 355 (quoting *Hines*, 312 U.S. at 66–67).

section 3 is an unconstitutional infringement upon the federal government's exclusive authority to regulate the registration of aliens.

3. *S.B. 1070 Section 5(C)—Penalty for Working or Soliciting Work*

The *Arizona* court also correctly upheld the preliminary injunction of SB 1070 section 5(C). Section 5(C) makes it a crime for an unauthorized alien to perform work as an employee or independent contractor.²⁰⁰ Congress has already created a complex federal regulatory scheme to deter the employment of illegal aliens.²⁰¹ 8 U.S.C. § 1324a makes it unlawful for employers to knowingly hire unlawful aliens and provided for a system to verify a potential employee's work eligibility.²⁰² Section 5(C) amounts to a regulation of immigration because it imposes an additional burden on aliens by criminalizing performance or solicitation of work.

Congress did invite state participation in the regulation of immigrant employment, but only to a very limited degree. 8 U.S.C. § 1324a(h)(2) states, "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." Thus, Congress specifically invited states to use licensing and similar laws to further the legislative goal of deterring employment of unauthorized aliens.

S.B. 1070 section 5(C) is inconsistent with Congress's invitation for state regulation of aliens because it attempts to deter employment of unauthorized aliens by punishing the undocumented employee. While it is true the preemption provision within 8 U.S.C. § 1324a only expressly preempts state laws regulating *employers*, nothing in the statute suggests Congress meant to invite states to alter its carefully considered balance of regulatory force by criminalizing work performed by unauthorized aliens. In creating the federal statutory scheme to deter employment of unauthorized aliens, Congress deliberately chose not to punish the aliens themselves for obtaining work. "While Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the *employee*, it ultimately rejected all such proposals."²⁰³ Rather, it sought to deter such employment *solely* by punishing employers who employ undocumented

200. S.B. 1070, 49th Leg., 2d Reg. Sess. § 5(C) (Ariz. 2010) ("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.").

201. 8 U.S.C. § 1324a (2006).

202. *Id.*

203. Nat'l Ctr. for Immigrants' Rights, Inc. v. Immigration and Naturalization Serv., 913 F.2d 1350, 1368 (1990), *rev'd on other grounds*, 502 U.S. 183 (1991).

aliens. While section 5(C) promotes Congress's goal of deterring unauthorized work, "a common end hardly neutralizes conflicting means."²⁰⁴ Therefore, section 5(C) is inconsistent with Congress's invitation for state participation in regulation of immigration and thus unconstitutional.

This conclusion is further supported by the Supreme Court's decisions in *DeCanas v. Bica*²⁰⁵ and *Chamber of Commerce of the U.S. v. Whiting*.²⁰⁶ At the time *DeCanas* was decided, Congress had expressed "at best . . . a peripheral concern with employment of illegal entrants."²⁰⁷ Given this lack of congressional interest in regulating employment of illegal aliens and the evidence that Congress intended for states to participate in the regulation of illegal alien employment, the *DeCanas* court concluded the law was a permissible exercise of state power to regulate aliens. At present, however, Congress has provided a comprehensive regulatory scheme to deter employment of illegal aliens and has expressly preempted state laws imposing similar penalties.²⁰⁸ Consequently, the Court's justification for allowing enforcement of the state law no longer exists. If the *DeCanas* court had faced the modern federal regulatory backdrop, it would have been loath to uphold the state law because Congress's comprehensive regulatory scheme evinces far more than a "peripheral concern with employment of illegal entrants."²⁰⁹ Unlike the law at issue in *Whiting*, section 5(C) goes beyond the scope of "licensing and similar laws" expressly sanctioned by Congress²¹⁰ and attempts to impose an additional burden Congress specifically chose not to impose on illegal aliens.²¹¹

In sum, S.B. 1070 section 5(C) is a regulation of immigration because Congress has provided a comprehensive system to regulate employment of illegal aliens. While Congress did contemplate state participation in the federal regulatory system, section 5(C) is nonetheless unconstitutional because it goes beyond the bounds of the Congressional invitation for states to regulate employment of aliens and frustrates Congress's policy goals.

204. *Arizona*, 641 F.3d at 360 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379–80 (2000)).

205. *DeCanas v. Bica*, 424 U.S. 351 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

206. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

207. *DeCanas*, 424 U.S. at 360.

208. *See* 8 U.S.C. § 1324a (2006).

209. *DeCanas*, 424 U.S. at 360.

210. 8 U.S.C. § 1324a(h)(2).

211. *See Nat'l Ctr. for Immigrants' Rights, Inc. v. Immigration & Naturalization Serv.*, 913 F.2d 1350, 1368 (1990) *rev'd on other grounds* 502 U.S. 183 (1991).

4. S.B. 1070 Section 6—Warrantless Arrest Authority

Finally, the *Arizona* court correctly upheld the preliminary injunction of S.B. 1070 section 6. Section 6 amended Arizona's existing statute governing warrantless arrests by state peace officers by adding a subsection authorizing warrantless arrests when officers have "probable cause to believe . . . the person to be arrested has committed any public offense that makes the person removable from the United States."²¹² The new subsection's placement within the existing warrantless arrest statute created a problem of statutory construction, however, because of its potential for redundancy.²¹³ Recognizing this problem, the *Arizona* court correctly construed Section 6 to authorize warrantless arrests in three circumstances. First, "where there is probable cause to believe the person *committed a crime in another state* that would be considered a crime if it had been committed in Arizona and that would subject the person to removal from the United States."²¹⁴ Second, where there is probable cause to believe an alien "committed a removable offense in Arizona, served his or her time for the criminal conduct, and was released."²¹⁵ And finally, "when there is probable cause to believe that an individual was arrested for a removable offense but was not prosecuted."²¹⁶

Section 6 amounts to a regulation of immigration because it attempts to impose an additional burden on aliens by authorizing state officers to conduct warrantless arrests in the circumstances outlined above. Congress has specifically addressed state officers' authority to arrest aliens in two statutes, 8 U.S.C. §§ 1252c and 1357(g). Section 1252c allows state and local officials to arrest illegal aliens who have previously been convicted of a felony in the United States and who left or were deported from the United States following the felony conviction.²¹⁷ The statute conditions this grant of authority upon the

212. S.B. 1070, 49th Leg., 2d Reg. Sess. § 6 (Ariz. 2010).

213. *United States v. Arizona*, 641 F.3d 339, 361 (9th Cir. 2011) *cert. granted*, 132 S. Ct. 845 (2011).

214. *Id.* at 361 (quoting *United States v. Arizona*, 703 F. Supp. 2d 980, 1005 (D. Ariz. 2010)).

215. *Id.*

216. *Id.*

217. 8 U.S.C. § 1252c(a) (2006). The statute reads:

Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—

- (1) is an alien illegally present in the United States; and
- (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction,

But only after the state or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

state or local official confirming the alien's status with the federal government prior to the arrest and it authorizes the state and local officials to detain the alien only long enough for the alien to be taken into federal custody.²¹⁸ Similarly, section 1357 describes the authority of federal immigration officers, including their authority to arrest aliens, and subsection (g) enumerates the circumstances under which state officers can perform the functions of federal immigration officials.²¹⁹ Thus, Congress has explicitly invited state officers to arrest aliens, but only in narrow circumstances.

S.B. 1070 section 6 is unconstitutional because it purports to give state officers more power than Congress conferred upon state officials. It effectively circumvents Congress's procedure for state officers to obtain the powers of a federal immigration officer as outlined in section 1357(g), by bestowing upon state officers the power to arrest an alien without a warrant and without a formal agreement with the Attorney General.²²⁰ Further, "[n]othing in [8 U.S.C. § 1252c] permits warrantless arrests" and the statute only confers arrest authority "where the immigrant has been convicted of a felony."²²¹ S.B. 1070 section 6, by contrast, authorizes *warrantless* arrests for *any* removable offense, regardless of its severity.²²²

While the dissent was correct to note that state officers have inherent police powers and can generally enforce federal law,²²³ the dissent failed to consider that states lack constitutional authority to regulate immigration. The dissent relied on the authority of the Tenth Circuit's decision in *United States v. Vasquez-Alvarez*,²²⁴ which broadly construed 8 U.S.C. § 1357(g)(10) and held that 8 U.S.C. § 1252c "does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal laws, including immigration laws."²²⁵ This statement highlights the Tenth Circuit's error: It presupposes an inherent state power to regulate immigration. States lack any such inherent power under the Constitution because the Framers granted that power exclusively to Congress.²²⁶

Congress, in establishing the uniform federal law regulating immigration, provided for both the creation of legislative policies and the executive enforcement of those policies.²²⁷ It vested most of the execu-

218. 8 U.S.C. § 1252c.

219. See *supra* subsection III.C.1.

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

221. *Id.*

222. See S.B. 1070, 49th Leg., 2d Reg. Sess. § 6 (Ariz. 2010).

223. *Arizona*, 641 F.3d at 384–91.

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

225. *Id.* at 1295.

226. See *supra* subsection III.A.1.

227. See 8 U.S.C. § 1357 (2006).

tive enforcement authority in executive branch of the federal government but also conferred limited powers upon state officers to participate in the enforcement of federal immigration laws.²²⁸ Therefore, any state authority to participate in the regulation of immigration through enforcement of federal law derives from a congressional grant of authority, not from the state's inherent police power. As illustrated above, S.B. 1070 section 6 exceeds Congress's grant of authority. As such, section 6 is inconsistent with Congress's invitation for state participation in the enforcement of federal immigration law and is therefore unconstitutional.

IV. ANALYSIS OF KELLER V. CITY OF FREMONT

Unlike the *Arizona* court, the *Keller* court recognized the unique constitutional issue created by the municipality's attempt to regulate immigration. After a brief discussion of the general field and conflict preemption standards, the *Keller* court observed "the Constitution of its own force requires pre-emption of any state efforts to regulate immigration, but not 'every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power.'"²²⁹ The *Keller* court read this structural preemption too narrowly, however, claiming the Constitution itself only preempts a state law that is "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."²³⁰ Consequently, the *Keller* court relied on conflict preemption to conclude the occupancy licensing provisions are preempted to the extent they provide "penalties for the harboring of persons who have entered or remained in the United States in violation of law, or provide[] for the revocation of occupancy licenses and penalties for the lease or rental o[f] dwelling units following the revocation of occupancy licenses."²³¹

Applying the three-level inquiry developed in section III.B of this Note to the Fremont, Nebraska Ordinance reveals the *Keller* court reached the correct conclusion when it determined federal law preempts Section 1, Parts 2, 3.L, and 4.D of the Ordinance and upheld the remainder of the Ordinance. The Ordinance's business licensing provisions are a constitutional exercise of state power to regulate immigration pursuant to an express congressional delegation of authority. Section 1, parts 2, 3.L, and 4.D of the Ordinance's occupancy

228. *See id.*

229. *Keller v. City of Fremont*, Nos. 8:10CV270, 4:10CV3140, 2012 WL 537527 at *6 (D. Neb. Feb. 20, 2012) (quoting *DeCanas v. Bica*, 424 U.S. 351, 355 (1976)).

230. *Id.* (quoting *DeCanas v. Bica*, 424 U.S. 351, 355 (1976)) (emphasis added). For a discussion of the proper scope of this structural preemption, see *supra* discussion in subsection III.B.

231. *Keller*, 2012 WL 537527 at *9.

licensing provisions are unconstitutional, however, because they exceed the authority Congress delegated to states to regulate immigration.

A. Business Licensing Provisions

The *Keller* court correctly concluded that the Ordinance's business licensing provisions are valid and enforceable. Congress has unmistakably regulated immigration in the field of employment law by creating a complex scheme meant to deter employment of unauthorized aliens.²³² The Ordinance's business licensing provisions also seek to deter employment of unauthorized aliens, and therefore constitute an attempt to regulate immigration.²³³ Congress invited limited state participation in the regulation of immigration through employment laws.²³⁴ The IRCA's express preemption provision indicates that federal law preempts any state law imposing civil or criminal sanctions upon those who employ unauthorized aliens, "other than through licensing and similar laws."²³⁵ Thus, Congress expressly granted states the authority to regulate immigration through "licensing and similar laws."²³⁶

As the *Keller* court noted, the Supreme Court recently passed on the question of what constitutes a licensing or similar law in *Chamber of Commerce of the U.S. v. Whiting*.²³⁷ In *Whiting*, the Court considered whether federal law preempted an Arizona law requiring employers to use the E-Verify system and allowing the suspension and revocation of business licenses for employing illegal aliens.²³⁸ The Court upheld the state statute in its entirety, noting that the IRCA savings clause²³⁹ expressly allows states to regulate employment of unauthorized aliens "through licensing and similar laws."²⁴⁰ The *Whiting* court concluded Arizona's business licensing requirement to use E-Verify "in no way obstructs" Congress's objectives in implementing the E-Verify system and was in fact "entirely consistent with federal law."²⁴¹

Whiting indicates that the Ordinance's business licensing provisions fall squarely within the congressional grant of authority for states to impose sanctions on those who employ unauthorized aliens

232. See 8 U.S.C. § 1324a (2006).

233. FREMONT, NEB., ORDINANCE 5165 § 1, Part 5 (June 21, 2010), available at <http://fremontne.gov/DocumentView.aspx?DID=770>.

234. 8 U.S.C. § 1324a(h)(2).

235. *Id.*

236. *Id.*

237. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

238. *Id.*

239. *Id.* at 1986–87; see 8 U.S.C. § 1324a(h)(2)

240. *Whiting*, 131 U.S. at 1987.

241. *Id.* at 1986.

through licensing and similar laws. Section 1, part 5 of the Ordinance requires employers seeking business licenses, permits, contracts, grants, or loans from the City to execute an affidavit swearing it does not knowingly employ unauthorized aliens and to provide documentation confirming that the employer has registered with the E-Verify program.²⁴² The Ordinance provides for its own enforcement through provisions authorizing revocation of permits and licenses, cancellation of contracts, recall and acceleration of grants and loans, and injunctive relief.²⁴³ Considering the obvious similarity between the Ordinance's requirements and those of the law at issue in *Whiting*, the Ordinance's business licensing provisions are constitutionally permissible exercises of state authority to regulate immigration pursuant to an express congressional delegation of authority.

Therefore, the *Keller* court correctly determined that federal law does not preempt the business licensing provisions of the Ordinance.²⁴⁴ Like the employment provisions in section 5(C) of Arizona's S.B. 1070, the Ordinance's business licensing provisions attempt to regulate immigration through the field of employment law. Unlike section 5(C), however, the Ordinance's business licensing provisions are narrowly tailored "licensing and similar laws" that are consistent with Congress's express invitation for state participation in the regulation of immigration through employment laws.

B. Occupancy Licensing Provisions

The *Keller* court also correctly concluded that federal law preempts section 1, parts 2, 3.L, and 4.D of the Ordinance's occupancy licensing provisions. The offending provisions of the Ordinance's occupancy licensing provisions fall into two distinct categories. The first category imposes penalties on individuals who knowingly harbor unauthorized aliens in dwelling units.²⁴⁵ The second category provides for the revocation of occupancy licenses for individuals determined to be unlawfully present in the United States.²⁴⁶

1. Anti-Harboring Provisions

The Occupancy Licensing provisions imposing penalties on individuals who knowingly harbor unauthorized aliens²⁴⁷ are unconstitutional because they exceed the congressional delegation of authority to regulate immigration by deterring harboring. Congress has created a

242. FREMONT, NEB., ORDINANCE 5165 § 1, Part 5.C (June 21, 2010).

243. FREMONT, NEB., ORDINANCE 5165 § 1, Part 5.H.

244. *Keller v. City of Fremont*, Nos. 8:10CV270, 4:10CV3140, 2012 WL 537527 at *8 (D. Neb. Feb. 20, 2012).

245. FREMONT, NEB., ORDINANCE 5165 § 1, Part 2, and Part 3.L.

246. FREMONT, NEB., ORDINANCE 5165 § 1, Part 4.D.

247. FREMONT, NEB., ORDINANCE 5165 § 1, Part 2, and Part 3.L.

federal regulatory scheme that criminalizes harboring of undocumented aliens.²⁴⁸ This scheme includes penalties for harboring aliens in a building “knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law.”²⁴⁹ Consequently, the Ordinance’s anti-harboring provisions amount to an attempt to regulate immigration through deterring individuals from providing housing to unlawful aliens.

In creating its regulatory scheme, Congress invited very limited state participation. 8 U.S.C. § 1324(c) empowers all “officers whose duty it is to enforce criminal laws” to make arrests for violation of § 1324, inviting states to participate in the enforcement of the federal anti-harboring laws.²⁵⁰ But nothing in 8 U.S.C. § 1324 suggests Congress contemplated state participation in regulating the harbor of aliens beyond this limited enforcement role.²⁵¹ Furthermore, nothing suggests Congress intended for states to adopt duplicitous anti-harboring regulations.

This conclusion is further supported by the Supreme Court’s decision in *Hines v. Davidowitz* striking down a duplicitous state immigrant registration law.²⁵² Like the registration law at issue in *Hines* and S.B. 1070 section 3, the anti-harboring provisions of the Ordinance duplicate federal immigration regulations. The Ordinance adopts substantially similar legal standards for culpability as the federal anti-harboring law, essentially providing an additional state penalty for the same conduct that violates federal law.²⁵³ The *Hines* Court struck down such a duplicitous state alien-registration law stating, “where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.”²⁵⁴

Therefore, even though Congress has invited state participation in deterring the harboring of unlawful aliens and the Ordinance’s anti-

248. 8 U.S.C. § 1324(a)(1)(A) (2006).

249. *Id.* § 1324(a)(1)(A)(iii).

250. *Id.* § 1324(c).

251. *See id.* § 1324.

252. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

253. *Compare* FREMONT, NEB., ORDINANCE 5165 § 1, Part 2 (“It is unlawful . . . to harbor an illegal alien . . . knowing or in reckless disregard of the fact that an alien has come to, entered or remains in the United States in violation of law . . .”), with 8 U.S.C. § 1324(1)(a)(iii) (criminalizing a person who “knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, . . . harbors, . . . or attempts to . . . harbor . . . such alien in any place, including any building.”).

254. *United States v. Arizona*, 641 F.3d 339, 355 (9th Cir. 2011) *cert. granted*, 132 S. Ct. 845 (2011) (emphasis added) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941)).

harboring provisions reflect similar policy goals as federal immigration laws, the Ordinance's anti-harboring provisions are nonetheless unconstitutional. The Ordinance's anti-harboring housing provisions fall outside the scope of the power Congress delegated to the states to regulate immigration by deterring the harboring of unlawful aliens.

2. License Revocation Provisions

The occupancy licensing provisions providing for the revocation of occupancy licenses for individuals determined to be unlawfully present in the United States²⁵⁵ are also unconstitutional because they exceed the authority Congress has delegated to the states to enforce immigration regulations. As the *Keller* court noted, Congress has provided a complex statutory and regulatory scheme for the identification, classification, adjudication, and removal of individuals identified as unlawfully present in the United States.²⁵⁶ Consequently, the occupancy license revocation provisions are an attempt to regulate immigration by seeking to exclude unlawful aliens from the City's jurisdiction.

Congress has expressly invited states to participate in identifying aliens unlawfully present in the United States²⁵⁷ and to "cooperate in the enforcement of Federal immigration law."²⁵⁸ The occupancy license revocation provisions exceed this authority, however, because there is no indication Congress intended for state or local governments to unilaterally act to remove unauthorized aliens from their jurisdiction. While the Ordinance's license revocation provisions do not directly remove unlawful aliens from the city or prevent them from entering the city, they have the ultimate effect of excluding individuals from the jurisdiction purely on the basis of their immigration status.²⁵⁹

Laws that exclude individuals from residing within a jurisdiction on the basis of immigration status are inconsistent with Congress's system established to classify, adjudicate, and potentially remove aliens from the United States. Congress has provided a "complex scheme for adjudicating an individual's right to remain in this country."²⁶⁰ In doing so, Congress has given the federal government sig-

255. FREMONT, NEB., ORDINANCE 5165 § 1, Part 4.D.

256. *Keller v. City of Fremont*, Nos. 8:10CV270, 4:10CV3140, 2012 WL 537527 at *8–9 (D. Neb. Feb. 20, 2012) (citing 8 U.S.C. § 1101, § 1229b(b), § 1255, and 8 C.F.R. § 1.1).

257. See 8 U.S.C. § 1357(g), § 1373(c) (2006).

258. See *id.* § 1357(g)(10).

259. See FREMONT, NEB., ORDINANCE 5165 § 1, Part 3.L; 4.D (June 21, 2010); See also *Lazano v. City of Hazelton*, 620 F.3d 170, 220–21 (2010), *vacated*, 131 S. Ct. 2958 (2011).

260. *Keller*, 2012 WL 537527 at *8 (citing the Immigration and Nationality Act, 8 U.S.C. § 1101).

nificant discretion in deciding whether and when to initiate removal proceedings.²⁶¹ Once removal proceedings are commenced, aliens identified as unlawfully present in the United States are often allowed to remain pending final adjudication of their status.²⁶² Judges hearing removal proceedings have discretion to cancel removal of certain aliens and to adjust their status to that of lawful residents,²⁶³ thus, even after removal proceedings have been commenced, there is considerable uncertainty as to whether the individual will be removed.

Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country, perhaps even as a citizen. Indeed, even the Immigration and Naturalization Service cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course.²⁶⁴

Proliferation of exclusionary state and local laws such as the Ordinance's occupancy licensing revocation provision would result in the federal government losing meaningfully exclusive control over decisions relating to immigration.²⁶⁵ Therefore, a state or local government's removal of aliens from its jurisdiction would frustrate Congress's classification, adjudication, and removal scheme.²⁶⁶

C. Severability and Remaining Provisions

The *Keller* court correctly found that the offending provisions, section 1, parts 2, 3.L, and 4.D, were severable from the remainder of the Ordinance. The Ordinance included an express severability provision²⁶⁷ and "the essential elements of a complete ordinance remain" with the offending portions stricken.²⁶⁸ Without the anti-harboring penalty provisions and the occupancy license revocation provisions, the Ordinance is constitutionally enforceable. The remaining occupancy licensing provisions are consistent with a congressional grant of authority because they merely require the city to communicate with the federal government regarding individuals' immigration status and do not invade the federal government's discretionary enforcement authority.²⁶⁹

261. *Lazano*, 620 F.3d at 222.

262. *Keller*, 2012 WL 537527 at *8.

263. 8 U.S.C. § 1229b (2006).

264. *Lazano*, 620 F.3d at 222 (quoting *Plyler v. Doe*, 457 U.S. 202, 241 n.6 (1982) (Powel, J., Concurring)).

265. *Lazano*, 620 F.3d at 221.

266. *Keller*, 2012 WL 537527 at *9 (citing *Lozano*, 620 F.3d at 219–24).

267. FREMONT, NEB., ORDINANCE 5165 § 2 (June 24, 2010).

268. *Keller*, 2012 WL 537527 at *10.

269. 8 U.S.C. §§ 1373(c), 1357(g)(10). See discussion of S.B. 1070 § 2(B) *supra* at subsection III.C.1.

V. CONCLUSION

The *Arizona* Court ultimately reached the correct conclusion that portions of S.B. 1070 are unconstitutional. But the *Arizona* court confused matters by applying general preemption standards in the context of immigration, implying that states possess inherent power to regulate immigration. States lack any such inherent power under the Constitution. Consequently, the *Arizona* court did the legal community a disservice by failing to clarify that—absent a specific congressional delegation of power—states possess no inherent power to regulate immigration.

The *Keller* Court also reached the correct conclusion when it found portions of the Ordinance unconstitutional. The *Keller* court admirably recognized the unique constitutional issue created by the Ordinance's attempt to regulate immigration and applied a more appropriate analytical framework than the *Arizona* court. Yet the *Keller* court still read the federal government's exclusive power to regulate immigration too narrowly, relying on conflict preemption to reach its conclusion.

The *Arizona* and *Keller* decisions nevertheless highlight the fact state and local governments can—to the extent authorized by Congress—constitutionally participate in the regulation of immigration. State and local governments can establish policies encouraging communication with the federal government and increased localized enforcement of immigration laws so long as the policies are consistent with a specific congressional grant of authority. Such policies will most likely be constitutional if they are narrowly tailored, are deferential to federal executive discretion, do not create additional penalties or burdens on individuals beyond those contemplated by federal law, and do not result in duplicitous civil or criminal regulation of immigration.

The *Arizona* and *Keller* decisions also highlight the need for significant reformation of federal immigration policy. Congress should see the actions of Arizona and the City of Fremont in passing S.B. 1070 and Ordinance No. 5165 as evidence that the current federal immigration laws and law enforcement mechanisms inadequately address the problems that the presence of unlawful aliens creates in states disproportionately burdened by the unlawful aliens. Among the most helpful reformations would be to clarify—if not expand—the roles state and local governments can play in enforcing federal immigration laws and adopting local immigration laws. Proactive reform efforts would be a more responsible use of government resources than engaging in costly and time-consuming litigation in reaction to state and local efforts to increase local enforcement of immigration laws like the laws at issue in *Arizona* and *Keller*.

