

## CHAMBER OF COMMERCE V. EDMONDSON: EMPLOYMENT AUTHORIZATION LAWS, STATES' RIGHTS, AND FEDERAL PREEMPTION—AN INFORMED APPROACH

### INTRODUCTION

Few issues are as divisive in American politics as illegal immigration. The Republican and Democratic parties are engaged in a virtual stalemate on the issue, and many would argue that the federal government's comprehensive overhaul of immigration law—the Immigration Reform and Control Act of 1986 (IRCA)—has been largely ineffective at stemming the tide of illegal immigration.<sup>1</sup> In response, states and municipalities have begun to enact statutes that seek to address the problem by preventing employers from hiring unauthorized workers.<sup>2</sup> These statutes raise questions about the extent to which state and local governments can regulate in the area of immigration without triggering federal preemption principles. One such example is the recent Tenth Circuit Court of Appeals decision in *Chamber of Commerce v. Edmondson*.<sup>3</sup> In *Edmondson*, the court analyzed a challenge to the Oklahoma Taxpayer and Citizen Protection Act of 2007 (the Oklahoma Act), which seeks to regulate illegal immigration through employment verification.<sup>4</sup>

Part I of this Comment outlines the relevant background information regarding the federal regulation of unauthorized workers and preemption doctrine. It also summarizes *Geier v. American Honda Motor Co.*,<sup>5</sup> which provides a significant framework for determining the existence of federal preemption.<sup>6</sup> Part II summarizes *Edmondson*, and Part III analyzes the Tenth Circuit's decision. This Comment commends the Tenth Circuit's decision in *Edmondson* as consistent with federal preemption jurisprudence by arguing that, in conducting its conflict preemption analysis, the court placed appropriate weight on the goals of IRCA when analyzing whether the Oklahoma Act was an obstacle to the accomplishment of these goals. It then argues that *Edmondson*, and the recently decided Third Circuit case *Lozano v. City of Hazleton*,<sup>7</sup> faith-

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1. Randall G. Shelley, Jr., *If You Want Something Done Right . . .*: Chicanos Por La Causa v. Napolitano and the Return of Federalism to Immigration Law, 43 AKRON L. REV. 603, 612 (2010) (citing *Ariz. Contractors Ass'n v. Napolitano*, 526 F. Supp. 2d 968, 972 (D. Ariz. 2007)).

2. Rachel Feller, Comment, *Preempting State E-Verify Regulations: A Case Study of Arizona's Improper Legislation in the Field of "Immigration-Related Employment Practices"*, 84 WASH. L. REV. 289, 302–05 (2009) (stating that twelve states have enacted legislation requiring the use of E-Verify, while only one has prohibited its use) (citations omitted).

3. 594 F.3d 742 (10th Cir. 2010).

4. *Id.* at 750.

5. 529 U.S. 861 (2000).

6. *Id.* at 865.

7. 620 F.3d 170 (3d Cir. 2010).

fully employ the implied preemption principles articulated in *Geier* by conducting a thorough conflict preemption analysis after concluding that sections of the state statutes were neither expressly preempted nor field preempted. These decisions stand in contrast to the Ninth Circuit's decision in *Chicanos Por La Causa, Inc. v. Napolitano*,<sup>8</sup> where the court largely ignored *Geier*, and failed to conduct a proper implied preemption analysis.<sup>9</sup> This Comment concludes by discussing the implications of the Third, Ninth, and Tenth Circuit decisions on federal and state immigration laws.

## I. BACKGROUND

### A. Federal Regulation of Unauthorized Workers

In 1986, Congress enacted IRCA, which created a “comprehensive scheme prohibiting the employment of illegal aliens in the United States.”<sup>10</sup> IRCA was the first federal law that sought to decrease illegal immigration by punishing employers for hiring unauthorized workers.<sup>11</sup> At the time Congress enacted IRCA, there were approximately three million illegal immigrants living in the United States.<sup>12</sup>

In 1942, many of the illegal immigrants in the United States were temporary farm workers hired due to the lack of agricultural laborers caused by World War II.<sup>13</sup> In response, Congress enacted a temporary-worker program that allowed employers to hire workers from Mexico for up to nine months of the year.<sup>14</sup> Subsequently, Congress enacted the Agricultural Act of 1949, which expanded the previous temporary-worker program to the Bracero Program.<sup>15</sup> Workers were paid low wages under the Bracero Program, allowing employers to reap greater profits.<sup>16</sup> The program ended in 1965, but during that sixteen year period, over five million Mexican workers immigrated legally to the United States.<sup>17</sup> In the wake of the Bracero Program, employers continued to demand cheap labor, and therefore, continued to hire and employ now illegal immi-

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8. 558 F.3d 856 (9th Cir. 2009), *cert granted sub nom.* Chamber of Commerce v. Whiting, 130 S. Ct. 3498 (June 28, 2010) (No. 09-115).

9. *See id.* at 866–67.

10. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

11. Shelley, *supra* note 1, at 627 (citing H.R. REP. NO. 99-682(I), at 52 (1986)). Prior to 1986, federal law did not directly prevent employers from hiring unauthorized workers. Kati L. Griffith, Comment, *A Supreme Stretch: The Supremacy Clause in the Wake of IRCA and Hoffman Plastic Compounds*, 41 CORNELL INT'L L.J. 127, 128 (2008) (citing H.R. REP. NO. 99-682(I), at 51–56).

12. Phi Mai Nguyen, Comment, *Closing the Back Door on Illegal Immigration: Over Two Decades of Ineffective Provisions While Solutions Are Just a Few Words Away*, 13 CHAP. L. REV. 615, 627 (2010).

13. *Id.*

14. *Id.*

15. *Id.* The Bracero Program was an agreement between the United States and Mexico to develop a plan to import farm workers. *Id.* at 625 n.65.

16. *Id.* at 625.

17. *Id.*

grants.<sup>18</sup> During the 1970s and 1980s, due to the widespread availability of employment, illegal immigration numbers continued to rise.<sup>19</sup> As illegal immigration increased, so too did anti-immigration sentiment.<sup>20</sup> This sentiment was compounded by a fragile economy with high unemployment and rising costs and inflation.<sup>21</sup> In response, Congress decided to combat illegal immigration by eliminating the “pull” factors.<sup>22</sup> In theory, if eliminated, these “pull” factors—such as increased employment opportunities and higher wages—would significantly reduce the impetus for people to enter or remain in the United States illegally.<sup>23</sup> In 1986, after nearly a decade of debate and compromise, Congress passed IRCA, and President Reagan signed the bill into law.<sup>24</sup>

The Supreme Court has repeatedly stated that IRCA made preventing the employment of unauthorized aliens a central “policy of immigration law.”<sup>25</sup> In order to more effectively combat illegal employment, IRCA established an extensive program, known as I-9, to confirm the work eligibility of employees.<sup>26</sup> Employers are required to verify the work eligibility of employees by examining specified documents.<sup>27</sup> If the documents appear to be reasonably legitimate, the employer may not request additional documentation.<sup>28</sup> This provision limits the potential for employment discrimination.<sup>29</sup> In addition, employers who “attempt to comply in good faith” with the requirements of IRCA are exempt from civil and criminal penalties,<sup>30</sup> thus representing Congress’s attempt to lessen the burden of verification on employers and minimize disruption of business.<sup>31</sup> Furthermore, IRCA does not require employers to verify the work eligibility of independent contractors.<sup>32</sup>

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18. *Id.* at 626.

19. *Id.*

20. See Adam L. Lounsbury, Comment, *A Nationalist Critique of Local Laws Purporting to Regulate the Hiring of Undocumented Workers*, 71 ALB. L. REV. 415, 419 (2008). This anti-immigrant sentiment was based on the assumption that illegal immigrants negatively impacted the “economic, social, and political well-being of the nation.” *Id.*

21. See *id.*

22. *Id.* The incentives that drive people to enter or remain in the United States illegally are often referred to as “push” and “pull” factors. Linda Sue Johnson, Comment, *The Antidiscrimination Provision of the Immigration Reform and Control Act*, 62 TUL. L. REV. 1059, 1062 (1988). The “push” factors that cause people to leave their home state include “unemployment, low wages, poor living and working conditions, a depressed or unstable economy, and internal strife.” *Id.* The “pull” factors that encourage people to come to the United States are “employment opportunities, higher wages, and better working and living conditions.” *Id.* at 1062–63.

23. See Lounsbury, *supra* note 20, at 419–20.

24. Johnson, *supra* note 22, at 1059.

25. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (quoting *INS v. Nat’l Ctr. for Immigrants’ Rights*, 502 U.S. 183, 194 n.8 (1991)).

26. *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 751 (10th Cir. 2010).

27. *Id.*

28. *Id.*

29. *Id.* at 767.

30. *Id.* at 751.

31. *Id.* at 767.

32. *Id.* at 751.

In enacting IRCA, Congress sought to balance several competing goals: “preventing the hiring of unauthorized aliens, lessening the disruption of American business, and minimizing the possibility of employment discrimination.”<sup>33</sup> Congress also added a provision to IRCA expressly preempting “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.”<sup>34</sup>

Illegal immigration continued to rise throughout the 1990s.<sup>35</sup> Congress, in an attempt to fight this upward trend, sought to create a more effective and efficient method for verifying employee work authorization that could be used in conjunction with the I-9 forms.<sup>36</sup> In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)<sup>37</sup> which, among other things, created another employment verification system—the Basic Pilot Program (E-Verify).<sup>38</sup> E-Verify differs from I-9 in that it is an internet based system in which information is submitted electronically, and the government then checks the employee’s information against an electronic database.<sup>39</sup> Congress, however, explicitly refused to require most employers to use E-Verify, rendering it an entirely voluntary alternative to I-9.<sup>40</sup> According to the U.S. Department of Homeland Security, in 2001, just over one thousand employers used E-Verify, but by 2010, over two hundred thousand employers participated.<sup>41</sup>

### *B. The Supremacy Clause and Preemption Doctrine*

The Supremacy Clause states that the Constitution and the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>42</sup> The Clause has long been interpreted as providing that federal law

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33. *Id.* at 767 (internal quotation marks omitted).

34. *Id.* at 765 (quoting 8 U.S.C. § 1324a(h)(2) (2006)).

35. See Elizabeth McCormick, *The Oklahoma Taxpayer and Citizen Protection Act: Blowing Off Steam or Setting Wildfires?*, 23 GEO. IMMIGR. L.J. 293, 301 (2009).

36. See Naomi Barrowclough, Note, *E-Verify: The Long Awaited “Magic Bullet” or Weak Attempt to Substitute Technology for Comprehensive Reform?*, 62 RUTGERS L. REV. 791, 797 (2010).

37. *Id.*

38. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 861 (9th Cir. 2009), *cert granted sub nom. Chamber of Commerce v. Whiting*, 130 S.Ct. 3498 (June 28, 2010) (No. 09-115).. In 2007, the Basic Pilot Program was renamed “E-Verify.” *History and Milestones*, U.S. DEP’T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Feb. 3, 2011), <http://www.uscis.gov/e-verify> (found under “About the Program” sub-menu).

39. *Edmondson*, 594 F.3d at 752. E-Verify compares information from the employee’s I-9 forms to data from the U.S. Department of Homeland Security and Social Security Administration records to determine employment eligibility. *Id.*

40. *Id.* at 768. E-Verify, however, is mandatory for many federal contractors. *Id.* at 772.

41. *History and Milestones*, *supra* note 38.

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

preempts contrary state laws.<sup>43</sup> Arising out of Supremacy Clause jurisprudence, preemption doctrine delineates the boundaries of federal supremacy when Congress has enacted legislation, which is otherwise within its enumerated powers.<sup>44</sup> The preemption inquiry “starts with the assumption that the historic police powers of the States are not to be superseded by . . . Federal Act unless that is the clear and manifest purpose of Congress.”<sup>45</sup> Therefore, one must look to Congressional intent for enacting a statute to determine if a state law is preempted.

Federal preemption can be either express or implied.<sup>46</sup> Express preemption exists “when Congress ‘define[s] explicitly the extent to which its enactments pre-empt state law.’”<sup>47</sup> Some federal statutes exempt state law that would otherwise be expressly preempted by way of a savings clause.<sup>48</sup> There are two types of implied preemption: field preemption and conflict preemption.<sup>49</sup> Field preemption occurs when “the scope of a statute indicates that Congress intended federal law to occupy a field exclusively.”<sup>50</sup> Conflict preemption occurs when a state law would make it impossible to comply with both state and federal law, or where state law “stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>51</sup> Furthermore, when state and federal laws share a common goal, “[t]he fact of a common end hardly neutralizes conflicting means[,]” and the foregoing preemption principles still apply.<sup>52</sup>

### C. Geier v. American Honda Motor Company

One of the Supreme Court’s most recent and significant pronouncements on the preemption of state law is *Geier v. American Honda Motor Co.* In *Geier*, the Court held that a state tort law claim conflicted with the objectives of Federal Motor Vehicle Safety Standard 208 (FMVSS 208), and therefore was impliedly preempted.<sup>53</sup> The case commenced after one plaintiff was seriously injured in an auto collision.<sup>54</sup> The 1987 Honda Accord that the plaintiff was driving was not equipped

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43. See *McCulloch v. Maryland*, 17 U.S. 316, 405–06 (1819).

44. Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659, 1665 (2009).

45. *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)).

46. *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

47. *Emerson*, 503 F.3d at 1129 (quoting *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000)) (alteration in original) (internal quotation marks omitted).

48. See Zellmer, *supra* note 44, at 1661, 1668.

49. *Id.* at 1666.

50. *Sprietsma v. Mercury*, 537 U.S. 51, 64 (2002) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

51. *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 766 (10th Cir. 2010) (quoting *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982)) (internal quotation marks omitted).

52. See *Edmondson*, 594 F.3d at 766 (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 379 (2000)).

53. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000).

54. *Id.* at 865.

with an airbag.<sup>55</sup> The plaintiffs sought damages under District of Columbia tort law, claiming that Honda was negligent by not equipping the car with an airbag.<sup>56</sup>

The Department of Transportation (DOT) promulgated FMVSS 208 pursuant to its power under the National Traffic and Motor Vehicle Transportation Act (Safety Act).<sup>57</sup> The Court concluded that the Safety Act's express preemption provision, when read with its savings clause, excluded common law tort actions.<sup>58</sup> However, the Court noted that a savings clause "does *not* bar the ordinary working of conflict preemption principles."<sup>59</sup> In addition, the Court emphasized that it "has repeatedly 'decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.'"<sup>60</sup> Furthermore, the Court declined to find that the existence of a saving clause or express preemption provision would create a "special burden" disfavoring preemption.<sup>61</sup>

Having concluded that the state tort law action was not expressly preempted, the Court then addressed whether the suit was impliedly preempted by FMVSS 208.<sup>62</sup> Although the purpose of FMVSS 208 was to improve automobile safety, it did not require the installation of airbags.<sup>63</sup> The Court explained that FMVSS 208 was not a safety floor, but was developed as a way to give automobile manufacturers a range of choices among different passive restraint systems, all of which promoted FMVSS 208's safety objectives.<sup>64</sup> Therefore, by requiring airbags and taking the choice away from the auto makers, the state tort law stood as an obstacle to the accomplishment of FMVSS 208's objective.<sup>65</sup>

The Court gave significant weight to the history of FMVSS 208 and DOT's explanation of FMVSS 208 in concluding that the state tort action was conflict preempted.<sup>66</sup> The Court deferred to DOT's explanation because of the technical nature of the subject matter and the complex and extensive historical background of FMVSS 208.<sup>67</sup> The Court added, "The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely

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55. *Id.*

56. *Id.*

57. *Id.* at 864.

58. *Id.* at 868.

59. *Id.* at 869.

60. *Id.* at 870 (quoting *United States v. Locke*, 529 U.S. 89, 106–07 (2000)) (alteration in original).

61. *Geier*, 529 U.S. at 870.

62. *Id.* at 874.

63. *Id.* at 874–76.

64. *Id.* at 874–75.

65. *Id.* at 886.

66. *Id.* at 875–77.

67. *Id.* at 883.

impact of state requirements.”<sup>68</sup> In sum, *Geier* provided the appropriate framework with which to analyze whether state and local immigration laws are preempted by federal law.

## II. CHAMBER OF COMMERCE V. EDMONDSON

### A. Facts and Procedural History

In 2007, Oklahoma enacted the Oklahoma Taxpayer and Citizen Protection Act (the Oklahoma Act) to regulate illegal immigration.<sup>69</sup> The Oklahoma Act reflects the judgment of the Oklahoma legislature that “illegal immigration is causing economic hardship and lawlessness . . . .”<sup>70</sup> The Oklahoma Act seeks to prevent illegal immigration by stopping the employment of illegal aliens through the use of mandatory verification systems and various monetary disincentives.<sup>71</sup>

Numerous chambers of commerce and trade associations brought suit challenging three sections of the Oklahoma Act: Sections 7(B), 7(C), and 9.<sup>72</sup> Section 7(B) requires employers to use E-Verify to confirm the employment status of their employees.<sup>73</sup> If an employer refuses to use E-Verify it is barred from contracting with Oklahoma public employers.<sup>74</sup> Section 7(C) “makes it a ‘discriminatory practice’ for any employer to ‘discharge an employee working in Oklahoma who is a United States citizen or permanent resident alien while retaining an employee who the employing entity knows, or reasonably should have known, is an unauthorized alien.’”<sup>75</sup> “An employer who engages in such a discriminatory practice may be investigated by the Oklahoma Human Rights Commission” (OHRC) and can be subject to temporary injunctive relief “and affirmative relief, including reinstatement, back pay, costs and attorney’s fees.”<sup>76</sup> However, if an employer uses E-Verify, it is exempt from liability under Section 7(C).<sup>77</sup> Section 9 requires all employers to obtain “documentation to verify . . . independent contractor[s]’ employment authorization.”<sup>78</sup> If the independent contractor does not provide proof of work authorization, then the employer must withhold compensation equal to “the top marginal income tax rate” allowable under Oklahoma

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68. *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996)).

69. *Chamber of Commerce v. Edmondson*, 594 F.3d 750, 750 (10th Cir. 2010).

70. *Id.* at 753 (quoting Oklahoma Taxpayer and Citizen Protection Act of 2007, 2007 Okla. Sess. Law Serv. Ch. 112, § 2 (West)) (internal quotation marks omitted).

71. *Edmondson*, 594 F.3d at 753–55.

72. *Id.* at 750.

73. *Id.* at 753–54.

74. *Id.*

75. *Id.* at 754 (citing Oklahoma Taxpayer and Citizen Protection Act of 2007, OKLA. STAT. tit. 25, § 1313(C)(1) (2007)).

76. *Edmondson*, 594 F.3d at 754.

77. *Id.*

78. *Id.* at 754–55 (quoting OKLA. STAT. tit., § 2385.32 (2007)) (alterations in original).

law.<sup>79</sup> Employers who do not withhold the required amount shall be liable to the state for the remaining amount.<sup>80</sup>

The plaintiffs claimed that all three sections of the Oklahoma Act were expressly and impliedly preempted by federal law, and therefore sought a preliminary injunction.<sup>81</sup> The defendants opposed the injunction and moved to dismiss on the basis that the chambers lacked standing, certain defendants were immune from suit under the Eleventh Amendment, and the Tax Injunction Act (TIA) stripped the district court of jurisdiction to enjoin Section 9.<sup>82</sup> The district court denied the motion to dismiss and granted the preliminary injunction as to all three sections.<sup>83</sup>

### *B. Majority Opinion*

The Tenth Circuit affirmed the district court's grant of a preliminary injunction with regard to Sections 7(C) and 9, but reversed the district court's grant of preliminary injunction against the enforcement of Section 7(B).<sup>84</sup> First, the court concluded that the plaintiffs had standing to challenge the three sections of the Oklahoma Act.<sup>85</sup> In finding standing, the court stated that the chambers had sufficiently demonstrated that the injury threatened by the three sections was "real, immediate, and direct[.]" and that the injunction requested would redress their alleged injuries.<sup>86</sup> Second, the court concluded that the Attorney General was not immune from suit under the Eleventh Amendment as to Section 7(B), but that he was immune from suit as to Sections 9 and 7(C) because he was not authorized to enforce those sections.<sup>87</sup> Third, the court found that the TIA did not deprive the district court of jurisdiction to enjoin Section 9.<sup>88</sup> It stated that the Oklahoma Act fell outside of the scope of the TIA because Section 9 was an assessment seeking to regulate illegal immigration and not a tax with the primary purpose of raising revenue.<sup>89</sup> Last, the court undertook a preemption analysis to determine whether the district court's grant of a preliminary injunction as to the three sections was proper.<sup>90</sup> The Tenth Circuit affirmed the district court regarding Sections 7(C) and 9, finding that Section 7(C) was expressly preempted and Section 9 was impliedly preempted.<sup>91</sup> The court, however, reversed the dis-

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79. *Edmondson*, 594 F.3d at 754–755 (quoting § 2385.32(A)).

80. *Edmondson*, 594 F.3d at 755.

81. *Id.* at 750.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 759.

86. *Id.* at 756 (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)).

87. *Edmondson*, 594 F.3d at 759–60.

88. *Id.* at 761.

89. *Id.*

90. *Id.* at 764.

91. *Id.* at 771.

strict court's decision as to Section 7(B), finding that the section was neither expressly nor impliedly preempted by federal law.<sup>92</sup>

The court began its preemption analysis by evaluating whether the three provisions of the Oklahoma Act were expressly preempted.<sup>93</sup> Judge Lucero stated that the proper express preemption analysis asks “whether the state law at issue falls within the scope of a federal preemption provision.”<sup>94</sup> “IRCA preempts ‘any State 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.’”<sup>95</sup> The court noted that IRCA does not define “sanction” as requiring a punitive component.<sup>96</sup>

The court determined that the penalties under Section 7(C) for firing a legal worker while retaining an illegal worker—cease and desist orders, reinstatement, back pay costs, and attorney's fees—are restrictive measures that fall within the definition of sanctions under § 1324a(h)(2) of IRCA.<sup>97</sup> The court added that the above penalties are consistent with the generally accepted use of the term “sanctions” under federal law.<sup>98</sup> Therefore, because these sanctions are imposed upon those who employ illegal aliens, Section 7(C) falls within the scope of § 1324a(h)(2) and is thus expressly preempted.<sup>99</sup>

Conversely, the court concluded that Sections 7(B) and 9 were not expressly preempted by § 1324a(h)(2) because neither “impos[es] civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens.”<sup>100</sup> Section 7(B) simply requires all employers to use E-Verify.<sup>101</sup> An employer violates this section not by employing illegal immigrants, but by refusing to implement the program.<sup>102</sup> According to the court, because sanctions are distinct from the employment of unauthorized aliens, this section does not come within the scope of § 1324a(h)(2) and therefore is not expressly preempted.<sup>103</sup> Likewise, under Section 9, it is irrelevant whether an independent contractor is an unauthorized alien.<sup>104</sup> Under that provision the employer must verify the work status or withhold taxes of all independent contractors.<sup>105</sup>

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92. *Id.*

93. *Id.* at 765.

94. *Id.*

95. *Id.* (quoting 8 U.S.C. § 1324a(h)(2) (2006)).

96. *Edmondson*, 594 F.3d at 765.

97. *Id.* at 765–66.

98. *Id.* at 765.

99. *Id.* at 766.

100. *Id.* (second alteration in original) (emphasis omitted) (internal quotation marks omitted).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

Having found that Sections 9 and 7(B) were not expressly preempted, the court set out to determine whether the sections were nonetheless impliedly preempted based on conflict preemption principles.<sup>106</sup> It concluded that, although Section 9 did not make compliance with federal law a physical impossibility, it did stand as an obstacle to accomplishing the goals of IRCA and therefore was conflict preempted.<sup>107</sup> However, the panel split in concluding that Section 7(B), which mandates the use of E-Verify, was not an obstacle to the accomplishment of Congress's goals under IRCA and therefore was not preempted.<sup>108</sup>

In its preemption analysis regarding Section 9, the court found that, although this section did not make compliance with IRCA an impossibility, it stood as an obstacle to the implementation of IRCA because it interfered with the methods chosen by Congress and therefore was conflict preempted.<sup>109</sup> Specifically, Section 9 requires employers to verify the work authorization of independent contractors.<sup>110</sup> In contrast, IRCA explicitly excludes independent contractors from verification requirements.<sup>111</sup> The court noted that this added requirement stood contrary to the goals of IRCA by potentially exposing employers to federal liability for employment discrimination and increasing burdens on businesses.<sup>112</sup> In addition, *Geier* also supported the court's conflict preemption conclusion.<sup>113</sup> The court noted that "Section 9 would create obligations on contracting entities that Congress expressly chose not to impose."<sup>114</sup> Just as state tort law could not hold automakers liable for not installing an airbag in *Geier*, Oklahoma should not be allowed to require the verification of independent contractors.<sup>115</sup>

The last part of the court's preemption analysis addressed the Ninth Circuit case of *Chicanos Por La Causa v. Napolitano*.<sup>116</sup> In *Chicanos*, the court held that the Legal Arizona Workers Act (LAWA) was neither

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106. *Id.* at 766–67.

107. *Id.* at 769.

108. *See id.* at 771. Judge Lucero argued that Section 7(B) is conflict preempted because making E-Verify mandatory would stand as an obstacle to the accomplishment of Congress goals in enacting IRCA. *Id.* at 768–70. He stated that Congress has concluded that I-9 "strikes the best balance between preventing employment of unauthorized workers, easing burdens on employers, and preventing employment discrimination." *Id.* at 768. Furthermore, Judge Lucero analogized mandating E-Verify to mandating airbags in *Geier*; Oklahoma should not be allowed to mandate the use of E-Verify because it is voluntary under federal law and mandating its use would restrict employers' choices. *Id.* at 769–70.

109. *Id.* at 767.

110. *Id.* at 769.

111. *Id.*

112. *Id.*

113. *Id.* at 770.

114. *Id.*

115. *Id.*

116. *Id.* at 770.

expressly nor implied preempted by IRCA or the IIRIRA.<sup>117</sup> Like the Oklahoma Act, LAWA was intended to combat illegal immigration by targeting employers who knowingly hire illegal immigrants.<sup>118</sup> The principal sanction of LAWA was the revocation of state business licenses.<sup>119</sup> The Arizona law also mandated the use of E-Verify.<sup>120</sup> The Tenth Circuit reasoned that Oklahoma's reliance on *Chicanos* was misplaced because the provision at issue in that case was a licensing law, and Oklahoma had not asserted that its law is a licensing law.<sup>121</sup> Most significantly, however, the Tenth Circuit opined that the Ninth Circuit's implied preemption holding was based largely on the Ninth Circuit's initial conclusion that LAWA fell within the savings clause of IRCA.<sup>122</sup> The Tenth Circuit expressed reservation with the ruling, stating it "is problematic because it implies that the presence of an express preemption provision precludes the possibility of implied preemption."<sup>123</sup> The court was "unpersuaded" by the Ninth Circuit's holding because its approach stood contrary to *Geier* and generally accepted implied preemption principles.<sup>124</sup>

Last, the court evaluated the remaining factors for granting a preliminary injunction.<sup>125</sup> It found that the plaintiffs would likely suffer irreparable harm absent a preliminary injunction as any monetary damages imposed would be unlikely to be recovered due to the government's sovereign immunity.<sup>126</sup> Additionally, the balance of equities tipped in the chambers' favor because an injunction would serve the public interest and Oklahoma does not have a public interest in enforcing a law that is likely unconstitutional.<sup>127</sup>

### C. Concurrence

The concurring opinion, authored by Judge Kelly, offered an explanation as to why Section 7(B) was not conflict preempted.<sup>128</sup> Judge Kelly argued, despite E-Verify's voluntary use on the national scale, "it is not reasonable to assume that a mandatory program choice for state public contractors conflicts with Congressional purpose."<sup>129</sup> Judge Kelly opined

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117. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860–61 (9th Cir. 2009), *cert granted sub nom. Chamber of Commerce v. Whiting*, 130 S. Ct. 3498 (June 28, 2010) (No. 09-115). The court also held that LAWA did not violate the employers' rights to due process. *Id.* at 861.

118. *Id.* at 860.

119. *Id.*

120. *Id.*

121. *Edmondson*, 594 F.3d at 770.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* The plaintiffs would have had to demonstrate "a likelihood that they will suffer irreparable harm absent preliminary relief, that the balance of equities tips in their favor, and that the injunction is in the public interest." *Id.* (citing *Attorney General v. Tyson Food, Inc.* 565 F.3d 769, 776 (10th Cir. 2009)).

126. *Edmondson*, 594 F.3d at 770.

127. *Id.* at 771.

128. *Id.* (Kelly, J., concurring).

129. *Id.* at 772.

that Congress had foreseen the increased use of technology as evidenced by requiring E-Verify for federal contractors.<sup>130</sup> The concurrence concluded “choice is not an end in itself and no evidence suggests that federal standards concerning immigration and employment-verification will be compromised by E-Verify.”<sup>131</sup>

#### *D. Dissent*

The dissent, authored by Judge Hartz, argued three points. First, the plaintiffs lacked standing to seek an injunction, as to Section 7(B), against the Attorney General because they failed to show an actual and imminent threat of injury traceable to him.<sup>132</sup> Second, the dissent contended that the TIA barred the chambers’ Section 9 claim because the TIA bars injunctions against tax-withholding statutes, and Section 9 is a tax withholding statute.<sup>133</sup> Additionally, the dissent argued that it is as reasonable to infer that the purpose of Section 9 is to protect the integrity of the tax system as to infer its purpose is to enforce immigration law.<sup>134</sup> Third, Judge Hartz concurred with the other judges regarding the injunction of Section 7(C), but on narrower grounds.<sup>135</sup> He contended that reinstatement, back pay, costs, and attorney fees are not civil sanctions under IRCA, but rather, compensatory relief, which IRCA does not cover.<sup>136</sup> However, because Section 7(C) imposes other civil fines that do come under the scope of IRCA, the disagreement did not affect his conclusion.<sup>137</sup>

### III. ANALYSIS

Part A of the analysis argues that the Tenth Circuit’s decision in *Edmondson* was consistent with the three goals of IRCA: preventing employment of unauthorized workers, preventing employment discrimination, and minimizing disruption of business.<sup>138</sup> Specifically, Section 9, independent contractor obligations, conflicted with the goals of IRCA and was preempted; whereas Section 7(B), which mandates the use of E-Verify, does not conflict with the goals of IRCA, and therefore, the court was correct in holding that it was not preempted by federal law. Part B of the analysis contends that the *Edmondson* court more accurately and

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130. *Id.*

131. *Id.*

132. *Id.* (Hartz, J., concurring and dissenting).

133. *Id.* at 774.

134. *Id.* at 776–77. It is worth noting that Judge Hartz believed that the majority wrongly relied on the motive behind the enactment of the Oklahoma Act in arriving at their conclusion that Section 9 imposed an assessment and not a tax and therefore was outside of the scope of the TIA. *Id.* at 776. If more judges put aside motive in determining whether a state enactment imposed an assessment or a tax, more states could disguise efforts to control immigration as tax laws, which are immune from injunction. However, implied preemption principles would likely still bar many of these enactments.

135. *Id.* at 777.

136. *Id.*

137. *Id.*

138. *Id.* at 767 (majority opinion).

faithfully applied the principles of implied preemption than did the Ninth Circuit in *Chicanos*. The Ninth Circuit largely ignored the implied preemption framework articulated in *Geier* by failing to place appropriate weight on the goals of IRCA. Finally, Part C of the analysis discusses the possible implications of the circuit courts' decisions on state and federal immigration laws, and the soon to be issued Supreme Court ruling on the constitutionality of LAWA.

#### A. Edmondson: True to the Goals of IRCA

When Congress enacted IRCA it sought to delicately balance three goals: preventing employment of unauthorized workers, preventing employment discrimination, and preventing undue disruption of business.<sup>139</sup> In *Edmondson*, the Tenth Circuit carefully considered each of these goals in arriving at its decision that Section 9 was conflict preempted, while Section 7(B) was not. The result was an informed holding that demonstrated a superior approach to immigration and employment that was faithful to Congressional intent.

##### 1. Section 9 Was Conflict Preempted

The court properly concluded that Section 9, which requires employers to verify the worker authorization of independent contractors, was conflict preempted. As the defendants argued, both the Oklahoma Act and IRCA share a common goal of preventing unauthorized employment.<sup>140</sup> However, although requiring employers to verify the work eligibility of independent contractors would potentially further the goal of preventing unauthorized workers, Section 9 runs completely counter to the other two avowed goals of IRCA: preventing the disruption of business and minimizing the possibility of employment discrimination.

The construction industry provides an apt example. In order to complete a construction project, a general contractor (employer) will often hire independent contractors to perform work that the general contractor does not specialize in.<sup>141</sup> By requiring the general contractor to verify the work authorization of each independent contractor, the hiring process would slow considerably. Either individuals would have to be taken away from their normal employment duties or the employer would need to hire additional employees to verify the work authorization of independent contractors. Either option results in the disruption of busi-

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139. *Id.*

140. *Edmondson*, 594 F.3d at 767 (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000)).

141. See Kent W. Collier, Comment, *The Nuts and Bolts of Bankruptcy, Trust Funds, and the Construction Industry: Building a Solution for Subcontractors "Nailed" with an Unpaid Bill*, 21 EMORY BANKR. DEV. J. 623, 624 (2005). The terms "subcontractor" and "independent contractor" are often used interchangeably. See, e.g., David F. Johnson, *Employers' Liability for Independent Contractors' Injuries*, 52 BAYLOR L. REV. 1, 19–20 (2000).

ness—falling behind schedule and paying additional employees both result in increased costs for the employer.<sup>142</sup>

In order to avoid this disruption of business, employers will likely resort to hiring those they know are authorized to work.<sup>143</sup> Although preventing the hiring of unauthorized aliens is one of the goals of IRCA, this objective comes with an increased risk of employment discrimination. In drafting IRCA, Congress took great pains to ensure that the new regulatory scheme did not increase discrimination.<sup>144</sup> For example, IRCA explicitly prohibits discrimination on the basis of citizenship status or national origin,<sup>145</sup> and if a court finds by a preponderance of the evidence that an employer has engaged in a discriminatory practice, the employer may be subject to fines ranging from \$100 to \$10,000 for each act of discrimination.<sup>146</sup> IRCA, therefore, imposes similar liability for hiring unauthorized workers and discriminating against authorized aliens.<sup>147</sup> In contrast, Section 9 and the Oklahoma Act do not contain a provision imposing liability on those who discriminate against authorized aliens.<sup>148</sup> In and of itself, the failure to incorporate an anti-discrimination provision does not necessarily mean that Section 9 conflicts with IRCA; however, by requiring the verification of independent contractors, Section 9 potentially exposes employers to federal liability as they strive to comply with the additional state requirement.<sup>149</sup> Surely, federal liability qualifies as a disruption of business.

In *Edmondson*, the court downplayed the foregoing argument by noting that, in order to incur federal liability, an employer must act with a specific intent to discriminate.<sup>150</sup> Under Section 9, this possibility is not far-fetched. For example, in many areas of business, contracts are awarded through the use of a bidding system.<sup>151</sup> Typically, in this system, the lowest bidder is awarded the contract.<sup>152</sup> An employer would have a strong incentive under Section 9 to award the contract not necessarily to the lowest bidder, but to the independent contractor whose work eligibility could most easily be verified. It is not hard to imagine that under this

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142. These employers would also need to confirm the work authorization of new hires, which would further disrupt business.

143. *Lozano v. City of Hazleton*, 620 F.3d 170, 217 (3d Cir. 2010) (“While drafting IRCA, Congress heard testimony that imposing employer sanctions would create economic incentives for employers to discriminate against workers who appeared to be of foreign origin.”).

144. Patrick S. Cunningham, Comment, *The Legal Arizona Worker’s Act: A Threat to Federal Supremacy Over Immigration?*, 42 ARIZ. STATE L.J. 411, 416 (2010).

145. *Id.* at 417.

146. *Id.*

147. *Id.* The penalties for hiring an unauthorized worker range from \$250 to \$10,000. *Id.* at 415.

148. *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 754–55 (10th Cir. 2010).

149. *Id.* at 769.

150. *Id.*

151. See, e.g., Janine McPeters Murphy, Note, *Promissory Estoppel: Subcontractors’ Liability in Construction Bidding Cases*, 63 N.C. L. REV. 387, 391 (1985).

152. See, e.g., *id.*

system, independent contracting companies owned and staffed by minorities or recent immigrants would have less opportunity to win a contract than a white-owned business.<sup>153</sup> In the alternative, if the employer opted for withholding taxes instead of verifying eligibility, this again would disrupt business by creating a larger financial burden on the employer—as the employer would still need to pay the contractor their original compensation and simultaneously set aside additional monies for the tax withholding. Additionally, Section 9 could lead to increased litigation between general contractors and subcontractors regarding contract disputes to determine which entity bore the financial burden for the withholding. Because Section 9 would significantly disrupt the balance of goals Congress sought to achieve in enacting IRCA, the court correctly concluded Section 9 was too large an obstacle and was therefore conflict preempted.<sup>154</sup>

## 2. Section 7(B) Was Not Impliedly Preempted

The Tenth Circuit's conclusion that Section 7(B), which requires the use of E-Verify, was not conflict preempted by IRCA gave proper weight to state sovereignty while not disturbing the goals of IRCA. The Third Circuit, in *Lozano*, and Judge Lucero concluded otherwise.<sup>155</sup> Yet, their arguments are less persuasive because state mandated use of E-Verify does not stand as an obstacle to the accomplishment of the goals of IRCA.<sup>156</sup>

### a. E-Verify Will Not Disrupt Business

Mandating the use of E-Verify will not disrupt business. One of Congress's goals in establishing E-Verify was to make the work authorization of employees more efficient.<sup>157</sup> To verify an employee's eligibility using E-Verify, all the employer must do is electronically submit the employee's information over the internet and wait for a confirmation.<sup>158</sup> If the employee information matches the government records, the government instantly notifies the employer of the employee's eligibility.<sup>159</sup> This process certainly does not require more time than examining docu-

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153. Johnson, *supra* note 22, at 1069 (“A primary reason for the opposition to the employer sanctions scheme [of IRCA] was the concern that some employers, when threatened with civil and criminal sanctions for hiring undocumented aliens, would discriminate against those applicants who share a number of characteristics with those immigrant groups most commonly perceived as illegal.”).

154. *Edmondson*, 594 F.3d at 769.

155. *Lozano v. City of Hazleton*, 620 F.3d 170, 210 (3d Cir. 2010); *Edmondson*, 594 F.3d at 768–69.

156. At issue in *Lozano* was a Pennsylvania town's licensing law that sought to reduce illegal immigration through, inter alia, the mandatory use of E-Verify. 620 F.3d at 177–79.

157. *Edmondson*, 594 F.3d at 752.

158. *Id.*

159. *Id.*

ments under the I-9 system.<sup>160</sup> If, on the other hand, the employer receives a non-confirmation, it is required to do nothing aside from alerting the employee of the non-confirmation.<sup>161</sup> In fact, the employer is mandated to take no action against the employee pending an appeal of the non-confirmation, which must be initiated by the employee.<sup>162</sup> Additionally, a recent study of E-Verify conducted by an independent research company, Westat, found that “employers are generally satisfied with the program and feel it is non-burdensome.”<sup>163</sup>

The Third Circuit contended that mandating the use of E-Verify would increase costs to businesses in the form of set-up and training expenses.<sup>164</sup> This additional burden is *de minimus*. First, the vast majority of businesses have computers and access to the internet. Second, it is estimated that the average implementation cost is \$125 and the average yearly cost is under \$750, with three-fourths of the employers spending less than \$100.<sup>165</sup> The burden imposed by mandating E-Verify does not pose a tangible obstacle to the goal of minimizing the disruption of business.

b. E-Verify Will Not Cause Increased Employment Discrimination

The mandatory use of E-Verify will not lead to increased employment discrimination. E-Verify provides sufficient safeguards against discrimination through its appeals process and as evidenced by the fact that Congress mandates its use for federal contractors.<sup>166</sup> If the employer receives a tentative non-confirmation, the employee is notified and then has eight business days to contest the tentative non-confirmation.<sup>167</sup> During this period, the employer may not take any adverse action against the employee.<sup>168</sup> Furthermore, because the employer is shielded from liability during this period, there is no impetus for it to discriminate against the employee.<sup>169</sup>

The *Lozano* court argued that E-Verify’s unreliability will lead to increased discrimination.<sup>170</sup> The decision cites a 2007 congressional

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160. *Id.* at 751.

161. *Id.* at 752.

162. *Id.*

163. U.S. CITIZENSHIP AND IMMIGRATION SERVS., WESTAT EVALUATION OF THE E-VERIFY PROGRAM: USCIS SYNOPSIS OF KEY FINDINGS AND PROGRAM IMPLICATIONS 3 (2010), available at <http://www.uscis.gov/USCIS/Native%20Docs/Westat%20Evaluation%20of%20the%20E-Verify%20Program.pdf>.

164. *Lozano v. City of Hazleton*, 620 F.3d 170, 215 (3d Cir. 2010).

165. *Shelley*, *supra* note 1, at 623–24.

166. Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 6, 2008).

167. *Edmondson*, 594 F.3d at 752 (stating that the appeals period may also extend up to ten business days).

168. *Id.*

169. *Id.*

170. *Lozano v. City of Hazelton*, 620 F.3d 170, 214–16 (3d Cir. 2010).

study that found foreign-born workers are thirty times more likely to receive tentative non-confirmations than employees born in the United States.<sup>171</sup> Tentative non-confirmations, however, do not affect the final determination of eligibility,<sup>172</sup> and because the employer may not take action during the appeals period, this non-confirmation will not result in discrimination. Indeed, Congress has repeatedly refused to mandate the use of E-Verify for the vast majority of employers,<sup>173</sup> but nonetheless, many businesses that contract with the federal government are required to use the system.<sup>174</sup> In 2008, President Bush issued an executive order directing all federal departments and agencies to require federal contractors and subcontractors to verify the work authorization of employees performing work under qualifying federal contracts.<sup>175</sup> The particulars of the order are complex, but in short, all federal contractors and subcontractors are required to use E-Verify with the following exceptions: contracts for fewer than 120 days; contracts less than \$100,000; contracts where all work is performed outside of the United States; and commercially off-the-shelf items and related services, which includes nearly all food and agricultural products.<sup>176</sup>

President Obama has pledged his support to implement this executive order<sup>177</sup> and has committed significant budget funds toward improving and expanding E-Verify.<sup>178</sup> There also appears to be bipartisan support in Congress for mandating the use of E-Verify for federal contractors and subcontractors.<sup>179</sup> As a proportion of the total national work force, federal contractors may not amount to much, but between January 2011 and the end of March 2011 the list of federal contractors with five or more employees enrolled in E-Verify totaled nearly 2,500 pages.<sup>180</sup> By

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171. *Id.* at 215.

172. *See Edmondson*, 594 F.3d at 752.

173. *Id.* at 753.

174. *Id.*

175. Exec. Order No. 13,465, 73 Fed Reg. 33,285 (June 6, 2008). The executive order took effect September 8, 2009. “Federal contractors and subcontractors will be required to begin using the U.S. Citizenship and Immigration Services’ E-Verify system starting September 8, 2009, to verify their employees’ eligibility to legally work in the United States.” *Federal Contractors Required to Use E-Verify System*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/September%202009/far-rule-1-sep-09.pdf> (last updated Jun. 4, 2009).

176. Exec. Order No. 13,465, 73 Fed Reg. 33,285 (June 6, 2008).

177. *Secretary Napolitano Strengthens Employment Verification with Administration’s Commitment to E-Verify*, U.S. DEP’T OF HOMELAND SEC. (July 8, 2009), [http://www.dhs.gov/ynews/releases/pr\\_1247063976814.shtm](http://www.dhs.gov/ynews/releases/pr_1247063976814.shtm).

178. In 2010, the Presidential Budget contained \$110 million for E-Verify. OFFICE OF MGMT. & BUDGET, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA’S PROMISE 72 (2009). The 2011 budget has allocated \$137 million for E-Verify and a similar work authorization program. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOV’T 82 (2010).

179. *See* Spencer S. Hsu, *Obama Revives Bush Idea to Catch Illegal Workers*, WASH. POST, July 9, 2009, A4.

180. *E-Verify Federal Contractors List “Updated”*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Aug. 30, 2010), available at <http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify%20from%20Controlled%20Vocabulary/E-VerifyFedContrListandQueryVol.pdf>.

mandating the use of E-Verify for federal contractors, the federal government has implicitly, yet strongly, rejected the argument that the system is an obstacle to limiting employment discrimination. Last, it is important to note that Congress has repeatedly extended E-Verify and has expanded its availability to all 50 states.<sup>181</sup> It seems doubtful that Congress and the Executive Branch would make such a concerted effort to proliferate the use of E-Verify if they believed that E-Verify conflicts with the goals of IRCA.

The federal government actively pursues affirmative action programs designed to increase minority participation in federal business.<sup>182</sup> Under the Small Business Act (SBA), the federal government seeks to increase the number of federal contracts awarded to small businesses “owned and controlled by socially and economically disadvantaged individuals.”<sup>183</sup> The act defines socially disadvantaged individuals as those individuals who “have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”<sup>184</sup> In order to increase the participation of disadvantaged businesses in federal contracting, the SBA set a “government-wide goal for the minimum participation of disadvantaged business enterprises . . . at five percent of the value of all federal government prime contract and subcontract awards in a given year.”<sup>185</sup> In addition to this government-wide goal, the SBA requires that each federal agency establish an annual goal that realistically reflects the maximum potential percentage of contracts that could be awarded to disadvantaged businesses.<sup>186</sup>

It is paradoxical, if not utterly illogical, that the federal government would promote the participation of minority owned businesses in federal contracting through the SBA, yet, it would discourage the hiring of minority employees through the mandatory use of E-Verify for federal contractors. Potentially, a minority owned business that benefits from the SBA could then be required to discriminate against minority workers using E-Verify. Such a contradictory situation can only lead to one conclusion; the use of E-Verify does not conflict with IRCA’s goal of reducing employment discrimination.

### c. E-Verify Will Help Prevent Unauthorized Workers

States requiring the use of E-Verify will likely further the goal of preventing unauthorized workers more effectively than the I-9 system.

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181. Lozano v. City of Hazleton, 620 F.3d 170, 200 (3d Cir. 2010).

182. Brian C. Eades, Casenote, *Affirmative Action: The United States Supreme Court Goes Color-Blind*: Adarand Constructors, Inc. v. Peña, 29 CREIGHTON L. REV. 771, 771 (1996).

183. *Id.* at 773 (quoting 15 U.S.C. § 637(a)(6) (1995)).

184. Eades, *supra* note 182, at 773 (quoting 15 U.S.C. § 637(a)(5) (1995)).

185. Eades, *supra* note 182, at 773–74.

186. *Id.* at 774.

One of the goals of Congress in creating E-Verify was to create a system that would more accurately verify an employee's eligibility for employment.<sup>187</sup> As discussed above, E-Verify is not perfect, but it does have advantages over I-9 for determining employee eligibility. E-Verify has "reduced unauthorized employment among participating employers by permitting employers to determine whether the information provided by employees on I-9 forms is consistent with the information on [Social Security Administration] and [Department of Homeland Security] databases."<sup>188</sup> Without this additional verification method, employees can easily forge documents because employers have no way of determining their authenticity aside from their outward appearance.<sup>189</sup> Furthermore, one study found that E-Verify returns a tentative non-confirmation for approximately ten percent of the requests.<sup>190</sup> Out of the ten percent that received tentative non-confirmations, few appealed the determination.<sup>191</sup> Of course, the failure to appeal could be due in part to factors aside from the employee's work authorization status, but at least anecdotally, this statistic would indicate the system is preventing unauthorized workers.

d. Section 7(B) is Not Conflict Preempted According to *Geier*

The conclusion that Section 7(B) was not conflict preempted is in accordance with the preemption analysis in *Geier*. In that case, DOT's decision not to require airbags was part of a deliberate and careful regulatory scheme.<sup>192</sup> DOT even considered an "all airbag" standard, but opted for a "gradual phase-in of passive restraints."<sup>193</sup> The agency found that giving automakers a choice of several restraints was best in the short-term and the long-term to accomplish its goals.<sup>194</sup> DOT stated that allowing a choice in passive restraint systems "would help develop data on comparative effectiveness, would allow the industry to overcome the safety problems and high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. And it would build public confidence."<sup>195</sup> In short, "safety would best be promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car."<sup>196</sup>

At first glance, the Third Circuit's and Judge Lucero's analogy appears sound: refusing to allow employers to choose their work verifica-

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187. *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 752 (10th Cir. 2010).

188. *Lozano v. City of Hazleton*, 620 F.3d 170, 214-15 (3d Cir. 2010) (quoting U.S. Citizenship and Immigration Servs., *Report to Congress on the Basic Pilot Program*, June 2004, at 3).

189. *Edmondson*, 594 F.3d at 751.

190. *Shelley*, *supra* note 1, at 631.

191. *Id.*

192. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 875 (2000).

193. *Id.* at 879.

194. *Id.* at 878-79.

195. *Id.* at 879 (citations omitted).

196. *Id.* at 881 (citing Brief for United States as Amicus Curiae at 25 (No. 98-1811)).

tion method is the same as negating automakers' passive restraint choice by requiring airbags. However, the voluntariness of E-Verify was not due to calculated assessments like in *Geier*. For example, Congress made no equivalent statement that the goals of IRCA would best be promoted by a choice of verification systems instead of one.<sup>197</sup> To the contrary, Congress strongly encouraged the use of E-Verify by expanding its duration and extending its availability to all fifty states.<sup>198</sup> There is also a strong textual argument against conflict preemption. Congress could have forbid states from making E-Verify mandatory, as it did with regard to state civil and criminal penalties under IRCA's express preemption provision, but opted not to do so.<sup>199</sup> Because E-Verify furthers the goals of IRCA, it does not raise significant conflict preemption concerns.

### B. IRCA, Geier, and the Circuit Split

In *Edmondson*, the Tenth Circuit more accurately and faithfully applied the principles of implied preemption than did the Ninth Circuit in *Chicanos*. There, the Ninth Circuit concluded that LAWA was not expressly preempted because, as a licensing law, it fell within the savings clause of IRCA.<sup>200</sup> The court determined that the mandatory use of E-Verify and LAWA's potentially harsh sanctions<sup>201</sup> were not impliedly preempted because they were not an obstacle to the accomplishment of the goals of IRCA.<sup>202</sup> The *Edmondson* court distinguished the two cases, because at issue in *Chicanos* was a licensing law and the Oklahoma Act was not a licensing law. Nonetheless, the Tenth Circuit opined that it found the Ninth Circuit's reasoning unpersuasive. After concluding that LAWA was not expressly preempted, and then by conducting a cursory implied preemption analysis, the *Chicanos* approach suggested that the presence of an express preemption provision or savings clause prevents the operation of implied preemption principles. This inferior approach stands in opposition to the approach taken in *Geier*, where the Supreme

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197. See *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 752 (10th Cir. 2010).

198. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 867 (9th Cir. 2009), cert granted sub nom. *Chamber of Commerce v. Whiting*, 130 S. Ct. 3498 (June 28, 2010) (No. 09-115).

199. *Id.*

200. *Id.* at 864. The savings clause states that IRCA preempts all state sanctions "other than through licensing and similar laws." *Id.* (quoting 8 U.S.C. § 1324a(h)(2) (2006)). Furthermore, the Court found that the savings clause should not have been narrowly interpreted because the power to regulate the employment of unauthorized aliens has traditionally been left to the states. *Chicanos*, 558 F.3d at 864-65. This presumption against preemption in the area of employment of unauthorized aliens is debatable, but nonetheless the existence of a presumption against preemption does not negate the need to conduct a robust implied preemption analysis. *Edmondson*, 594 F.3d at 768-69 (Lucero, J., dissenting).

201. LAWA imposes a graduated series of sanctions for violations. *Chicanos*, 558 F.3d at 862. The first infraction "requires the employer to terminate the employment of all unauthorized aliens, file quarterly reports of all new hires for a probationary period, and file an affidavit stating that it terminated all unauthorized aliens and will not intentionally or knowingly hire any others." *Id.* If the employer violates the act during this probationary period the employer's business license is permanently revoked. *Id.*

202. *Id.* at 866.

Court conducted a thorough conflict preemption analysis after concluding that the claim was not expressly preempted.

In *Geier*, the Court repeatedly emphasized that the existence of a savings clause “does *not* bar the ordinary working of conflict preemption principles.”<sup>203</sup> After concluding that the express preemption provision of IRCA saved LAWA, the Ninth Circuit appeared to largely ignore this maxim of federal preemption doctrine. In concluding that LAWA was not conflict preempted, the Ninth Circuit downplayed the potential for conflict between the Arizona law and IRCA by stating “a hypothetical situation in which an employer may be subject to conflicting rulings from state and federal tribunals on the basis of the same hiring decision . . . does not provide an adequate basis to sustain a facial challenge.”<sup>204</sup> The court concluded that, because a claim had not yet been brought under LAWA, there was no record to demonstrate the effect of the act on an employer. Therefore, the argument was essentially speculative and did not create an implied conflict.<sup>205</sup>

The Ninth Circuit’s wait-and-see approach runs contrary to the approach taken in *Edmondson*. The *Edmondson* court concluded that Section 9 was conflict preempted and that the potential risk of increased liability was enough for an injunction when the law “upsets Congress’ carefully constructed balance by interfering with its chosen methods.”<sup>206</sup> IRCA exhaustively details a specialized regulatory scheme, and clearly, sanctions are an important tool in the scheme.<sup>207</sup> Because it is clear from the text of the legislation that LAWA’s sanctions stand as an obstacle to the goals Congress sought to achieve in creating IRCA’s sanctions, it is not necessary to wait and see the effects of LAWA prior to deciding whether it is conflict preempted.

The Tenth Circuit’s implied preemption analysis was also superior because it placed appropriate weight on the goals of IRCA in arriving at the conclusion that Section 9 stood as an obstacle to the implementation of the regulatory scheme and was therefore conflict preempted. In enacting IRCA, Congress manifested a clear intent to create a comprehensive and overarching regulatory scheme and corresponding civil and criminal penalties.<sup>208</sup> Even assuming that LAWA did fall under the savings clause, the penalties imposed run counter to the enumerated penalties of IRCA, and therefore, there was a considerable likelihood that LAWA could expose an employer to federal liability by following the letter of Arizona law. For example, by filing quarterly reports on all new hires during the probationary period, an employer could come in conflict with the rule

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203. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

204. *Chicanos*, 558 F.3d at 856.

205. *Id.* at 867.

206. *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 769 (10th Cir. 2010).

207. *Id.* at 751.

208. *See Lozano v. City of Hazleton*, 620 F.3d 170, 210–12 (3d Cir. 2010).

under IRCA preventing employers from asking employees for additional documentation. Additionally, having an employer file an affidavit stating he has fired all illegal employees, and that he will not hire other illegal workers on pain of permanent loss of a business license, could likely lead to firing and hiring decisions based on race or national origin, which is obviously a discriminatory practice in violation of the goals of IRCA and other federal laws. Furthermore, in signing LAWA, then Arizona Governor Napolitano noted that it was problematic that the bill lacked “an antidiscrimination clause to ensure that it is enforced in a fair and non-discriminatory manner.”<sup>209</sup>

Besides potential federal liability, LAWA places other burdens on business owners. Minor burdens include asking employees for additional documentation and requiring employers to sign affidavits. More significantly, the Ninth Circuit wrongly discounted the plaintiffs’ argument that LAWA was impliedly preempted because the permanent revocation of a business license is far more severe than IRCA sanctions and therefore it conflicts with IRCA’s goals.<sup>210</sup> Other licensing laws, with lesser penalties, may not interfere with the goals of IRCA’s sanctioning scheme, but LAWA, by permanently revoking a business’s license, imposes the ultimate burden on employers: the loss of livelihood. In finding Section 9 of the Oklahoma Act conflict preempted, the Tenth Circuit placed great weight on the employer’s burden to verify the work authorization of independent contractors.<sup>211</sup> The *Edmondson* court stated that the risk of increased employee discrimination and employer burdens under “Section 9 . . . upsets Congress’ carefully constructed balance by interfering with its chosen methods.”<sup>212</sup> Clearly, both these dangers are present in LAWA.

These types of situations raise serious conflict preemption concerns, yet the *Chicanos* court limited its conflict preemption analysis and invoked *Geier* only to analyze the mandatory use of E-Verify,<sup>213</sup> which is not conflict preempted. In *Geier*, the Court took into account all of DOT’s goals in enacting FMVSS 208, but in *Chicanos* the Ninth Circuit only considered the goal of preventing unauthorized workers. Ignoring the goals of preventing employment discrimination and minimizing the burden on employers resulted in an analysis that was overly simplistic. Having wrongly ignored the two foregoing goals, the court’s analysis then flowed logically—LAWA was not expressly preempted based on the savings clause as it was a licensing law, and LAWA did not stand as an obstacle to accomplishing IRCA’s goal of preventing unauthorized

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209. Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683, 1716 (2009).

210. See *Chicanos*, 558 F.3d at 867.

211. *Edmondson*, 594 F.3d at 769.

212. *Id.*

213. *Chicanos*, 558 F.3d at 866–67.

workers, and therefore, it was not impliedly preempted. This contrived conclusion, however, contradicts long established federal preemption jurisprudence that “has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law . . . .”<sup>214</sup> And it is undisputed that IRCA is a “careful regulatory scheme.” Unless the courts undertake a meaningful implied preemption analysis subsequent to an express preemption analysis, states and municipalities will be able to essentially supplement or bypass IRCA entirely by labeling employment verification laws as licensing laws in order to fall within the savings clause.<sup>215</sup>

C. Edmondson, Chicanos, and Lozano: *The Implications for State Immigration Laws and Federal Lawmaking*

By enacting LAWA, then Governor Napolitano hoped to pressure the federal government into addressing immigration through more effective legislation.<sup>216</sup> It is argued that by enacting their own immigration laws states will pressure Congress to reform federal immigration laws, and this reform will lead to greater and much needed state and federal cooperation on immigration.<sup>217</sup> Additionally, because the federal courts have upheld these two immigration laws, at least in part, this will likely motivate other states to pass similar legislation. Some municipalities and states have already enacted similar legislation, but with mixed results.<sup>218</sup> The longer Congress waits before enacting new, improved legislation the more challenges to state immigration laws will be decided in the courts and the more varied these laws will become.

As more states enact new work authorization statutes, it raises an interesting question. Will Congress base new legislation on successful state statutes, or will courts strip away so much of each state law that none will prove to be effective? In the past the courts have allowed states to operate as small laboratories for developing new and innovative solutions to the problems they face.<sup>219</sup> The courts, however, are resistant to allow states to continue to function as laboratories in areas of traditionally federal law.<sup>220</sup> One of the dangers of allowing states to enact their own immigration laws is that the variety of enforcement approaches taken could result in a “thousand borders,” which would certainly be problematic.<sup>221</sup> For example, varied state work authorization laws could

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214. *Geier*, 529 U.S. at 870.

215. *See Shelley*, *supra* note 1, at 616–17.

216. *Id.* at 633.

217. *Id.* at 637.

218. *Id.* at 632–33.

219. *See Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting).

220. *See id.* (majority opinion) (holding that regulation of marijuana under the Controlled Substances Act is solely within the power of the federal government because of the Commerce Clause).

221. Nchimunya D. Ndulo, *State Employer Sanctions, Laws and the Federal Preemption Doctrine: The Legal Arizona Workers Act Revisited*, 18 CORNELL J.L. & PUB. POL’Y 849, 866

make it very difficult for nationwide businesses to comply in their hiring practices. This could pose a significant disruption to businesses as they face more and more complex immigration laws with potentially harsh penalties for non-compliance. Also, approaches taken by states to combat illegal immigration could result in racial profiling.<sup>222</sup> Federal immigration officers receive extensive training, including courses in immigration and nationality law, but many states lack the funds necessary to provide state agencies with similar training.<sup>223</sup> This lack of training may force state officers to rely on racial profiling to enforce state laws, and undoubtedly in communities where anti-immigrant sentiment already exists, this practice will be exacerbated.<sup>224</sup> Therefore, the courts' determination as to who has the power to regulate work authorization, the states or the federal government, is important to the future of state legislation in the area of immigration.

If the Supreme Court were to follow the implied preemption approach taken in *Chicanos*, which narrowly viewed obstacle preemption in favor of more emphasis on express preemption, there could be significant consequences as a result in this shift of the federal preemption paradigm.<sup>225</sup> For example, if more emphasis is placed on express preemption it may force more positive law making at the federal level.<sup>226</sup> Congress will be required to put more thought into considering the burdens and benefits of a particular piece of legislation if it intends the law to preempt contrary state enactments.<sup>227</sup> One drawback to this approach is Congress already conducts extensive hearings when crafting policy, and spending more time and money on any one piece of legislation will draw resources from other matters. Furthermore, it is not always feasible, or even possible, to predict all the consequences of a law. Therefore, it will be difficult, in some cases impossible, to draft express preemption provisions that account for all possibilities.

Another possible consequence of increased reliance on express preemption is that states would then be free to enact worker authorization statutes where employers are strictly liable for hiring unauthorized workers. Without implied preemption, states could simply label their worker authorization laws as licensing laws, and then they would be free to impose any penalties they felt appropriate. Penalties could range from revocation of business licenses, like in LAWA, to increased costs for license renewal for those who have hired unauthorized workers in the past.

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(2009) (quoting Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 995 (2004)).

222. Ndulo, *supra* note 221, at 879.

223. *Id.*

224. *Id.*

225. Gulasekaram & Villazor, *supra* note 209, at 1714.

226. *Id.* at 1713–14.

227. *Id.* at 1723.

Without the “reasonableness” safe harbor of IRCA, employers faced with a law based on strict liability would surely discriminate against those who appear Hispanic, or who speak English as a second language.<sup>228</sup> In addition to this increased motivation to discriminate, employers would also face a greater disruption of business. This disruption would occur not only through the imposition of penalties, but as illegal immigration and the use of fraudulent documents continue to rise, it is exceedingly difficult for an employer to be absolutely certain that it is hiring an authorized worker. When faced with a strict liability offense, employers will surely use all means available to avoid penalties, including discrimination and extending additional resources to verify the work eligibility of employees. Additionally, if the Court was to narrowly interpret conflict preemption, it would represent a shift in the balance of power between states and the federal government; states in the absence of a detailed express preemption provision would be free to craft their own immigration laws, which would likely vary considerably from state to state.<sup>229</sup>

#### IV. CONCLUSION

*Chicanos* and *Edmondson* reveal significantly different approaches to federal preemption. *Edmondson* faithfully applied accepted principles of federal preemption, balancing states’ rights and the goals of IRCA. Alternatively, *Chicanos* was not consistent with federal preemption precedent, and represented a shift toward increased reliance on express preemption language. The Supreme Court granted certiorari to *Chicanos*,<sup>230</sup> and oral arguments were heard on December 8, 2010.<sup>231</sup> The Court’s decision will surely have long standing consequences for immigration and employment in the United States, and perhaps even for preemption doctrine more generally.

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228. Johnson, *supra* note 22, at 1069 (“Although undocumented aliens come from many countries, the public generally identifies illegal immigrants as being Mexican or aliens from other Latin American countries. Due to the porosity of the Mexican border, Mexican aliens find it relatively easy to enter the United States clandestinely. As a result, people who share a number of characteristics with this group, but who are in the United States legally, have a potentially serious problem.”).

229. *See id.* at 1108–09.

230. Chamber of Commerce v. Whiting, 130 S. Ct. 3498 (June 28, 2010) (No. 09-115) (granting certiorari).

231. Lyle Denniston, *On Aliens, Arizona May Win—For Now*, SCOTUSBLOG (Dec. 8, 2010, 1:56 PM), <http://www.scotusblog.com/?p=110330>.

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