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ENFORCEMENT IN KIND: REEXAMINING  
THE PREEMPTION DOCTRINE IN  
*ARIZONA V. UNITED STATES*

*William Hochul III\**

INTRODUCTION

In early 1995, a fight broke out between Cesar Herante, Guillermo Escobedo, and Justin Younie in Hawarden, Iowa. Younie was killed following a series of stab wounds from Herante and Escobedo.<sup>1</sup> Younie's death "in the small Iowa town in which he was born and raised"<sup>2</sup> sparked national outrage because his killers were unauthorized aliens. Federal lawmakers—fearing that state and local governments were powerless to stop violent aliens—quickly created a mechanism for local agencies to "join the fight against illegal immigration."<sup>3</sup>

Fifteen years later, Robert Krentz was murdered near his home on the Arizona-Mexico border.<sup>4</sup> His death came amidst growing discontent with the federal government's ability and eagerness to curtail movement across the border, which was perceived as both an economic and security threat to American citizens.<sup>5</sup> Arizona responded by enacting legislation that empowered state and local officers to enforce immigration law of their own accord.<sup>6</sup> A critical component

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1 See *State v. Escobedo*, 573 N.W.2d 271, 274–75 (Iowa Ct. App. 1997).

2 *Immigration in the National Interest Act of 1995: Hearing on H.R. 2202 Before the Committee of the Whole*, 142 CONG. REC. H2476 (daily ed. Mar. 20, 1996) [hereinafter *Hearing on H.R. 2202*] (statement of Rep. Latham) (discussing his proposed amendment).

3 *Id.* at H2477.

4 See Randal C. Archibold, *Ranchers Alarmed by Killing Near Border*, N.Y. TIMES, Apr. 5, 2010, at A9.

5 See Daniel B. Wood, *Robert Krentz Killing Stokes Fears of Rampant Illegal Immigration*, CHRISTIAN SCI. MONITOR, Mar. 31, 2010, available at <http://www.csmonitor.com/USA/2010/0331/Robert-Krentz-killing-stokes-fears-of-rampant-illegal-immigration>.

6 See *infra* note 90 and accompanying text.

of the law—the “Papers, Please” provision—required state and local officers to perform immigration checks during any stops or detentions that raise reasonable suspicion of unauthorized presence in the United States.<sup>7</sup> Shortly after the Ninth Circuit ruled that the Arizona law was preempted by federal immigration law,<sup>8</sup> Alabama passed an identical provision that was eventually upheld by the Eleventh Circuit.<sup>9</sup>

This Note uses *Arizona v. United States*<sup>10</sup> as a platform to reexamine preemption jurisprudence and sets forth a comprehensive framework for analyzing federal-state conflicts. Part I establishes the foundation of federal preemption in immigration law and evaluates the role and operation of competing preemption principles. Part II critiques *United States v. Arizona* and *United States v. Alabama* and sets the stage for the case before the Court. Part III applies the framework set forth in this Note to *Arizona v. United States* and offers a resolution to the federal-state conflict presented to the Court. While the Arizona and Alabama Papers, Please provisions further Congress’s overarching goal of strengthening immigration enforcement, the process they implement undermines Congress’s ability to account for the collateral implications of empowering thousands of local officers to enforce federal immigration law. By vesting affirmative duties in state and local officers that subvert the top-down enforcement mechanism created by Congress, the Arizona and Alabama laws conflict with, and are therefore preempted by, federal law.

## I. FEDERAL PREEMPTION IN IMMIGRATION LAW

Recent challenges to local and state immigration regulations are rooted in the preemption doctrine.<sup>11</sup> This Part establishes the foundation of federal preemption and examines its application in the

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7 *Id.*

8 *United States v. Arizona*, 641 F.3d 339, 354 (9th Cir. 2011).

9 *See infra* Part II.B.2.

10 No. 11-182 (2012).

11 *See, e.g.*, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (“[Plaintiffs] argued that the Arizona [immigrant employment] law[ ] . . . [was] both expressly and impliedly preempted by federal immigration law . . . .”); *United States v. Alabama*, 443 F. App’x 411 (11th Cir. 2011) (“[The United States argues the Alabama immigration law is] preempted under the Supremacy Clause and by federal law . . . .”); *Arizona*, 641 F.3d at 344 (“[T]he United States . . . alleg[es] that [Arizona’s immigration law] violated the Supremacy Clause on the grounds that it was preempted . . . .”); *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 851 (N.D. Tex. 2010) (“Plaintiffs’ first substantive challenge . . . is rooted in the Supremacy Clause and federal preemption.”).

sphere of immigration law. The principles set forth in this Part will guide the forthcoming analysis of *Arizona v. United States*.

A. *The Framework of Federal Preemption*

The constitutional foundation for the preemption doctrine lies in the Supremacy Clause, which dictates “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . under the Authority 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>12</sup> As a result, “any state law, however clearly within a State’s acknowledged power, must yield if it interferes with or is contrary to [valid] federal law . . . .”<sup>13</sup> In sum, “if a federal statute establishes a rule, and if the Constitution grants Congress the power to establish that rule, then the rule preempts whatever state law it contradicts.”<sup>14</sup>

Thus, the Supremacy Clause establishes a rule of federal priority when a court must choose between applying state or federal laws.<sup>15</sup> The challenge for the court is to draw the line between compatibility and conflict.<sup>16</sup> The court’s “ultimate task” in a preemption case is to determine whether a state or local ordinance is consistent with the “structure and purpose” of a federal statute.<sup>17</sup>

As a general matter, the court should proceed by first establishing that the federal law in question is valid. The power to preempt is “pendant on some enumerated power under [the Constitution,]” so the court must determine whether Congress has acted within the scope of its enumerated powers, thereby creating a valid law that could preempt the state law at issue.<sup>18</sup> Should the court determine

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

13 *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 89 (1992). *See also* *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824) (“[T]hough enacted in the execution of acknowledged State powers, [laws that] interfere with, or are contrary to the laws of Congress . . . must yield to [federal law].”).

14 Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 264 (2000).

15 *See id.* at 250.

16 Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743, 1753 (1992) (“It is a hallmark of the ‘actual’ conflict cases that the interesting question . . . is likely to begin with the question whether there is a conflict or not . . . because once ‘actual’ conflict is ascertained, the Supremacy Clause potentially resolves the conflict in favor of primary governance by the nation.” (footnote omitted)).

17 *Gade*, 505 U.S. at 98.

18 Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2091 (2000) (“Preemption is not a substantive power of Congress, but rather a method of regulation in furtherance of some other substantive Congressional authority.”).

the federal law is valid, the court may proceed to determine whether and to what extent the statute conflicts with state law.<sup>19</sup>

The court's conflict analysis begins with the intended scope and application of the federal statute and is guided by two principles.<sup>20</sup> First, the "purpose of Congress is the ultimate touchstone in every pre-emption case."<sup>21</sup> For this reason, extratextual sources must be examined even where language does not directly conflict.<sup>22</sup> Second, preemption analysis is guided by the "assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress."<sup>23</sup>

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19 See *id.*, at 2092 ("When Congress has legislated consistent with its limited, enumerated powers, the question ceases to be one about the vertical distribution of powers between federal and state governments . . . . Rather, . . . the task for the Court is to discern what Congress has legislated and whether such legislation displaces concurrent state law—in short, the task of statutory construction."). At times, the Court has proceeded by beginning with the breadth of the federal statute and then analyzing its constitutionality. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26–27 (1988) ("[W]hen the federal law sought to be applied is a Congressional statute, the first and chief question . . . is whether the statute is 'sufficiently broad to control the Issue before the Court.' . . . [If so, the court] proceeds to inquire whether the statute represents a valid exercise of Congress'[s] authority under the Constitution." (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–750 (1980))). This formulation should not affect a case's outcome and seems better suited to handle cases in which the primary issue is Congressional authority. Often, as with *Arizona v. United States*, the case turns on the breadth of the federal statute rather than its constitutionality. In such instances, preemption analysis seems to proceed more efficiently by beginning briefly with constitutionality and moving to the breadth of the federal statute, after which the court may determine the extent to which the state statute in question conflicts with that breadth.

20 See generally *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

21 *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

22 *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) ("Whether federal law pre-empts a state law . . . is a question of Congressional intent."); Dinh, *supra* note 18, at 2117 ("[I]t is consistent with traditional statutory analysis to resort to external sources such as structure and purpose to resolve [textual deadlock]."). I recognize that reference to extratextual materials has drawn extensive criticism from scholars and some members of the Court. I will discuss this issue in greater depth in Part III, but it is important to note that recent preemption analysis has relied on such extraneous sources. For acknowledgement and critique of its use, see *Wyeth*, 555 U.S. at 604 (Thomas, J., concurring) ("The origins of this Court's 'purposes and objectives' pre-emption jurisprudence in [*Hines v. Davidowitz*, 312 U.S. 52 (1941)] and its broad application in cases like [*Geier v. Am. Honda Motor, Inc.*, 529 U.S. 861, 907 (2000)] illustrate that this brand of the Court's pre-emption jurisprudence facilitates free-wheeling, extra-textual, and broad evaluations of the 'purposes and objectives' embodied within federal law.").

23 *Wyeth*, 555 U.S. at 565. The presumption against preemption "is rooted in the concept of federalism[.]" and serves to keep the "power of pre-emption squarely in the hands of Congress," thereby protecting "state interests from undue infringe-

Once the court has ascertained the intended scope, i.e., whether the statute governs the conduct in question, and application, i.e. how the statute operates in practice, it may determine whether a state statute conflicts with the federal law. To do so, the court must identify how the state statute operates in practice. The Court has identified two broad categories of preemption, express and implied. “In enacting a federal law, Congress may [expressly] provide for or limit the scope of any intended preemption through the statutory text or the law’s legislative history.”<sup>24</sup> Congress has expressly preempted state immigration law subject to its constitutional authority to legislate on some immigration issues, including sanctioning the employment of unauthorized aliens.<sup>25</sup>

Absent an express preemption clause, federal law may still preempt state law by implication.<sup>26</sup> The breadth of implied preemption is limited in fields traditionally occupied by state power, in which case Congress’s intent or purpose to preempt state law must be expressed or necessarily implied.<sup>27</sup> In contrast, state statutes are

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ment.” *Geier*, 529 U.S. at 907. *See also* *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 546 (1994) (“[Federal law] can of course override by implication when the implication is unambiguous. But where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation.”); *Hines*, 312 U.S. at 80 (Stone, J., dissenting) (“[A]n exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so ‘direct and positive’ that the two acts cannot ‘be fairly reconciled or consistently stand together.’”).

24 Robert S. Peck, *A Separation-of-Powers Defense of the “Presumption Against Preemption”*, 84 TUL. L. REV. 1185, 1190 (2010).

25 *See infra* note 54 and accompanying text.

26 *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2579 (2011) (“The Supremacy Clause, on its face, makes federal law ‘the supreme Law of the Land’ even absent an express statement by Congress.”).

27 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.” (citations omitted)). This presumption against preemption does not affect Congress’s authority to preempt state law by a valid exercise of federal power. *See, e.g.*, *Gonzalez v. Oregon*, 546 U.S. 243, 272 (2006) (“Even though regulation of health and safety is ‘primarily, and historically, a matter of local concern,’ there is no question that the Federal Government can set uniform national standards in these areas.” (internal citations omitted)). For a discussion of the presumption for or against preemption based on historic presence in the field, see Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 850–52 (2008).

afforded less leeway in spheres traditionally occupied by the federal government.<sup>28</sup>

Federal law impliedly preempts state statutes in three occasionally overlapping circumstances:<sup>29</sup> when Congress has enacted such a comprehensive scheme as to occupy an entire field of law (field preemption),<sup>30</sup> when a state law conflicts with federal law (conflict preemption), and when a state law stands as an obstacle to the accomplishment of a federal purpose (obstacle preemption).<sup>31</sup> Field preemption may exist where a federal regulatory scheme touches an area “in which the federal interest is so dominant” that it may be assumed that Congress intended, or purposed, to preclude state action in that area.<sup>32</sup> Conflict preemption exists where compliance with both the federal and the state or local statute is impossible.<sup>33</sup> Obstacle preemption, sometimes referred to as a species of conflict preemption, exists where the state or local statute stands as an obstacle to the attainment

28 See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (“Even when Congress has not chosen to occupy a particular field, pre-emption may occur to the extent that state and federal law actually conflict.”).

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

30 See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203–04 (1983) (“Absent explicit pre-emptive language, 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 to supplement it . . . .’” (quoting *Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982))); see also *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010) (“Field preemption [of state law] applies where ‘the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’” (quoting *Hillsborough Cnty. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985))).

31 *PLIVA, Inc.*, 131 S. Ct. at 2579 (“[T]he text of the [Supremacy] Clause—that federal law shall be supreme, ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding’—plainly contemplates conflict pre-emption by describing federal law as effectively repealing contrary state law.”); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (“Our primary function is to determine whether . . . [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).

32 *Pac. Gas*, 461 U.S. at 204 (internal citation omitted); see also *Santa Fe Elevator Corp.*, 331 U.S. at 230 (finding that Congressional purpose to supersede historic state powers may be inferred from a pervasive federal regulatory scheme or action in an area in which there is a “dominant” federal interest).

33 See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (“[F]ederal exclusion of state law is inescapable and requires no inquiry into Congressional design where compliance with both federal and state regulations is a physical impossibility . . . .”).

of a federal purpose or goal.<sup>34</sup> When evaluating the implied effects of a federal law, “pre-emption is not to be lightly presumed.”<sup>35</sup> Nonetheless, “courts should not strain to find ways to reconcile federal law with seemingly conflicting state law.”<sup>36</sup>

### B. Federal Action and Preemption in Immigration Law

Matters of pure immigration law, i.e., regulations governing the entry of foreign nationals,<sup>37</sup> generally fall within the historic power of the federal government.<sup>38</sup> The Supreme Court has indicated that Congress derives its immigration power from general sovereignty principles and the federal government’s authority to conduct foreign policy and commerce.<sup>39</sup> Despite historic federal dominance in the sphere of immigration, states recently began enacting statutes that

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34 See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (“[Preemption exists] where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))); *Columbia Venture, LLC v. Dewberry & Davis, LLC*, 604 F.3d 824, 830 (4th Cir. 2010) (noting that obstacle preemption “occurs where state law interferes with the methods by which the federal statute was designed to reach its goal” (quoting *Gade*, 505 U.S. at 103)).

35 *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987).

36 *PLIVA, Inc.*, 131 S. Ct. at 2580 (“[P]re-emption analysis should not involve speculation about ways in which federal agency and third-party actions could potentially reconcile federal duties with conflicting state duties.”); see also Nelson, *supra* note 14, at 255 (“[T]he Supremacy Clause told courts not to strain [a federal statute’s] meaning in order to harmonize it with state law.”).

37 Huntington, *supra* note 27, at 795.

38 *Id.* (“For more than a hundred years, immigration law . . . has been almost exclusively federal with no, or only a limited, role for state and local governments.”); see also *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (“[We have] long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.”); *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (“[In general] [t]he plenary power . . . doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions.”). It has been argued, however, that “[t]he text and structure of the Constitution allow for shared authority,” and a better approach to preemption analysis would be to apply federalism balancing principles to immigration law. See Huntington, *supra* note 27, at 792–93.

39 Huntington, *supra* note 27, at 812 (citing *Chinese Exclusion Case*, 130 U.S. 581 (1889) and *Head Money Cases*, 112 U.S. 580 (1884) as the historical foundation for federal authority over immigration). Huntington also notes that states are expressly forbidden from engaging in certain activities that relate to foreign affairs. *Id.*

regulate the lives of immigrants with increasing frequency.<sup>40</sup> These statutes, defended by state governments as public safety ordinances<sup>41</sup>—matters of traditional state police power—have created the present conflict between historic state police powers and the federal government’s dominance in the field of immigration. For the Court’s preemption analysis, it is important to first establish whether these state statutes qualify as traditional exercises of state power, thereby creating a presumption that Congress does not intend to preempt the statutes.<sup>42</sup>

Courts and commentators have attempted to distinguish between pure immigration law, including laws that select immigrants, and laws that regulate the lives of immigrants already living in a state.<sup>43</sup> The

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40 Kati L. Griffith, *Discovering “Immigration” Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL’Y REV. 389, 397 (2011) (“Preemption challenges to subfederal employer-sanctions laws were rare before 2006, at least in part because state and local governments largely did not legislate in this area.”). Employment restrictions, while outside the scope of the Note, are often central to state local immigration legislation. *Id.* at 390 n.1. Professor Adam Cox also noted the recent “explosion” of state and local immigration laws. Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 353 (2008). According to the Migration Policy Institute (cited by Cox), more than 150 immigration-related measures were passed in 2007, up more than three-hundred percent from 2006. *State and Local Immigration Regulation*, MIGRATION POL’Y INST., <http://www.migrationinformation.org/integration/regulation.cfm> (last visited Apr. 22, 2012).

41 Since their passage, many commentators have argued that legislators were in fact motivated by prejudice rather than good faith safety concerns and intended to affect the lives and residency of unauthorized immigrants. For a scathing critique of Arizona state legislators, see Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants’ Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 2 (2011) (“[A]nti-immigrant fervor in Arizona reached a crescendo with the enactment of S.B. 1070, . . . the codification of a long-standing scheme designed to spur ‘attrition through enforcement . . . .’”). Professor Campbell argues Arizona’s Papers, Please provision is a “form of legitimized vigilantism designed to purge the State of Arizona . . . of all persons who are or appear to be of Latino heritage, through racial profiling by state and local law enforcement.” *Id.* at 2.

42 See *supra* note 23 and accompanying text.

43 See Cox, *supra* note 40, at 345. While acknowledging this bifurcation is the generally accepted approach to the federal-state power conflict, Professor Cox notes this distinction may not withstand closer scrutiny. *Id.* at 360 (“Efforts to classify a particular legal rule either as an immigrant-selecting rule or an immigrant-regulating rule will inevitably fail. Every putative selection rule creates regulatory pressure . . . , and every putative regulatory rule creates selection pressure . . . .”). The Court formerly recognized the inherent difficulty in distinguishing between rules that select and rules that regulate immigrants, but has since embraced this distinction. See *Truax v. Raich*, 239 U.S. 33, 42 (1915) (“The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. The assertion of an

assumption is that while unauthorized to select immigrants for residency, states have an inherent power to police the interaction between people and institutions within their borders and a legitimate interest in doing so. Thus, state statutes that fall under the umbrella of state regulation, though still affecting the lives of immigrants, should be afforded greater latitude in the immigration sphere and should not be per se preempted by federal law.<sup>44</sup>

To determine whether a specific state law is preempted by federal immigration law, a court should start by determining the purpose and scope of federal regulations. The “primary body”<sup>45</sup> of federal immigration law is found in the Immigration and Nationality Act<sup>46</sup> (INA), which “establishe[s] a ‘comprehensive federal statutory scheme for regulation of immigration and naturalization.’”<sup>47</sup> The INA sets forth the legal definition of “aliens”<sup>48</sup> and generally governs the freedom afforded to non-U.S. citizens when they attempt to “enter, visit, and reside in [the United States].”<sup>49</sup> Most importantly, the INA provides the “sole and exclusive procedure” for admitting and removing non-citizens from the United States.<sup>50</sup> In so doing, the INA dictates the “treatment of aliens lawfully in the country.”<sup>51</sup> Thus, the INA expressly preempts state and local legislation touching “pure” immigration—i.e., the procedures for admitting and removing aliens—and vests substantial discretion in the federal government in carrying out its plenary power in the field.<sup>52</sup> The INA also governs the enforce-

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authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.” (internal citation omitted)).

44 *De Canas v. Bica*, 424 U.S. 351, 355 (1976) (“[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by [federal power], whether latent or exercised.”); *see also* *Huntington*, *supra* note 27, at 799 (discussing the resurgence of state and local immigration regulation).

45 *Lozano v. City of Hazleton*, 620 F.3d 170, 196 (3d. Cir. 2010), *rev’d*, 131 S. Ct. 2958 (2011) (reversing on other grounds).

46 8 U.S.C. §§ 1101–1357 (2006).

47 *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *De Canas*, 424 U.S. at 353).

48 8 U.S.C. § 1101(a)(3).

49 *Lozano*, 620 F.3d at 196.

50 8 U.S.C. § 1229a(a)(3).

51 *De Canas*, 424 U.S. at 359.

52 Section 1229b of the INA authorizes the Attorney General to cancel the removal of unauthorized aliens. 8 U.S.C. § 1229b. *See also* *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491–92 (1999) (noting the authority of the Immigration and Nationalization Services (now administered by the Department of

ment of federal immigration law by empowering immigration officers and employees.<sup>53</sup>

The Immigration Reform and Control Act<sup>54</sup> (IRCA) supplements the federal regulatory scheme created by the INA by criminalizing the unauthorized employment of aliens. Though local and state employment restrictions are generally outside the scope of this Note, the IRCA indicates Congress's desire to make "combating the employment of illegal aliens central to the '[p]olicy of immigration law.'"<sup>55</sup> In so doing, Congress expressly preempted state and local statutes that criminalize the employment of unauthorized aliens.<sup>56</sup> The IRCA also demonstrates Congress's concern for discrimination in the enforcement of immigration law.<sup>57</sup> The IRCA sets forth harsh penalties (equivalent to those for unlawfully employing unauthorized aliens)<sup>58</sup> for employers who discriminate based on national origin or citizenship status.<sup>59</sup> The Illegal Immigrant Reform and Immigrant Responsibility Act<sup>60</sup> (IIRIRA) constitutes the final component of fed-

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Homeland Security) to selectively enforce federal immigration law based on policy and equitable considerations); *Lozano*, 630 F.3d at 197–98 ("[W]hile any alien who is in the United States unlawfully faces the prospect of removal proceedings being initiated against her/him, whether s/he will actually be ordered removed is never a certainty until all legal proceedings have concluded.").

53 Most importantly, the Illegal Immigrant Reform and Immigrant Responsibility Act governs the enforcement of federal immigration law. 8 U.S.C. § 1357 provides:

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien . . . , if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation [made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens] . . . but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.

54 8 U.S.C. §§ 1324a–1324b.

55 *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002) (internal citation omitted).

56 8 U.S.C. § 1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens.").

57 *Lozano*, 630 F.3d at 199 ("Because of its concern that prohibiting the employment of unauthorized aliens might result in employment discrimination . . . Congress included significant anti-discrimination protections in IRCA.").

58 Compare 8 U.S.C. § 1324a(e)(4)(A), with 8 U.S.C. § 1324b(g)(2)(B).

59 8 U.S.C. § 1324b.

60 Pub. L. No. 104-208, 110 Stat. 3009-546.

eral immigration law. Central to the analysis of this Note, IIRIRA, through section 1357(g), dictates the conditions under which state and local officials may take part in the enforcement of federal immigration law.<sup>61</sup>

### C. *Traditional State Action and the Presumption Against Preemption*

The *Arizona* and *Alabama* courts declined to apply a presumption against preemption to the state laws in question without extensive analysis.<sup>62</sup> Relying on *Wyeth v. Levine*, the courts ruled that the identification of unlawfully present aliens is not “a field which the States have traditionally occupied.”<sup>63</sup> In so doing, the courts overlooked the valid interest that state and local governments have in managing the effects of immigration in their communities. Because the presumption against preemption is “rooted in the concept of federalism” and

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61 As codified in 8 U.S.C. § 1357(g), IIRIRA states in relevant part,

(1) [T]he Attorney General may enter into a written agreement with a State . . . pursuant to which an officer or employee of the State . . . who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . may carry out such function . . . to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State . . . performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and . . . the officers or employees performing the function . . . [must] have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State . . . shall be subject to the direction and supervision of the Attorney General . . . .

(10) 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.

IIRIRA also creates an obligation for the federal government to respond to inquiries by “State [and] local government agenc[ies] . . . seeking to verify or ascertain the citizenship or immigration status of any individual . . . for any purpose authorized by law.” 8 U.S.C. § 1373(c) (2006).

62 See *infra* notes 103, 125 and accompanying text.

63 *Id.*

the structural protection of state interests,<sup>64</sup> the decision whether to apply it requires a thorough examination of the breadth of state police power and its operation in immigration law. *Arizona v. United States* presents an opportunity to reevaluate the proper place for the presumption in preemption analysis. This Note advocates applying the presumption against preemption as it pertains to section 1357(g) but relegates its function to the background in which Congress legislates.

The “structure and limitations of federalism” afford states “great latitude” in the exercise of their police powers.<sup>65</sup> States are not altogether precluded from legislating on matters that have foreign policy implications.<sup>66</sup> Rather, where a state law is “designed to protect vital state interests,” the court will presume that Congress did not intend to preempt the law.<sup>67</sup> In *De Canas*, California’s economic and security interests were enough to bring an unauthorized immigrant employment law into the realm of state police power and secure the law a presumption against preemption.<sup>68</sup> Similarly, the purpose behind S.B. 1070 and H.B. 56 was to protect Arizona and Alabama citizens from the perceived threats posed by unauthorized aliens.<sup>69</sup> The “undeniable economic and social stake in immigration”<sup>70</sup> possessed by Arizona and Alabama should generally bring the laws within the operation of their historical police powers.<sup>71</sup>

The *Arizona* and *Alabama* courts drew a distinction between the authority to arrest unauthorized aliens and the authority to investigate and identify unauthorized aliens, and agree that identifying unauthorized aliens goes beyond traditional state police power.<sup>72</sup> Congress

64 *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting).

65 *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (“[T]he structure and limitations of federalism . . . allow the States ‘great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort and quiet of all persons.’”) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)).

66 *See* *Huntington*, *supra* note 27, at 822 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

67 *De Canas v. Bica*, 424 U.S. 351, 357 (1976).

68 *See* *Griffith*, *supra* note 41, at 396.

69 *See supra* notes 2–6 and accompanying text.

70 *Huntington*, *supra* note 27, at 817.

71 It may be argued that, prior to the exercise of federal immigration power, state and local immigration regulation itself is rooted in the exercise of a historic state power. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1729 (2010) (“For the American republic’s first century, state and local immigration laws were almost the only source of immigration regulation.”).

72 *See infra* notes 103, 125 and accompanying text.

may favor such a distinction, but it is premature to separate the investigation of unauthorized aliens from general police powers when determining the breadth of traditional state authority.<sup>73</sup> As explored at length by the Office of Legal Counsel, states possess an inherent authority to enforce federal law subject to any federal law that preempts them from doing so.<sup>74</sup> The power to enforce law, vested in traditional notions of police power, encompasses the power to investigate violations.<sup>75</sup> Therefore, the Court should apply a presumption against preemption in its implied preemption analysis.<sup>76</sup>

Assuming the presumption against preemption applies, the Court is left with two related and strongly contested questions: (1) where should the presumption fit into the Court's analytical framework; and (2) what weight should be given to the presumption that Congress did not intend to subjugate traditional police power? This Section concludes the answers are early and with the weight normally afforded to extratextual principles of interpretation.

The presumption against preemption has been applied at varying stages of the Court's analysis,<sup>77</sup> but the presumption fits most naturally

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73 Professor Kobach, in accordance with the *Arizona* and *Alabama* courts, argues that there is a distinction between arrest authority—which falls within traditional state power—and the authority to investigate violations. See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 196 (2005). Kobach cites Congressional recognition “that the broad [1357(g)] enforcement authority differed from the narrower inherent arrest authority already possessed by state and local law enforcement officers” to support this proposition. *Id.* at 196–97. Congress's understanding of state authority, however, goes to Congress's intent in enacting section 1357(g)—rather than the actual scope of traditional state police power, governed by federalism principles—and therefore should be considered in the later stages of preemption analysis.

74 OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, NON-PREEMPTION OF THE AUTHORITY OF STATE AND LOCAL LAW ENFORCEMENT OFFICIALS TO ARREST ALIENS FOR IMMIGRATION VIOLATIONS 4 (2005) (citing *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984)).

75 For a broad reading of state police power, see *United States v. Lopez*, 514 U.S. 549, 566 (1995) (“The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”).

76 *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal citations omitted).

77 *Compare* *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484–85 (1996) (“Although our analysis of the scope of the pre-emption statute must begin with its text, our interpretation of that language does not occur in a contextual vacuum. Rather, that interpretation is informed by [the presumption against preemption].” (internal citation omitted)), *with* *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989) (“The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.” (internal quotation omitted)).

as the background in which Congress legislates.<sup>78</sup> Applying the presumption at the end of the Court's analysis, perhaps as a tie-breaker, would improperly tip the balance in favor of state power;<sup>79</sup> a substantive application of the presumption seems at odds with the Supremacy Clause.<sup>80</sup> Instead, considering the presumption as a background principle, the Court should "give the [federal] statute its natural meaning and to let the chips fall where they may."<sup>81</sup> The presumption against preemption should assist the Court's analysis where the language of the statute is ambiguous.<sup>82</sup> Once the Court determines that a federal statute intends to enter a sphere of traditional state power, "there is no automatic reason to adopt a 'narrow reading' of the words that Congress enacts."<sup>83</sup> If the Court is unable to ascertain the intended scope of the federal statute from the text, the presumption may come into play as a principle of interpretation.

The presumption should be weighted as other extratextual interpretive tools, in part because of the substantive force of the Supremacy Clause, and in part due to its inherent difficulty of application. The Court raised both these concerns in *Garcia v. San Antonio*

78 See Dinh, *supra* note 18, at 2106 ("The doctrine makes sense . . . if one considers the traditional assumption not as a dice-loading, ambiguity-resolving presumption, but rather simply as the background in which Congress legislates and therefore against which courts interpret the legislation . . . . The question is not whether Congress has the power; rather, the question is whether and to what extent Congress has exercised that power.").

79 See Weinberg, *supra* note 15, at 1797 ("To impose some additional choice-of-law process on the 'actual' conflict case would be to raise a second presumption against displacement of state law, and to sap the constitutional imperative of federal supremacy.").

80 See Nelson, *supra* note 14, at 241–42 ("A *non obstante* clause . . . acknowledge[s] that [a] statute might contradict prior law and instruct[s] courts not to apply the general presumption against [preemption].").

81 *Id.* at 242.

82 See *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) ("In the face of such ambiguity [as to whether Congress intended for federal law to cover state judges], we will not attribute to Congress an intent to intrude on state government functions . . . .").

83 Nelson, *supra* note 14, at 301; see also Dinh, *supra* note 18, at 2092 ("[T]he task for the Court is to discern what Congress has legislated and whether such legislation displaces concurrent state law—in short, the task of statutory construction . . . . [A]s a matter of constitutional structure, there should be no general systematic presumption against or in favor of preemption."). It follows that the more extensively Congress legislates in a field, the more likely it is that Congress intended the full force of its statutory language to take effect. See *id.* at 2106 ("[A]s Congress passes more and more legislation in [an] area, what had initially seemed to be an extraordinary inferential leap becomes a rather natural step, simply because a Congressional decision to displace state law is not as dramatic given its pervasive substantive regulations in the area.").

*Metropolitan Transit Authority*, where it refused to limit federal power based on traditional state functions.<sup>84</sup> Further trivializing the weight of the presumption, scholars have noted that the Court has displaced state legislation in spheres of traditional state power even absent Congressional action.<sup>85</sup> Thus, it would be improper to use the presumption against preemption as a *per se* solution for textual ambiguity;<sup>86</sup> the Court, recognizing the limitations of the presumption, should use it as an interpretive tool alongside other extratextual sources. Once the Court has determined Congress's intent, the presumption against preemption should no longer play a role in preemption analysis.<sup>87</sup>

## II. THE BASES OF THE NINTH-ELEVENTH CIRCUIT SPLIT

### A. *The State Statutes at Issue*

The Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070)<sup>88</sup> and the Beason–Hammon Alabama Taxpayer and Citizen Protection Act (H.B. 56)<sup>89</sup> are nearly identical in language, intent, and effect. First and foremost, both laws require state and local law enforcement officers to determine the immigration status of any

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84 469 U.S. 528, 531 (1985); *see also id.* at 549 (“Interference with the power of the states was no constitutional criterion of the power of Congress.” (quoting JAMES MADISON, 2 ANNALS OF CONG. 1897 (1791))); *id.* at 544 (“[T]he only apparent virtue of a rigorous historical standard, namely, its promise of a reasonably objective measure for state immunity, is illusory.”). *But see Gregory*, 501 U.S. at 462 (1991) (adopting a plain statement rule where a federal statute intrudes on “an authority that lies at the heart of representative government” (internal quotations omitted)). Dinh explains the plain statement rule set forth in *Gregory* as “go[ing] to the structures of [state] governance and thus implicat[ing] the Tenth Amendment’s protection of state sovereignty.” Dinh, *supra* note 18, at 2095. The Papers, Please provisions are probably not central to Arizona’s or Alabama’s sovereign governance interest so they may be afforded less than plain statement protection.

85 *See* Dinh, *supra* note 18, at 2098 (“[I]t is logically bankrupt to state . . . that the touchstone of preemption analysis is Congressional intent and that there is a general presumption against such intent, but then to recognize that state law can be displaced without any relevant Congressional action—as in federal common law or dormant Commerce Clause analysis.”).

86 *Id.* at 2116.

87 *See* Nelson, *supra* note 14, at 301. *See also* *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., dissenting) (“Though we generally ‘assum[e] that the historic police powers of the States [are] not to be superseded by . . . Federal Act[s] unless that [is] the clear and manifest purpose of Congress[.]’ . . . [t]he ultimate question in each case, as we have framed the inquiry, is one of Congress’s intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved.” (internal citations omitted)).

88 ARIZ. REV. STAT. ANN. § 11-1051 (2010).

89 ALA. CODE § 31-13-12 (2011).

stopped or arrested person they suspect may be in the country illegally.<sup>90</sup> Second, both statutes determine immigration status based on the federal immigration standards and impose a duty to report unauthorized aliens to federal authorities. Finally, both laws include anti-discrimination provisions that attempt to ameliorate the effects of the statutes on minority groups.<sup>91</sup>

Both statutes are meant to curb the perceived problems caused by unauthorized immigrants<sup>92</sup> and the laws had similar effects on citizens and non-citizens living in each state. Thus, with nearly identical language, intent, and effect, the Ninth and Eleventh Circuits were left to evaluate the constitutionality of each statute based solely on their differing preemption analyses of the conflict between the state statutes and federal immigration law.

### B. *The Decisions*

The *Arizona* and *Alabama* courts reached opposing legal conclusions regarding the preemptive effects of federal law on the *Arizona* and *Alabama Papers, Please* statutes. The courts' disagreement is rooted in differing statutory constructions that led to opposing interpretations of Congress's intent.

#### 1. *United States v. Arizona*

The Ninth Circuit reached two important conclusions that led to its decision that *Arizona's Papers, Please* law was preempted by federal immigration law. First, the court held that the federal government enacted a comprehensive regulatory scheme to govern immigration enforcement, and as part of that scheme, state and local governments

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90 Compare ARIZ. REV. STAT. ANN. § 11-1051(B) ("For any lawful stop, detention or arrest made by a law enforcement official . . . of 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 . . . to determine the immigration status of the person . . . . Any person who is arrested shall have the person's immigration status determined before the person is released."), with ALA. CODE § 31-13-12 ("Upon any lawful stop, detention, or arrest made by a . . . law enforcement officer of this state . . . where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made . . . to determine the citizenship and immigration status of the person . . . . Any alien who is arrested and booked into custody shall have his or her immigration status determined . . . .").

91 Compare ARIZ. REV. STAT. ANN. § 11-1051(B) ("A law enforcement official . . . of this state . . . may not consider race, color or national origin in implementing the requirements of this subsection . . . ."), with ALA. CODE § 31-13-12(c) ("A law enforcement officer may not consider race, color, or national origin in implementing the requirements of this section . . . .").

92 See *supra* note 6 and accompanying text.

are only permitted to enforce immigration laws under the direction and supervision of the federal government—not of their own accord.<sup>93</sup> Second, the court held that the federal immigration scheme was designed to balance competing federal interests in its implementation and enforcement.<sup>94</sup> Taken together, these findings dictated that the Arizona law was impliedly preempted by federal law based on both obstacle and conflict preemption theories. The court structured its opinion by examining the language and application of the state statute in question before proceeding to relevant federal law and finally engaging in preemption analysis. For the purpose of this Note, I reordered the court’s analysis to reflect the preemption test set forth in Part I.<sup>95</sup>

Based on the text of section 1357(g),<sup>96</sup> the *Arizona* court determined that the statute’s scope encompasses the conditions under which state officials are permitted to assist federal immigration enforcement.<sup>97</sup> The court recognized the textual conflict between section 1357(g)(3) and section 1357(g)(10). Section 1357(g)(3) dictates, “In performing a function under this subsection, an officer . . . of a State . . . shall be subject to the direction and supervision of the Attorney General,”<sup>98</sup> from which the court determined that “Congress intended for states to be involved in the enforcement of immigration laws under the Attorney General’s close supervision.”<sup>99</sup>

In contrast, section 1357(g)(10) states, “Nothing in this subsection shall be construed to require an agreement . . . in order for any officer or employee of a State . . . to cooperate with the Attorney General in the identification, apprehension, detention, or removal of

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93 *United States v. Arizona*, 641 F.3d 339, 350–51 (9th Cir. 2011) (“Congress contemplated state assistance in the identification of undocumented immigrants . . . within the boundaries established [by federal law] . . . not in a manner dictated by a state law that furthers a state immigration policy.”).

94 *Id.* at 352 (“Section 2(B)’s interference with Congressionally-granted Executive discretion . . . ‘undermine[s] the President’s intended statutory authority’ to establish immigration enforcement priorities and strategies.” (citing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 377 (2000))).

95 *See supra* Part I.A. The court assumed that the federal government had the constitutional authority to enact section 1357(g), or at least did not call its authority into question, and without any reason to doubt the validity of this assumption, I will begin with the federal statutory interpretation portion of the test.

96 8 U.S.C. § 1357(g) (2006). *See supra* note 61 for the relevant text of section 1357(g) as it applies to the Ninth Circuit’s analysis.

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

98 8 U.S.C. § 1357(g)(3).

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

aliens not lawfully present in the United States.”<sup>100</sup> Recognizing the internal conflict presented by section 1357(g), the court relied on “absurdity doctrine”-type analysis<sup>101</sup> to give meaning to the statute.<sup>102</sup> The court declined to apply a presumption that Congress intended to limit its presence in the field, finding that “the states have not traditionally occupied the field of identifying immigration violations . . . .”<sup>103</sup> Returning to the statute, the court “interpret[ed] the meaning of [the] provisions as a whole, not . . . [section] 1357(g) (10) at the expense of all others . . . .”<sup>104</sup> The provisions of section 1357(g) demonstrate that Congress “[intended] that systematic state immigration enforcement will occur under the direction and close supervision of the Attorney General.”<sup>105</sup>

Proceeding to the state statute in question, S.B. 1070, the court found that “on its face, the text . . . [of] Section 2(B) requires officers to verify—with the federal government—the immigration status of *all* arrestees before they are released . . . .”<sup>106</sup> Mandatory state participation in immigration enforcement, according to the court, was “foreclosed” by Congress’s explicit directives in section 1357(g), and therefore mandatory participation stands as an obstacle to (and is preempted by) federal law.<sup>107</sup> Furthermore, by interfering with “Congress’[s] delegation of discretion to the Executive branch in enforcing [federal immigration law],” the Arizona law conflicts with Congress’s intent because it imposes a mandatory enforcement mechanism on local and state officials.<sup>108</sup>

The court supported its intent analysis by looking to other purposes and objectives embodied in federal immigration policy. According to the court, Congress recognizes that “flexibility is a critical component” of the statutory and regulatory framework of federal immigration law, which allows the executive branch to balance the “goals of protecting national security, protecting public safety, and

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100 8 U.S.C. § 1357(g)(10).

101 *See* Dinh, *supra* note 18, at 2116.

102 *Arizona*, 641 F.3d at 349 (“Although this language, read alone, is broad, we must interpret Congress’[s] intent . . . in light of the rest of § 1357(g). Giving subsection (g)(10) the breadth of its isolated meaning would completely nullify the rest of § 1357(g) . . . .”).

103 *Id.* (relying on the standard set forth in *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

104 *Id.* at 351.

105 *Id.* at 352.

106 *Id.* at 347 (citing ARIZ. REV. STAT. ANN. § 11-1051(B) (2010)).

107 *Id.* at 349.

108 *Id.* at 352.

securing the border.”<sup>109</sup> The execution of immigration law also has far-reaching domestic and foreign policy implications, which the court held were jeopardized by the Arizona statute.<sup>110</sup> The court concluded that Arizona’s Papers, Please law was inconsistent with both the purpose and operation of federal immigration law and was therefore preempted by federal law based on obstacle and conflict preemption analysis.<sup>111</sup>

## 2. *United States v. Alabama*<sup>112</sup>

The Eleventh Circuit was presented with a nearly identical state statute as the Ninth Circuit but held the statute not preempted by federal law.<sup>113</sup> In an order upholding *United States v. Alabama*, the court allowed Alabama’s Papers, Please law to go into effect.<sup>114</sup> The opinion relied on two conclusions central to the district court’s reasoning. First, the text of section 1357(g) does not expressly preempt the Alabama statute, but rather allows for cooperation between the Department of Homeland Security and state and local law enforcement officers.<sup>115</sup> Second, the Alabama statute is consistent with the purpose of Congress—“to provide an important role for state officers in the enforcement of immigration laws”<sup>116</sup>—and does not conflict

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109 *Id.* (quoting *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 349 (2001)).

110 The court noted that the law “has had a deleterious effect on the United States’ foreign relations,” citing the negative response from various foreign heads of state. *Id.* at 352. The court also feared that “50 states layering their own immigration enforcement rules on top of the INA” would increase the burdens of federal enforcement in the United States. *Id.* at 354.

111 It is important to note that the Ninth Circuit based the need for central oversight and discretion on the federal government’s ability to “most efficiently . . . advance the goals” of “safety and security” and account for the foreign policy implications of increased immigration enforcement. *Id.* at 351–52. As set forth in Part III, *infra*, these interests are insufficient to justify vesting discretion in the federal government.

112 813 F. Supp. 2d 1282 (N.D. Ala. 2011). The Eleventh Circuit upheld the district court’s decision regarding the constitutionality of the Alabama’s Papers, Please provision without discussion of the issue before the court, intending to leave further analysis to a merits panel that would hear the case. *United States v. Alabama*, 443 Fed. App’x 411 (11th Cir. 2011). For this reason, this section will analyze the district court’s opinion with the assumption that the circuit court adopted its reasoning in upholding the district court’s order.

113 *See supra* Part I.A.

114 *Alabama*, 443 Fed. App’x at 411.

115 *Alabama*, 813 F. Supp. 2d at 1322.

116 *Id.* at 1326 (quoting *United States v. Arizona*, 641 F.3d 339, 376 (9th Cir. 2011) (Bea, J., dissenting)).

with broader national policy objectives.<sup>117</sup> Based on these findings, the court held that federal law neither expressly nor impliedly preempted the Alabama law.<sup>118</sup>

Like the *Arizona* court, the *Alabama* court did not raise constitutional questions as to the validity of section 1357(g).<sup>119</sup> Moving to the statute's text, section 1357(g) indicates that state and local law enforcement may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."<sup>120</sup> The court determined that the scope of 1357(g) covers the conduct in question, i.e., subfederal participation in the identification, apprehension, detention, and removal of illegal aliens.<sup>121</sup> The core issue for the court was how Congress intended the law to be carried out.

As important as the affirmative duties vested in the Executive, the language of this section indicates an "inherent authority to assist in the enforcement of federal immigration law . . . ."<sup>122</sup> Thus, while Congress did not intend to create state enforcement authority independent of Executive authorization, Congress also did not foreclose subfederal assistance in its entirety. First, state and local officials are free to communicate with the federal government regarding the immigration status of an individual and the federal government is required to respond.<sup>123</sup> Second, by the plain language of section 1357(g), no formal agreement is necessary for states "otherwise to cooperate" with the federal government.<sup>124</sup> The court declined to apply a presumption against preemption upon reaching textual ambiguity.<sup>125</sup>

The next piece of the court's analysis involved the language and effect of H.B. 56. Noting the similarities between S.B. 1070 and H.B.

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117 *Id.* at 1312, 1328.

118 *Id.* at 1323.

119 *Id.* at 1294.

120 8 U.S.C. § 1357(g)(10) (2006). The court rejected the Ninth Circuit's argument that the language in section 1357(g)—dictating that the Attorney General "may" deputize state officers—indicates the only way in which state officers may take part in the enforcement of federal immigration law. *Alabama*, 813 F. Supp. 2d at 1294.

121 *Id.* at 1329.

122 *Id.*

123 *Id.* (citing 8 U.S.C. §§ 1357(g), 1373(c) (2006)).

124 *Id.* (citing 8 U.S.C. § 1357(g)(10)(B)).

125 *Id.* at 1321 ("Section 12 reaches beyond arrest protocols into the field of identification of unlawfully present aliens. Identifying unlawfully present aliens is not a field which the States have traditionally occupied." (internal quotation marks omitted) (quoting *Wyeth v. Levine*, 599 U.S. 555, 585 (2009))).

56, the court relied largely on the statutory interpretation put forth by the dissenting opinion in *United States v. Arizona*.<sup>126</sup> The Alabama law, like section 1357(g), governs subfederal immigration enforcement and reflects a broader “intent to cooperate with the federal government.”<sup>127</sup>

Based on these analyses, the court established that the Alabama provision fits within the space the federal government left for enforcement cooperation and is therefore not preempted. The court found the Alabama statute consistent with the purpose of the INA, and thus not standing as an obstacle to federal immigration enforcement. According to the court, the purpose of sections 1357(g) and 1373(c) is to facilitate federal immigration enforcement by enlisting state and local officers.<sup>128</sup> Relying again on Judge Bea’s dissenting opinion in *Arizona*, the court cited the “important roles for state and local officials to play” in the enforcement of federal laws.<sup>129</sup> The court concluded that these provisions reveal Congress’s intent that states play an active role in enforcing federal immigration law, and therefore their doing so is consistent with the purpose of federal law.

The court also held that the Alabama law does not stand as an obstacle to broader federal policy objectives.<sup>130</sup> Congress allows Executive discretion in federal immigration enforcement in that the federal government does not have to act on the information that Alabama state and local officials are required by state law to submit.<sup>131</sup> Likewise, Alabama will only transfer detained immigrants to the federal government’s custody at the federal government’s request, so the law will not unduly burden federal enforcement resources beyond the extent authorized by the federal government.<sup>132</sup> According to the court, the Alabama law also protects individual rights, in keeping with federal policy, through its anti-discrimination provision and reliance on federal immigration standards.<sup>133</sup> Finally, the court held that the

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126 *Id.* at 1327.

127 *Id.* at 1328. The court notes that the Alabama law goes so far as to rely on federal law in its enforcement. *Id.* (“[A]ll final determinations as to immigration status are made by the federal government, unlawful presence is defined by federal law, and state law enforcement will only transfer illegal aliens to the federal government’s custody at the federal government’s request.” (internal citations omitted)).

128 *See id.* at 1324 (“Congress has clearly expressed its intention that state officials *should* assist federal officials in checking the immigration status of aliens.” (quoting *United States v. Arizona*, 641 F.3d 339, 372 (9th Cir. 2011) (Bea, J., dissenting))).

129 *Id.*

130 *Id.* at 1334.

131 *Id.* at 1321.

132 *Id.*

133 *Id.* at 1338.

United States submitted insufficient evidence to show that the Alabama law threatens foreign policy goals.<sup>134</sup> Because the Papers, Please provision did not conflict with the purpose of federal immigration law and did not stand as an obstacle to federal immigration enforcement, the court held that federal law does not impliedly preempt the Papers, Please provision.

### III. PREEMPTION ANALYSIS

The heart of the courts' disagreement is the nature of the relationship between federal and state law enforcement agencies that Congress intended to create for enforcing federal immigration law. The *Arizona* court found that Congress intended a top-down relationship, whereby the federal government would dictate the terms of cooperation between the state and federal enforcement agencies.<sup>135</sup> In contrast, the *Alabama* court held that Congress intended to create an enforcement scheme whereby state actors may pursue immigration violations on their own accord so long as they cooperate with the federal government by relaying status inquiries through federal agencies.<sup>136</sup> This Part opens by determining the intended scope and application of section 1357(g), governing the “[p]erformance of immigration officer functions by State officers and employees,”<sup>137</sup> and concludes by analyzing the preemptive effect of section 1357(g) on the state statute before the Court.

#### A. Congressional Intent

Congressional intent is the “touchstone” of implied preemption analysis.<sup>138</sup> As such, this Section uses the principles set forth in Part I to discern the intent behind federal immigration statutes that govern subfederal immigration enforcement. This Section begins with the language of section 1357(g) and relies on extratextual indications of Congressional intent as needed.<sup>139</sup> The key issue before the Court is

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134 *Id.* at 1328. The court rejected evidence of foreign disapproval and statements by U.S. officials because “the power to preempt lies with Congress, not with the Executive.” *Id.* (“It is Congress—not the [Executive]—that has the power to pre-empt otherwise valid state laws . . . .” (citing *North Dakota v. United States*, 495 U.S. 423, 442 (1990))).

135 *See supra* Part II.B.1.

136 *See supra* Part II.B.2.

137 8 U.S.C. § 1357(g) (2006).

138 *See supra* note 21 and accompanying text.

139 *See supra* note 22 and accompanying text.

what Congress meant by “cooperate” in section 1357(g)’s savings clause.

Beginning with the text, section 1357(g)(1) states that the federal government may enter into a written agreement with a State “pursuant to which an officer or employee of the State . . . who is . . . qualified to perform a function of an immigration officer . . . may carry out such function . . . .”<sup>140</sup> The federal government may give state officers “immigration officer” powers, including command of “the investigation, apprehension, or detention of aliens.”<sup>141</sup> Read in isolation, section 1357(g)(1) indicates that Congress intended for state officers to derive their immigration authority from the federal government and are permitted to act within the provisions of these agreements. Section 1357(g)(3) supports *Arizona*’s top-down enforcement interpretation, stating that “[i]n performing a function under this subsection,” state and local officers are subject to the “direction and supervision” of the federal government.<sup>142</sup>

Section 1357(g)’s savings clause, central to the courts’ disagreement, allows subfederal law enforcement to “communicate with the [federal government] regarding immigration status . . . or *otherwise to cooperate* with the [federal government] in the identification, apprehension, detention, or removal of aliens” absent a written agreement.<sup>143</sup> The *Arizona* court limited the breadth of this provision because it believed that applying a natural reading would eviscerate

140 8 U.S.C. § 1357(g)(1).

141 *Id.*

142 8 U.S.C. § 1357(g)(3). The location of this provision may indicate that Congress intended its constraint to apply only to the provisions above it in the subsection, in which case it would have no bearing on state action pursuant to section 1357(g)(10). However, the language of section 1357(g)(3) refers to the performance of functions under section 1357(g)—not only to state and local officers acting pursuant to a written agreement with the federal government. In contrast, 1357(g)(2) specifies “*an agreement* under this subsection shall require . . . .” 8 U.S.C. § 1357(g) (emphasis added).

143 8 U.S.C. § 1357(g)(10) reads in full:

(10) 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.

*Id.* (emphasis added).

the entire section.<sup>144</sup> In contrast, the *Alabama* court read this provision to indicate Congressional understanding that state and local power to enforce immigration law is not predicated on an agreement with the federal government.<sup>145</sup> By this reading, section 1357(g)(10) empowers state and local governments to dictate the terms of their officers' cooperation with the federal government so long as they communicate to verify immigration status.<sup>146</sup> *Alabama's* "verification-as-cooperation" would allow subfederal actors, among other things, to remove unlawful aliens from the United States so long as they cooperate (verify) status with the federal government. Vesting such a power in the states could undermine the existing federal enforcement structure.

By preserving federal oversight, the Court may give the savings clause its full and natural reading while maintaining a functional immigration system. Rather than working against the rest of section 1357(g), the savings clause ensures that Congress does not handcuff federal enforcement agencies by preventing them from enlisting local assistance as needed. Irrespective of agreement, state officials may cooperate in immigration enforcement to the extent dictated by federal agencies on a case-by-case basis as their services are needed. In light of the provision as a whole, the presence or absence of an agreement only determines the freedom afforded to state officials. With an agreement, state and local officials may act as full-fledged immigration officers. Absent agreement, state and local actors may provide assistance the federal government, whether through manpower or detainment facilities, without subjecting these procedures to legal challenge. The savings clause does not change the nature of the federal-state

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144 *United States v. Arizona*, 641 F.3d 339, 351 (2011) ("[O]ur task is to interpret the meaning of many INA provisions as a whole, not . . . [section] 1357(g)(10) at the expense of all others . . .").

145 *See supra* Part II.B.2.

146 While this seems to be a stark outcome, the "removal of aliens" is among the enumerated powers in the savings clause. *See* 8 U.S.C. § 1357(g)(10) (2006); *United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011) ("H.B. 56 . . . reflects an intent to cooperate with the federal government, in that all final determinations as to immigration status are made by the federal government, . . . unlawful presence is defined by federal law, . . . and state law enforcement will only transfer illegal aliens to the federal government's custody at the federal government's request." (citations omitted)). By this interpretation, if a an illegal immigrant is identified by a state officer and his or her status is determined by federal law enforcement, the state may unilaterally remove that immigrant so long as they do not force his or her transfer upon the federal government. This is compatible with Congress's interest in not overburdening federal holding centers, but such a broad power is unsupported by any extratextual indicators of Congressional intent.

relationship; in both cases the federal government retains a supervisory role.

The existence of a circuit split indicates that there may be sufficient textual ambiguity to look outside the text of section 1357(g) for Congress's intent.<sup>147</sup> As set forth in Part I, the Court should apply the presumption that Congress legislated in the background of state police powers.<sup>148</sup> The presumption should not take the Court far, however, as the text of 1357(g) explicitly places federal actors in the sphere of immigration enforcement, thereby overcoming the presumption that Congress did not intend to encroach upon a sphere of state sovereignty.<sup>149</sup>

Turning to section 1357(g)'s legislative history with hesitance,<sup>150</sup> it seems that the *Alabama* court properly took the last provision of the subsection into account but adopted a reading at odds with Congress's intent. On its surface, section 1357(g)'s legislative history indicates that it was added to the INA in order to "empower State and local law enforcement agencies with the ability to actively fight the problem of illegal immigration."<sup>151</sup> Behind the purpose of this amendment was the general consensus that, prior to its enactment, state and local law enforcement had no power in the field of immigration enforcement.<sup>152</sup> This point was largely overlooked by both

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147 See Nelson, *supra* note 14, at 284 ("Because everyone agrees that some type of context or purpose is relevant to interpreting a federal statute's words, and because the meaning of those words determines the statute's preemptive scope, it follows that everyone sees a role for the consideration of some type of context or purpose in preemption cases.").

148 *Supra* Part I.C.

149 See *supra* note 22 and accompanying text.

150 See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring) ("[T]he Court[r]'s routine[ly] invalidat[es] state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of Congressional purposes that are not embodied within the text of federal law.").

151 *Hearing on H.R. 2202, supra* note 2, at H2479; see also *id.* ("[T]his amendment would allow the State and local government officials to apprehend and detain illegal aliens who are caught violating deportation orders." (statement of Rep. Salmon)); *id.* ("We are talking about . . . allowing the local community to contribute to the Federal [immigration enforcement] effort." (statement of Rep. Bilbray)); *id.* at 2477 ("The amendment . . . will give [local law enforcement] the tools they need to deal with [illegal immigration]." (statement of Rep. Doolittle)).

152 This belief was held by the amendment's supporters and opponents. See, e.g., *id.* at H2476 ("Local law enforcement agencies are understandably frustrated by [the problem of illegal immigration] because there is legally nothing that a State or local law enforcement agency can do about a violation of immigration law other than calling the [federal government]."); *id.* at H2477 ("You do not find the California Highway Patrol . . . trying to enforce national immigration law . . . because those are separate and distinct activities . . . . But to now break those clear lines of division

courts, but if taken at face value, may be a critical component of Congress's intended scope. If Congress believed subfederal actors were powerless outside an affirmative grant then it would seem illogical to conclude that they intended section 1357(g)(10) to reserve pre-existing state immigration authority. The states, according to the law's sponsor, were powerless to act on immigration enforcement outside of "calling the local INS officer to report the case."<sup>153</sup> Thus, in terms of scope, section 1357(g)'s legislative history indicates that the entire authority Congress intended to grant state officers in immigration enforcement is derived from the statute.

The debate surrounding the enactment of section 1357(g) gives several clues as to Congress's intended scope, i.e., the way Congress intended to empower state and local governments in immigration enforcement. First, section 1357(g)'s sponsor envisioned a prominent role for the Justice Department in dictating the rights and authorities of state and local law enforcement.<sup>154</sup> Representative Latham's statements accord with the *Arizona* court's "supervisory role" interpretation of Congressional intent.<sup>155</sup> Most importantly, these statements indicate that the states are powerless to take on an investigatory role in immigration enforcement absent express agreement with the federal government.<sup>156</sup>

A secondary purpose may be discerned from the text (and perhaps the legislative history) of section 1373(g). Section 1357(g)(3), along with supplementary immigration statutes,<sup>157</sup> indicates a concern for unfettered subfederal enforcement.<sup>158</sup> If Congress's sole intention was to maximize immigration enforcement, presumably Congress would have given any willing participants free reign in this arena. Instead, section 1357(g)(2) requires that subfederal law enforcement receive adequate training before taking part in immigration enforce-

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would have us allow a local law enforcement officer to do the work of a Federal law enforcement officer." (statement of Rep. Becerra)).

153 *Id.* at H2476 (statement of Rep. Latham).

154 *Id.* ("My amendment will allow State and local law enforcement agencies to enter into voluntary agreements with the Justice Department to give them the authority to seek, to apprehend, and detain those illegal aliens who are subject to an order of deportation." (emphasis added)).

155 *See id.* at H2477-79; *supra* note 151 and accompanying text.

156 *Hearing on H.R. 2202, supra* note 2, at H2477-79.

157 *See supra* note 54 and accompanying text.

158 8 U.S.C. § 1357(g)(3) (2006) (subjecting state and local officers to the "direction and supervision" of the federal government "in performing a function under this subsection").

ment.<sup>159</sup> The legislative history details an extensive debate regarding the potential problem of unqualified and over-zealous state and local law enforcement officers. The opposition to section 1373(g) believed that because of the sensitive nature of immigration enforcement, state and local law enforcement would be unable to take on federal responsibilities while respecting the rights of individuals.<sup>160</sup>

The question remains whether the statute reflects its legislative history; the text must support the purpose and intent of the members who crafted the bill.<sup>161</sup> The text seems to do so, so the Court may choose to use the legislative history to shed some light on Congress's intended scope and application. The text and history, in isolation and conjunction, indicate that Congress's primary purpose was to strengthen federal immigration enforcement subject to federal direction and supervision. In so doing, Congress intended to create a top-down enforcement mechanism that vests ultimate authority and discretion in the federal government.

### B. *State Interference with Federal Law*

After ascertaining the intended scope and application of section 1357(g), the Court should next evaluate whether S.B. 1070 and H.B. 56 come into conflict with federal law. This Part proceeds by applying the field and conflict preemption analyses set forth in Part I.<sup>162</sup>

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159 8 U.S.C. § 1357(g)(2) (“An agreement under this subsection shall require that an officer or employee of a State . . . performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and . . . the officers or employees performing the function . . . [must] have received adequate training regarding the enforcement of relevant Federal immigration laws.”).

160 See *Hearing on H.R. 2202, supra* note 2, at H2477 (“I believe [this law] will lead to situations where we have people who are not trained to do the work doing the work beyond their capacity as local law enforcement trying to do Federal enforcement activities . . . which has in the past caused harm, injury, and discrimination against certain classes of individuals.” (statement of Rep. Becerra)); *id.* at H2478 (“[I]n the past there have been occasions when some very aggressive, zealous local law enforcement officials have actually detained people because of their foreign-looking appearance or because of their racial or ethnic appearance.”); *id.* (“I think we are [ ] endangering our ethnic and minority communities . . . .” (statement of Rep. Jackson-Lee)).

161 See Nelson, *supra* note 14, at 285–86 (“[E]ven if courts can learn exactly how far members of the enacting Congress would have liked to carry the purposes behind a particular statute, courts still must ask whether the statute reflects that decision . . . .”).

162 Papers, Please provisions are not expressly preempted by federal law. Congress has proposed legislation that would expressly limit the authority to investigate immigration violations to immigration officers and the federal government, but as of this writing, the legislation is stalled in the Senate. See S. 1258, 112th Cong. § 224 (2011).

### C. *Implied Preemption*

#### 1. Field Preemption

Congress has not legislated so extensively in the field of immigration law enforcement as to preclude state participation in the area. Rather, Congress has expressly provided for a state role in immigration enforcement by allowing states and localities to enter into enforcement agreements with the federal government.<sup>163</sup> State and local law enforcement are authorized to arrest and detain certain unauthorized aliens,<sup>164</sup> and section 1357(g)'s legislative history suggests that Congress intended a role for states in federal immigration enforcement.<sup>165</sup> Thus, based on the text of 1357(g), Congress did not intend to occupy the entire field of immigration enforcement.

The perceived distinction between selection and regulation in immigration law should play a role in field preemption analysis. Congress has preempted state law that selects residents based on citizen-

Section 287(g) (8 U.S.C. § 1357(g)) is amended by striking paragraph (10) and inserting the following:

(10) [T]he authority to investigate, identify, apprehend, arrest, or detain persons for any violation of this Act or any regulation issued pursuant to this Act—

(A) is restricted to immigration officers and employees of the Department of Homeland Security; and

(B) is subject to the specific limitations set forth in this Act.

*Id.* Though Executive agencies have denounced S.B. 1070 and H.B. 56, only Congress may preempt state law. *See* *North Dakota v. United States*, 495 U.S. 423, 442 (1990) (“It is Congress—not the [Executive Branch]—that has the power to pre-empt otherwise valid state laws.”). Thus, the Court’s express preemption analysis should be fairly straight forward and will not be examined in this Note.

<sup>163</sup> 8 U.S.C. § 1357(g)(1) (“[T]he Attorney General may enter into a written agreement with a State . . . pursuant to which an officer or employee of the State . . . who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . may carry out such function . . .”).

<sup>164</sup> *See* 8 U.S.C. § 1252(c) (2006) (“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 confided of a felony in the United States and deported or left the United States after such conviction . . . after the State or local law enforcement officials obtain appropriate confirmation from the [federal government] of the status of such individual . . .”).

<sup>165</sup> *See, e.g., Hearing on H.R. 2202, supra* note 2 at H2477 (“I offer this amendment today to empower State and local law enforcement agencies with the ability to actively fight the problem of illegal immigration.” (statement of Rep. Latham)).

ship status,<sup>166</sup> while states have been allowed to regulate the lives of immigrants living within their borders.<sup>167</sup> So long as the Court recognizes this distinction, state laws that regulate the lives of immigrants will probably withstand field preemption scrutiny. However, as state and local immigration laws continue to ratchet up the pressure on immigrants living within their borders, this distinction will probably exist only in theory. As Professor Cox points out, every law that regulates the lives of immigrants has the effect of applying selection pressure.<sup>168</sup> State regulations have the potential to affect broader immigration patterns by discouraging immigration to the United States entirely and therefore may encroach upon the field of federal immigration practice.<sup>169</sup>

As it stands, however, states are not altogether preempted from policing the lives of immigrants as S.B. 1070 and H.B. 56 seek to do. A legally analogous case was presented to the Supreme Court in *De Canas v. Bicas*.<sup>170</sup> Prior to the enactment of section 1324a,<sup>171</sup> the Court analyzed a state statute that criminalized the employment of unauthorized aliens.<sup>172</sup> The Court held that “scope and detail of the INA” did not foreclose the possibility of state immigration legislation without clear Congressional intent to preempt state law.<sup>173</sup> Thus, despite the presence of a “comprehensive federal statutory scheme for regulation of immigration and naturalization,” field preemption did not invalidate state attempts to regulate the lives of unauthorized immigrants.<sup>174</sup>

While it may be argued that checking immigration status does not fall under the umbrella of historic state police power, and therefore state statutes that impose such a duty should not be afforded the same

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166 Though the Constitution does not grant exclusive immigration selection authority to the federal government, it is widely presumed that Congress wields broad power in this sphere. See *supra* notes 38–39 and accompanying text.

167 See *supra* note 44.

168 *Supra* note 43.

169 See Huntington, *supra* note 27, at 798 (“[A]lienage laws barring non-citizens from certain public benefits likely affect immigration by discouraging some non-citizens from coming to the United States and encouraging others to leave.”).

170 424 U.S. 351 (1976).

171 8 U.S.C. § 1324a (2006) (governing the unlawful employment of aliens).

172 CAL. LAB. CODE § 2805(a) (repealed by Stats. 1988, c. 946, § 1).

173 *De Canas*, 424 U.S. at 359 (“[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by [federal immigration] power, whether latent or exercised.”).

174 *Id.* at 355. It should be noted that the Court considered the regulation of employment among the states’ historic police powers, and therefore did not presume that Congress intended to preempt immigration employment laws. *Id.* at 357.

latitude as employment regulations, this distinction fits more appropriately in conflict preemption analysis. The important takeaway from *De Canas* is that Congress has not legislated so extensively in the field of immigration law as to foreclose state action that touches upon the subject. As such, S.B. 1070 and H.B. 56 are constitutional based on field preemption.

## 2. Conflict Preemption

### a. Impossibility of Dual Compliance

Federal law preempts state statutes where dual compliance is impossible.<sup>175</sup> While impossibility preemption sets forth a difficult standard,<sup>176</sup> S.B. 1070 and H.B. 56 are incompatible with federal law because they vest affirmative duties in state and local law officers that section 1357(g) prohibits.<sup>177</sup>

For a brief recapitulation of S.B. 1070 and H.B. 56, state and local officers must determine the immigration status of any individual who draws reasonable suspicion of unauthorized presence during a routine stop or detention.<sup>178</sup> The subjective suspicion requirement is dropped upon arrest, after which every detainee's immigration status must be determined prior to release.<sup>179</sup> The *Alabama* court found this requirement compatible with federal law, noting that sections 1373(c) and 1357(g)(10) create an obligation for the federal government to respond to immigration inquiries and do not limit the number of

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175 See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (“A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility . . .”).

176 *Wyeth v. Levine*, 555 U.S. 555, 573 (2009) (“Impossibility pre-emption is a demanding defense.”); see also Nelson, *supra* note 14, at 288 n.15 (“The ‘physical impossibility’ test applies so rarely that even *Florida Lime*—the case consistently cited as authority for it—mentioned the test only in dicta.”).

177 Professor Nelson notes that the physical impossibility component of implied preemption will not be met where “one sovereign’s law purports to give people a right to engage in conduct that the other sovereign’s law purports to prohibit,” because a person could comply with both laws by refraining from that conduct. Nelson, *supra* note 14, at 288 n.15. This affirmative requirement created by S.B. 1070 and H.B. 56—that officers engage in conduct that violates federal law—distinguishes this case from those presented to the Court in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), and *Michigan Canners & Freezers Ass’n v. Agriculture Marketing and Bargaining Board*, 467 U.S. 461 (1984), where compliance with both the state and federal law at issue could be attained by inaction. Rather, this case is more analogous to *Stewart Org. Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) for reasons set forth below.

178 See *supra* note 90.

179 *Id.*

inquiries a state or local agency may make.<sup>180</sup> This interpretation of S.B. 1070 and H.B. 56, however, mischaracterizes the duty placed on state and local officers. The state laws plainly require state and local officers not only to communicate immigration status with federal agencies, but also to identify and detain unauthorized aliens.<sup>181</sup>

This requirement is irreconcilable with the scope and application section 1357(g), which requires either a written agreement or cooperation with the federal government to identify or detain unlawful aliens.<sup>182</sup> The issue of opposing directives was presented to the Court in *Stewart Organization Inc. v. Ricoh Corp.*<sup>183</sup> In that case, the federal statute in question vested discretion for venue transfers in the district court based on flexible and individualized analyses.<sup>184</sup> In contrast, Alabama law allowed judges to refuse transfer requests.<sup>185</sup> Though at times a court would refuse transfer in compliance with both laws, the court held that the “federal law’s ‘discretionary mode of operation’ conflicts with the nondiscretionary provision of [state] law.”<sup>186</sup>

Professor Nelson provides a similar approach to conflict preemption, which he refers to as the “logical-contradiction” test. Preemption does not require “physical impossibility”; rather, if “state law purports to authorize something that federal law forbids . . . the Supremacy Clause requires [courts] to apply the federal rule.”<sup>187</sup> Justice Thomas has also criticized the “physical impossibility” test in favor of a formulation of the “logical-contradiction” test.<sup>188</sup> Thomas recognized “[t]here could be instances where it is not ‘physically impossible’ to comply with both state and federal law, even when state and federal law give directly conflicting commands.”<sup>189</sup> With regard to the issue at hand, the Papers, Please provisions give subfederal law enforcers a right which may only be vested at the discretion of the federal government. Beyond “logical-contradiction,” in the absence of an

180 *United States v. Alabama*, 813 F.Supp.2d 1282, 1320–21 (N.D. Ala. 2011).

181 *See supra* notes 91–94 and accompanying text.

182 *See supra* Part III.A.

183 487 U.S. 22.

184 *Id.* at 22.

185 *Id.* at 30.

186 *Id.* (quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987)). The Court noted even “potential conflict in fact frames an additional argument for the supremacy of federal law.” *Id.* at 31.

187 Nelson, *supra* note 14, at 261.

188 *See Wyeth v. Levine*, 555 U.S. 555, 590 (2009) (Thomas, J., dissenting) (“‘[P]hysical impossibility’ may not be the most appropriate standard for determining whether the text of the state and federal laws directly conflict.” (citing Nelson, *supra* note 14, at 260–61)).

189 *Id.* (citing Nelson, *supra* note 14, at 260–61).

agreement with the federal government, it is impossible for a local officer in Alabama to comply with the requirements of H.B. 56 during a routine stop or detention without violating federal law. Because of the conflicting applications of state and federal law, the state law must be preempted.

b. Obstacle to the Attainment of a Federal Purpose or Goal

Federal law preempts state law where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>190</sup> As set forth in Part III.A, Congress’s purpose and objective in enacting section 1357(g) was to strengthen and enhance immigration enforcement by empowering state and local governments to act pursuant to federal direction. The first aspect of Congress’s purpose, to strengthen and enhance immigration enforcement, is unlikely to suffer from unfettered state and local action.<sup>191</sup> For this reason, this Section focuses on the second aspect of Congress’s purpose—maintaining federal oversight and discretion in immigration enforcement.<sup>192</sup>

Proponents of greater subfederal autonomy in immigration enforcement point to the Court’s reasoning in *Hines v. Davidowitz*, which states, “states cannot, *inconsistently* with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law . . . .”<sup>193</sup> This language opens the possibility that state and local laws may supplement federal law insofar as they advance the purpose of Congress. The Arizona and Alabama legislatures shared Congress’s primary goal and went so far as to include safeguards against discriminatory enforcement.<sup>194</sup> Furthermore, Congress expressly allows for state participation, albeit in cooperation with the federal government, in the “identification, apprehension, detention, or removal of aliens

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

191 Rather, if Congress wanted to maximize the breadth of immigration enforcement and crack down on the perceived threat posed by unauthorized aliens, this purpose would likely be best served by offering state and local governments full autonomy in the field.

192 For a strong critique of the “purposes and objectives” test, see Justice Thomas’s dissent in *Wyeth v. Levine*, 555 U.S. at 583 (“I have become increasingly skeptical of this Court’s ‘purposes and objectives’ pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of Congressional purposes that are not embodied within the text of federal law.”).

193 *Hines*, 312 U.S. at 67 (emphasis added).

194 See *supra* note 91.

not lawfully present in the United States.”<sup>195</sup> While at odds with the procedure Congress intended to create for state participation, sub-federal involvement in immigration enforcement may further Congress’s substantive goals of strengthening enforcement while protecting civil rights.

Sharing a goal with the federal government, however, does not save a state or local law that interferes with Congress’s chosen means of application.<sup>196</sup> By setting forth strict procedures for state and local involvement, Congress intended to vest discretion in federal agencies over immigration enforcement.<sup>197</sup> The federal government is better suited than state and local actors to balance competing interests and account for the interstate effects of immigration enforcement.<sup>198</sup> Thus, to accomplish the “full purposes and objectives of Congress,”<sup>199</sup> the federal government must maintain supervisory authority over state and local officers.

While Congress does not need to justify setting forth a mechanism for the application of federal law,<sup>200</sup> obstacle preemption analy-

195 8 U.S.C. § 1357(g)(10)(B) (2006).

196 See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 379 (2000) (“The conflicts are not rendered irrelevant by the States’ argument that there is no real conflict between the statutes because they share the same goals and because some companies may comply with both sets of restrictions . . . . The fact of a common end hardly neutralizes conflicting means . . . .” (internal quotation and citations omitted)).

197 See, e.g., *supra* Part III.A.

198 See, e.g., Motomura, *supra* note 71, at 1744–45 (“[P]reemption of state and local laws affecting immigrants reflects a reliance on the political process, especially on transparency and deliberation in a larger federal policy arena with a more complex array of counterweights than would shape state or local decisionmaking. With regard to unauthorized migrants, if laws and policies must be enacted nationally, then many that raise constitutional concerns—such as racial or ethnic discrimination—might never be adopted.” (footnote omitted)); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 528 (2001) (“[T]he federal government is empowered to regulate immigration because immigration lawmaking can implicate foreign policy and national security concerns; thus, when the federal government exercises its immigration power, foreign affairs considerations, to some extent, may be balanced with equality principles in assessing the justification for that regulation.” (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.” (footnote omitted))))).

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

200 See, e.g., Dinh, *supra* note 18, at 2092; Weinberg, *supra* note 165, at 1756 (rejecting interest analysis for the resolution of state-federal conflicts).

sis often rests on extratextual justification.<sup>201</sup> Federal discretion necessarily encompasses both the decision whether to exert immigration power and to what extent.<sup>202</sup> The federal government has a strong interest in balancing the civil rights implications of state immigration action when dictating the manner and extent of enforcement.<sup>203</sup> S.B. 1070 and H.B. 56 “incrementally diminish[ ]”<sup>204</sup> the federal government’s control over immigration enforcement and its ability ensure that enforcement is carried out in accordance with its civil rights policy. Congress believed that federal oversight was the best means to achieve nondiscriminatory immigration enforcement, so S.B. 1070 and H.B. 56 will not be saved by their anti-discrimination provisions.<sup>205</sup> Federal law preempts S.B. 1070 and H.B. 56 because they stand as an obstacle to Congress’s intended application of section 1357(g) and the attainment of Congress’s secondary purpose.

### CONCLUSION

*Arizona v. United States* provides the Court with an opportunity to disentangle competing preemption doctrines and set forth a compre-

201 For a critique of the Court’s traditional formulation of obstacle preemption, see *supra* note 22 and accompanying text.

202 See Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2063–64 (2008) (“[F]ederal immigration law is a matter of inaction as much as affirmative decision-making. . . . It is crucial not only who picks enforcement targets, but also who allocates resources, and who balances enforcement against competing concerns like inappropriate reliance on race or ethnicity.”).

203 Scholars contest the proposition that uniform immigration policy will better serve the interests of unauthorized immigrants than contrasting subfederal laws. See, e.g., Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 639 (2008) (“[P]reempting local laws that aim to exclude immigrants will not make for a better integration environment, because the sentiments behind the preempted ordinances are likely to remain and fester.”); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997) (“State-level modulation in immigration policy . . . will more efficiently represent wide state-to-state variations in voter preferences . . . that may ultimately benefit aliens as a group.”). Indeed, some states have passed laws that increase state benefits to unauthorized aliens. See Huntington, *supra* note 27, at 803 (“[S]ome states and localities have enacted laws that benefit non-citizens, including unauthorized migrants.”). Furthermore, state laws touching on immigration issues receive more judicial scrutiny for discriminatory effect than federal laws. *Id.* at 797, 891. Regardless of net impact, however, Congress was concerned with particular incidents of discrimination. Congress’s intent—that state and local enforcement power does not foster discrimination—should guide the Court’s preemption analysis. See *supra*, note 160.

204 Wisc. Dep’t of Indus., Labor and Human Relations v. Gould, Inc., 475 U.S. 282, 288 (1986).

205 See *supra* note 160.

hensive framework for federal-state conflict analysis. The framework set forth in this Note advocates that the Court proceeds through each issue as follows: (1) whether Congress has the constitutional authority to enact the federal law in question; (2) what is the intended scope and operation of the federal law in question; (3) what is the actual scope and operation of the state law in question; and (4) whether that state law conflicts with Congress's intended application of federal law.

As applied to *Arizona v. United States*, Congress intended to strengthen immigration enforcement by empowering subfederal officers to take part in the investigation, apprehension, and detention of unauthorized aliens. In the application of that power, Congress intended to create a top-down immigration enforcement mechanism that vested a supervisory interest in the federal government. The Arizona Papers, Please provision conflicts with Congress's intent because it creates a mandatory enforcement scheme that subverts federal oversight and interferes with the scope and operation of federal immigration law. Federal law therefore preempts the Papers, Please provisions.

