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## UNAUTHORIZED IMMIGRATION

### SUMMARY

Immigration issues have sparked controversy nationwide. In the wake of Congress's failure to pass comprehensive immigration reform legislation, state legislatures have proposed and enacted an array of bills that attempt to regulate immigration, an area traditionally reserved for Congress. Meanwhile, Congress has authorized states to enforce certain immigration laws through cooperative agreements. Based on that authorization, New Mexico has established immigration-related law enforcement policies and has collaborated with Immigration and Customs Enforcement (ICE).

Other states have continued to regulate immigration, potentially intruding on a field of law preempted by Congress. Specifically, Utah has enacted a guest worker program, and Arizona has enacted the Legal Arizona Workers Act (LAWA) and the Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070). The legal status and effects of the legislation enacted by Utah and Arizona continue to inform and clarify the national debate over the role of states in regulating immigration.

### REACTION TO THE UNAUTHORIZED IMMIGRANT POPULATION

Although the number of unauthorized immigrants in the United States has recently begun to decline, it grew steadily between 2000 and its 2007 peak.<sup>1</sup> Currently, more than 11 million unauthorized immigrants live in the United States.<sup>2</sup> Approximately 85,000 people in New Mexico, or 4.3% of the state's total population, are unauthorized immigrants.<sup>3</sup> New Mexico ranks tenth in the nation for unauthorized immigrants as a percentage share of the total population, with Nevada the highest at 7.2%.<sup>4</sup> New Mexico's unauthorized immigrants make up 5.6% of its total labor force, just over the national average of 5.4%.<sup>5</sup>

Despite bipartisan efforts to respond to concerns attendant with this once-growing population — and many states' criticism that the federal government inadequately enforces federal immigration laws — Congress has failed to act within its domain of plenary power over immigration matters to pass comprehensive immigration reform. In response, states have increasingly proposed and passed legislation in the areas of immigrant education, employment, and licensing and identification, as well as law enforcement interaction with immigrants. In the first quarter of 2011, state legislatures introduced over 1,500 immigration-related bills.<sup>6</sup>

### RECENT LEGISLATION IN NEW MEXICO

#### Higher Education

In 2005, the New Mexico Legislature extended educational benefits to unauthorized immigrants.<sup>7</sup> It enacted SB 582 (2005), which prohibits admission or benefits-related discrimination against any immigrant student applying to a public college or university. The California Supreme Court has upheld the validity of a similar statute.<sup>8</sup> On June 6, 2011, the United States Supreme Court declined to review an appeal challenging the California court's decision.<sup>9</sup> The court's refusal to hear the case suggests that New Mexico's statute will remain good law for the foreseeable future.

#### Driver's License and Identification

During the 2011 regular legislative session, debate arose over New Mexico's status as one of two states that issue driver's licenses to unauthorized immigrants. No version of any bill discontinuing issuance passed. House Floor Substitute for HB 78 would have required the applicant's or holder's legal presence in the United States for driver's license issuance and validity. Senate amendments to the bill would have permitted the continued issuance of driver's licenses to unauthorized immigrants, but would have imposed heightened fraud penalties and residency requirements, shortened the validity period of those licenses and required fingerprinting.

#### Law Enforcement

In the 2011 regular session, two bills, SB 419 and SB 152, that would have prohibited law enforcement personnel from enforcing immigration laws were introduced. These bills died in the senate. SB 419 would have prevented law enforcement agencies and officers from both inquiring into the immigration status of a person and enforcing civil immigration laws. SB 152, with some exceptions, would have prevented law enforcement agencies from using state or federal resources to detect or apprehend anyone whose only violation of law fell under federal civil immigration law classification.

### CONSTITUTIONALITY OF STATE-BASED IMMIGRATION LEGISLATION

The constitutionality of any piece of state-based immigration legislation depends largely on whether the measure expressly or implicitly conflicts with federal law. When a state law conflicts with — or is "preempted" by — federal law, the state law violates the Supremacy Clause of the United States Constitution and is unconstitutional.

Much of the ambiguity and role-conflict between the states and the federal government over enforcement of

immigration law arises from the field's divergence into civil and criminal realms. Traditionally, states retain the power to enact and enforce public welfare, health and safety laws within their jurisdictions. These "police powers" extend to most criminal and many civil areas. But with immigration, which falls within the federal domain, Congress retains "broad"<sup>10</sup> and "exclusive"<sup>11</sup> power — power it has exercised through the Immigration and Nationality Act (INA) and amendments to the INA. The INA contains both civil and criminal laws applying to non-United States citizens. Civil immigration laws are adjudicated in an administrative system and include rules on unauthorized presence and deportation, while criminal immigration laws are prosecuted in courts and penalize acts such as alien smuggling. As with most other federal criminal laws, states may play only an incidental role in enforcing the *criminal* aspects of the INA.<sup>12</sup> Moreover, the INA's *civil* law enforcement rests almost exclusively with the federal government.<sup>13</sup>

Congress may, however, expressly authorize state and local governments to enforce certain immigration laws. For instance, Congress has amended Section 287(g) of the INA to provide a broad grant of authority to state and local law enforcement agencies that enter into a partnership with ICE. Participating entities each sign a joint memorandum of agreement (MOA) and receive delegated authority for immigration enforcement within their jurisdictions. ICE supervisors train and supervise local law enforcement officers. These officers then perform functions relating to the "investigation, apprehension, or detention" of unauthorized immigrants.<sup>14</sup>

#### **LAW ENFORCEMENT CUSTODY CENTERS AND IMMIGRATION**

The New Mexico Corrections Department (NMCD) participates in the 287(g) program, one of several types of ICE's Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS). The NMCD's Central New Mexico Correctional Facility, the state's central intake unit, has signed an MOA to implement ICE's "Delegation of Authority Program Jail Enforcement Model".<sup>15</sup> The agreement stipulates that the NMCD will pursue to completion all the criminal charges that caused an alien to be taken into custody. When an alien with prior criminal convictions has served any required sentence and when it accords with statute, ICE will assume custody of that alien. Even where this criteria is

not met, ICE may assume custody of an unauthorized alien on a case-by-case basis.

Another of ICE's ACCESS programs is the Secure Communities initiative, in which local law enforcement custody centers and the federal government share fingerprints and "biometric" information to identify criminal aliens. As a matter of course, anytime someone is booked into jail, that individual's biometric data are taken and sent to the Federal Bureau of Investigation (FBI) for criminal background cross reference. When a Secure Communities jurisdiction submits a set of biometric data, the FBI records and then forwards the information to the Department of Homeland Security in order for ICE to screen the suspect for detention and removal.

Every county in New Mexico has activated Secure Communities.<sup>16</sup> Since the program's inception in the state in mid-2009, 687 criminal aliens in New Mexico have been administratively arrested or booked into ICE custody. Of those, 367 have been removed from the United States.<sup>17</sup>

#### **OTHER STATES' IMMIGRATION LEGISLATION Utah — Guest Worker Program: A State-Based Approach to Comprehensive Immigration Reform<sup>18</sup>**

Recently, Utah lawmakers worked toward reconciling the conflicting interests of parties with immigration-related concerns. These interests include fulfilling labor demands, keeping families intact and addressing widespread disregard for civil immigration laws. On March 15, 2011, Utah's governor signed into law four bills known as "the Utah solution". One of those bills, HB 116, establishes a state-based guest worker program, the first of its kind in the United States.

HB 116 seeks a waiver from the federal government to set in motion a program allowing unauthorized immigrants to obtain a permit to work in the state. Even without a waiver, the program is scheduled to take effect on July 1, 2013. According to the law's terms, a program applicant who is present in the United States without authorization must pay a fine. Each participant must meet age, work, criminal background, health, insurance and driving requirements and make a good faith effort to learn English. To deter the hiring and employment of unauthorized immigrants, the law prohibits private employers from knowingly hiring an unauthorized immigrant who does not hold a permit. In addition, HB 116 provides for the creation of an employment verification

system and requires law enforcement officers to check immigration status while enforcing certain state and local laws.

Utah's Office of Legislative Research and General Counsel reviewed HB 116 and identified practical and legal concerns.<sup>19</sup> First, federal agencies have no process to produce the type of waiver that HB 116 seeks. Moreover, if challenged, a court is likely to find that federal law preempts the Utah law and rule HB 116 unconstitutional. Federal preemption might be found either because the law seems to directly conflict with specific sections of the United States Code, or because the federal government has so occupied the field that the federal government alone may regulate it.

### Arizona — The Legal Arizona Workers Act (LAWA)<sup>20</sup>

The LAWA of 2007 is among the most stringent "illegal immigration" laws in the nation. The LAWA prohibits employers from knowingly or intentionally hiring anyone not legally authorized to work in the United States. Any licensed business owner who violates the law is subject to license suspension and revocation. The LAWA also mandates that all employers enroll in and use the voluntary federal electronic system that authenticates employment eligibility, commonly known as E-Verify.

Unlike Utah's guest worker program, which pointedly conflicts with federal immigration policy and law, the LAWA was designed to operate in accord with the federal Immigration Reform and Control Act (IRCA), which amended the INA. The INA generally prohibits the hiring or employment of illegal aliens.<sup>21</sup> And while IRCA expressly preempts state and local governments' imposition of civil or criminal sanctions against employers who hire unauthorized workers,<sup>22</sup> it contains an exception: states *may* impose sanctions "through licensing and similar laws".<sup>23</sup> The LAWA attempts to fall within this exception by regulating employer licenses. When an employer violates the LAWA, that employer's license may be suspended or revoked. Against the backdrop of state legislation and laws that directly attempt to regulate immigration, a field over which the federal government has domain, Arizona's provision distinguishes itself by targeting employers, not unauthorized immigrants. Moreover, the LAWA attempts to regulate within the narrow gap where the federal government has expressly allowed state action.

On May 26, 2011, the United States Supreme Court decided *Chamber of Commerce of the United States of America v. Whiting*<sup>24</sup> and held that the Arizona licensing law and the E-Verify mandate were neither expressly nor implicitly preempted by federal law. Therefore, Arizona

may continue to enforce these provisions of the LAWA.

A recent report suggests that Arizona's LAWA has produced both intended and unintended effects.<sup>25</sup> While the LAWA provisions appear to have reduced the statewide number of unauthorized immigrants, it also appears that more people in this population have turned to informal work situations.<sup>26</sup> Moreover, there is no evidence that those in the low-skilled, work-authorized population have benefited from the reduction in unauthorized immigrant workers.<sup>27</sup>

Additionally, a Government Accountability Office (GAO) report<sup>28</sup> indicates that E-Verify remains vulnerable to identity theft, employer fraud and matching errors. The GAO report stated that the error percentage was too high to meet the federal Illegal Immigration Reform and Immigrant Responsibility Act of 1996 requirement for accurate verification or for E-Verify to become a mandated program. The use of multiple or hyphenated names leads to name mismatches and produces tentative non-confirmation notices. There is also a significant difference in approval rates for citizen versus non-citizen cases; only 72% of lawful permanent residents and 63% of immigrants who are authorized to work are confirmed automatically.

### Arizona — Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070)<sup>29</sup>

Hoping to further deter and control unauthorized immigration, Arizona enacted SB 1070, modified by HB 2162, in April 2010. In large part, SB 1070, as modified, attempted to deal with unauthorized immigration through local law enforcement and civil law channels.

The Obama administration filed a lawsuit seeking an injunction against Arizona's enforcement of most of SB 1070's provisions. Arguing that federal law preempts many of the state's actions, the administration maintained that SB 1070 could have the unintended consequence of harassing people whose presence in the United States is authorized. In July 2010, a federal district court judge blocked sections of the law that:

- required state and local police officers, when practicable and upon reasonable suspicion of unauthorized presence, to attempt to determine the immigration status of a person stopped, detained or arrested and authorized police to detain any arrested person until that person's immigration status was determined (Sec. 2(B));
- established the procedural presumption of illegal status for any person who could not produce documentation of authorized presence in the United States and made the failure to produce documentation of immigration status a misdemeanor (Sec. 3);
- authorized police with probable cause but no warrant to

arrest anyone believed to have committed an offense that would result in deportation (Sec. 6); and

- forbade unauthorized immigrants from seeking work in public places (Sec. 5(C)).<sup>30</sup>

The judge upheld other provisions of SB 1070, including those that:

- require cities to cooperate with federal immigration authorities (Sec. 2(A));
- allow residents to sue local authorities if those authorities adopt policies refusing to cooperate with federal immigration authorities (Sec. 2); and
- make it unlawful for anyone in a motor vehicle to block the flow of traffic when picking up workers for hire (Sec. 5 (A)).

In April 2011, the Ninth Circuit upheld the district court's order of injunction.<sup>31</sup> Arizona Governor Jan Brewer has said that she will appeal the decision to the United States Supreme Court.<sup>32</sup>

### CONCLUSION

Congress, which has control of immigration regulation, has created opportunities for state and local governments to participate in immigration law enforcement. Because of the criminal-civil nature of immigration law and the limited role that states and local governments may play in enforcing immigration laws, these express grants of authority by Congress to states are highly likely to withstand constitutional scrutiny. Employer licensing and jail and prison programs are two areas where states may play a role in deterring unauthorized immigration and facilitating the removal of unauthorized aliens. States may also require that employers in their jurisdictions enroll and participate in E-Verify. State-based employment licensing laws target employers who hire unauthorized immigrants; the laws are constitutional if they fall within an express exception to Congress's bar against states sanctioning unauthorized-immigrant employers. Jail and prison programs target aliens suspected or convicted of engaging in criminal activity; these programs are formally approved through cooperative agreements with ICE. New Mexico's public prison system participates in the 287(g) program, and all New Mexico counties participate in the Secure Communities program.

Conversely, in areas where Congress has not given states express authorization to regulate immigration or enforce immigration laws, proposed or enacted state-based immigration legislation is more suspect. Examples of likely unconstitutional legislation include those measures creating guest worker programs, those requiring all people to carry proof of authorized status and those authorizing or requiring law enforcement personnel to make warrantless arrests of suspected unauthorized immigrants. While Congress has

yet to enact comprehensive immigration reform legislation, it continues to maintain broad and exclusive power to regulate immigration and define a state's role in regulating immigration.

### Endnotes

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