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SUMMARY

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Federal Preemption and State Authority to Deter the Presence of Unlawfully Present Aliens: An Overview and Issues for the 119th Congress

The Supremacy Clause of the U.S. Constitution (Article VI, clause 2) states that the Constitution, treaties, and federal law "shall be the supreme Law of the land." In interpreting this clause, the Supreme Court has formulated the doctrine of preemption, under which federal law supersedes conflicting state measures. In examining cases, the Court has identified two general ways in which a state law must yield or is preempted by a federal law—where a federal law expressly preempts state law or where a federal law impliedly preempts a state law. Congressional intent is the "ultimate touchstone" in determining whether state law is expressly or impliedly preempted. The Court has further held that, in the absence of explicit preemptive language, there are two types of implied preemption: field preemption, where Congress legislated in a particular field or area of law "so pervasive" that it "left no room for the States to supplement it"; and conflict preemption, where it is impossible to comply with both federal and state law or where a state law has created "an obstacle to the accomplishment of the full purposes and objectives of Congress."

The power to prescribe rules as to which aliens may enter the United States and which aliens may be removed resides solely with the federal government—and primarily with Congress. Pursuant to its broad power, Congress has enacted various laws, primarily contained in the Immigration and Nationality Act of 1952, as amended, that regulate not only the entry and removal of aliens but also many aspects of aliens' presence within the United States, including employment eligibility. The Supreme Court has observed that, while Congress has established a comprehensive framework to regulate immigration, not every state measure "which in any way deals with aliens is a regulation of immigration and thus per se preempted."

This report examines the interplay between federal regulation of immigration and state measures that seek to deter the presence of aliens within their jurisdictions who are believed to be in the United States unlawfully. In particular, this report discusses how courts have resolved conflicts between state and federal law in this area. For example, in 2010, Arizona passed a law that, among other things, gave police authority to stop anyone they suspected of being in the United States unlawfully and to request proof of immigration status. The Arizona law also made it unlawful to work in Arizona without federal work authorization. A group of plaintiffs sued the state, claiming that the state was barred from legislating in these areas. In 2012, the Supreme Court held in *Arizona v. United States* that many aspects of the Arizona measure of were impliedly preempted by federal immigration law. The Supreme Court most recently resolved a dispute over the preemptive effect of federal immigration law on state measures in the Court's 2020 decision, *Kansas v. Garcia*. The challengers argued that the Kansas statutes, which made it a crime to commit identity theft or engage in fraud to obtain a benefit, were preempted as applied to the prosecution of an unauthorized alien's use of false documents to obtain employment. The Court rejected these arguments, holding that Kansas's criminal statutes were not expressly or impliedly preempted because the governing federal law did not bar states from the entire field of employment verification and it was possible to comply with both federal and state law.

In recent years, states have enacted laws to, among other things, criminalize an alien's presence in their jurisdictions if the alien unlawfully entered or reentered into the United States. In legal challenges to these measures, plaintiffs raise similar preemption arguments to those made in the *Arizona* case. The defendant states counter by arguing, in part, that federal law does not preempt states' authority to defend their borders when they have been "invaded." This theory, informed by Justice Scalia's partial dissent in *Arizona*, rests on the notion that the sovereignty of a state includes the right to exclude people who have no right to be in the United States. Some states argue that federal immigration cannot preempt a state law enacted pursuant to its sovereign right protect itself against an "invasion" if, in their view, the federal government has failed to defend the state against such invasion.

Lastly, this report discusses considerations for Congress, including describing proposals introduced by some Members of Congress aimed at addressing conflicts over states' ability to deter the presence of unlawfully present aliens within their jurisdictions. In particular, there have been proposals that would constrain or enhance states' ability to take action to deter the presence within their jurisdictions of aliens who lack federal permission to enter or remain in the United States.

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Introduction

The Supreme Court has recognized that the power to prescribe rules as to which aliens[1] may enter the United States and which aliens may be removed resides solely with the federal government, and primarily with Congress.[2] Congress's authority to enact laws regulating immigration derives from its Article I constitutional powers to, among other things, "establish an uniform Rule of Naturalization" and to regulate foreign commerce.[3] More broadly, the Supreme Court has described the immigration power as flowing from the federal government's inherent authority over the nation's borders and the conduct of foreign relations.[4] Pursuant to this authority, Congress has enacted various laws regulating not just the entry and removal of aliens but also many aspects of those persons' continued presence in the United States.[5]

The Supremacy Clause of the U.S. Constitution provides, in part, that "the Laws of the United States ... shall be the supreme Law of the Land."[6] In interpreting this clause, the Supreme Court formulated the doctrine of federal preemption, and, under this constitutional mandate, courts are required to determine whether a state or local law regulating in a particular issue area is preempted by federal law. The Supreme Court has held that "[t]he passage of laws which concerns the admissions of citizens and subjects of foreign nations ... belongs to Congress, and not to the States."[7] Courts have generally held that state and local measures that intrude upon or interfere with the federal government's regulation of immigration are preempted, even when such measures are directed at aliens who lack legal permission from the federal government to enter or remain in the United States.[8] Nevertheless, while Congress's authority over immigration is well established, the Supreme Court has never recognized that any state law "which in any way deals with aliens is a regulation of immigration and thus per se preempted."[9] Therefore, in determining whether a state or local law—which has the effect of deterring the presence of unlawfully present

[1] "The term 'alien' means any person not a citizen or national of the United States." *See* 8 U.S.C. § 1101(a)(3). Some have criticized the statutory term as offensive, but avoiding its use in legal analysis is difficult because the term is woven deeply into the statutory framework. *Compare* Trump v. Hawaii, 585 U.S. 667, 746 n.7 (2018) (Sotomayor, J., dissenting) ("It is important to note ... that many consider 'using the term "alien" to refer to other human beings' to be 'offensive and demeaning.' I use the term here only where necessary 'to be consistent with the statutory language' that Congress has chosen and 'to avoid any confusion in replacing a legal term of art with a more appropriate term.'") (quoting Flores v. U.S. Citizenship & Immigr. Servs., 718 F.3d 548, 551–52 n.1 (6th Cir. 2013), *abrogated by* Sanchez v. Mayorkas, 593 U.S. 409 (2021)) *with* Avilez v. Garland, 69 F.4th 525, 541 (9th Cir. 2022) (Bea, J., concurring) ("Federal courts applying federal immigration laws should not invent their own terminology to stand in place of definitions used in the congressional statutes they are tasked with applying.").

[2] Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 343 (1909) (describing the "plenary power of Congress as to the admission of aliens" and "the complete and absolute power of Congress over" immigration); *see also* Galvan v. Press, 347 U.S. 522, 531 (1954).

[3] *See* U.S. CONST. art. I, § 8, cl. 3, 4; Toll v. Moreno, 458 U.S. 1, 10 (1982).

[4] *See, e.g.*, Arizona v. United States, 567 U.S. 387, 394 (2012) (discussing the foreign relations power); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

[5] *See infra* "Congressional Authority to Regulate Immigration."

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

[7] Chy Lung v. Freeman, 97 U.S. 275, 280 (1875).

[8] *See Arizona*, 567 U.S. at 416 ("The National Government has significant power to regulate immigration.... Arizona may have understandable frustrations with the problems caused by illegal immigration ... , but the State may not pursue policies that undermine federal law.").

[9] De Canas v. Bica, 424 U.S. 351, 355 (1976).

aliens—is valid, courts must take into consideration congressional intent in determining whether federal law preempts state law.[10]

This report provides an overview of preemption as it applies to potential conflicts between federal immigration law and state and local efforts to deter the presence of aliens believed to be in the United States without authorization.[11] The report begins by providing a brief overview of congressional authority to regulate the entry and removal of aliens and the doctrine of preemption. The report then examines notable Supreme Court decisions from the mid-20th century onward that have considered preemption challenges to state laws seeking to deter the presence of unlawfully present aliens. In particular, the report discusses the scope and implications of the Supreme Court's 2012 ruling in *Arizona v. United States*, where the Court held that Arizona's attempt to "discourage and deter the unlawful entry and presence of aliens" was preempted. The report also discusses the Court's 2020 decision in *Kansas v. Garcia*, where the Court held that Kansas's statutes that make it a crime to commit identity theft or engage in fraud to obtain a benefit was neither expressly nor impliedly preempted.

The report then provides an overview of states' recent efforts to criminally deter the presence of unlawfully present aliens within their borders and the ensuing litigation following the Court's opinions in *Arizona* and *Kansas*. Some states have argued that neither Congress nor the executive branch has properly addressed their immigration concerns and that they maintain sovereign authority to exclude the presence of persons who have "invaded" their borders.[12] Lastly, the report identifies several considerations for Congress and summarizes recent proposals to enhance or constrain states' ability to deter the presence within their jurisdictions of aliens who lack federal permission to enter or remain in the United States.

Congressional Authority to Regulate Immigration

As mentioned above, the Supreme Court has repeatedly recognized that the federal government exercises "broad, undoubted power over the subject of immigration and the status of aliens."[13]

[10] Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982).

[11] This report solely focuses on the legal analysis of preemption challenges as they relate to conflicts between federal law and state laws that either directly or indirectly deter the presence of unlawfully present aliens. The area of preemption and federal immigration law is vast and, in addition to the topics covered in this report, also includes discussions regarding whether the Immigration and Nationality Act (INA) preempts state and local restrictions on communications with federal immigration officials. These challenges regarding what has become known as "sanctuary" policies highlight a tension between federal agencies and states and local jurisdictions. For further discussion regarding the interplay between federal law and "sanctuary" jurisdictions, *see* CRS In Focus IF11438, *"Sanctuary" Jurisdictions: Policy Overview*, coordinated by Abigail F. Kolker (2025).

[12] *See e.g.*, Defendants' Consolidated Response in Opposition to Plaintiffs' Motions for Preliminary Injunction at 22–31, United States v. Texas, 719 F. Supp. 3d 640 (W.D. Tex. 2024) (No. 1:24-cv-00008-DAE), Dkt. No. 25; United States v. Texas, 97 F.4th 268, 283 (5th Cir. 2024) ("The results of the lack of funding coupled with the lack of political will are apparent. Texas, nobly and admirably some would say, seeks to fill at least partially the gaping void."). Commentators have stated that Texas enacted such laws in the hopes of bringing the issue of the federal government's broad power over immigration back to the forefront of the Supreme Court, as the Supreme Court declined to hear this issue in the *Arizona* case. *See* Devan Cole, Texas Immigration Controversy Rekindles Fight Over Arizona's 'Show Me Your Papers' Law, CNN (Apr. 3, 2024, 11:43 AM), https://www.cnn.com/2024/04/03/politics/texas-immigration-law-sb-4/index.html. (quoting Governor Abbott's statement to CNN that he welcomes a decision from the Supreme Court that could overturn *Arizona v. United States*).

[13] *Arizona*, 567 U.S. at 394. Federal authority over immigration derives from multiple sources. The Constitution provides Congress with the authority "[t]o regulate Commerce with foreign Nations" and "[t]o establish an uniform Rule of Naturalization." U.S. CONST., Art. I, § 8, cl. 3-4. Federal authority to regulate the admission and presence of aliens also derives from its authority over foreign affairs. *See* Toll v. Moreno, 458 U.S. 1, 10 (1982). The Supreme (continued...)

The Court has treated this power as primarily resting with Congress, with executive authority generally deriving from statutory delegations of authority.[14] The Court has characterized Congress's power over immigration as "plenary"[15] and has observed that "Congress may make rules as to aliens that would be unacceptable if applied to citizens."[16]

Congress has established an "extensive and complex" set of rules governing the admission and removal of aliens along with conditions for aliens' continued presence within the United States, including eligibility for employment and public benefits.[17] These rules are primarily contained in the Immigration and Nationality Act of 1952, as amended (INA).[18] The INA supplements these rules through an enforcement regime that contains criminal and civil provisions, which sometimes sanction similar conduct.[19] For example, unlawful entry by an alien into the United States is both a criminal offense[20] and a ground for removal from the United States.[21] At the same time, the INA provides several avenues by which an eligible alien, even if unlawfully present within the country, may obtain relief from removal.[22] The Supreme Court has characterized this framework as conferring "broad discretion" to immigration officials, including in deciding "whether it makes sense to pursue removal at all."[23]

Congress has also created several avenues for states and localities to assist in the enforcement of federal immigration law. For example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the INA to permit the delegation of certain immigration enforcement functions to state and local officers by way of cooperative agreements, commonly known as 287(g) agreements.[24] Another provision authorizes state and local authorities, after obtaining confirmation from federal immigration authorities, to arrest unlawfully present criminal aliens who have reentered the United States so that those aliens may be transferred to federal custody.[25] Other provisions allow state or local police to make arrests for certain federal

Court has also characterized control over immigration as a fundamental attribute of a national sovereign. Fiallo v. Bell, 430 U.S. 787, 792 (1977).

[14] Galvan v. Press, 347 U.S. 522, 530 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.") (internal citations omitted).

[15] Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 343 (1909) (noting the plenary power of Congress as to the admission of aliens and the complete and absolute power of Congress over the subject of immigration).

[16] Demore v. Kim, 538 U.S. 510, 522 (2003).

[17] *See Arizona*, 567 U.S. at 395–96; *see also* 8 U.S.C. §§ 1324a (barring the employment of aliens who are unauthorized to work in the United States) and 1601–46 (limiting alien eligibility for public benefits).

[18] 8 U.S.C. §§ 1101, *et seq*.

[19] For a brief discussion, *see* CRS In Focus IF11410, *Immigration-Related Criminal Offenses* (2023).

[20] 8 U.S.C. § 1324 (providing that unlawful entry is a criminal offense).

[21] 8 U.S.C. §§ 1182(a)(6)(A)(i) (providing that unlawful entry is a ground for removal).

[22] *See, e.g.*, *id.* § 1158 (allowing eligible aliens to apply for asylum within one year of entering the United States, regardless of immigration status, if unable or unwilling to return to his or her country because of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group).

[23] *Arizona*, 567 U.S. at 396.

[24] Pub L. No. 104-208, tit. III § 133, 110 Stat. 3009-563 (1996), codified at 8 U.S.C. § 1357(g)(1).

[25] 8 U.S.C. § 1252c.

immigration crimes.[26] In other cases, a federal immigration statute may specify that it does not displace state or local measures that address similar topics.[27]

In recent decades, many of the most prominent preemption challenges to state and local measures have involved efforts to deter aliens believed to be unlawfully present in the United States from residing in the state or municipality.[28] Those bringing forth a suit challenging the state's action assert that federal immigration law preempts state regulation. To better understand these complex and interconnected issues, a brief overview of the doctrine of preemption is necessary.

The Supremacy Clause and Preemption in Immigration Cases

Article VI, clause 2, of the U.S. Constitution, also known as the Supremacy Clause, provides that the Constitution, treaties, and federal laws are "the supreme Law of the Land."[29] The Supremacy Clause is the foundation for the doctrine of federal preemption, under which federal law supersedes conflicting state measures.[30] The Supreme Court has held that when analyzing whether a state or local measure is preempted, "[c]ongressional intent is the touchstone."[31] The Supreme Court has identified two categories of preemption: express and implied preemption.[32]

Express Preemption

Express preemption occurs when Congress enacts a statute and the language of the statute explicitly details its preemptive intent.[33] When Congress includes such language, it is expressing its intent to "withdraw specified powers from the States."[34] The Supreme Court has held that

[26] *See, e.g., id.* §1324(c) (authorizing "officers whose duty it is to enforce criminal laws" to make arrests for violations of the alien smuggling and harboring statute).

[27] *Id.* § 1324a(h)(2) (preempting states from imposing additional criminal or civil penalties on employers of unauthorized aliens "other than through licensing and similar laws").

[28] *See e.g.*, Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524 (5th Cir. 2013) (holding that an ordinance that prevented rental housing to unlawfully present individuals was preempted because, among other things, by creating criminal offense provisions it disrupted the existing federal immigration framework and covered more unlawful conduct than the existing federal anti-harboring statute); Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013) (holding that an ordinance that prevented rental housing to unlawfully present individuals was not preempted because, among other things, it did not physically remove anyone from the city and immigration officials still had full discretion in deciding when and whether to pursue removal proceedings); Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013) (holding that ordinances that prevented rental housing to unlawfully present individuals and regulated employment of individuals without work authorization were preempted because, among other things, they applied to a wider group of people than currently existed under federal immigration law and interfered "with the federal government's discretion" over the removal process).

[29] U.S. CONST. art. VI, cl. 2.

[30] *See* United States v. Texas, 97 F.4th 268, 315–16 (5th Cir. 2024) (Oldham, J., dissenting) ("States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." (internal quotation marks omitted) (quoting Tafflin v. Levitt, 493 U.S. 455, 458 (1990))). For a discussion of preemption generally, see CRS Report R45825, *Federal Preemption: A Legal Primer*, by Bryan L. Adkins, Alexander H. Pepper, and Jay B. Sykes (2023).

[31] *Texas*, 97 F.4th at 298 (5th Cir. 2024) (Oldham, J., dissenting) (citing to Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992)).

[32] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

[33] *Id.* For a discussion regarding the language commonly used in express preemption clauses, see CRS Report R45825, *Federal Preemption: A Legal Primer*, by Bryan L. Adkins, Alexander H. Pepper, and Jay B. Sykes (2023).

[34] Arizona v. United States, 567 U.S. 387, 399 (2012).

"[w]hen a federal law contains an express preemption clause, [the Court] focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress's preemptive intent" to determine whether Congress has expressed an intent to displace state authority.[35] The Court has further held that it considers in its analysis as to whether Congress intended to supplant state authority the "statutory framework surrounding" the statute and the "structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute" to operate.[36]

Implied Preemption

The Supreme Court has recognized that implied preemption can occur in one of two ways—when a state tries to regulate conduct in a field that Congress dominantly regulates (known as field preemption)[37] or when compliance with both state and federal law is impossible or when a state law obstructs Congress's objectives (known as conflict preemption).[38]

Field Preemption

The Supreme Court has held that states cannot regulate conduct "in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance."[39] The Court has determined that the intent behind displacing a state law can be inferred from "a framework of regulation 'so pervasive ... that Congress left no room for the States to supplement it' or where there is a 'federal interest ... so dominant that the federal system' precludes enforcement of 'state laws on the same subject.'"[40] The Court has indicated a hesitancy to infer field preemption unless a plaintiff can show that Congress clearly manifested this intention in federal law.[41] It has been observed that the Court "has never extended field preemption to any part of the immigration laws beyond alien registration."[42] Finally, when a court analyzes field preemption claims, "the relevant field should be defined narrowly."[43]

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[35] Chamber of Commerce v. Whiting, 563 U.S. 582, 594 (2011) ("When a federal law contains an express preemption clause, we focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." (internal quotation marks omitted)).

[36] Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996) (citations and internal quotation marks omitted). In evaluating congressional intent, the Supreme Court has held that its interpretation of a statute "does not occur in a contextual vacuum" and that its interpretation must be "informed by two presumptions"—that states are independent sovereigns and that courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" and that an understanding of Congress's purpose in enacting the legislation "is the 'ultimate touchstone' in every preemption case." *Id.* at 485–86.

[37] *See* De Canas v. Bica, 424 U.S. 351, 356 (1976), *superseded by statute*, IRCA, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360–74 (1986), *as stated in* Kansas v. Garcia, 589 U.S. 191 (2020); Arizona v. United States, 567 U.S. 387, 399 (2012); *see also* United States v. Texas, 97 F.4th 268, 278 (5th Cir. 2024) (stating that the field for field preemption needs to be narrowly defined and that field preemption can be inferred when Congress has touched "a field in which the federal interest is so dominant that the federal system" precludes states from enforcing its own laws in that same field or subject).

[38] Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 142–43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[39] *Arizona*, 567 U.S. at 399.

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

[41] *See De Canas*, 424 U.S. at 357; *see also* City of El Cenizo v. Texas, 890 F.3d 164, 176 (5th Cir. 2018).

[42] *Texas*, 97 F.4th at 298 (5th Cir. 2024) (Oldham, J., dissenting).

[43] *City of El Cenizo*, 890 F.3d at 177.

Conflict Preemption

The Supreme Court has held that conflict preemption occurs where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"[44] or where it is physically impossible to comply with both federal and state law.[45] The Court has described that determining what "is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."[46] The Court has observed that, just because a state law may overlap with a federal law does not automatically mean there is a case for conflict preemption.[47] However, "conflict is imminent when two separate remedies are brought to bear on the same activity."[48]

Preemption and Immigration: Select Supreme Court Decisions

Court decisions involving the relationship between state action and federal control over immigration date as far back as the 1800s, when the Supreme Court held that states cannot tax foreign vessels/nationals arriving into the United States.[49] The following section surveys Supreme Court decisions from mid-20th century onward that have been frequently invoked in litigation concerning state and municipal action seeking to deter the presence of unlawfully present aliens within their jurisdictions.

Hines v. Davidowitz (1941)

In 1939, Pennsylvania passed the Alien Registration Act, which, among other things, required all aliens in the state over the age of 18 to register once a year and to carry and be ready to show a registration card.[50] In 1940, Congress passed the federal Alien Registration Act, which, among other things, required aliens over the age of 14 to register with the federal government. Unlike the Pennsylvania law, under the federal act, the individual was required to register only once and did not have to carry or show a registration card.[51] A group of plaintiffs challenged[52] the validity of the state law, and the Supreme Court determined that because Congress had created an exclusive alien registration system through the Alien Registration Act of 1940 after Pennsylvania had, it had to determine if the Pennsylvania law was invalid "in light of the congressional act."[53] The Court

[44] *Hines*, 312 U.S. at 67.

[45] *See Arizona*, 567 U.S. at 399.

[46] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).

[47] Kansas v. Garcia, 589 U.S. 191, 211–12 (2020).

[48] *Texas*, 97 F.4th at 289 (internal quotation marks omitted).

[49] *See, e.g.*, New York v. Compagnie Generale Transatlantique, 107 U.S. 59 (1883). For further discussion on early immigration jurisprudence and the interplay of federal and state immigration-related laws, see CONGRESSIONAL RESEARCH SERVICE, UNITED STATES CONSTITUTION: ANALYSIS AND INTERPRETATION (CONSTITUTION ANNOTATED), *Immigration Jurisprudence (1837-1899), available at* https://constitution.congress.gov/browse/essay/artI-S8-C18-8-5/ALDE_00001259/ and *Immigration-Related State Laws, available at* https://constitution.congress.gov/browse/essay/artI-S8-C18-8-8-5/ALDE_00001268/ (last visited Apr. 30, 2025).

[50] *Hines*, 312 U.S. at 59.

[51] *Id.* at 60–61.

[52] Davidowitz v. Hines, 30 F. Supp. 470, 472–73 (M.D. Pa. 1939).

[53] *Hines*, 312 U.S. at 60.

held that the congressional act occupied the field and that the Pennsylvania registration law had been impliedly preempted.[54]

The Court began by briefly describing the Supremacy Clause and immigration preemption, holding that when the federal government establishes, through either statute or treaty, the rules and regulations that touch on "the rights, privileges, obligations or burdens of aliens," that is the "supreme law of the land."[55] The Court then focused much of its analysis on the importance of the federal government's "full and exclusive" role and responsibility "for the conduct of affairs with foreign sovereignties" and that the "federal power in the field affecting foreign relations [must] be left entirely free from local interference."[56] For example, the Court observed that one important aspect of international affairs is being able to protect one's own nationals when they are in different countries.[57] As a result, the Court explained that the United States has entered into many treaties and abides by international customs and practices that are "aimed at preventing injurious discriminations against aliens."[58] Therefore, the Court held that a state law that imposes extraordinary or unusual burdens on aliens—who may otherwise be law-abiding—"to indiscriminate and repeated interception and interrogation by public officials" affects all states and provokes international affairs.[59]

Alien regulation, according to the Court, intimately blends and intertwines with the federal government's responsibilities, so when both Congress and a state act on the same subject, the state has to yield to Congress.[60] The Court held that because Congress, "in the exercise of its superior authority in this field," enacted a standard alien registration system, states cannot conflict or interfere with it.[61]

The Court's concluding analysis was whether the Pennsylvania law stood as an obstacle to Congress's objectives and purposes.[62] According to the Court, "this legislation [was] in a field which affects international relations, the one aspect of our government that ... demand[s] broad national authority."[63] The Court agreed with the plaintiffs that the states do not have "the power to restrict, limit, regulate, and register aliens" and that their power must be "subordinate to supreme national law."[64] Nevertheless, the Court had to further determine if Congress acted in a way to prevent the Pennsylvania law from being enforced.[65] The Court briefly touched on Congress's history in providing the terms and conditions for an alien's entry or removal and citizenship and discussed how various bills had been introduced over the years regarding the registration of aliens.[66] Based on this analysis, the Court agreed with the plaintiffs that the Pennsylvania law was preempted and held that because Congress "provided a standard for alien registration in a single integrated ... system" to get necessary information from aliens, Congress likely desired uniformity

[54] *Id.* at 72–74.

[55] *Id.* at 62–64.

[56] *Id.*

[57] *Id.* at 64–65.

[58] *Id.*

[59] *Id.* at 65–66.

[60] *Id.* at 66.

[61] *Id.*

[62] *Id.* at 67.

[63] *Id.* at 68.

[64] *Id.*

[65] *Id.* at 69.

[66] *Id.* at 69–71.

and did so in a way "to leave them free from the possibility of inquisitorial practices and police surveillance" that might affect international relations, among other things.[67]

De Canas v. Bica (1976)

In 1971, California passed a law that prohibited an employer from knowingly hiring "an alien who is not entitled to lawful residence in the United States" if his or her employment would adversely impact workers who are lawful residents.[68] Migrant farmworkers sued their employers (farm labor contractors) and alleged that their employers violated the California law because they "had refused petitioners continued employment due to a surplus of labor resulting from [the farm labor contractors'] knowing employment ... of aliens not lawfully admitted to residence in the United States."[69] A California superior court held that the law was unconstitutional, finding that the law "encroaches upon, and interferes with, a comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration," and dismissed the complaint.[70] The California court of appeals affirmed the lower court's decision, and the California Supreme Court denied further review.[71]

The case was appealed to the Supreme Court, which reversed and remanded the lower courts' decisions.[72] The Court held that the California law was not preempted because "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."[73] The Court further specified that it is within California's police powers to prevent California employers from hiring people who do not have lawful residence in the country.[74] The Court distinguished the facts in this case from *Hines v. Davidowitz*, observing that the law being challenged in *Hines* was "in the specific field which the State [was] attempting to regulate, while here there is no indication that Congress intended to preclude state law in the area of employment regulation."[75]

The Supreme Court held that, even though regulating immigration is a federal power, a state's enactment of a law "touching on aliens in general" does not mean that the state is trying to regulate immigration and that therefore any such law should be automatically preempted.[76] The Court further held that the INA, although comprehensive, did not make references to the employment of aliens and that therefore states were not precluded from regulating in this field.[77]

At the time this case was decided, Congress had not yet addressed the employment of unauthorized aliens. Congress enacted Immigration Reform and Control Act (IRCA) in 1986, which is incorporated into the INA and regulates the employment of aliens in the United States.[78]

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[67] *Id.* at 73–74.

[68] De Canas v. Bica, 424 U.S. 351, 352 (1976), *superseded by statute*, IRCA, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360–74 (1986), *as stated in* Kansas v. Garcia, 589 U.S. 191 (2020).

[69] *Id.* at 353.

[70] *Id.*

[71] *Id.* at 353–54.

[72] *Id.* at 352.

[73] *Id.* at 353–54, 356.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 354–55.

[77] *Id.* at 357–60.

[78] *See* 8 U.S.C. § 1324a. For a more detailed review on federal regulation of alien employment and preemption, see this (continued...)

Chamber of Commerce v. Whiting (2011)

In 2007, Arizona passed the Legal Arizona Workers Act of 2007 (LAWA), which allowed state courts to suspend or revoke business licenses if employers intentionally or knowingly hired aliens who were unauthorized to work.[79] LAWA also required that every employer within the state use the federal government's E-Verify system to confirm workers' eligibility to work in the United States.[80] The plaintiffs, including the U.S. Chamber of Commerce and various organizations, filed a lawsuit against the state arguing that these two aspects of LAWA were expressly and impliedly preempted by federal law.[81] Specifically, they argued that LAWA's business license provision was expressly and impliedly preempted by IRCA, which states that "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws)" on those who employ unauthorized aliens.[82] Further, they argued that the requirement that all employers had to use E-Verify was impliedly preempted because, in their view, Congress wanted a work authorization verification system that was not burdensome and could "serve as an alternative to the I-9 procedures."[83] The plaintiffs contended that the "mandatory use of E-Verify" would get in the way of that goal.[84]

The Supreme Court held that federal immigration law did not preempt the LAWA provisions at issue.[85] Because IRCA contains an express preemption clause, the Supreme Court first focused its analysis on the plain wording of the clause, as it best shows Congress's preemption intent.[86] The clause specifies that states cannot impose "civil or criminal sanctions" on employers who hire unauthorized aliens except "through licensing and similar laws."[87] The Court held that LAWA, on its face, imposed sanctions through licensing and therefore fell within the confines of the authority Congress left to the states in IRCA.[88] The plaintiffs argued that, although LAWA used the term "licensing," it was not being used in the same way as IRCA's express preemption clause and that this argument was further supported by the legislative history.[89] The Court disagreed, holding that LAWA's licensing provision was not expressly preempted because the statute itself served as Congress's authoritative statement—not legislative history—and the plaintiffs did not show a textual basis to limit the meaning of the phrasing in IRCA's express preemption clause.[90]

CRS Legal Sidebar LSB10550, *Federal Regulation of Alien Employment and Preemption over State Laws*, by Hillel R. Smith (2020).

[79] Chamber of Commerce v. Whiting, 563 U.S. 582, 591 (2011).

[80] *Id.* at 593. E-Verify is a pilot program that was established in 1997, is generally voluntary, and remains in effect today. Its purpose is to electronically confirm employment eligibility by using an employee's I-9 form and confirming with the Social Security Administration and Department of Homeland Security that the employee is allowed to work in the United States. *See, e.g.*, 8 U.S.C. § 1324a (note); 8 U.S.C. § 1324a(b)(3); *About E-Verify*, E-VERIFY (Apr. 10, 2018), https://www.e-verify.gov/about-e-verify. Federal employers, including federal contractors, must use E-Verify. For all other employers, participation in E-Verify is optional. *See* 8 U.S.C. § 1324a (note) (referencing Secs. 402(a), (e)); Exec. Order No. 13,465, 73 Fed. Reg. 33285 (June 11, 2008) (amending Exec. Order 12, 989, as amended).

[81] *See Whiting*, 563 U.S. at 593–94.

[82] *See id.* at 594; *see also* 8 U.S.C. § 1324a(h)(2).

[83] *See Whiting*, 563 U.S. at 607.

[84] *Id.*

[85] *Id.* at 587.

[86] *Id.* at 594.

[87] 8 U.S.C. § 1324a(h)(2).

[88] *See Whiting*, 563 U.S. at 595, 600.

[89] *Id.* at 596–99.

[90] *Id.* at 599.

Next, the Court held that the licensing provision was not impliedly preempted.[91] The plaintiffs argued that since Congress meant for the federal immigration system to be exclusive, "any state system therefore necessarily conflicts with federal law."[92] The Court rejected this argument, holding that Congress specifically carved out an exception for states in IRCA's express preemption clause and that Arizona ensured that LAWA tracked IRCA in all important aspects.[93] The Court determined that LAWA sought to enforce only the ban on hiring unauthorized aliens and that "Congress did not intend to prevent the States from using appropriate tools to exercise that authority."[94]

Finally, the Court held that LAWA's requirement for all employers to use E-Verify was also not impliedly preempted.[95] The plaintiffs argued that this requirement impeded on Congress's goal to use a reliable and non-burdensome way to verify work authorization.[96] The Court disagreed and held that the mandatory use of E-Verify in Arizona did not conflict with federal objectives because the provision in immigration law concerning E-Verify included no language to limit state action.[97] The Court further held that the law limited *federal* action only and that the federal government had encouraged the use of E-Verify.[98] The Court determined that Arizona's use of E-Verify did not obstruct Congress's objectives to protect employee privacy, combat counterfeit identity documents, and ensure reliability in employment verification.[99]

Arizona v. United States (2012)

In 2010, Arizona passed the Support Our Law Enforcement and Safe Neighborhoods Act, commonly referred to as S.B. 1070.[100] Before the law went into effect, the United States sued Arizona and filed a motion for preliminary injunction.[101] The United States argued that several provisions of S.B. 1070 were preempted by federal law.[102] The U.S. District Court for the District of Arizona granted a preliminary injunction to enjoin four provisions of S.B. 1070, and the U.S. Court of Appeals for the Ninth Circuit[103] affirmed. The case was appealed to the Supreme Court.[104] In a 2012 majority opinion authored by Justice Kennedy, the Court recognized that the United States "has broad, undoubted power over the subject of immigration" and that states "may not pursue policies that undermine federal law."[105] The four provisions of S.B. 1070 at issue were Sections 3, 5(C), 6, and 2(B), and the majority held that three of the four provisions were preempted by federal law.

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[91] *Id.* at 607.

[92] *Id.* at 600.

[93] *Id.* at 600–01.

[94] *Id.* at 601.

[95] *Id.* at 608.

[96] *Id.* at 607.

[97] *Id.* at 608.

[98] *Id.* at 608–09.

[99] *Id.* at 609–10.

[100] Arizona v. United States, 567 U.S. 387, 392–93 (2012).

[101] *Id.* at 393–94.

[102] *Id.* at 393.

[103] For purposes of brevity, references to a particular circuit in this report (e.g., the Ninth Circuit) refer to the U.S. Court of Appeals for that particular circuit (e.g., the U.S. Court of Appeals for the Ninth Circuit).

[104] *Arizona*, 567 U.S. at 394.

[105] *Id.* Justice Kagan took no part in the consideration or decision in this case. *Id.* at 416.

The Court held that Section 3 of S.B. 1070, which made it a crime to fail to carry alien registration documents in violation of federal law, was preempted because the United States had already occupied the field of alien registration and that any state law that complements federal law in this regard cannot stand, even if it is parallel.[106] Additionally, according to the Court, Section 3's penalties were greater than and different from those imposed by federal law and created a conflict with what Congress had already put in place regarding alien registration.[107]

The Court also held that Section 5(C), which made it a crime to work in Arizona without work authorization, was preempted because Congress had already established parameters for work authorization and chose to impose civil and criminal penalties on employers of unauthorized aliens but only *civil* penalties on aliens who worked unlawfully in the United States.[108] In the Court's view, Section 5(C) was standing as an obstacle to the federal regulatory system already in place.[109]

Lastly, the Court determined that Section 6, which allowed a warrantless arrest if a state police officer had probable cause to believe that the individual arrested committed a public offense that made him or her removable from the United States, was preempted because it would give state officers more power than federal immigration officers to arrest and detain people on the basis of removability.[110] By giving state officers the power to decide whether aliens should be arrested and detained for being removable, Section 6 violated the principle "that the removal process is entrusted to the discretion of the Federal Government."[111] Federal law provides very limited circumstances in which a federal immigration officer can arrest a person without a warrant and when a police officer can perform the function of a federal immigration officer.[112] The Court reasoned that Section 6 encroached on the federal government's discretion to arrest aliens for removal proceedings and served as an obstacle to this objective.[113]

The Court left intact the fourth provision, Section 2(B)—which required state officers to determine "the immigration status of any person they stop, detain, or arrest" if there was reasonable suspicion that the person was in the country without authorization and required that anyone arrested would have his or her immigration status determined before being released.[114] The Court held that because immigration laws encourage the sharing of information between federal and state officers, nothing in Section 2(B) clearly indicated that it would be in violation of federal law when applied.[115] Furthermore, the Court observed that Section 2(B) contained

[106] *Id.* at 400–03.

[107] *Id.*; *id.* at 402 ("Were [Section 3] to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials ... determine that prosecution would frustrate federal policies.")

[108] *Id.* at 403–07.

[109] *Id.*

[110] *Id.* at 407–10.

[111] *Id.*

[112] *Id.*; *see also* 8 U.S.C. § 1357(a)(2) (detailing how without a warrant, a federal immigration officer can arrest a person if he or she believes that the person is "in the United States in violation of any [immigration] law or regulation" but only where the person "is likely to escape before a warrant can be obtained"); 8 U.S.C. § 1357(g) (detailing how police officers can perform certain functions of a federal immigration officer when they enter into formal agreements with the federal government).

[113] *See Arizona*, 567 U.S. at 407–10.

[114] *See id.* at 411 (internal quotation marks omitted).

[115] *Id.* at 411–15 (internal quotation marks omitted).

limitations to prevent it from conflicting with federal immigration law.[116] The federal government contended that even with these limitations, the provision still created an obstacle to Congress's framework, specifically regarding mandatory immigration status checks and prolonged detention while the checks were taking place.[117] The Court rejected these contentions and stated that "Congress has made clear that no formal agreement ... needs to be in place for state officers to communicate with" federal immigration officers regarding an individual's immigration status, and federal law "leaves room for a policy requiring state officials to contact [U.S. Immigration and Customs Enforcement] as a routine matter."[118] The Court also explained that at this point, it was not clear whether Section 2(B) would lead to prolonged detention of an individual, because if the law requires state officers to determine the immigration status during the course of a lawful detention, the provision could survive preemption "absent some showing that it has consequences that are adverse to federal law and its objectives."[119]

Justice Scalia wrote a separate opinion, concurring in part and dissenting in part.[120] He began by arguing that the states have a "sovereign interest in protecting their borders" and that, "as a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress."[121] In support of his assertion that, as sovereigns, states have the authority to prevent the influx of individuals, Justice Scalia cited, among other things, the Compact Clause of the Constitution, which provides that "[n]o State shall, without the Consent of Congress ... engage in War, *unless actually invaded, or in such imminent Danger as will not admit of delay*."[122] He acknowledged that although this clause limits a state's sovereignty in ways not relevant to the discussion of the case, "it leaves intact [its] inherent power to protect [its] territory."[123] Justice Scalia pointed out that Arizona had every right to exclude people from its state who have no right to be in the United States.[124] He argued that Arizona was simply trying to enforce already existing immigration restrictions more effectively and that, if the state cannot even do that, then it should no longer be considered a sovereign state.[125] Justice Scalia also believed that, in exercising its sovereign authority, Arizona could impose harsher penalties than federal law could for violations of its own law.[126]

With respect to S.B. 1070's provisions at issue, Justice Scalia maintained that Section 3 "merely ma[de] a violation of state law the very same failure to register and failure to carry evidence of

[116] *Id.* at 411 (describing the three limits as follows: (1) a detained person is not presumed to be an alien who is unlawfully present if he or she can show "a valid Arizona's driver's license or similar identification"; (2) police officers are not allowed to consider a person's race or national origin except as permitted under the U.S. and state constitutions; and (3) the provision of S.B. 1070 must be implemented in a way that protects the civil rights of all people, respects "the privileges and immunities of United States citizens," and is consistent with federal law).

[117] *Id.* at 411.

[118] *Id.* at 411–13.

[119] *Id.* at 413–14; *see also id.* at 414 ("There is no need in this case to address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging detention, or whether this too would be preempted by federal law."); *cf.* ("This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applies after it goes into effect.").

[120] Justice Scalia concurred with the majority only on Section 2(B). *Id.* at 416 (Scalia, J., concurring in part and dissenting in part).

[121] *Id.* at 417 (Scalia, J., concurring in part and dissenting in part).

[122] *Id.* at 419, 424 (Scalia, J., concurring in part and dissenting in part); U.S. CONST. art. I, § 10, cl. 3.

[123] *Arizona*, 567 U.S. at 419 (Scalia, J., concurring in part and dissenting in part).

[124] *Id.* at 417 (Scalia, J., concurring in part and dissenting in part).

[125] *Id.* at 437 (Scalia, J., concurring in part and dissenting in part).

[126] *Id.* at 430 (Scalia, J., concurring in part and dissenting in part).

registration that are violations of federal law [and] ... Arizona's legitimate interest in protecting ... its unemployment-benefits system is an entirely adequate basis" for enacting this law.[127] For Section 5, he believed that the fact that Congress chose not to impose criminal penalties for unauthorized work does not mean the states are prohibited from imposing their own criminal penalties.[128] For Section 6, he argued that Arizona can have its own immigration policy so long as it is not in conflict with federal law and that the executive branch's "policy choice of lax federal enforcement" is not a valid federal prohibition to stop Arizona from protecting its borders.[129] Finally, Justice Scalia agreed with the Court's rejection of the government's challenge to Section 2(B).[130]

Justice Thomas also wrote a separate opinion, concurring in part and dissenting in part. He agreed with Justice Scalia that none of the provisions of S.B. 1070 at issue was preempted by federal immigration law but reached that conclusion because he determined that there was no conflict "between the ordinary meaning of the relevant federal laws and that of the four provisions of" S.B. 1070.[131] He also disagreed with the Court's holding that "Congress preempted the field of" alien federal registration because "nothing in the text of the relevant federal statutes indicates that Congress intended enforcement of its registration requirements to be exclusively the province of the Federal Government."[132] Further, according to him, the alien registration system that Congress created shows that it could work on its own, not that Congress "wanted to preclude the [s]tates from enforcing the federal standards."[133] Finally, he emphasized that the "'purposes and objectives' theory of implied preemption is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text" and that, under the Supremacy Clause, preemption should apply to "congressionally enacted laws, not to judicially divined legislative purposes."[134]

Justice Alito wrote a separate opinion as well, concurring in part and dissenting in part. He agreed with the majority that Section 2(B) was not preempted and that Section 3 was preempted.[135] However, he further argued that Sections 5(C) and 6 were not preempted by federal law.[136] According to Justice Alito, the majority's holding regarding Section 5(C) was at odds with *De Canas v. Bica*. Even though federal regulation in the employment of aliens is much more pervasive today (due to IRCA's passage) since *De Canas*, Justice Alito asserted that the Court still had "to determine whether the federal scheme discloses a clear and manifest congressional intent to displace state law."[137] Congress, according to Justice Alito, clearly "chose not to impose *federal* criminal penalties" on aliens who work without authorization, but this "does not mean that Congress also chose to preempt *state* criminal penalties."[138] Justice Alito maintained that because an inference could be made for or against preemption, federal law had not clearly or manifestly displaced state law in this space and therefore, Section 5(C) was not preempted by

[127] *Id.* at 429–30 (Scalia, J., concurring in part and dissenting in part).

[128] *Id.* at 432 (Scalia, J., concurring in part and dissenting in part).

[129] *Id.* at 427–28 (Scalia, J., concurring in part and dissenting in part).

[130] *Id.* at 425 (Scalia, J., concurring in part and dissenting in part).

[131] *Id.* at 437 (Thomas, J., concurring in part and dissenting in part) (internal quotation marks omitted).

[132] *Id.* at 438–39 (Thomas, J., concurring in part and dissenting in part).

[133] *Id.* at 439 (Thomas, J., concurring in part and dissenting in part).

[134] *Id.* at 440 (Thomas, J., concurring in part and dissenting in part) (internal quotation marks omitted).

[135] *Id.* at 441 (Alito, J., concurring in part and dissenting in part).

[136] *Id.*

[137] *Id.* at 451 (Alito, J., concurring in part and dissenting in part).

[138] *Id.* at 452 (Alito, J., concurring in part and dissenting in part).

federal law.[139] Justice Alito then determined that Section 6 was also not preempted because it "adds little to the authority that Arizona officers already possess, and whatever additional authority it confers is consistent with federal law."[140] Justice Alito further determined that there were several ways to enforce Section 6, and the majority's invalidation of the statute without first seeing if Arizona implemented it in a way contrary to congressional intent had been premature.[141]

The *Arizona* opinion informed subsequent litigation in lower courts. For example, reviewing courts applied *Arizona* to hold that state laws similar to S.B. 1070 were preempted.[142] Yet reviewing courts reached different conclusions about how *Arizona* and other Supreme Court rulings applied to other types of immigration-related measures, such as restrictions on unlawfully present aliens' ability to rent housing.[143] Further, according to at least one scholar, the *Arizona* opinion used a methodology in its preemption analysis that had not been used before: Instead of relying solely on specific statutes in the INA, the majority also relied on the executive branch's assertions regarding its enforcement priorities that existed at the time.[144] Justice Alito criticized the government's position and explained that the enforcement priorities are policy rather than law and posed the rhetorical question of whether a preempted state statute could be un-preempted in the future if the executive branch were to change its enforcement priorities.[145] He also argued that the majority opinion gave "short shrift" to the Court's presumption against preemption.[146] Justice Alito later had an opportunity to further this line of analysis when he authored the majority opinion in *Kansas v. Garcia*.

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[139] *Id.* at 453 (Alito, J., concurring in part and dissenting in part).

[140] *Id.* at 454 (Alito, J., concurring in part and dissenting in part).

[141] *Id.* at 458 (Alito, J., concurring in part and dissenting in part).

[142] *See e.g.*, Georgia Latino All. for Hum. Rts. v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012); Hisp. Int. Coal. of Alabama v. Governor of Alabama, 691 F.3d 1236 (11th Cir. 2012); United States v. South Carolina, 720 F.3d 518 (4th Cir. 2013).

[143] *See e.g.*, Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524 (5th Cir. 2013) (holding that an ordinance that prevented rental housing to unlawfully present individuals was preempted because, among other things, by creating criminal offense provisions it disrupted the existing federal immigration framework and covered more unlawful conduct than the existing federal anti-harboring statute did); Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013) (holding that an ordinance that prevented rental housing to unlawfully present individuals was not preempted because, among other things, it did not physically remove anyone from the city and immigration officials still had full discretion in deciding when and whether to pursue removal proceedings); Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013) (holding that ordinances that prevented rental housing to unlawfully present individuals and regulated employment of individuals without work authorization were preempted because, among other things, they applied to a wider group of people than currently existed under federal immigration law and interfered "with the federal government's discretion" over the removal process).

[144] *See* Pratheepan Gulasekaram, *Immigration Enforcement Preemption*, 84 OHIO ST. L.J. 535, 537 (2023); *see also Arizona*, 567 U.S. at 396 ("A principal feature of the removal system is the broad discretion exercised by immigration officials.... Discretion in the enforcement of immigration law embraces immediate human concerns."); *see id.* at 402 (stating that if Section 3 of S.B. 1070 were in effect, Arizona could "bring criminal charges against individuals for violating a federal law in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies"); *id.* at 409 ("By authorizing state officers to decide whether an alien should be detained for being removable, [Section 6 of S.B. 1070] violates the principle that the removal process is entrusted to the discretion of the Federal Government."). *Contra* Gulasekaram, *supra* note 14, at 554–55 ("In [*De Canas v. Bica*] ... federal enforcement practices seemed to play little ... role, at least in so far as explicit references to presidential priorities or practices.... [T]he background statutory scheme was not designed for any federal enforcement of unauthorized employment; thus the President could not help define the limits of federal workplace enforcement policy.").

[145] *See Arizona*, 567 U.S. at 445 (Alito, J., concurring in part and dissenting in part).

[146] *Id.* at 451.

Kansas v. Garcia (2020)

In 2017, the Kansas Supreme Court in three separate cases reversed the convictions of three unlawfully present aliens for state identity theft and false information. The state court held that a provision in IRCA expressly preempted the state statutes at issue insofar as they related to those prosecutions.[147] The state identity theft statute criminalized "the 'using' of 'any personal identifying information' belonging to another person with the intent to 'defraud that person or anyone else'" to receive a benefit.[148] The state false information statute criminalized "'making, generating, distributing or drawing' a 'written instrument' with knowledge that it 'falsely states or represents some material matter' and 'with intent to defraud, obstruct the detection of a theft or felony offense or induce official action.'"[149] The respondents had used stolen Social Security numbers on their I-9 and W-4 forms when they were applying for jobs and had been convicted of either or both of these state statutes.[150] IRCA makes it unlawful to hire unauthorized aliens and states that the I-9 form "and any information contained in or appended ... may not be used for purposes other than for enforcement of" certain sections of the INA.[151] The respondents argued that the Kansas statutes had to defer to federal law when it came to using the information on the I-9 for something other than securing employment (i.e., their prosecutions).[152]

The cases were appealed to the U.S. Supreme Court, where the issue before the Court was whether the Kansas statutes were expressly or impliedly preempted by IRCA.[153] In 2020, Justice Alito, writing for the majority, reversed the judgments of the Kansas Supreme Court and held that the statutes were not preempted.[154] All nine justices[155] first rejected the argument that the state's statutes were expressly preempted by IRCA because the language in 8 U.S.C. § 1324a(b)(5), which generally limits use of the I-9, could not be read so broadly as to prevent any entity or person from ever using *any* information on an I-9—including things like a telephone number or an email address—outside of the narrow situations listed in the statute.[156]

The Court then considered whether the statutes were impliedly preempted. The Court first held that the statutes were not field preempted because IRCA did not bar states from the entire field of employment verification.[157] Further, the Court explained that the federal employment verification system under IRCA is meant to prevent unauthorized aliens from being hired, whereas the purpose of using tax-withholding forms is to enforce tax laws.[158] The Court held that using someone else's "Social Security number on tax forms" creates harm—related to wages and certain benefits such as disability or retirement—that is unrelated to immigration law.[159] Next, the

[147] Kansas v. Garcia, 589 U.S. 191, 201 (2020).

[148] *Id.* at 198.

[149] *Id.*

[150] *Id.* at 198–200. The Form W-4 is used so an employer can determine the right amount of federal income tax to withhold from an employee's pay. *See About Form W-4, Employee's Withholding Certificate*, Internal Revenue Service, https://www.irs.gov/forms-pubs/about-form-w-4 (last visited Apr. 30, 2025).

[151] 8 U.S.C. § 1324a(b)(5).

[152] *Kansas*, 589 U.S. at 203.

[153] *Id.*

[154] *Id.* at 195.

[155] *See id.* at 207; *see also id.* at 213 (Thomas, J., concurring; Gorsuch, J., concurring), 215 (Breyer, J., Ginsburg, J., Sotomayor, J., and Kagan, J. concurring in part and dissenting in part).

[156] *Id.* at 203–07.

[157] *Id.* at 210.

[158] *Id.* at 208–09.

[159] *Id.* at 209.

Court held that the statutes were not conflict preempted because it is possible to comply with the state statutes and IRCA and that the fact that there is overlap between state and federal statutes does not necessarily mean there is conflict.[160] The Court distinguished its opinion in *Arizona*—where the majority held that Congress made a concerted effort not to prosecute people working in the United States without authorization—and held that IRCA made no concerted effort not to criminalize conduct relating to the use of false identity documents on tax forms.[161] The Court further explained that the Kansas statutes did not frustrate federal interests and that the federal government fully supported Kansas's decision to prosecute the respondents.[162] Lastly, the Court determined that a disruption in federal priorities by state prosecutions does not signal the existence of preemption, because the Supremacy Clause prioritizes "'the Laws of the United States'" and "not the criminal law enforcement priorities or preferences of federal officers."[163]

Justice Thomas, joined by Justice Gorsuch, wrote a separate concurring opinion, reiterating the view that the Court should explicitly abandon the "purposes and objectives preemption jurisprudence."[164] This jurisprudence, according to Justice Thomas, "rests on judicial guesswork about 'broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law.'"[165] Instead, Justice Thomas asserted that a proper interpretation of the Supremacy Clause requires ascertaining "whether the ordinary meaning of federal and state law 'directly conflict'" and that preemption exists only if there is a logical contradiction between federal and state law.[166]

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, filed a separate opinion, concurring in part and dissenting in part.[167] Justice Breyer explained that he agreed that IRCA does not expressly preempt the Kansas statutes but disagreed with the majority's opinion over implied preemption.[168] According to Justice Breyer, IRCA, through its comprehensive scheme, clearly and manifestly showed that "Congress has occupied at least the narrow field of policing fraud committed to demonstrate federal work authorization."[169] Justice Breyer characterized the statute as containing very detailed requirements to fight employment of unauthorized aliens, including two "calibrated sets of sanctions for noncompliance": one for employers and one for employees.[170] Justice Breyer further explained that for employers, IRCA imposes federal penalties for hiring unauthorized aliens,[171] and for employees, IRCA imposes federal penalties only "for anyone [who commits] fraud 'for the purpose of satisfying' [IRCA's] requirements."[172] Further, according to Justice Breyer, even though IRCA's goal is to combat the employment of

[160] *Id.* at 211.

[161] *Id.* at 212.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 213–15 (Thomas, J., concurring; Gorsuch, J., concurring). Justice Thomas first brought up the argument that the Court should explicitly abandon this jurisprudence in *Wyeth v. Levine*. *See* 555 U.S. 555, 604 (2009) (Thomas, J., concurring). He brought it up again in *Arizona v. United States*. *See* 567 U.S. 387, 440 (2012) (Thomas, J., concurring in part and dissenting in part).

[165] *Kansas*, 589 U.S. at 214 (Thomas, J., concurring; Gorsuch, J., concurring).

[166] *Id.*

[167] *Id.* at 215 (Breyer, J., Ginsburg, J., Sotomayor, J., and Kagan, J., concurring in part and dissenting in part).

[168] *Id.*

[169] *Id.*

[170] *Id.* at 216 (Breyer, J., Ginsburg, J., Sotomayor, J., and Kagan, J., concurring in part and dissenting in part).

[171] *Id.* (citing 8 U.S.C. § 1324a).

[172] *Id.* at 217 (Breyer, J., Ginsburg, J., Sotomayor, J., and Kagan, J., concurring in part and dissenting in part) (quoting 18 U.S.C. § 1546(b)).

unauthorized aliens, it does not pursue this goal by any and all means, because the statute generally imposes criminal penalties on the employers only and not on the unauthorized alien employees themselves who merely seek such employment.[173] Lastly, Justice Breyer asserted that IRCA clearly allows only the federal government to punish conduct related to fraudulently demonstrating federal work authorization and not the states, such as Kansas.[174] According to him, among other things, Kansas prosecuted an unauthorized alien "for misrepresenting ... federal work-authorization status for the purpose of obtaining employment ... and fell squarely within the field that ... [IRCA] preempts."[175]

Legal scholars have noted that in the *Kansas* decision, Justice Alito was able to continue the discussion he began in his concurring and dissenting opinion in *Arizona* about whether the executive branch's immigration policies at a particular point in time should or should not guide a court's preemption analysis, especially when the party bringing the lawsuit does not identify a specific federal statute that preempts state law.[176] In *Arizona*, Justice Alito criticized the majority's reliance on the executive branch's immigration enforcement priorities and explained that the priorities were not law and therefore should not have been relied upon in the preemption analysis.[177] Less than a decade later in *Kansas*, the majority (which Justice Alito authored) held that "[t]he Supremacy Clause gives priority to 'the laws of the United States,' not the criminal law enforcement priorities or preferences of federal officers."[178] In *Kansas*, Justice Alito seemed to repudiate the reliance on the executive branch's immigration policies or priorities as a basis for the preemption analysis (which was present in *Arizona*) and "normalize the presence of states in immigration enforcement matters."[179] As the executive branch's immigration priorities continually change with different Administrations, states that have been dissatisfied with the federal government's handling of immigration enforcement have recently relied on Justice Scalia's partial dissent in *Arizona*—where he explained that states have a "sovereign interest in protecting their borders"—to pass legislation that seeks to deter the presence of unlawfully present aliens and normalize a state's involvement in immigration enforcement matters.[180]

Preemption and Immigration: Select Cases Pending in Lower Courts

New litigation has emerged in the past year or so as a result of several states passing legislation to deter the presence of unlawfully present aliens within their borders. Specifically, several states have recently enacted laws that criminalize the presence of individuals in their states who have either unlawfully entered or reentered into the United States.[181] In addition, this legislation allows

[173] *Id.*

[174] *Id.* at 218–20 (Breyer, J., Ginsburg, J., Sotomayor, J., and Kagan, J., concurring in part and dissenting in part).

[175] *Id.* at 220 (Breyer, J., Ginsburg, J., Sotomayor, J., and Kagan, J., concurring in part and dissenting in part).

[176] *See* Gulasekaram, *supra* note 144, at 539 ("The migration from *Arizona* to *Kansas* resurfaces profound separation of powers and federalism debates raising difficult questions about the role of the President in defining federal policy vis a vis both Congress and the states.").

[177] *See Arizona*, 567 U.S. at 445 (Alito, J., concurring in part and dissenting in part).

[178] *See Kansas*, 589 U.S. at 212.

[179] *See* Gulasekaram, *supra* note 144, at 567.

[180] *See Arizona*, 567 U.S. at 417 (Scalia, J., concurring in part and dissenting in part).

[181] *See, e.g.*, United States v. Texas, 97 F.4th 268 (5th Cir. 2024).

for state judges to order an alien's removal.[182] The plaintiffs in these cases argue that these laws are field and conflict preempted.[183]

The ensuing litigation in the various states may provide an opportunity for the Supreme Court to revisit its preemption jurisprudence. This section begins by summarizing *Texas v. United States*—commonly known as the Texas S.B. 4 case. The section continues by summarizing pending litigation in other states that enacted laws similar to Texas.

Texas, S.B. 4 (*United States v. Texas*)

In November 2023, Texas passed Senate Bill 4 or S.B. 4, making it a crime, among other things, to "enter[] or attempt[] to enter this state directly from a foreign nation at any location other than a lawful port of entry."[184] The law was set to become effective on March 5, 2024.[185] Under S.B. 4, entering the United States outside a port of entry and into Texas would be a violation of federal law under 8 U.S.C. §§ 1325 and 1326 and a violation of Texas state law. Section 1325 generally makes it a criminal offense to improperly enter or attempt to enter the United States, while Section 1326 makes it a federal crime for a previously removed alien to reenter the United States without authorization.[186] Aliens who violate these federal statutes may be subject to criminal penalties, including imprisonment, and civil fines.[187]

S.B. 4 has several provisions, but four of them are the subject of litigation where preemption challenges have been raised. The first provision makes it a state crime for aliens to enter Texas anywhere other than at lawful ports of entry.[188] Under S.B. 4, a violation of this provision is a misdemeanor and carries a fine of up to $2,000 and/or imprisonment of up to 180 days.[189] The second provision makes it a crime for aliens to reenter Texas after being removed or ordered removed from the United States.[190] A violation of this Texas provision is a misdemeanor and carries a fine of up to $4,000 and/or imprisonment of up to one year.[191] The third provision authorizes state judges and magistrate judges to order the removal of an alien back to "the foreign nation from which the person entered or attempted to enter."[192] This third provision applies any time an alien is convicted of either of the first two provisions.[193] Finally, the fourth provision prevents state judges from abating prosecutions "on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated."[194]

[182] *See, e.g.*, United States v. Iowa, 126 F.4th 1334 (8th Cir. 2025), *vacated*, No. 24-2265, 2025 WL 1140834, at *1 (8th Cir. Apr. 15, 2025).

[183] *See, e.g.*, United States v. Oklahoma, 739 F. Supp. 3d 985 (W.D. Okla. 2024).

[184] S.B. 4, 88th Leg., 4th Spec. Sess. (Tex. 2023), https://capitol.texas.gov/tlodocs/884/billtext/pdf/SB00004F.pdf#navpanes=0.

[185] *See* United States v. Texas, 719 F. Supp. 3d 640, 658 (W.D. Tex. 2024).

[186] For a more detailed review on the federal immigration crimes of illegal entry and reentry, see this CRS Report R47667, *Immigration Crimes: Improper Entry and Reentry*, by Kelsey Y. Santamaria (2023).

[187] *See* 8 U.S.C. §§ 1325, 1326.

[188] TEX. PENAL CODE ANN. § 51.02.

[189] *Id.* § 51.02(b); § 12.22.

[190] TEX. PENAL CODE ANN. § 51.03.

[191] *Id.* § 51.03(b); § 12.21.

[192] TEX. CODE CRIM. PROC. ANN. art. 5B.002 (West 2024).

[193] *Id.*

[194] TEX. CODE CRIM. PROC. ANN. art. 5B.003 (West 2024).

In December 2023 and January 2024, a group of plaintiffs filed two different complaints and motions for a preliminary injunction against Texas, arguing that S.B. 4 violates the Supremacy Clause of the U.S. Constitution because it is field and conflict preempted.[195] A judge in the District Court for the Western District of Texas consolidated the cases on January 31, 2024.[196]

The parties cited *Arizona v. United States* in their motions to the court, comparing and contrasting S.B. 4 to Arizona's S.B. 1070.[197] The plaintiffs argued that S.B. 4 is field preempted because "it regulates a field—entry and removal of noncitizens—that Congress has committed to the federal government's 'exclusive governance.'"[198] The plaintiffs emphasized that it is the United States, and not the states, that have broad, undoubted power over immigration and that not only does S.B. 4 regulate alien entry, reentry, and removal, it "also directly implicates the United States' foreign relations."[199] By criminalizing actions that take place on the southern border and regulating immigration functions, the plaintiffs argue, S.B. 4 is trampling over federal interests.[200] Finally, the plaintiffs pointed out that since *Arizona v. United States*, lower courts "have routinely held that state immigration crimes paralleling their federal counterparts are field preempted."[201] The plaintiffs then argued that S.B. 4 is conflict preempted because it allows the state to remove people whose right to remain in the country could be under review by federal immigration officials, it conflicts with the federal government's ability to determine where aliens can be removed to by working with foreign governments, its punishments are broader than federal law allows, and it intrudes on the ways in which Congress has determined under what limited circumstances state officers can help with immigration enforcement.[202]

Texas argued that S.B. 4 comports with federal law and can therefore not be conflict preempted.[203] Texas also argued that although S.B. 4 might be an obstacle to the executive branch's objectives, it is not an obstacle to Congress's objectives and emphasized that Supremacy Clause jurisprudence focuses on federal laws rather than executive priorities in their implementation.[204] Texas then argued that S.B. 4 is not field preempted because, among other things, states have wide latitude in regulating misconduct of aliens and others within their jurisdictions and that, even if the removal of aliens is exclusively a federal power, S.B. 4 does not actually remove anyone from the United States.[205] Further, even if field preemption remains a viable argument, Texas argued, there can be no field preemption when "the federal executive branch has abandoned the very field it now purports to occupy."[206] Finally, Texas argued that even

[195] Complaint for Declaratory and Injunctive Relief, Las Americas Immigrant Advoc. Ctr. v. Texas, No. 1:23-cv-1537 (W.D. Tex. Dec. 19, 2023), Dkt. No. 1; Complaint, United States v. Texas, 719 F. Supp. 3d 640 (W.D. Tex. 2024) (No. 1:24-cv-00008), Dkt. No. 1.

[196] Order, United States v. Texas, 719 F. Supp. 3d 640 (W.D. Tex. 2024) (No. 1:24-cv-00008-DAE), Dkt. No. 45.

[197] *See generally* United States' Motion for Preliminary and Permanent Injunction at 14–21, 24–26, 30–31, United States v. Texas, 719 F. Supp. 3d 640 (W.D. Tex. 2024) (No. 1:24-cv-00008-RP), Dkt. No. 14 [hereinafter Plaintiffs' Motion]; Defendants' Consolidated Response in Opposition to Plaintiffs' Motions for Preliminary Injunction at 15–18, 21, 30, United States v. Texas, 719 F. Supp. 3d 640 (W.D. Tex. 2024) (No. 1:24-cv-00008-DAE), Dkt. No. 25 [hereinafter Defendants' Response].

[198] *See* Plaintiffs' Motion, *supra* note 197, at 14.

[199] *Id.* at 15.

[200] *Id.* at 16–17.

[201] *Id.* at 20.

[202] *See id.* at 22–25.

[203] *See* Defendants' Response, *supra* note 197, at 12–13.

[204] *See id.* at 14 (referring to the Biden Administration's objectives as "favor[ing] open-border policies").

[205] *See id.* at 15–16.

[206] *Id.* at 19–20.

if federal immigration laws preempt S.B. 4, the federal government's duty to protect the states and the state's constitutional right to defend itself are not diminished if there is an "invasion at the border."[207] This determination, according to Texas, rebuts the plaintiffs' preemption claims.[208] According to Texas, the United States failed to protect the state and its citizens by allowing individuals to enter Texas without authorization—including cartel members who traffic weapons, drugs, and people—so this amounts to an "invasion at the border."[209] Texas relied at least in part on Justice Scalia's partial dissent in *Arizona* and argued that it has the same constitutional right to defend itself from an "invasion at the border" that the United States does.[210]

On February 29, 2024, just days before S.B. 4 was set to become effective, the district court granted a preliminary injunction blocking S.B. 4 from taking effect.[211] The court held that S.B. 4 was field and conflict preempted.[212] The court spent the majority of its analysis on field preemption. First, the court held that the field of immigration is so deeply intertwined with the federal government's foreign relations and that the federal government has an interest in admitting and removing aliens.[213] Second, the court held that there is no "question that the federal government occupies the field of immigration," as there are countless federal immigration statutes and treaties that support this statement, and that Congress has made it clear there is no room for states to supplement this existing framework.[214] Third, the court relied on the Supreme Court's analysis in *Arizona v. United States* and held that two sections of S.B. 4 that try to "vest a state with the power to punish federal immigration offenses" are strikingly similar to S.B. 1070 (the law in question in *Arizona*) and the majority in *Arizona* forbade this type of concurrent criminalization.[215] Fourth, the court held that "[b]y authorizing state officials to conduct removals ... [S.B. 4] intrudes into a particularly sensitive area of foreign affairs and is field preempted."[216] The court also dispelled some of Texas's arguments against field preemption by holding that field preemption is not limited to alien registration; orders under S.B. 4 really are removal orders and these types of decisions must be made by the federal government alone; state laws, like S.B. 4, that run concurrent to federal law run the risk of preemption because Congress has stated that "federal statutes are the sole and exclusive procedure for determining" alien admissibility and removability; and just because Texas is unhappy with the former Biden Administration's handling of immigration enforcement does not mean that there can be no field preemption and that "the federal government has abandoned the role of immigration enforcement."[217]

[207] *See id.* at 22–31 (citing to and quoting the Compact Clause and Guarantee Clause of the Constitution). The Guarantee Clause of the Constitution states, "The United States shall guarantee every State ... a Republican form of Government, and shall protect each of them *against Invasion*." U.S. CONST. art. IV, § 4 (emphasis added).

[208] *See* Defendants' Response, *supra* note 197, at 29 ("Texas's sovereign right of self-defense, as reserved to the States in Article I, Section 10, Clause 3, independently forecloses Plaintiffs' preemption claims against SB4.").

[209] *See id.* at 25–26.

[210] *See id.* at 24–25.

[211] United States v. Texas, 719 F. Supp. 3d 640, 682 (W.D. Tex. 2024).

[212] *Id.* at 674.

[213] *Id.* at 663–65; *see also id.* at 665 ("Texas's own state courts acknowledge the matter of entry into the United States is wholly preempted by federal law as are matters involving deportation." (internal citation and quotation marks omitted)).

[214] *Id.* at 665–66; *see id.* at 666 (reaffirming the notion that Congress occupies the field of removal, as evidenced through the INA).

[215] *Id.* at 666–67.

[216] *Id.* at 668.

[217] *Id.* at 668–74.

For conflict preemption, the district court relied again on *Arizona* and held that S.B. 4 gives state officers "the power to enforce federal law without supervision" and is conflict preempted because Congress already created a way in which the enforcement of "federal immigration law is conducted under the watch of federal officials in a uniform way across all 50 states."[218] In addition, the court held that S.B. 4 takes away federal immigration officers' discretion in the enforcement of immigration law, instructs "judges to disregard pending federal defenses," removes all aliens to Mexico in contradiction to federal immigration law that requires consideration of various factors, and exceeds penalties that currently exist under federal immigration law.[219] Finally, the court addressed Texas's "invasion" argument and held that unlawful immigration is not considered an "invasion" under the U.S. Constitution,[220] enacting S.B. 4 Texas is not a wartime response,[221] and even if Texas were at war it would have to "cede authority to the federal government to conduct that war once the federal government has had time to respond to the purported invasion."[222] According to the court, "Texas either *is* engaging in war, in which case it must obey federal war directives once the federal military has responded, or it *is not* engaging in war, in which case the [Compact Clause] does not apply."[223]

Texas appealed the case and, on March 2, 2024, the Fifth Circuit stayed the district court's preliminary injunction.[224] On March 4, 2024, the Supreme Court stayed the Fifth Circuit's order,[225] and on March 19, 2024, the Court declined to vacate the Fifth Circuit's stay of the preliminary injunction.[226] Also on March 19, 2024, the Fifth Circuit lifted its own administrative hold,[227] and the next day, the Fifth Circuit heard oral arguments on the stay against the district court's injunction.[228] On March 26, 2024, in an interlocutory[229] decision, the Fifth Circuit denied Texas's motion to stay the injunction pending appeal before the court.[230] "On a motion for a stay pending appeal," a court considers four factors as set forth by the Supreme Court in *Nken v. Holder*.[231] The Fifth Circuit largely focused its analysis on the first factor—likeliness of success on the merits—and held that Texas failed to show that it would succeed on the merits of the plaintiffs' preemption claims and that there is sufficient authority to support the claim that S.B. 4

[218] *Id.* at 674.

[219] *Id.* at 674–77.

[220] *Id.* at 680–89.

[221] *Id.* at 689–90; *see id.* at 689 ("None of [S.B. 4's] provisions are operations of war. Rather, they are standard operations of criminal enforcement by state civil authorities.").

[222] *Id.* at 690–94; *see id.* at 691 ("Here, the United States has had time to respond, and it has directed Texas to halt enforcement of SB4. If the United States is truly at war, Texas may not direct its officers to disobey that command." (internal citation omitted)).

[223] *Id.* at 694.

[224] United States v. Texas, No. 24-50149, 2024 WL 909612 (5th Cir. Mar. 2, 2024).

[225] United States v. Texas, No. 23A814, 2024 WL 909451 (Mem) (U.S. Mar. 4, 2024). On March 12, United States v. Texas, No. 23A814, 2024 WL 1055544 (Mem) (U.S. Mar. 12, 2024), and on March 18, 2024, United States v. Texas, No. 23A814, 2024 WL 1151565 (Mem) (U.S. Mar. 18, 2024), the Supreme Court extended its hold.

[226] United States v. Texas, 144 S. Ct. 797 (2024).

[227] United States v. Texas, 96 F.4th 797 (5th Cir. 2024).

[228] United States v. Texas, 97 F.4th 268, 274 (5th Cir. 2024).

[229] An interlocutory decision is a decision "that relates to some intermediate matter in the case; any order other than a final order." *See Order*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[230] United States v. Texas, 97 F.4th 268 (5th Cir. 2024).

[231] *Id.* at 274. The four factors are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties ... and (4) where the public interest lies." *Id.* (quoting Nken v. Holder, 556 U.S. 418, 426 (2009)).

is field or conflict preempted.[232] The Fifth Circuit was also not convinced that the Compact Clause, or Texas's "invasion at the border" argument, could compel a different result.[233]

The Fifth Circuit's opinion spanned 121 pages. For field preemption, the Fifth Circuit held that S.B. 4's provision on removal likely encroaches on the field of immigration removal by giving state judges authority that is reserved only for the United States and that Texas failed to demonstrate that it is likely to prevail on its argument that the district court erred by holding that S.B. 4 is likely field preempted.[234] The Fifth Circuit further held that giving the state this authority precludes aliens from being able to avail themselves "of rights [they have] under federal law."[235] For conflict preemption, the Fifth Circuit held that S.B. 4 likely conflicts with the federal government's exercise of discretion in deciding whether to initiate civil or criminal proceedings when an alien is arrested, because in Texas, an alien is arrested and charged with the crime of illegal entry (or reentry) and the federal government has no say in the matter.[236] The Fifth Circuit held that S.B. 4 also likely conflicts with federal immigration law because it authorizes state judges to remove aliens from the United States without the federal government's consent, takes away "the United States' authority to select the country to which [aliens] will be removed," and takes away the federal government's discretion in deciding who it will allow to stay in the United States.[237] Finally, the Fifth Circuit briefly mentioned Texas's "invasion at the border" argument and held that because Texas provided no authority to support its claim, Texas failed to persuade that it would likely prevail on the merits of this argument.[238]

Judge Oldham wrote a separate dissenting opinion, focusing his analysis on the section of S.B. 4 that criminalizes illegal entry, and concluded that this section is not field or conflict preempted.[239] For field preemption, he argued that Congress has the exclusive power in determining who can enter the country and under what conditions but that this section does not affect whom Congress allows to enter the United States and says only that Texas is allowed to arrest people who "cross the border somewhere other than a lawful port of entry."[240] Judge Oldham also argued that for Supremacy Clause arguments, what matters is what the laws of the United States say and not "criminal law enforcement priorities or preferences of federal officers."[241] Next, Judge Oldham did not believe that a court should "infer that Congress has occupied a field whenever it proscribes something" and instead reminded that just because a state and federal law overlap does not mean preemption automatically exists.[242] For conflict preemption, Judge Oldham asserted that although federal law may allow state officials to enforce federal law only under limited circumstances, state officials enforcing state law do "not need to rely on federal law."[243] Judge Oldham also argued that even if this section of S.B. 4 were conflict preempted to the extent the

[232] *Id.* at 295.

[233] *Id.*

[234] *Id.* at 284, 288.

[235] *Id.* at 285.

[236] *Id.*

[237] *Id.* at 291.

[238] *Id.* at 295.

[239] *Id.* at 317–29 (Oldham, J., dissenting).

[240] *Id.* at 320–21 (Oldham, J., dissenting).

[241] *Id.* at 322 (Oldham, J., dissenting) (internal quotation marks omitted).

[242] *Id.* at 323–24 (Oldham, J., dissenting).

[243] *Id.* at 327 (Oldham, J., dissenting).

plaintiffs argued, they needed to show that "*all applications* of [Section 51.02] are preempted" and that they failed to do so.[244]

This lawsuit was initially filed under the Biden Administration. With the recent change in Administration, on February 11, 2025, the Fifth Circuit directed the parties to file supplemental briefings on whether they had changed positions on any issues on appeal.[245] On March 18, 2025, the Department of Justice filed a notice of voluntary dismissal of its case with the district court.[246] On March 21, 2025, the district court ordered a status conference for April 3, 2025.[247] Also on March 21, 2025, the remaining parties submitted their supplemental briefings to the Fifth Circuit.[248] As of the date of this report, a trial on the merits is scheduled with the district court for July 8, 2025.[249]

Oklahoma, H.B. 4156 (*United States v. Oklahoma*)

In April 2024, Oklahoma passed House Bill 4156 (H.B. 4156),[250] which was set to go into effect on July 1, 2024. Similar to Texas's S.B. 4, H.B. 4156 created new state criminal penalties for individuals in Oklahoma who entered or reentered the United States unlawfully and subjected them to mandatory expulsion from Oklahoma.[251] Several plaintiffs sued and sought declaratory and injunctive relief, arguing, among other things, that the law was preempted by federal immigration law.[252] On June 28, 2024, a federal district court judge granted the plaintiffs' motion for preliminary injunction and held that H.B. 4156 was field and conflict preempted. The court relied on analyses in *Arizona v. United States* as well as the decisions by the Fifth Circuit and U.S. District Court Judge Ezra in the S.B. 4 litigation. First, the court held that H.B. 4156's illegal entry and reentry provisions were field preempted because federal immigration regulation of entry and reentry is comprehensive enough to infer that Congress did not leave any room for the states to supplement.[253] The court applied the same logic to H.B. 4156's expulsion provision, finding sufficient evidence to conclude that Congress meant to occupy the entire field of expulsion, including for decisions that remove individuals from states.[254] The court added that if

[244] *Id.* at 328 (Oldham, J., dissenting).

[245] Order, United States v. Texas, No. 24-50149 (5th Cir. Feb. 11, 2025), Dkt. No. 231.

[246] Notice of Voluntary Dismissal, United States v. Texas, 719 F. Supp. 3d 640 (W.D. Tex. Mar. 18, 2025) (No. 1:24-cv-00008-DAE), Dkt. No. 79. Notwithstanding this case, on February 12, 2025, the Justice Department filed a lawsuit against New York arguing that New York's Green Light Law (which prohibits the Department of Motor Vehicles from sharing information with federal immigration officials) violates the Supremacy Clause. *See* Complaint, United States v. New York, No. 1:25-CV-0205 (AMN/MJK), 2025 WL 486630, (N.D.N.Y. Feb. 12, 2025), Dkt. No. 1. Among other things, the Justice Department argues that the Green Light Law is expressly preempted by 8 U.S.C. § 1373, that it is conflict preempted because it frustrates cooperation and sharing of information between the state and the federal government and undermines federal immigration enforcement, and that it violates intergovernmental immunity by attempting to directly regulate the federal government. *See id.* at 13–16.

[247] Order Setting Status Conference, United States v. Texas, 719 F. Supp. 3d 640 (W.D. Tex. Mar. 21, 2025) (No. 1:24-cv-00008-DAE), Dkt. No. 80.

[248] Letter, United States v. Texas, No. 24-50149 (5th Cir. Mar. 21, 2025), Dkt. No. 250; Plaintiffs-Appellees' Supplemental Briefing Pursuant to Court Order, No. 24-50149 (5th Cir. Mar. 21, 2025), Dkt. No. 252.

[249] Order, United States v. Texas, 719 F. Supp. 3d 640 (W.D. Tex. 2024) (No. 1:24-cv-00008-DAE), Dkt. No. 72.

[250] H.B. 4156, 59th Leg., 2d Reg. Sess. (Okla. 2024).

[251] United States v. Oklahoma, 739 F. Supp. 3d 985, 994–95 (W.D. Okla. 2024).

[252] The federal district court consolidated the cases on June 5, 2024. Order, United States v. Oklahoma, 739 F. Supp. 3d 985 (W.D. Okla. 2024) (No. 5:24-cv-00511-J), Dkt. No. 17.

[253] *Oklahoma*, 739 F. Supp. at 997–99.

[254] *Id.* at 999–1000.

H.B. 4156 were permitted to stand, any state could create its own immigration policy, and this would diminish the federal government's ability to conduct immigration policy with one voice.[255]

Second, the court held H.B. 4156 was conflict preempted in two ways. H.B. 4156's provisions on unlawful entry and reentry and mandatory expulsion were in conflict with federal law because federal law allows some individuals who initially unlawfully entered the United States to either receive lawful immigration status or stay in the United States under certain conditions.[256] The court explained that even when an individual receives a removal order from the federal government, there is at least a chance that that individual could obtain permission from the federal government to remain in the United States.[257] The court next analyzed a more glaring conflict with H.B. 4156: The law would give state officials authority "to unilaterally arrest, prosecute, and punish noncitizens for immigration offenses" without direction from the federal government and in contravention to federal law under 8 U.S.C. § 1357(g).[258] This, the court held, was not Congress's intention when it created the system of federal and state cooperation in which state officers could perform federal functions under limited circumstances.[259]

Finally, the court briefly addressed the defendants' "invasion at the border" argument and was unpersuaded that the current situation in Oklahoma presented an exception to the Compact Clause of the U.S. Constitution that would allow the state to defend itself from an "invasion at the border."[260]

On July 17, 2024, the case was appealed to the Tenth Circuit, and oral arguments were scheduled for April 10, 2025.[261] On March 14, 2025, the federal government, one of the plaintiffs in the case, filed a notice of voluntary dismissal of their case with the district court.[262] On March 16, 2025, the remaining plaintiffs filed a notice regarding the government's voluntary dismissal and requested that the district court leave the preliminary injunction in place while next steps are decided in the case.[263] Finally, on March 25, 2025, the Tenth Circuit vacated the oral arguments scheduled for April 10, 2025, dismissed the appeal as moot, and denied the remaining plaintiffs' motion to intervene and motion to remand.[264]

Iowa, S.F. 2340 (*United States v. Iowa*)

In April 2024, Iowa passed Senate File 2340 (S.F. 2340),[265] which was set to go into effect on July 1, 2024. Similar to Texas's S.B. 4, Iowa's S.F. 2340 created two new state criminal penalties for certain immigration offenses, such as illegal reentry, and gave state judges authority to order

[255] *Id.* at 1002.

[256] *Id.* at 1003–04.

[257] *Id.*

[258] *Id.* at 1004.

[259] *Id.*

[260] *Id.* at 1004–05.

[261] Instructions for Cases Set for Oral Argument, United States v. Oklahoma, No. 24-6144 (10th Cir. Feb. 7, 2025), Dkt. No. 81.

[262] Notice of Voluntary Dismissal, United States v. Oklahoma, 739 F. Supp. 3d 985 (W.D. Okla. Mar. 14, 2025) (No. 5:24-cv-00511-J), Dkt. No. 50.

[263] Notice Regarding Voluntary Dismissal Filed by the United States, United States v. Oklahoma, 739 F. Supp. 3d 985 (W.D. Okla. Mar. 16, 2025) (No. 5:24-cv-00511-J), Dkt. No. 51.

[264] Order, United States v. Oklahoma, No. 24-6144 (10th Cir. dismissed Mar. 25, 2025), Dkt. No. 91-1.

[265] S.B. 2340, 90th Gen. Assembly, Reg. Sess. (Iowa 2024).

the removal of an alien back to the country from which he or she entered.[266] Several plaintiffs sued and sought declaratory and injunctive relief, arguing, among other things, that the law was preempted by federal immigration law.[267] On June 17, 2024, a federal district court judge granted the plaintiffs' motions for preliminary injunction.[268] The court held that S.F. 2340 was field and conflict preempted. Using the Fifth Circuit's and U.S. District Court Judge Ezra's analysis as guidance, the court held that S.F. 2340 was field preempted because the INA established a federal scheme to regulate immigration and set the terms and conditions by which people could be admitted to the United States and that the Iowa law interfered with this scheme when it criminalized behavior that the INA already prohibits.[269] According to the court, Iowa could not implement its own penalties for illegal reentry because Congress did not leave any room for this kind of state regulation, and doing so would frustrate federal objectives.[270]

The court further held that S.F. 2340 was conflict preempted. The court reasoned that, under federal law, some of the plaintiffs would not be criminally liable for federal illegal reentry because they would be able to use their current immigration status as a legal defense.[271] Under the Iowa law, these same plaintiffs, on the other hand, would not be able to use their current immigration status as a legal defense and could still be held criminally liable for illegal reentry. The court stated that this is untenable.[272] Finally, the court held that S.F. 2340's provision giving state judges authority to order the removal of aliens was also conflict preempted because Congress had already created a very intricate system by which individuals are removed from the United States and to what countries, and sometimes, for a variety of reasons, individuals are not returned to the countries from which they entered.[273] According to the court, the Iowa law prevents the United States from speaking with one voice.[274]

On January 24, 2025, the Eighth Circuit affirmed the district court, upheld the preliminary injunction, and held that the three relevant sections of the new Iowa law were conflict preempted.[275] For Section 2, which criminalizes illegal entry and reentry, the court held that Iowa would be creating its own immigration policy and that this was an obstacle to the broad discretion federal officials currently have when it comes to enforcing immigration law.[276] Specifically, Section 2, unlike the federal illegal reentry statute, does not contain any exceptions.[277] Iowa asked the court to infer the same exceptions that exist in federal law, but according to the court, Iowa is

[266] United States v. Iowa, 737 F. Supp. 3d 725 (S.D. Iowa 2024), *vacated*, *appeal dismissed*, No. 24-2265, 2025 WL 1140834, at *1 (8th Cir. Apr. 15, 2025).

[267] *Id.* at 738, 746. The plaintiffs include the federal government, a nonprofit organization, and several individuals. The federal government filed one motion, and the nonprofit organization and individual plaintiffs filed a separate motion to enjoin (or prevent) the state law from going into effect. *Id.* at 738.

[268] *Id.* at 732–33. The district court granted both motions for a preliminary injunction in one opinion. *Id.*

[269] *Id.* at 747.

[270] *Id.*

[271] *Id.* at 747–48.

[272] *Id.* at 748.

[273] *Id.*

[274] *Id.*

[275] United States v. Iowa, 126 F.4th 1334 (8th Cir. 2025), *vacated*, No. 24-2265, 2025 WL 1140834, at *1 (8th Cir. Apr. 15, 2025). The same day, the Eighth Circuit issued a separate short order dismissing Iowa's appeal as to the nonprofit organization and individual plaintiffs because the court, in its long opinion, upheld the preliminary injunction of S.F. 2340 and held that that appeal is now moot. *See* Iowa Migrant Movement for Just. v. Bird, No. 24-2263, 2025 WL 319926, at *1 (8th Cir. Jan. 24, 2025), *reh'g granted*, *vacated*, No. 24-2263, 2025 WL 1140762, at *1 (8th Cir. Apr. 15, 2025).

[276] *Iowa*, 126 F.4th at 1347, 1349.

[277] *Id.* at 1346.

asking the court "to ignore the plain text of the statute," and "[t]he plain text of Section 2 has no exceptions."[278] Further, according to the Eighth Circuit, Section 2 "creates a parallel scheme of enforcement for immigration law" and complicates United States' foreign relations.[279]

For Section 4, which gives state judges authority to order the removal of an alien back to the country from which he or she entered, the court held that it would also create an obstacle to the broad discretion immigration officials have over removal decisions.[280] Similar to Section 2, Section 4 also has no exceptions for judges to issue this order, unlike federal law, which allows federal officials to withhold removal for those who illegally reenter if, for example, an alien "expresses a fear of returning to the country designated in" his or her reinstated order of removal.[281] The Eighth Circuit held that Section 4 also conflicts with where an alien can be removed to. Under federal law, if an "alien's life or freedom would be threatened in" the country of removal, then that alien can be removed to another country.[282] In contrast, Section 4 "mandates only one destination for an [] alien."[283] The court held that Section 4 conflicts with the principle that the federal government is entrusted with the removal process.[284] Finally, for Section 6, which prevents a court from delaying prosecution because the federal government is still determining an individual's immigration status, the Eighth Circuit held that this section (like the others) "undermines federal officials' discretion to decide if, when, and how to address the case of an individual alien."[285] Iowa argued that a state judge has the option to stop or suspend a prosecution while the federal determination of an individual's immigration status is pending, but the court held that because this discretion would lie with the state courts and not the federal government, "Iowa could still make its own immigration policy" and therefore this section was also conflict preempted.[286]

On March 14, 2025, the federal government, one of the plaintiffs in the case, filed a notice of voluntary dismissal of the case.[287] On March 18, 2025, the remaining plaintiffs filed a motion to amend their petition for a panel rehearing in light of the federal government's notice of voluntary dismissal.[288] On March 24, 2025, the defendants filed a petition for a panel rehearing of the Eighth Circuit's opinion, and that petition is currently pending before the court.[289] On April 15, 2025, the Eight Circuit vacated its prior opinion, vacated the district court's grant of a preliminary injunction, dismissed Iowa's appeal as moot, and remanded "to the district court with instructions

[278] *Id.* at 1346–47.

[279] *Id.* at 1348.

[280] *Id.* at 1351.

[281] *Id.* at 1349 (internal quotation marks omitted) (quoting 8 C.F.R. § 241.8(e)).

[282] *Id.* at 1350.

[283] *Id.*

[284] *Id.*

[285] *Id.* at 1351.

[286] *Id.*

[287] Notice of Voluntary Dismissal, United States v. Iowa, 737 F. Supp. 3d 725 (S.D. Iowa Mar. 14, 2025) (No. 4:24-cv-162-SHL-SBJ), Dkt. No. 46.

[288] Motion to Amend Plaintiffs' Petition for Panel Rehearing, Iowa Migrant Movement for Just. v. Bird, (8th Cir. Mar. 18, 2025) (No. 24-2263) [hereinafter Plaintiffs' Amended Petition]. The remaining plaintiffs had a pending petition for rehearing of the Eighth Circuit's January 24, 2025, order that dismissed their appeal as moot. Petition for Panel Rehearing and Stay of Mandate, Iowa Migrant Movement for Just. v. Bird, (8th Cir. Feb. 21, 2025) (No. 24-2263). The circuit court found the plaintiffs' case moot because the court had affirmed the preliminary injunction in the federal government's related case. Now, with the federal government's voluntary dismissal of the case, the plaintiffs argued that they have further reasons to show that their appeal is not moot. *See* Plaintiffs' Amended Petition at 3.

[289] Appellants' Petition for Panel or En Banc Rehearing, United States v. Iowa, 126 F.4th 1334 (8th Cir. Mar. 14, 2025) (No. 24-2265).

to dismiss" the district court case.[290] The same day, the Eight Circuit also granted the remaining plaintiffs' petition for rehearing and vacated its January 24, 2025, order that dismissed the remaining plaintiffs' appeal as moot, thereby reviving their challenge to S.F. 2340.[291] This information is current as of the date of this report.

Other Recent State Measures Addressing Unlawfully Present Aliens

In addition to the state enactments and associated legal challenges discussed above, other states have adopted similar measures to deter the presence of unlawfully present aliens within their jurisdictions.

On June 18, 2024, Louisiana Governor Jeff Landry signed Senate Bill 388, which was modeled after Texas's S.B. 4.[292] The main provisions of the Louisiana statute do not go into effect unless or until either the Supreme Court issues a final decision upholding S.B. 4 or a constitutional amendment is ratified that authorizes states to restrict unlawfully present aliens from entering their jurisdictions.

In November 2024, Arizona voters agreed to Proposition 314, or the "Secure the Border Act."[293] The proposition contained components that resembled Texas's S.B. 4. Among other things, Proposition 314 makes it a state crime to enter Arizona from any foreign nation (e.g., Mexico) other than through an official port of entry[294] and authorizes state court judges to order the return of an alien back to the country from which he or she entered.[295] These two components cannot be enforced until Texas's S.B. 4, or any other similar state law, is in effect for 60 days.[296] On April 2, 2025, a lawsuit was filed in Arizona state court challenging the proposition.[297]

On February 13, 2025, Florida Governor Ron DeSantis signed into law Senate Bill 4C (S.B. 4C), which is similarly modeled after Texas's S.B. 4 and went into effect immediately.[298] On April 2, 2025, a group of plaintiffs sued, claiming that S.B. 4C is unconstitutional and conflicts with the Supremacy Clause, among other things.[299] On April 4, 2025, a federal district judge granted a temporary restraining order, blocking enforcement of S.B. 4C.[300]

[290] United States v. Iowa, No. 24-2265, 2025 WL 1140834, at *1 (8th Cir. Apr. 15, 2025).

[291] Iowa Migrant Movement for Just. v. Bird, No. 24-2263, 2025 WL 1140762, at *1 (8th Cir. Apr. 15, 2025).

[292] *See* LA. STAT. ANN. §§ 14:112.11–13 (2024).

[293] Steve Nielsen & Gabriel Sandoval, *Arizona Voters Approve State-Level Immigration Enforcement*, FOX10 PHOENIX (Nov. 6, 2024, 5:43 PM), https://www.fox10phoenix.com/election/arizona-voters-approve-state-level-immigration-enforcement.

[294] ARIZ. REV. STAT. ANN. § 13-4295.01.

[295] *Id.* § 13-4295.03.

[296] *Id.* § 13-4295.04.

[297] *See* Verified Complaint for Declaratory Judgment and Injunction, Living United for Change in Ariz. v. Arizona, No. CV2025-011729 (Ariz. Sup. Apr. 2, 2025) (No. CV2025-011729).

[298] *See* FLA. STAT. §§ 811.

[299] *See* Class Action Complaint for Injunctive and Declaratory Relief, Florida Immigr. Coalition v. Uthmeier, No. 1:25CV21524, 2025 WL 1006475, at *1 (S.D. Fla. Apr. 2, 2025).

[300] *See* Order, Florida Immigr. Coalition v. Uthmeier, No. 1:25-cv-21524-KMW (S.D. Fla. Apr. 4, 2025), Dkt. No. 28.

Considerations for Congress

Recent state measures seeking to deter unlawfully present aliens from entering or remaining in their jurisdictions have prompted new legal challenges. The Supreme Court's decision in *Arizona* looms large over these suits. Whereas plaintiffs look to the majority opinion in *Arizona* to argue that these state laws impermissibly conflict with the federal immigration framework, the states contend that they retain sovereign authority to take action to prevent an "invasion" of their borders. The Supreme Court and Congress have yet to address this issue separately or collectively.[301] From the pending litigation thus far, no federal court has determined that there is currently an "invasion at the border." According to Judge Ezra from the Western District of Texas, for example, the definition of "invasion"[302] has been interpreted over time to refer to "a hostile and organized military force," and the Compact Clause "was to be used sparingly for temporary, exigent, and dangerous circumstances."[303] Judge Ezra rejected[304] Texas's "invasion at the border" argument for three reasons: A surge in people illegally crossing the border does not constitute an invasion, Texas is not at war if it enforces S.B. 4, and if Texas were at war then "it would have to abide by federal directives in waging that war."[305] On the other hand, Judge Ho from the Fifth Circuit, in a concurring and dissenting opinion in *United States v. Abbott*, argued that Texas has the right to respond to an "invasion" under the Compact Clause of the Constitution and that Texas's invocation of that right is a nonjusticiable political question.[306]

The "invasion at the border" claim has also emerged in spaces outside of litigation.[307] In November 2022, before Texas passed S.B. 4, Texas Governor Abbott sent then-President Biden a letter detailing how, according to the governor, the Biden Administration had failed to protect the state from an "invasion at the border"—in violation of the Constitution—and that as a result Texas would have to take matters into its own hands.[308] In January 2024, a group of former Federal Bureau of Investigation officials wrote a letter to Congress and warned that there is an

[301] Although the courts have yet to address this issue on point, in the 1990s, several courts suggested—albeit relying on other parts of the Constitution and not the Compact Clause—that an invasion means a military invasion or an armed hostility. *C.f., e.g.*, New Jersey v. United States, 91 F.3d 463, 468 (3d Cir. 1996) (suggesting an invasion under the Invasion Clause of the Constitution refers to a military invasion); Padavan v. United States, 82 F.3d 23, 28 (2d Cir. 1996) (suggesting that an invasion under the Invasion Clause requires an armed hostility).

[302] United States v. Texas, 719 F. Supp. 3d 640, 682 (W.D. Tex. 2024) ("The natural and normal meaning of 'invade,' as shown by the predominant dictionary definition, is to enter a country with hostile intent, typically to assault, attack, seize, or plunder."); *see id.* at 683 ("The natural and plain meaning of 'invasion' within the [Compact Clause] is a narrow and time-constrained response in the face of imminent military emergency.").

[303] *Id.* at 680.

[304] The district court in *Oklahoma v. United States* also rejected the "invasion at the border" argument for the same reasons. *See* 739 F. Supp. 3d 985, 1004–05 (W.D. Okla. June 28, 2024).

[305] *Texas*, 719 F. Supp. 3d at 679.

[306] United States v. Abbott, 110 F.4th 700, 725 (5th Cir. 2024) (Ho, J., concurring in part and dissenting in part).

[307] *Republican Governors Band Together, Issue Joint Statement Supporting Texas' Constitutional Right to Self-Defense*, REPUBLICAN GOVERNORS ASSOCIATION (Jan. 25, 2024), https://www.rga.org/republican-governors-ban-together-issue-joint-statement-supporting-texas-constitutional-right-self-defense/.

[308] Letter from Greg Abbott, Governor of Texas, to Joseph R. Biden, President of the United States (Nov. 16, 2022), https://gov.texas.gov/uploads/files/press/BidenJoseph_11.16.22.pdf. Also in 2022, Senator Marshall declared that the situation at the southern border was an invasion according to the Constitution and requested "unanimous consent to pass his new resolution" declaring it as such. *See* Press Release, Roger Marshall, Senator, U.S. Senate, Sen. Marshall: Joe Biden's Open Borders Agenda Exposed States to Invasion (Aug. 4, 2022), https://www.marshall.senate.gov/newsroom/press-releases/sen-marshall-joe-bidens-open-borders-agenda-exposed-states-to-invasion/.

"invasion" of people coming from hostile nations.[309] On January 20, 2025, President Trump issued Executive Order 10888, "Guaranteeing the States Protection Against Invasion," in which he declared that "the current situation at the southern border qualifies as an invasion under [the Guarantee Clause] of the Constitution."[310]

Another issue Congress may want to consider is the possibility that the pending challenges to state measures addressing the unlawfully present population may end up before the Supreme Court. If this occurs, the Supreme Court may consider the preemptive effect of federal immigration law, the continuing vitality of the Court's decision in *Arizona*, and whether states' invocation of sovereign authority to respond to an "invasion" alters the Court's legal analysis.

Congress has options if it seeks to address the issues present in the pending preemption cases as well. For example, H. Res. 1031, introduced in the 118th Congress, would have expressed that the situation at the southern U.S. border is an invasion "to help support legal arguments of states in federal court."[311] As another example, H. Res. 50, introduced in the 119th Congress, would declare, among other things, that "from 2021 through 2024, the United States failed to protect the [southern border states] against invasion pursuant to [the Guarantee Clause of the Constitution]" and that states have "the sovereign right to exclude from [their] territory any person who does not have the right to be here" and can defend themselves from invasion.[312]

Congress may also choose to enact legislation that repeals existing federal immigration statutes upon which some states have patterned their own enforcement measures. For example, the New Way Forward Act (H.R. 2374) in the 118th Congress would have, among other things, repealed the illegal entry and reentry statutes under 8 U.S.C. §§ 1325 and 1326 and the statutes on communication and coordination between federal and state or local law enforcement under 8 U.S.C. §§ 1373 and 1644.[313] Alternatively, Congress may enact legislation that provides the states with greater control over immigration regulation within their borders. For example, the State and Immigration Enforcement Act (H.R. 218) in the 119th Congress would allow states and localities to enact and enforce civil and "criminal penalties that penalize the same conduct that is prohibited" in the civil and criminal provisions of immigration laws.[314]

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[309] Senator Ron Johnson (@SenRonJohnson), X (Jan. 25, 2024, 2:41 PM) https://x.com/SenRonJohnson/status/1750604869910602022?s=20.

[310] *See* Exec. Order No. 10,888, 90 Fed. Reg. 8,333 (Jan. 20, 2025). President Trump issued other executive orders that also classified the situation at the border as an "invasion." *See, e.g.*, Exec. Order No. 10,886, 90 Fed. Reg. 8,327 (Jan. 20, 2025); Exec. Order No. 14,165, 90 Fed. Reg. 8,467 (Jan. 20, 2025); Exec. Order No. 14,159, 90 Fed. Reg. 8,443 (Jan. 20, 2025).

[311] *See* H. Res. 1031, 118th Cong. (2023); Press Release, Daniel Webster, Representative, U.S. House of Representatives, Webster Introduces Bill Recognizing Border Crisis as an Invasion (Mar. 1, 2024), https://webster.house.gov/2024/3/webster-introduces-bill-recognizing-border-crisis-as-an-invasion. In February 2024, Senators Marshall and Tuberville went to the Senate floor and demanded passage of Senator Marshall's 2022 resolution that would declare the situation at the southern border an invasion. *See* Press Release, Roger Marshall, Senator, U.S. Senate, Senator Marshall Leads Efforts to Declare an Invasion at the Southern Border on Senate Floor (Feb. 7, 2024), https://www.marshall.senate.gov/newsroom/press-releases/senator-marshall-leads-efforts-to-declare-an-invasion-at-the-southern-border-on-senate-floor/. Doing so would "reaffirm states' Constitutional right to protect themselves from an invasion, which would immediately empower Governors to secure the southern border without interference from the federal government." *Id.*

[312] *See* H. Res. 50, 119th Cong. (2025).

[313] *See* New Way Forward Act, H.R. 2374, 118th Cong. (2023).

[314] *See* State Immigration Enforcement Act, H.R. 218, 119th Cong. (2025).

Congress may also enact legislation that further expands immigration enforcement cooperation between the federal government and state and local governments. For example, the 287(g) Program Protection Act (H.R. 756) in the 119th Congress would require the Department of Homeland Security to approve 287(g) applications within 90 days and would prevent termination or denial of any applications without a compelling reason.[315] On the other hand, Congress may constrict this kind of cooperation. For example, the PROTECT Immigration Act (S. 1336) in the 117th Congress would have rescinded state and local immigration enforcement authority under 8 U.S.C. § 1357(g).[316]

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[315] *See* 287(g) Program Protection Act, H.R. 756, 119th Cong. (2025). Section 1357(g) of Title 8 of the U.S. Code, or more commonly known as the "287(g) program," authorizes U.S. Immigration and Customs Enforcement (ICE) to work with state and local law enforcement to perform certain immigration functions under ICE's direction and oversight. *See* 8 U.S.C. § 1357(g); *see also Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. ICE, https://www.ice.gov/identify-and-arrest/287g (last visited Apr. 30, 2025).

[316] *See* PROTECT Immigration Act, S. 1336, 117th Cong. (2021).