I. INTRODUCTION

The Supremacy Clause of the United States Constitution, Article VI, Clause 2 provides as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Thus, if a state or local government enacts a law in an area that has been reserved to the federal government either in the Constitution or by a federal statute, that state/local law is “preempted” or nullified by reason of the Supremacy Clause. Preemption can be “express” or “implied.”

Express preemption occurs when either the Constitution or a federal law specifically prohibits state and local governments from legislating in a particular area. For example, only Congress may declare war on or ratify a treaty with a foreign nation. Implied preemption occurs when Congress has enacted a comprehensive scheme of federal laws in an area sufficient to “occupy the field.” Implied preemption also occurs when federal and state laws impose conflicting duties and obligations such that it is either impossible to comply with both sets of laws or compliance with the state scheme would pose an “obstacle” to achieving the goals and objectives of the similar federal scheme.
Under the U.S. Constitution, the power to regulate immigration is exclusively a federal power. Exercising that power more than 20 years ago with the passage in 1986 of the Immigration Reform and Control Act (“IRCA”), Congress established a complex, carefully-balanced, nationally-uniform and comprehensive federal system for regulating the employment of aliens. That comprehensive federal scheme prohibits the employment of unauthorized aliens and imposes significant, but graduated, penalties on employers who violate the restrictions of that scheme. What IRCA did not and could not do was predict (1) the high level of demand and opportunities for foreign-born workers in the U.S. economy that developed and grew over the succeeding years, and (2) the failure of foreign economies, especially in neighboring Mexico, to keep pace with the growth of the U.S. economy. Those conditions resulted in the presence of nearly 12 million undocumented aliens in the U.S. by the year 2008.

Trying to fix the perceived “broken” immigration system, some state and local governments have attempted to take on the federal government’s job. The result so far has been a complex, diverse and disconnected web of state and local laws that discourage development of new businesses and impose additional, unnecessary costs on employers who are already suffering from the worst financial crisis in history. Immigration reform is needed, but it must be undertaken at the national level with a realistic view of the needs of businesses for foreign born workers, both skilled and unskilled, due to shortages here at home. There must be an efficient and effective path to citizenship for those already here, and attention must be paid to the realities and complexities of a global marketplace.

Although citizens and public officials may be frustrated concerning the apparent lack of adequate enforcement of federal immigration laws, the “will of the people” alone in urging action at the state and local level does not “bestow the imprimatur of constitutionality” on any
new laws. See Villas at Parkside Partners v. City of Farmers Branch, 577 F.Supp.2d 858, 864 (N.D. Tex. 2008). Instead, state and local laws that seek to impose sanctions on employers for knowingly hiring “unauthorized alien,” or that mandate the use of E-Verify, or that create state crimes for being an “unauthorized alien,” run afoul of the Supremacy Clause and are preempted by the comprehensive scheme of federal immigration law.

II. THE SUPREMACY CLAUSE AND FEDERAL PREEMPTION

1. Express Preemption

There is no question that immigration is an area of uniquely federal responsibility. DeCanas v. Bica, 424 U.S. 351, 354 (1976)(“Power to regulate immigration is unquestionably exclusively a federal power.”); Toll v. Moreno, 458 U.S. 1, 10 (1982). Moreover, in matters relating to immigration, there is a special need for nationwide consistency given the “explicit constitutional requirement of uniformity” in Article I, §8, and the myriad problems that would result for citizens and non-citizens alike if each of the 50 states – or each of thousands of localities – were permitted to adopt its own rules for the treatment of aliens. Graham v. Richardson, 403 U.S. 365, 382 (1971); see also Zadvydas v. Davis, 533 U.S. 678, 700 (2001) (recognizing “Nation’s need ‘to speak with one voice’ in immigration matters”); Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (laws relating to foreign nationals are intertwined with foreign relations).

Under IRCA, the employment of unauthorized aliens is subject to a detailed, carefully balanced, federal regulatory scheme that “‘forcefully’ ma[kes] combating the employment of illegal aliens central to ‘[t]he policy of immigration law.’” Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147 (2002). Immigration is an area in which federal interests are both well-established and particularly strong. Moreover, courts “decline to give broad effect to saving
clauses where doing so would upset the careful regulatory scheme established by federal law.””


IRCA contains an express preemption clause that 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) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. §1324a(h)(2)(emphasis added). Thus, the only sanction that a state or local government can impose for a violation of federal immigration law is a “licensing” sanction. However, nothing in the “savings clause” authorizes states to create their own adjudication and enforcement systems, or empowers states to make determinations about who is and who is not an “unauthorized alien.”

Congress manifestly sought in IRCA and §1324a(h)(2) to create a uniform, comprehensive, federal regulatory system for deciding which employers may be sanctioned for hiring unauthorized aliens. The parenthetical savings clause cannot be read as silently authorizing the creation of parallel state procedures and systems that would inevitably introduce complexity and non-uniformity of results. Rather, the savings clause allows states to make state licensing decisions based on federal findings pursuant to the careful IRCA process set forth in 8 U.S.C. §1324a(e) that an employer has violated IRCA and is subject to its sanctions.

2. Conflict Preemption

In addition, and independent of express preemption, even a state law that is authorized by a savings clause is still preempted if it conflicts with federal law. Geier, 529 U.S. at 873. Indeed, a state law is preempted if, “‘under the circumstances of th[e] particular case …[it] stands as an
obstacle to the accomplishment and execution of the full purposes and objectives of Congress – whether that ‘obstacle’ goes by the name of ‘conflicting; contrary to; … repugnance; difference; irreconcilability; inconsistency; violation; curtailment; … interference,’ or the like.” Id. (citations omitted). Even if the goals of federal and state law are the same, a state law, “is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal.” Int’l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987).

IRCA created a system that carefully balanced enforcing the ban against employing unauthorized aliens, limiting the burdens and risks on employers, and avoiding a system that would foster discrimination or penalize lawful workers. Lozano, et al., v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010). Congress was also greatly concerned that employers might, out of fear of sanctions, discriminate against lawfully authorized employees or job applicants who looked or sounded foreign. See, e.g., H.R. Rep. No. 99-682(I) at 68, 1986 USCCAN at 5672 (“Numerous witnesses over the past three Congresses have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members.”). As a result, Congress took pain-staking care to ensure that, (1) the burdens placed on employers for complying with the new requirements under the Immigration Reform and Control Act (“IRCA”) were not overly excessive, (2) the penalties for violating the prohibitions against knowingly hiring unauthorized aliens were severe but not crippling, and (3) the penalties for discrimination in the name of compliance were at least equal to the penalties for violating the law. Because the federal scheme carefully and comprehensively balanced and addressed these competing but equally important goals, state and local efforts aimed only at enforcement impermissibly conflict with the federal scheme and are preempted.
Congress also stated its intent in §115 of IRCA that the employment provisions, together with the remainder of the immigration laws, be enforced uniformly:

It is the sense of the Congress that – (1) the immigration laws of the United States should be enforced vigorously and uniformly, and (2) in the enforcement of such laws, the Attorney General shall take due and deliberate actions necessary to safeguard the constitutional rights, personal safety, and human dignity of United States citizens and aliens.

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According to the Third Circuit in _Lozano_, “[a] patchwork of state and local systems each independently monitoring, investigating, and ultimately deciding – all concurrently with the federal government – whether employers have hired unauthorized workers could not possibly be in greater conflict with Congress’ intent for its carefully crafted prosecution and adjudication system to minimize the burden imposed on employers.” _Id._ at 213.

Similarly, the Third Circuit found that mandating the use of E-Verify (an experimental and voluntary federal internet-based system to verify Social Security numbers of employees by checking them against databases maintained by the Social Security Administration and the Department of Homeland Security) also impermissibly tips the careful federal balance against employers. IRCA established the famous (maybe infamous) I-9 paper verification system for checking the work authorization status of potential employees. According to the Court, in setting up E-Verify as a voluntary, pilot program, with a limited duration and subject to periodic review and evaluation, Congress meant to give employers a choice between the I-9 process and E-Verify. Indeed, Congress went so far as to prohibit the Secretary of Homeland Security from requiring any person or other entity to participate in E-Verify. As a result, state and local governments may not, consistent with the Supremacy Clause, impose an additional burden on employers by requiring that they use E-Verify.
III. CONCLUSION

The threat to uniformity and risk of chaos that would result if individual states and municipalities were allowed to upset the comprehensive federal system that Congress created in IRCA is real. Each state, city, and town could create its own process for determining whether an employer has hired an unauthorized alien. Employers doing business in multiple states would be faced with having to comply with different schemes for all 50 states and for every city and town throughout the nation. Absent a uniform federal system, an employer alleged to have hired an unauthorized alien could be hauled into multiple forums – at the federal, state, and municipal levels – each with its own court system, procedures, and case law bearing on the meaning and implementation of that forum’s scheme. Nothing could be further from the goals and objectives for federal immigration law expressly and impliedly set forth by Congress in IRCA. As a result, those conflicting state and local efforts violate the Supremacy Clause and are preempted.