

## **Policy Arguments in Favor of the Jorgenson Immigration Bill**

**If illegal aliens found it difficult to obtain employment in Idaho, and the risks of enforcement against them increased in the state, attrition through enforcement would occur, and consequently, many would voluntarily return to their country of origin.**

Case studies in both Arizona and the National Security Entry-Exit Registration System (NSEERS) are proof positive that attrition through enforcement is an effective means of combating illegal immigration. In 2007, Arizona was inundated by approximately half a million illegal aliens.<sup>1</sup> That year, the state became the first to require all employers to verify the legal status of employees via the federal government's "E-Verify" internet system.<sup>2</sup> Arizona gave the program teeth by deeming the knowing employment of an illegal alien a violation of state law, an infringement that would result in suspension of the employer's business license.<sup>3</sup> Only one year after implementing the program, the effects in Arizona were clear. According to immigration law scholar, Kris Kobach, "Newspapers in the state reported in January 2008 that illegal aliens were already *self*-deporting by the thousands."<sup>4</sup> Ultimately, by requiring employers to verify the citizenship status of potential employees, it became virtually impossible for illegal aliens to get hired because they could no longer abuse the state's labor market by falsifying Social Security numbers and creating fake identity cards to trick prospective employers.<sup>5</sup>

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<sup>1</sup> Federation for American Immigration Reform (FAIR), Arizona: Illegal Aliens, [http://www.fairus.org/site/PageServer?pagename=research\\_research82b2](http://www.fairus.org/site/PageServer?pagename=research_research82b2) (last visited, Dec. 16, 2009). FAIR placed the number at approximately 475,000. *See also* The Pew Hispanic Center (Pew), Estimates of the Unauthorized Migrant Population for States based on the 2005 CPS, <http://pewhispanic.org/files/factsheets/17.pdf> (last visited Dec. 16, 2009) [hereinafter Pew, Estimates]. Pew placed the number at 400,000-450,000 in 2005.

<sup>2</sup> Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 157, 157 (2008) [hereinafter Kobach, *Attrition Through Enforcement*].

<sup>3</sup> *See* ARIZ. REV. STAT. ANN. § 23-212(F)(1)(c)-(d) (2007).

<sup>4</sup> Kobach, *Attrition Through Enforcement*, *supra* note 2, at 157-58.

<sup>5</sup> *Id.* at p. 157.

NSEERS, a program began by the United States Department of Justice in late 2002, also illustrates the effectiveness of attrition through enforcement.<sup>6</sup> The September 11, 2001 attacks on the World Trade Center prompted the federal government to screen and register all aliens from countries with ties to Al Qaeda, as well as any individual whose history or travel patterns suggest an elevated chance of his likely involvement in terrorism.<sup>7</sup> The screening and registration requirements, enforced by Immigration and Customs Enforcement (ICE) officers, apply regardless of whether the individual is arriving in the United States or is already on American soil.<sup>8</sup> Those individuals who fail to register face stiff penalties, including detention and ultimately deportation.<sup>9</sup> Shortly following the implementation of NSEERS, approximately 1,500 Pakistanis unlawfully residing in the United States, were deported by American officials.<sup>10</sup> However, the more striking number was provided by the government of Pakistan itself, which estimated that 15,000 illegal Pakistani aliens left the United States voluntarily when faced with the threat of real enforcement.<sup>11</sup> Again, like Arizona, “the credible threat of enforcement had resulted in mass self-deportation.”<sup>12</sup>

**Attrition through enforcement is a relatively inexpensive solution and can be accomplished by utilizing programs such as E-Verify, which curtail the use of fraudulent Social Security and IRS identification numbers for employment and benefits purposes.**

The process of arresting, detaining, initiating and providing removal proceedings and appellate review, and ultimately deporting an illegal alien, requires substantial manpower and is extremely expensive. The possibility of amnesty would also inflict a hefty financial burden upon

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<sup>6</sup> *Id.* at p. 159.

<sup>7</sup> *Id.* See also U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), available at <http://www.ice.gov/pi/specialregistration/>.

<sup>8</sup> *Id.*

<sup>9</sup> ICE, available at <http://www.ice.gov/pi/dro/index.htm>.

<sup>10</sup> Kobach, *Attrition Through Enforcement*, *supra* note 2, at 160.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

the state of Idaho. According to the Federation for American Immigration Reform (FAIR), if amnesty were adopted for illegal aliens, the annual fiscal cost to the Idaho taxpayer for emergency medical care, education, and incarceration would be \$148 million in 2010.<sup>13</sup> This number would increase to a whopping \$264 million by 2020.<sup>14</sup>

On the other hand, attrition by enforcement, which would eventually result in self-deportation thanks to mechanisms such as the E-Verify system, would cost the government much less. Again, consider Arizona where “[n]o government official had to lift a finger for tens of thousands [of illegal aliens] to self-deport” even in the months before implementation of the E-Verify program.<sup>15</sup> Moreover, according to the Center for Immigration Studies (CIS), a nationwide attrition through enforcement approach would cost only \$400 million a year for five years- an amount less than one percent of President George Bush’s 2007 budget request for the entire Department of Homeland Security.<sup>16</sup> Internet based programs are cheap, efficient, and expeditious; an employer armed with a prospective employee’s basic information, such as a name, birth date, and social security number, need merely have access to an Internet connection to confirm his or her legal status and thus discover within minutes whether the individual can legally work in the United States.

**The federal government has neither the resolve nor the resources to enforce immigration law; thus, utilizing state and local law enforcement agencies in the battle against illegal immigration presents another cost effective and practical solution that will encourage attrition through enforcement.**

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<sup>13</sup> FAIR, Immigration Impact: Idaho, [http://www.fairus.org/site/PageServer?pagename=research\\_research6f04](http://www.fairus.org/site/PageServer?pagename=research_research6f04) (last visited Dec. 13, 2009).

<sup>14</sup> *Id.*

<sup>15</sup> Kobach, *Attrition Through Enforcement*, *supra* note 2, at 162.

<sup>16</sup> *Id.* (citing Jessica M. Vaughan, *Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population*, CENTER FOR IMMIGRATION STUDIES BACKGROUNDER, Apr. 2006, at 1, available at <http://www.cis.org/articles/2006/back406.pdf>).

According to the National Conference of State Legislatures (NCSL), 1169 bills and resolutions pertaining to immigration were introduced in each of the 50 states by the early spring of 2007, a number that more than doubled from 2006.<sup>17</sup> Idaho Senator John McGee attributes this “flurry of legislation” to the “states' mounting frustration with federal inaction.”<sup>18</sup>

Rather than waiting on the federal government to act, the state of Idaho can address illegal immigration on the state and local level by taking reasonable steps within the law to discourage it. One of these steps is utilizing state and local law enforcement. Kris Kobach explains that because ICE is terribly undermanned, it is rendered unable to “effectively scan the whole country . . . You've got 2,000 people whose full-time responsibility is to look for those 11 to 12 million [illegal immigrants]. Even if a very small proportion of [state and local] officers help only passively, that's a huge help.”<sup>19</sup> Kobach suggests that states can turn state and local law enforcement into the “eyes and ears,” of federal immigration agents.<sup>20</sup> Moreover, there are no legal impediments blocking this particular approach. In 1996, an amendment to the Immigration and Naturalization Act authorized the Attorney General to enter into written agreements with states or political subdivisions of a state so that qualified officers could be deputized and assist the federal government in enforcing certain aspects of immigration law.<sup>21</sup>

Essentially, the resources Idaho needs in order to adequately protect the interests of its legal residents and citizens are already in place. After the proper training, and at little cost,

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<sup>17</sup> National Conference of State Legislatures, *Overview of State Legislation Related to Immigration and Immigrants in 2007*, available at

<http://www.ncsl.org/IssuesResearch/Immigration/2007StateLegislationImmigration/tabid/13113/Default.aspx>.

<sup>18</sup> Senator John McGee, *Address Immigration Problems at State Level*, IDAHO STATESMAN, Feb. 19, 2007, <http://idahoptv.org/idreports/showEditorial.cfm?StoryID=26602> (last visited Dec. 16, 2009) [hereinafter McGee, *Address*].

<sup>19</sup> Statement from Kris Kobach, *Georgia Police Tapped for Immigration Duties*, FoxNews.com, May 4, 2006, <http://www.foxnews.com/story/0,2933,194287,00.html> (last visited Dec. 16, 2009).

<sup>20</sup> Julia Preston, *Lawyer Leads an Immigration Fight*, N.Y. TIMES, July 20, 2009, at A10.

<sup>21</sup> *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, CONGRESSIONAL RESEARCH SERVICE (CRS), Aug. 14, 2006, at 17, available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf>.

experienced state and local law enforcement officers can readily assist in handling the enforcement of federal and state immigration laws. With this solution, there is no need for additional ICE officers to enter the state, and there is no need for the state of Idaho to pay for additional law enforcement agents. These programs, commonly referred to as a “Memorandum of Understanding,” typically offer training by ICE, supervision by the Department of Homeland Security, and treat state officers as federal employees for purposes of the Federal Tort Claims Act.<sup>22</sup> Florida, Alabama, Arizona, and the city of Los Angeles have successfully implemented variations of the MOU programs.<sup>23</sup>

**Sanctuary states and cities attract illegal aliens, and are subsequently plagued by drugs, gangs, criminal activity, and a corresponding rise in the costs of healthcare.**

The term “sanctuary city” typically describes a city that follows certain procedures that protect illegal aliens. Generally, these procedures include not allocating funds and resources that would be used to aid in enforcing federal immigration laws, as well as prohibiting local or state law enforcement from inquiring into an individual’s immigration status.<sup>24</sup> “Most cities that are considered sanctuary cities have adopted a ‘don’t ask-don’t tell’ policy where they don’t require their employees, including law enforcement officers, to report to federal officials aliens who may be illegally present in the country.”<sup>25</sup>

According to the Center for Immigration Studies, “the Department of Homeland Security (DHS) estimates that immigrants (legal and illegal) comprise 20 percent of inmates in prisons and jails.”<sup>26</sup> Unfortunately, when a city provides sanctuary to illegal aliens, the influx of

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<sup>22</sup> *Id.* at 21. *See also* Federal Tort Claims Act, 28 U.S.C. §§2671-2680.

<sup>23</sup> *Id.* at 18-21.

<sup>24</sup> *Id.* at 26.

<sup>25</sup> *Id.*

<sup>26</sup> Center for Immigration Studies, *Immigration and Crime: Assessing a Conflicted Issue*, Nov. 2009, available at <http://cis.org/ImmigrantCrime#2>.

individuals unlawfully present contributes to rising crime rates, and consequently, rising law enforcement and health care costs. Kris Kobach offers the town of Hazelton, Pennsylvania, which experienced a wave of illegal immigration beginning in 2000, to illustrate the burdens inflicted upon a city with a high illegal population. “Hazelton witnessed a crime wave in narcotics and related violence due to the presence of gangs dominated by illegal aliens . . . a small town that previously experienced murder once every seven to eight years saw a series of violent homicides involving illegal aliens in a two-year period.”<sup>27</sup> When crime increases in such a manner, an increase in the health care needs of the community, including the criminals, is quick to follow. Kobach added that an influx of illegal immigration to an area “often coincides with dramatic increases in patients visiting the emergency rooms of area hospitals, because the vast majority of illegal aliens do not possess health insurance,” and per federal law, those emergency rooms are required to provide emergency care, even to those who will not be able to pay.<sup>28</sup> Ultimately, what follows, to the detriment of the whole community, both legal residents and illegal, is that over-burdened hospitals are forced to shut down for budgetary reasons.<sup>29</sup>

**Offering in-state tuition rates to illegal aliens benefits those individuals in violation of federal law, is a misappropriate of Idaho tax dollars, denies the same benefits to U.S. citizens coming from out-of-state, and rewards illegal behavior.**

Despite the country’s difficult economic times, college costs continue to rise all over the United States.<sup>30</sup> In Idaho, while the median family income increased only 18 percent from 2000 to 2005, the cost of attending a four-year public school soared from \$6,763 in 2000-2001 to

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<sup>27</sup> Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 461, 461-62 (2008) [hereinafter Kobach, *Reinforcing the Rule of Law*].

<sup>28</sup> *Id.* at 461.

<sup>29</sup> *Id.*

<sup>30</sup> Daniel de Vise and Nick Anderson, *College Costs Still Rising*, THE WASHINGTON POST, Oct. 21, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/20/AR2009102001415.html> (last visited Dec. 16, 2009).

\$9,066 during the 2004-2005 academic year- a 34 percent increase.<sup>31</sup> After factoring in an Idaho student's financial aid, 22 percent of the average family income will be needed to pay for that student's college education.<sup>32</sup> Moreover, Pell grants and other federal assistance covered only 45 percent of costs for the 2004-2005 academic year, compared to 56 percent in 1986-1987.<sup>33</sup> "In such an environment, taxpayer-subsidized tuition is extremely valuable, reducing what could otherwise constitute a crippling financial burden."<sup>34</sup> Providing in-state tuition benefits to illegal alien students would result in incredible costs to Idaho taxpayers, as is evidenced in California where state taxpayers contribute over \$100 million a year to pay to educate thousands of illegal aliens.<sup>35</sup>

Perhaps the most troubling aspect of rewarding in-state tuition benefits to illegal aliens is that it would deprive those same benefits to American citizens from outside the state of Idaho, while simultaneously rewarding the illegal behavior of those students who reside unlawfully in the state. Obviously, this is a benefit that most Idaho taxpayers would rather give to "law-abiding U.S. citizens from out of the state, who can legally settle and work in the state after graduation."<sup>36</sup> While proponents of giving in-state tuition rates to illegal aliens cite compassion as a rationale for their stance, should compassion not also apply to those who have consistently followed the rules, whether it is an American student in Montana that would like to attend college in Idaho, or a law abiding foreign student with a visa?

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<sup>31</sup> Democratic Policy Committee, *The College Cost Crunch: A State-by-State Analysis of Rising Tuition and Student Debt*, June 28, 2006, available at [http://democrats.senate.gov/dpc/dpc-new.cfm?doc\\_name=sr-109-2-91](http://democrats.senate.gov/dpc/dpc-new.cfm?doc_name=sr-109-2-91).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 GEO. IMMIGR. L.J. 473, 499 (2006-2007) [hereinafter Kobach, *Immigration Nullification*].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 500.

Finally, proponents of in-state tuition rates claim taxpayers are educating individuals who will stay in the United States and become a more valuable addition to the American workforce.<sup>37</sup> However, illegal students who graduate are still *illegal* even after graduation, and they are subject to deportation at any time.<sup>38</sup> Moreover, to add insult to injury, even if these individuals manage to evade authorities and apply for college-graduate level jobs, most employers that hire college graduates will be hesitant to employ individuals without proper work authentication.<sup>39</sup>

**The burdensome costs imposed upon state and local governments by illegal aliens who enter the country and undercut the American labor force by working for menial wages, not paying taxes, and absorbing welfare services, are born most heavily by taxpaying citizens.**

Currently, the unemployment rate in the United States is 10.2 percent, and Americans face the worst job market that the country has experienced in 25 years.<sup>40</sup> As of 2005, an estimated 35,000 illegal immigrants were part of Idaho's workforce.<sup>41</sup> That same year, The Pew Hispanic Center estimated that number could be even higher, placing the unauthorized migrant population in Idaho to be anywhere between 25,000 to 45,000.<sup>42</sup> Consequently, each time an illegal alien, particularly those employed illegally by an American business, can be encouraged to leave the United States for his or her country of origin, a door opens for a legal worker.

Furthermore, illegal immigration places mammoth economic and social pressures on states all over the nation, Idaho included. In difficult economic times, where there are little

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<sup>37</sup> *Id.* at 502.

<sup>38</sup> *Id.* at 502.

<sup>39</sup> *Id.* at 503.

<sup>40</sup> FAIR, *Amnesty and Joblessness*, [http://www.fairus.org/site/PageNavigator/issues/illegal\\_immigration/](http://www.fairus.org/site/PageNavigator/issues/illegal_immigration/) (last visited Dec. 16, 2009).

<sup>41</sup> Sean Alfano, *County Takes on Illegal Immigrants: Idaho County Sues Agriculture Companies that Hire Illegal Workers*, CBSNews.com, Oct. 27, 2005 [hereinafter Alfano, *County Takes on Illegal Immigrants*]. <http://www.cbsnews.com/stories/2005/10/27/eveningnews/main989910.shtml> (last visited Dec. 16, 2009).

<sup>42</sup> Pew, *Estimates*, *supra* note 1.

funds available to provide assistance to taxpaying Idaho citizens, services absorbed by the demands of illegal immigrants stretch those funds for welfare, education, law enforcement, health care, and employment to the brink.<sup>43</sup> Take for example, Idaho's Limited English Proficiency (LEP) program for public schoolchildren, which has experienced a surge in enrollment, and a consequent need for added funds.<sup>44</sup> The second most widely spoken language in Idaho is Shoshone, yet Spanish is the native tongue of over 74 percent of the students enrolled in the LEP programs.<sup>45</sup> "There is no other change in the flow of foreigners into the country other than the flow of illegal immigrants that would explain this surge in LEP enrollment. Thus, a large majority of the expenditures on LEP students is likely a cost that can be attributed to the children of illegal immigrants, whether or not these children were born abroad or in the United States."<sup>46</sup>

Ultimately, these programs must not only meet the needs of taxpaying Idaho citizens, but they must also absorb the demands of illegal aliens who have broken the law to enter the country, and then break the law again by exploiting support programs to which they have no legal privileges.<sup>47</sup>

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<sup>43</sup> McGee, *Address*, *supra* note 18.

<sup>44</sup> Jack Martin, *Limited English Proficiency Enrollment and Rapidly Rising Costs*, FAIR Report, available at [http://www.fairus.org/site/DocServer/LEP\\_Special\\_Report.pdf?docID=1581](http://www.fairus.org/site/DocServer/LEP_Special_Report.pdf?docID=1581) (last visited Dec. 16, 2009).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> McGee, *Address*, *supra* note 18.

## **Constitutional Analysis at the Federal and Idaho State Level**

Immigration legislation is a field in which, “the federal government enjoys plenary authority under Article I of the U.S. Constitution; state statutes must be carefully drafted to avoid federal preemption.”<sup>48</sup> Still, states must heed caution because there are restrictions on how far state and local governments may go in enforcing immigration laws. The “power to regulate immigration is unquestionably exclusively a federal power,” and state laws cannot make criteria that determines “who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”<sup>49</sup> Nor may states impose “criminal penalties on the employers of unauthorized aliens” because federal law preempts both.<sup>50</sup>

Even though federal law preempts some state laws regarding immigration, an abundance of areas remain that states are entitled to regulate. The United States Supreme Court “has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised.”<sup>51</sup> The court went even further and stated:

We will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship [concerning unauthorized aliens] in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws--was “the clear and manifest purpose of Congress” would justify that conclusion. Respondents have not made that demonstration. They fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.<sup>52</sup>

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<sup>48</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 464.

<sup>49</sup> *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976).

<sup>50</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 464.

<sup>51</sup> *De Canas* at 355.

<sup>52</sup> *Id.* at 357-58.

Thus, the eight areas in which states may constitutionally act in the field of immigration are:

- A. Denying public benefits to illegal aliens
- B. Denying resident tuition rates to illegal aliens
- C. Prohibiting the employment of unauthorized aliens
- D. Enacting state-level crimes that mirror federal immigration crimes
- E. Enacting state-level crimes against identity theft
- F. Providing state and local law enforcement assistance to ICE
- G. Presuming illegal aliens to be flight risks for bail purposes
- H. Denying drivers licenses to illegal aliens<sup>53</sup>

In these eight areas, there are three important restrictions that states must follow in order to “conform to the requirements of federal law and avoid preemption.”<sup>54</sup> First, “the statute must not attempt to create any new categories of aliens not recognized by federal law.”<sup>55</sup> Next, “the statute must use terms consistent with federal law.” Finally, “the statute must not attempt to authorize state or local officials to independently determine an alien's immigration status, without verification by the federal government.”<sup>56</sup>

#### *A. Denying Public Benefits to Illegal Aliens*

In 1996, Congress enacted 8 U.S.C. §§ 1601-1622, which mandated that illegal aliens are “not eligible for any State or local public benefits.”<sup>57</sup> The statute instructs state and local governments to deny the following benefits to illegal aliens:

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<sup>53</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 465.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 8 U.S.C. §§ 1601-1622.

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.<sup>58</sup>

A handful of exceptions apply to emergency medical assistance, emergency disaster relief, and immunizations.<sup>59</sup> In addition, “since the 1982 decision of the U.S. Supreme Court in *Plyler v. Doe*, states have been required to provide free K-12 education to illegal alien children.”<sup>60</sup>

In order to implement these provisions, “the federal government expanded the Systematic Alien Verification for Entitlements (SAVE) Program” pursuant “to the Immigration Reform and Control Act (IRCA).”<sup>61</sup> The SAVE Program uses “a massive automated database that state and local government agencies can consult, via internet, to determine whether an alien is lawfully present in the United States and entitled to receive the benefits in question.”<sup>62</sup>

Two U.S. district courts “have confirmed the authority of states to enact statutes that deny public benefits to illegal aliens.”<sup>63</sup> In *Friendly House v. Napolitano*<sup>64</sup>, the Court upheld “Arizona’s Proposition 200 against a preemption challenge” and “concluded that Congress clearly intended that states should verify the status of aliens seeking public benefits.”<sup>65</sup>

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<sup>58</sup> 8 U.S.C. § 1622(c).

<sup>59</sup> 8 U.S.C. § 1622(b).

<sup>60</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 467.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 468.

<sup>64</sup> *Friendly House v. Napolitano*, 419 F.3d 930 (9<sup>th</sup> Cir. 2005).

<sup>65</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 468.

In *LULAC v. Wilson*<sup>66</sup>, the Court found that “benefits denial provisions were not an impermissible regulation of immigration and therefore withstood scrutiny under the first *De Canas* test.”<sup>67</sup> The Court went on to say that “[t]he benefits denial provisions of Proposition 187 may therefore be implemented without impermissibly regulating immigration if state agencies, in verifying for services and benefits, rely on federal determinations made by the INS and accessible through SAVE.”<sup>68</sup> These judicial decisions confirm that the states can deny public benefits “if they follow the requirements of federal law and deny public benefits to illegal aliens, using the SAVE program to verify with the federal government the legal status of any alien applicant.”<sup>69</sup>

Idaho already adheres to federal law by denying the benefit of worker’s compensation to illegal aliens. Under the Idaho Statute,

[B]enefits shall not be payable on the basis of services performed by an alien unless the alien was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time the services were performed.<sup>70</sup>

Thus, if Idaho law abides by 8 U.S.C. §§ 1601-1622 and does not deny illegal aliens emergency medical assistance, emergency disaster relief, immunizations and K-12 education, Idaho is fully within its right to deny public benefits to illegal aliens.

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<sup>66</sup> *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755 (C.D. Cal. 1995).

<sup>67</sup> *Id.* at 770.

<sup>68</sup> *Id.*

<sup>69</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 468.

<sup>70</sup> Idaho Code Ann. § 72-1366 (2009).

### *B. Denying Resident Tuition Rates to Illegal Aliens*

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). In order to “prevent states from extending in-state tuition eligibility to illegal aliens, IIRIRA’s sponsors inserted a section that prohibited any state from doing so, unless the state also provided the same discounted tuition to all U.S. citizens”<sup>71</sup>:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.<sup>72</sup>

Ultimately, if a state wished to make in-state tuition rates available to any illegal alien, it would have to make the benefit available to all nonresident U.S. citizens and nationals.

In 2004, the U.S. District Court for the Eastern District of Virginia “found that a Virginia policy denying postsecondary education benefits to illegal aliens was permissible under federal law.”<sup>73</sup> The Court reasoned that because the Virginia policy “adopted federal standards for classifying aliens and deferred to federal determinations of alien status” it was secure on constitutional grounds.<sup>74</sup> Currently under Idaho law, illegal aliens do not qualify as residents, and thus, they are unable to receive in-state tuition. The Idaho statute, which defines “nonresident students” states:

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<sup>71</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 469.

<sup>72</sup> 8 U.S.C. § 1623 (West 2008).

<sup>73</sup> *Equal Access Education v. Merten*, 305 F. Supp.2d 585, (2004).

<sup>74</sup> *Id.* at 603.

A person who is not a citizen of the United States of America, who does not have permanent or temporary resident status or does not hold "refugee-parolee" or "conditional entrant" status with the United States immigration and naturalization service or is not otherwise permanently residing in the United States under color of the law and who does not also meet and comply with all applicable requirements of this section.

IIRIRA permits Idaho from denying in-state tuition to illegal aliens, but if Idaho were to provide in-state tuition to illegal aliens, the state would have to make the benefit available to every student in the United States.

*C. Prohibiting the Employment of Unauthorized Aliens*

8 U.S.C. § 1324a(h)(2) expressly preempts states from imposing criminal penalties on the employers of unauthorized aliens, but it also expressly allows states to impose penalties such as a suspension or loss of business license. The federal law states:

Preemption. The 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.<sup>75</sup>

Therefore, a state statute or local ordinance, which only suspends the business license and relies only on “the federal government’s determination of any alien’s employment authorization[,] will not be preempted.”<sup>76</sup>

In *Ariz. Contractors Ass’n v. Candelaria*, the District Court denied a preemption challenge of an Arizona law, which requires E-Verify participation and prohibits the knowingly

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<sup>75</sup> 8 U.S.C. § 1324a(h)(2)

<sup>76</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 473.

employment of unauthorized aliens.<sup>77</sup> The Court reasoned that the state was within its authority to require the use of E-Verify:

Federal policy encourages the utmost use of E-Verify. The [state] Act effectively increases employer use of the system with no evidence of surpassing logistical limits, and it does so in the context of a licensing sanction law that is within the police power of the states as expressly recognized by IRCA.<sup>78</sup>

To further this point in *Gray v. Valley Park*, the Eastern District of Missouri upheld the City of Valley Park's ordinance, which suspended the business licenses of employers who knowingly employ unauthorized aliens.<sup>79</sup> The Court concluded, "The Ordinance at issue is not preempted by federal law, to the contrary, federal law specifically permits such licensing laws."<sup>80</sup>

Idaho already prohibits illegal aliens from working on public works projects. Under the statute, "no person not a citizen of the United States, or who has not declared his intention to become such, or who is not eligible to become such, shall be employed upon any state or municipal works; nor shall any such person be employed by any contractor to work on any public works of the state or any municipality."<sup>81</sup> Idaho has the right to prohibit the employment of unauthorized aliens and already does to some extent. For Idaho to do this, they must not impose criminal penalties on the employers because federal law would preempt it, but Idaho is expressly allowed to impose penalties such as a suspension or loss of business license.

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<sup>77</sup> *Ariz. Contractors Ass'n v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008).

<sup>78</sup> *Id.* at 1057.

<sup>79</sup> *Gray v. Valley Park*, LEXIS 7238 (E.D. Mo. Jan. 31, 2008).

<sup>80</sup> *Id.* at 101.

<sup>81</sup> Idaho Code Ann. § 44-1005 (2009).

#### *D. Enacting State-Level Crimes that Mirror Federal Crimes*

The States “possess the authority to criminalize particular conduct concerning illegal immigration, if they do so in a way that mirrors the terms of federal law.”<sup>82</sup> The State “can utilize state and local law enforcement agencies to enforce these state crimes, thereby reinforcing the efforts of federal law enforcement agencies.”<sup>83</sup>

The Ninth Circuit Court stated that when “state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized.”<sup>84</sup> It further stated that when “federal and local enforcement have identical purposes,” preemption does not occur.<sup>85</sup> Judge Learned Hand stated it best when he wrote, “it would be unreasonable to suppose that [the federal government’s] purpose was to deny itself any help that the states may allow.”<sup>86</sup>

In a recent example, Arizona passed the Arizona Human Smuggling Statute of 2005, which created a state crime prohibiting the smuggling of illegal aliens.<sup>87</sup> The Court upheld the Arizona statute against a preemption challenge because it prohibited the same activity prohibited by federal immigration law:

Concurrent state and federal enforcement of illegal alien smuggling and conspiracy to smuggle illegal alien laws serves both federal and state law enforcement purposes and is highly compatible. In fact, concurrent enforcement enhances rather than impairs federal enforcement objectives. Thus, because federal and State enforcement have compatible purposes, and Congress has not expressly preempted state prosecution of such conduct, preemption does not exist.<sup>88</sup>

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<sup>82</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 475.

<sup>83</sup> *Id.*

<sup>84</sup> *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983).

<sup>85</sup> *Id.*

<sup>86</sup> *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928).

<sup>87</sup> Ariz. Rev. Stat. §13-2319 (West 2008).

<sup>88</sup> *Arizona v. Salazar*, C.R. 2006-005932-003DT, Slip Op. at 9 (Ariz. Super. Ct., June 9, 2006)

To illustrate this even further, the Idaho Supreme Court wrote when dealing with a federal statute that conferred “exclusive jurisdiction on federal government over Indians charged with larceny did not create federal jurisdiction over crime of possession of stolen property.”<sup>89</sup> Thus, Idaho is fully permitted to enact state-level crimes that mirror federal crimes so long as the federal and local law enforcement has an identical purpose.

*E. Enacting State Laws that Prohibit Identity Theft and the Use of False Documents in the Employment Context*

Defining and prosecuting the crime of identity theft is within the “state’s police powers, there is little dispute that a state may define that crime so as to apply within the employment context.”<sup>90</sup> To show this, all fifty states and the District of Columbia have enacted identity theft laws,<sup>91</sup> including Idaho, which makes it illegal to receive money or property under false personation.<sup>92</sup> A preemption challenge to a state’s identity theft statute “would be difficult, if not impossible, to mount successfully.”<sup>93</sup>

*F. Providing State and Local Law Enforcement Assistance to ICE*

There are three ways states and cities can assist the Immigrations and Customs Enforcement:

“(1) By directing their law enforcement agencies to utilize their inherent arrest authority more frequently, (2) by entering into so-called “Section 287(g) agreements” with ICE so that their officers can exercise the delegated authority of federal immigration officers, and (3) by prohibiting sanctuary cities. It must be noted at the outset that inherent arrest authority and Section 287(g) authority are two very different authorities.”<sup>94</sup>

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<sup>89</sup> State v. Major, 111 Idaho 410, 417 (Idaho 1987).

<sup>90</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 477.

<sup>91</sup> 2005 State Identity Theft Laws & Statutes, (2009). <http://www.identity-theft-advisor.com/state-laws.htm>

<sup>92</sup> Idaho Code Ann. § 18-3002 (2009).

<sup>93</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 477.

<sup>94</sup> *Id.* at 478.

First, “the inherent arrest authority of states and localities is simply the power to arrest an illegal alien who is removable, detain the alien temporarily, and then transfer the alien to the custody of the ICE.”<sup>95</sup> Many “federal courts of appeals, as well as by the Office of Legal Counsel of the U.S. Department of Justice” recognize this authority.”<sup>96</sup> In *United States v. Salinas-Calderon*, the Court ruled it was legal for a state trooper to detain a passenger while he inquired into federal immigration matters and question the defendant about his green card.<sup>97</sup> The Court ruled that “a state trooper has general investigatory authority to inquire into possible immigration violations,” and in this case “the trooper's question about the green card was reasonable under the circumstances, and thus lawful.”<sup>98</sup>

In Idaho, the court ruled that near the Canada border when “an officer has reason to suspect that a particular vehicle may contain aliens ... he may stop the car briefly and investigate the circumstances that provoke suspicion.”<sup>99</sup> Furthermore, the court went on to write when an officer is on roving patrol they may stop vehicles “if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”<sup>100</sup> The Court outlined some “factors that may constitute reasonable suspicion warranting a stop, such as characteristics of the area, proximity to the border, previous experience with alien traffic, information about recent crossings, the driver's behavior while driving, an extraordinary number of passengers, etc.”<sup>101</sup> Therefore, Idaho, through the inherent arrest authority and the Idaho courts, has the power to investigate, arrest, and then transfer an illegal alien to the custody of ICE for deportation.

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *United States v. Salinas-Calderon*, 728 F.2d 1298 (10<sup>th</sup> Cir. 1984)

<sup>98</sup> *Id.* at 1301.

<sup>99</sup> *State v. Bordeaux*, 148 Idaho 1, 7 (Idaho App. 2009)

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

Secondly, States can enter into Section 287(g) agreements, which “deputizes officers of the state or local law enforcement agency to perform the “function[s] of an immigration officer.”<sup>102</sup> Section 287(g) includes:

Not only the power to arrest and transfer, but also the power to investigate immigration violations, the power to collect evidence and assemble an immigration case for prosecution or removal, the power to take custody of aliens on behalf of the federal government, and other general powers involved in the routine enforcement of immigration laws.<sup>103</sup>

Finally, States can “also enact legislation to ensure that their municipalities do not become so-called “sanctuary cities” which refuse to communicate any illegal alien’s immigration status to the federal government.”<sup>104</sup> Congress “outlawed such sanctuary policies in 1996”<sup>105</sup> and “such statutes need only reiterate the terms of federal law, found at 8 U.S.C. §§ 1373(a)-(b) and 1644, and provide disincentives for municipalities that violate the state statutes.”<sup>106</sup>

#### *G. Presuming Illegal Aliens to be Flight Risks for Bail Purposes*

In these statutes, it directs “state courts to presume that an illegal alien is a flight risk when making bail determinations.”<sup>107</sup> These statutes “serve the purpose of reinforcing federal immigration law,” and “the state’s independent law enforcement objectives.”<sup>108</sup> An “extraordinary number of illegal aliens either do not show up for their hearings before immigration courts or do not present themselves for removal upon the issuance of a removal

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<sup>102</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 478.

<sup>103</sup> 8 U.S.C. § 1357

<sup>104</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 479.

<sup>105</sup> 8 U.S.C. § 1373(a)-(b) (West 2009); 8 U.S.C. § 1644 (West 2009).

<sup>106</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 479-80.

<sup>107</sup> *Id.* at 480.

<sup>108</sup> *Id.*

order,” and with such “a high absconding rate drives up the probability that any given illegal alien charged with a state offense may flee.”<sup>109</sup>

In Idaho, when considering bail the Court must “satisfy itself that defendant's release would not constitute a menace to society and that the defendant is not likely to flee.”<sup>110</sup> When looking into whether a defendant is likely to flee the court considers “(1) the defendant's ties to the community, including his employment, the duration of his residence, his family attachments and his property holdings; (2) the defendant's record of appearance at past court hearings or of flight to avoid prosecution.”<sup>111</sup> Thus, by directing Idaho state judges to presume that illegal aliens pose a flight risk, the court can ensure that illegal aliens charged with a crime will be present at trial and not flee.

#### *H. Denying Driver's Licenses to Illegal Aliens*

In 2005 Congress enacted the “REAL ID” Act, “which denies the use of a state's driver's licenses for access to commercial airplanes and access to federal buildings, if that state issues its licenses to illegal aliens.”<sup>112</sup> Furthermore, the REAL ID Act “encourages states to cause driver's licenses that are issued to aliens lawfully present in the United States to expire when the aliens' authorized periods of stay expire.”<sup>113</sup> Thus, there is “explicit inducements in federal law that encourages states to deny driver's licenses to illegal aliens,” and there are implicit requirements in federal law to compel the “states to deny driver's licenses to illegal aliens, in states where issuance of a driver's license entails recognition of the holder's residency.”<sup>114</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> State v. Kerrigan, 98 Idaho 701, 706 (Idaho 1977).

<sup>111</sup> *Id.*

<sup>112</sup> REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (West 2009).

<sup>113</sup> *Id.* § 202(c)(2)(C).

<sup>114</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 482.

In Idaho, it is not lawful to “issue any driver’s license, any instruction permit, privileges or right to drive and if issued, may revoke or cancel the driver’s license of a person who” is not a resident of the Idaho or “not lawfully present in the United States.”<sup>115</sup> Idaho is fully within its right to deny driver’s license to illegal aliens and the “Real ID” Act induces this through implicit requirements that deny states that permits an illegal alien to have a driver’s license entry onto commercial airplanes and entry into federal buildings.

### *Conclusion*

The power to regulate immigration is exclusively a federal power, and state laws may not make criteria to determine who should or should not be admitted into the United States, and the conditions under which a legal entrant may remain. Federal law also preempts the states from imposing criminal penalties on the employers of unauthorized aliens.

However, the states may pass legislation on Immigration in eight areas. The states may deny public benefits to illegal aliens, deny resident tuition rates to illegal aliens, prohibit the employment of unauthorized aliens, enact state-level crimes that mirror federal immigration crimes, enact state-level crimes against identity theft, provide state and local law enforcement assistance to ICE, presume illegal aliens to be flight risks for bail purposes, and they may deny driver licenses to illegal aliens.

In these eight areas, there are three important restrictions. The statute must not attempt to create any new categories of aliens not recognized by federal law, it must use terms consistent with federal law, and it must not attempt to authorize state or local officials to independently determine an alien's immigration status, without verification by the federal government.

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<sup>115</sup> Idaho Code Ann. § 49-303 (2009).

## **SUMMARY OF IMMIGRATION LEGISLATION IN OTHER STATES**

### **State Comparison:**

Bills concerning illegal immigration have been proposed in all fifty states. However, states must comport with the boundaries laid out by Congress and the principles of federal preemption. Because immigration is an area in which the federal government is given authority under Article I of the United States Constitution, state statutes must be drafted in a way to avoid federal preemption. Because of this, not all bills proposed in the fifty states are permissible under federal law.<sup>116</sup>

There are eight distinct areas in which a state or municipality can enact immigration law in ways that does not offend the U.S. Constitution. These areas are:

1. Denying public benefits to illegal aliens;
2. Denying resident tuition rates to illegal aliens;
3. Prohibiting the employment of unauthorized aliens;
4. Enacting state-level crimes that mirror federal immigration crimes;
5. Enacting state-level crime against identity theft;
6. Providing state and local law enforcement assistance to ICE;
7. Presuming illegal aliens to be flight risks for bail purposes; and
8. Denying driver licenses to illegal aliens.

In each of these eight areas, there are three restrictions that are required in any state statute in order to adhere to federal requirements and avoid preemption: (1) the statute cannot attempt to created any new categories of aliens not recognized by federal law; (2) the statute must use terms consistent with federal law; and (3) the statute cannot attempt to authorize state or local officials to independently determine an alien's immigration status without verification by the federal government.<sup>117</sup>

To date, there are three states that have passed statutes that deal with all of the eight areas mentioned above: Arizona, Oklahoma, and Missouri. Oklahoma and Missouri enacted omnibus immigration bills in 2007 and 2008, respectively, while Arizona passed a series of bills from 2004 through 2007. Most of the remaining states have enacted bills that cover one or more of the eight acceptable areas of legislation. Additionally, several municipalities and counties have passed legislation in one or more of these areas.<sup>118</sup>

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<sup>116</sup> Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 464.

<sup>117</sup> *Id.* at 465.

<sup>118</sup> *Id.*

## ***1. DENYING PUBLIC BENEFITS TO ILLEGAL ALIENS***

### **Arizona**

#### *Proposition 200*

Arizona's Proposition 200 denies the vast majority of public benefits to illegal aliens, including Medicare, Medicaid, unemployment insurance, housing benefits, food assistance, commercial licenses, and numerous other public benefits. Several other states have enacted similar statutes.

### **Colorado**

*"Colorado Restrictions on Public Benefits Act"; Colo. Rev. Stat. 24-76.5-103*

*"(1) Except as otherwise provided in subsection (3) of this section or where exempted by federal law, on and after August 1, 2006, each agency or political subdivision of the state shall verify the lawful presence in the United States of each natural person eighteen years of age or older who applies for state or local public benefits or for federal public benefits for the applicant."*

### **Georgia**

*"Georgia Security and Immigration Compliance Act"; O.C.G.A. 50-36-1*

*"(a) Except as provided in subsection (c) of this Code section or where exempted by federal law, on or after July 1, 2007, every agency or political subdivision of this state shall verify the lawful presence in the United States of any natural person 18 years of age or older who has applied for state or local public benefits, as defined in 8 U.S.C. Section 1621 or for federal public benefits, as defined in 8 U.S.C. Section 1611, is administered by an agency or a political subdivision of this state."*

### **Oklahoma**

*"Oklahoma Taxpayer and Citizen Protection Act"; 56 Okla. Stat. Ann. 71*

*"A. Except as provided in subsection C of this section or where exempted by federal law, every agency or a political subdivision of this state shall verify the lawful presence in the United States of any natural person fourteen (14) years of age or older who has applied for state or local public benefits, as defined in 8 U.S.C., Section 1621, or for federal public benefits, as defined in 8 U.S.C., Section 1611, that is administered by an agency or a political subdivision of this state."*

## Missouri

*Rev. Stat. Mo. 208.009*

**“1. No alien unlawfully present in the United States shall receive any state or local public benefit, except for state or local public benefits that may be offered under 8 U.S.C., Section 1621(b). Nothing in this section shall be construed to prohibit the rendering of emergency medical care, prenatal care, services offering alternatives to abortion, emergency assistance, or legal assistance to any person.”**

### **2. DENYING RESIDENT TUITION RATES TO ILLEGAL ALIENS**

## Arizona

*Proposition 300*

“15-1803. Alien in-state student status

B. In accordance with the Illegal Immigration Reform and Immigrant Responsibility Act Of 1996 (P.L. 104-208; 110 STAT. 3009), ***a person who was not a citizen or legal resident of the United States or who is without lawful immigration status is not entitled to classification as an in-state student*** pursuant to Section 15-1802 or entitled to classification as a county resident pursuant to Section 15-1802.01.”

## Missouri

*Rev. Stat. Mo. 173.1110*

**“1. No covered student unlawfully present in the United States shall receive a postsecondary education public benefit.** Educational institutions awarding postsecondary education public benefits to covered students shall verify that these students are United States citizens, permanent residents, or lawfully present in the United States.”

## South Carolina

**“No state or other appropriated funds authorized in this act or authorized in any state law may be used to provide illegal aliens tuition assistance, scholarships, or any form of reimbursement of student expenses for enrolling in or attending an institution of higher learning in this State.”**

## Virginia

*Policy denying postsecondary education benefits to illegal aliens found to be permissible; Equal Access Education v. Merten, 305 F. Supp.2d 585, 603 (2004).*

***“... it is clear...that there is no Supremacy Clause bar to a state admissions policy that denies admission to illegal aliens, provided that in doing so, the institutions implementing the policy adopt federal immigration standards.*** This case turns, therefore, on whether defendants' admissions policies simply adopt federal standards, in which case they are not invalid under the Supremacy Clause, or instead create and apply state standards to assess the immigration status of applicants, in which case the policies may run afoul of the Supremacy Clause.”

- It is worth mentioning that ten states have violated federal law by rewarding illegal aliens with benefits of taxpayer-subsidized college educations. These ten states are California, Texas, New York, Illinois, Washington, Utah, Oklahoma, Kansas, New Mexico, and Nebraska.<sup>119</sup>

### **3. PROHIBITING THE EMPLOYMENT OF UNAUTHORIZED ALIENS**

#### **Arizona**

*Ariz. Rev. Stat. 23-212*

**“A.** An employer shall not knowingly employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer knowingly contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.”

\*Arizona was the first state to require all employers to verify the employment authorization of newly-hired workers through the federal government’s “E-Verify” system.<sup>120</sup>

#### **Mississippi**

*“Mississippi Employment Protection Act, S.B. 2988”*

**“(4) (a)** Employers in the State of Mississippi shall only hire employees who are legal citizens of the United States of America or are legal aliens. For purposes of this section, a legal alien is an individual who was lawfully present in the United States at the time of employment and for the duration of employment, or was permanently residing in the United States under color of law at the time of employment and for the duration of employment.

**(b) (i)** Every employer shall register with and utilize the status verification system to verify the federal employment authorization status of all newly hired employees.

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<sup>119</sup> *Id. at 469.*

<sup>120</sup> *Id. at 471.*

(ii) No contractor or subcontractor shall hire any employee unless the contractor or subcontractor registers and participates in the status verification system to verify the work eligibility status of all newly hired employees.

(iii) No contractor or subcontractor who enters into a contract with a public employer shall enter into such a contract or subcontract unless the contractor or subcontractor registers and participates in the status verification system to verify information of all newly hired employees.”

Municipalities have also taken Arizona’s lead in prohibiting employers from employing illegal aliens. The most notable municipal ordinances enacted in this area are Hazleton, Pennsylvania, and Valley Park, Missouri.<sup>121</sup>

#### **4. ENACTING STATE-LEVEL CRIMES THAT MIRROR FEDERAL CRIMES**

##### **Arizona**

“*Arizona Human Smuggling Statute of 2005*”; *Ariz. Rev. Stat. § 13-2319*

“**A.** It is unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose...

3. “Smuggling of human beings” means the transportation, procurement of transportation or use of property or real property by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state or have attempted to enter, entered or remained in the United States in violation of law.”

##### **Georgia**

*O.C.G.A. § 16-5-46*

“(b) A person commits the offense of trafficking a person for labor servitude when that person knowingly subjects or maintains another in labor servitude or knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person for the purpose of labor servitude.”

##### **Oklahoma**

*Oklahoma H.B. 1804; 21 Okla. Stat. 446 (mirrors 8 U.S.C. § 1324(a)(1)(A))*

“**A.** It shall be unlawful for any person to transport, move, or attempt to transport in the State of Oklahoma any alien knowing or in reckless disregard of the fact that the alien has come to,

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<sup>121</sup> *Id. at 472.*

entered, or remained in the United States in violation of law, in furtherance of the illegal presence of the alien in the United States.

B. It shall be unlawful for any person to conceal, harbor, or shelter from detection any alien in any place within the State of Oklahoma, including any building or means of transportation, knowing or in reckless disregard of the fact that the alien has come to, entered, or remained in the United States in violation of law.”

### **Utah**

*Utah Stat. Ann. 76-10-2701 (mirrors 8 U.S.C. § 1324(a)(1)(A))*

“(2) It is unlawful for a person to:

(a) transport, move, or attempt to transport into this state or for a distance of greater than 100 miles within the state an alien for commercial advantage or private financial gain, knowing or in reckless disregard of the fact that the alien is in the United States in violation of federal law, in furtherance of the illegal presence of the alien in the United States; or

(b) knowingly, with the intent to violate federal immigration law, conceal, harbor, or shelter from detection an alien in a place within this state, including a building or means of transportation for commercial advantage or private financial gain, knowing or in reckless disregard of the fact that the alien is in the United States in violation of federal law.”

### **5. ENACTING STATE LAWS THAT PROHIBIT IDENTITY THEFT AND THE USE OF FALSE DOCUMENTS IN THE EMPLOYMENT CONTEXT**

All fifty states have some version of an identity theft offense codified into statute. Identity theft falls squarely within the limits of a state’s police power, so it is nearly impossible for a preemption challenge to succeed, and these statutes go a long way to discourage illegal aliens from residing and seeking employment within the United States.<sup>122</sup>

### **6. PROVIDING STATE AND LOCAL LAW ENFORCEMENT ASSISTANCE TO ICE**

States and municipalities can enter into “Section 287(g) agreements” with ICE. These agreements give authority that is much broader than the power to arrest an illegal alien and transfer him to ICE custody. Any state or municipality can enter into a formal Memorandum of Understanding (MOU) with ICE, which effectively deputizes officers of the local law enforcement agency to perform the “functions of an immigration officer,” under Section 287(g) of the Immigration and Nationality Act. States that have implemented Section 287(g)

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<sup>122</sup>Kobach, *Reinforcing the Rule of Law*, *supra* note 27 at 477-78.

agreements are Alabama, Florida, Colorado, Arizona, and Georgia, along with numerous counties.

States may also maximize inherent arrest authority in local law enforcement. Missouri and Utah are two states that have taken this approach.

### **Missouri**

*Rev. Stat. Mo. 577.900*

“Law enforcement officers are required to verify the legal status of individuals charged and confined to jail. If the law enforcement agency cannot determine the individual’s status by using documents the individual possesses, the agency must submit a verifying request to the Department of Homeland Security within 48 hours.

Individuals determined to be undocumented will be reported to the Department of Homeland Security. Until August 28, 2009, this will only apply to the Highway Patrol, Water Patrol, Capitol Police, the Fire Marshal’s Office and the Division of Alcohol and Tobacco Control. After August 28, 2009, it will apply to all Missouri law enforcement officers and agencies.”

### **Utah**

*Utah Code Ann. 17-22-9.5*

“(1) The sheriff shall make a reasonable effort to determine the citizenship status of a person charged with a felony or driving under the influence under [Section 41-6a-502](#) when the person is confined to the county jail for a period of time.

(2) If the confined person is a foreign national, the sheriff shall make a reasonable effort to verify that the person:

(a) has been lawfully admitted into the United States; and

(b) the person's lawful status has not expired.

(3)(a) If the sheriff cannot verify the confined person's lawful status from documents in the person's possession, the sheriff shall attempt to verify that status within 48 hours of the person's confinement at the jail through contacting:

(i) the Law Enforcement Support Center of the United States Department of Homeland Security; or

(ii) an office or agency designated for citizenship status verification by the United States Department of Homeland Security.

(b) The sheriff shall notify the United States Department of Homeland Security of a person whose lawful citizenship status cannot be verified under Subsection (2) or (3)(a). “

Additionally, states may pass legislation ensuring that their municipalities will not become “sanctuary cities” that do not disclose illegal alien’s immigration status to the federal government. Missouri and Oklahoma are states that have enacted such legislation.

### **Missouri**

*Rev. Stat. Mo. 67.307*

“2. No municipality shall enact or adopt any sanctuary policy. Any municipality that enacts or adopts a sanctuary policy shall be ineligible for any moneys provided through grants administered by any state agency or department until the sanctuary policy is repealed or is no longer in effect. Upon the complaint of any state resident regarding a specific government entity, agency, or political subdivision of this state or prior to the provision of funds or awarding of any grants to a government entity, agency, or political subdivision of this state, any member of the general assembly may request that the attorney general of the State of Missouri issue an opinion stating whether the government entity, agency, or political subdivision has current policies in contravention of this section.”

### **Oklahoma**

*74 Okla. Stat. 20j*

“C. No local government, whether acting through its governing body or by an initiative, referendum, or any other process, shall enact any ordinance or policy that limits or prohibits a law enforcement officer, local official, or local government employee from communicating or cooperating with federal officials with regard to the immigration status of any person within this state.”

## **7. PRESUMING ILLEGAL ALIENS TO BE FLIGHT RISKS FOR BAIL PURPOSES**

### **Missouri**

*Rev. Stat. Mo. 544.470*

“2. There shall be a presumption that releasing the person under any conditions as provided by section 544.455 shall not reasonably assure the appearance of the person as required if the circuit judge or associate circuit judge reasonably believes that the person is an alien unlawfully present in the United States. If such presumption exists, the person shall be committed to the jail, as provided in subsection 1 of this section, until such person provides verification of his or her lawful presence in the United States to rebut such presumption. If the person adequately proves his or her lawful presence, the circuit judge or associate circuit judge shall review the issue of release, as provided under section 544.455, without regard to previous issues concerning whether

the person is lawfully present in the United States. If the person cannot prove his or her lawful presence, the person shall continue to be committed to the jail and remain until discharged by due course of law.”

## **Utah**

*Utah Code Ann. 17-22-9.5*

“(4) It is a rebuttable presumption for the purpose of determining the grant or issuance of a bond that a person who is verified under this section as a foreign national not lawfully admitted into the United States is at risk of flight.”

### **8. DENYING DRIVER’S LICENSES TO ILLEGAL ALIENS**

Forty-two states have enacted statutes that deny driver’s licenses to illegal aliens. The eight states allow illegal aliens to acquire state driver’s licenses are Hawaii, Maine, Maryland, Michigan, New Mexico, Oregon, Utah, and Washington. However, many of the 42 states that deny driver’s licenses to illegal aliens have yet to adjust their state laws to require that licenses for legal aliens expire when their authorized stay in the United States ends. Also, some states that deny driver’s licenses for illegal aliens do not require their agencies to verify an alien’s immigration status with the federal government before issuing the license, so these states may be actually issuing driver’s licenses to illegals. Because of this, there is room to further restrict the issuance of driver’s licenses in most states.<sup>123</sup>

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<sup>123</sup> *Id.* at 481-82.

<b>Policy Arena</b>	<b>Number of Bills</b>	<b>Number of States</b>
Benefits	149	39
Documentation/ID	48	22
Driver's Licenses	69	31
Education	195	30
Employment	199	41
Health	92	23
Human Trafficking	63	28
Law Enforcement	129	30
Legal Services	20	10
Licensing	83	28
Voting	46	22
Miscellaneous	53	24
Comprehensive Measures	9	5
Resolutions	104	27
<b>TOTAL</b>	<b>1169 Bills</b>	<b>50 States</b>

\*Information gathered from National Conference of State Legislators, and can be found at:  
<http://www.ncsl.org/IssuesResearch/Immigration/2007StateLegislationImmigration/tabid/13113/Default.aspx>