# NOTES

# The Uncertain Terrain of State Occupational Licensing Laws for Noncitizens: A Preemption Analysis

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TABLE OF CONTENTS

INTRODUCTION . . . . . 1598

I. BACKGROUND . . . . . 1600

A. FEDERAL REGULATION OF IMMIGRATION . . . . . 1600

1. Constitutional Context . . . . . 1600

2. Statutory and Regulatory Context . . . . . 1603

B. STATE LICENSING LAWS . . . . . 1605

C. INTERSECTION OF STATE OCCUPATIONAL LICENSING LAWS AND IMMIGRATION LAW . . . . . 1606

D. PARAMETERS OF PREEMPTION OF STATE LICENSING LAWS . . . . . 1608

II. PREEMPTION ANALYSIS . . . . . 1610

A. EXPRESS PREEMPTION . . . . . 1612

B. CONFLICT PREEMPTION . . . . . 1613

C. FIELD PREEMPTION . . . . . 1616

D. RESOLUTION THROUGH OBSTACLE PREEMPTION . . . . . 1618

III. A FEDERAL STATUTE AT THE INTERSECTION OF IMMIGRATION AND STATE OCCUPATIONAL LICENSING LAWS MAKES ALL LAWFULLY PRESENT NONCITIZENS ELIGIBLE FOR STATE LICENSES . . . . . 1624

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A. HISTORY AND STRUCTURE OF SECTION 1621 . . . . . 1624
B. ALL LAWFULLY PRESENT NONCITIZENS ARE INCLUDED IN ELIGIBILITY FOR OCCUPATIONAL LICENSES UNDER SECTION 1621 . . 1626
C. SECTION 1621 IS NOT A SAVINGS CLAUSE, AND EVEN IF IT WERE, STATE LICENSING LAWS THAT STAND AS AN OBSTACLE TO FEDERAL IMMIGRATION LAW ARE PREEMPTED . . . . . 1631
CONCLUSION . . . . . 1633
APPENDIX 1: CASES THAT HOLD EQUAL PROTECTION IS VIOLATED BY STATE LAWS LIMITING OCCUPATIONAL LICENSES AND OPPORTUNITIES BASED ON IMMIGRATION CATEGORY . . . . . 1635
APPENDIX 2: EXAMPLES OF STATE OCCUPATIONAL LICENSING LAWS REQUIRING CERTAIN STATUS . . . . . 1638
APPENDIX 3: NONCITIZENS "LAWFULLY PRESENT" UNDER AFFORDABLE CARE ACT BUT *NOT* INCLUDED IN 8 U.S.C. § 1621 . . . . . 1644

## INTRODUCTION

Eight hundred occupations required a license by at least one state during 2003. It is uncertain whether legally present immigrants will be able to obtain these licenses and contribute their skills to society.[1] Whether federal law preempts state laws that condition eligibility for state occupational licenses on certain immigration status is an issue of increasing importance. Federal immigration law includes noncitizen categories in which individuals are legally present in the United States and authorized to work, but are prevented by state licensing laws from engaging in occupations for which they are otherwise qualified. The most common state statutes limit licenses to legal permanent residents. Such statutes preclude a range of people who are lawfully present from obtaining occupational licenses, including noncitizens admitted to provide specific skills (such as those with H visas), individuals with pending applications who have been granted work authorization (such as asylees), and noncitizens granted employment authorization under the Deferred Action for Childhood Arrivals (DACA) program.[2]

1. *See* Byron Schlomach, *Six Reforms to Occupational Licensing Laws to Increase Jobs and Lower Costs*, GOLDWATER INST. POL'Y REP., No. 247 (July 10, 2012), http://goldwaterinstitute.org/article/six-reforms-occupational-licensing-laws-increase-jobs-and-lower-costs.

2. For other examples of legally present individuals who would be precluded, see Appendix 3. As of August 2013, nearly four hundred thousand people have been accepted for DACA. *Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Aug. 8, 2013), http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA%20Monthly%20Report%20AVer%20II%20PDF.pdf. In addition to having federal work authorization, many in the DACA category are eligible for in-state tuition to train them for occupations for which they may *not* be able to get licenses. *See* Erica Pearson, *After*

Further, recent proposals for immigration reform contemplate long-term noncitizen categories with employment authorization, in which people would not be legal permanent residents and may not have a pathway to resident status and citizenship. The recently proposed Senate immigration reform bill provides for "Registered Provisional Immigrants" with at best a thirteen-year path to citizenship.[3] These reform proposals also expand categories for individuals with highly specialized skills, especially in science and technology—industries that often require licenses.[4] If the Senate bill becomes law, access to licenses for work will be particularly important to those in provisional categories because they will have to demonstrate a continuing connection with the labor market and will not be eligible for safety-net programs.[5]

Whether states retain the power to only allow certain noncitizens to be eligible for occupational licenses is the subject of an unresolved circuit split, in which the Fifth Circuit and the Second Circuit have considered both equal protection and preemption to guide the resolution of this issue.[6] This Note seeks to explore the preemption analysis that should govern the interpretation and application of immigration restrictions included in state occupational-licensing laws. This is a particularly difficult and long-contested question because occupational licensing of noncitizens is at the intersection of powers claimed by the dual sovereigns in our federalist system. The federal government has near plenary power over immigration, and the states claim general police power over licensing as part of regulating for health and safety. In this already uncertain terrain there is a federal statute, 8 U.S.C. § 1621, which categorizes professional licenses as a state benefit that is subject to federal restrictions passed as part of welfare reform, the Personal Responsibility and Work Opportunity Act.[7]

Part I of this Note sets the background framework for the preemption issue and includes an overview of the federal regulation of immigration, state licens-

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*Getting Work Permits from Feds, Young Immigrants Navigate Job Hunts*, N.Y. DAILY NEWS (Feb. 16, 2013, 7:10 PM), http://www.nydailynews.com/new-york/young-immigrants-balance-job-hunt-deferred-action-program-article-1.1266144#ixzz2NoW48yru (noting that DACA recipients were "heartbroken to learn they can't be teachers or dentists like they dreamed because state certification requirements include an actual green card").

3. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

4. *See id.* § 4101(b).

5. *See id.* § 2101(b)(9)(B)(i)–(ii) (explaining that provisional immigrant status cannot be extended unless the registered provisional immigrant proves that she "was regularly employed throughout the period of admission as a registered provisional immigrant, allowing for brief periods lasting not more than 60 days; and . . . is not likely to become a public charge . . . or is able to demonstrate average income or resources that are not less than 100 percent of the Federal poverty level throughout the period of admission as a registered provisional immigrant"); *id.* § 2101(d)(3) ("An alien who has been granted registered provisional immigrant status under this section is not eligible for any Federal means-tested public benefit.").

6. *See* Dandamudi v. Tisch, 686 F.3d 66 (2d Cir. 2012); LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005).

7. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2262 (1996).

ing laws, the intersection of state occupational laws and immigration law, and the parameters of preemption of state licensing laws. To provide context to this background, Appendix 1 chronicles cases that have found state licensing laws to violate equal protection, and Appendix 2 details examples of state occupational-licensing laws requiring certain immigration categories as a precondition for eligibility. Part II analyzes the conflicts between federal and state laws and includes a discussion of express, conflict, field, and obstacle preemption. Part III addresses the role of a federal statute, 8 U.S.C. § 1621, at the intersection between immigration and state occupational-licensing laws. A chart in Appendix 3 provides an example of the ambiguity created by § 1621 if the statute is interpreted to prevent states from offering benefits, including licenses, to certain categories of noncitizens that are eligible for other federal and state benefits.

This Note concludes that state laws denying legally present noncitizens the opportunity to be considered for occupational licenses are preempted by federal regulation. The intersection between licensing and immigration is a contested area in which both levels of government within our federalist system have strong claims to power. In occupational licensing the best way to reconcile these competing claims is through an obstacle preemption analysis. There must be room for a state to maintain its traditional power to establish the professional competencies required of any person who practices an occupation within its sovereign bounds. But, if a state makes eligibility for a license conditioned on particular immigration status, this stands as an obstacle to the full purpose of Congress and is preempted through the Supremacy Clause.[8]

## I. BACKGROUND

Immigration policy that governs noncitizen employment has the goals of providing opportunity, ensuring self-sufficiency, and utilizing the skills of noncitizens with authorization to work to contribute to the needs of society. Restrictions on access to occupational licenses affect all three of these goals.

### A. FEDERAL REGULATION OF IMMIGRATION

#### 1. Constitutional Context

The Supreme Court has recognized that the federal government has near plenary power over immigration.[9] This power stems both from powers enumer-

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

9. In most cases, the courts employ extreme judicial deference to congressional and executive exercise of immigration power. *See* Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 33 (1998). However, this power is only near plenary because the doctrine has not been applied to all cases, such as those in which courts apply due process norms. *See id.* at 52; Landon v. Plasencia, 459 U.S. 21, 32–33 (1982) (holding that deportation procedure of a resident alien must satisfy due process); Francis v. INS, 532 F.2d 268, 272 (2d Cir. 1976) (applying a "minimal scrutiny" equal

ated in the Constitution and the implied federal power over foreign affairs.[10] Article I, Section 8, Clause 4 states that Congress has the power to "establish a uniform Rule of Naturalization," and this is recognized to include the power over immigration.[11] Congress also has the power to regulate immigration under the Commerce Clause.[12]

The federal government's power over immigration is also derived from its implied power over foreign affairs. Immigration policy is "vitally and intricately interwoven"[13] with foreign relations[14] because decisions that regulate relationships with "alien visitors" implicate an important and delicate relationship between the United States and foreign nations.[15] As the Court recently explained in *Arizona v. United States*, "Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws."[16] International trade agreements that the federal government has implemented providing work authorization to certain noncitizens demonstrate the tight relationship between immigration and foreign affairs. For example, nonimmigrant NAFTA professional visas, referred to as TN visas, were created pursuant to North American Free Trade Agreement (NAFTA), and H1-B1 "fast track" visas were established pursuant to trade agreements with

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protection analysis to hold unconstitutional a provision that provided the potential for relief in an exclusion proceeding but not in a deportation context).

10. *See, e.g.*, Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597, 1608–09 (1995); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 791 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 68 (2007).

11. U.S. CONST. art. 1, § 8, cl. 4; *see, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2498 (2012); Toll v. Moreno, 458 U.S. 1, 10 (1982); Plyler v. Doe, 457 U.S. 202, 225 (1982); Graham v. Richardson, 403 U.S. 365, 377–80 (1971).

12. U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, *Toll*, 458 U.S. at 10. Early cases established that, under the Commerce Clause, Congress could place a federal fee on immigrants and regulate immigration. *See* Ekiu v. United States, 142 U.S. 651, 658–59 (1892); Edye v. Robertson (*Head Money Cases*), 112 U.S. 580, 589–91 (1884). However, the states could not; the Court relied on the Commerce Clause power to invalidate state taxes on immigrants. *See* Chy Lung v. Freeman, 92 U.S. 275, 280–81 (1875); Henderson v. Mayor of New York, 92 U.S. 259, 273 (1875); Smith v. Turner (*Passenger Cases*), 48 U.S. 283, 409 (1849). Congress also has power over immigration under its War Power. U.S. CONST. art. I, § 8, cl. 11. However, this is limited because the ability to regulate alien enemies does not necessarily justify general regulation of immigration.

13. Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952).

14. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 134 (1994).

15. The Supreme Court has reaffirmed that "[i]t is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States" and "[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Arizona*, 132 S. Ct. at 2498–99 (alteration in original) (internal quotation marks omitted) (quoting Hines v. Davidowitz, 312 U.S. 52, 64 (1941)); *see* Mathews v. Diaz, 426 U.S. 67, 81 (1976) ("[T]he responsibility for regulating the relationship between the United States and our alien visitors . . . . may implicate our relations with foreign powers."); *see also Chy Lung*, 92 U.S. at 279–80.

16. *Arizona*, 132 S. Ct. at 2498.

Chile and Singapore.[17]

The power to admit or forbid the entry of foreigners is inherent in national sovereignty and essential for self-preservation.[18] As the Court explained in *United States v. Curtiss-Wright Export Corp.*, the federal government's supremacy over foreign affairs is an inherent pillar of the federalist structure.[19] States have no claim to international powers because no state ever possessed international powers; therefore such powers were transmitted to the United States from some other source.[20] State governments do not have any claim to the power to determine the terms of immigration.

The terms of immigration have been held by the Supreme Court to include a broad set of laws. In *Takahashi v. Fish & Game Commission*, the Supreme Court defined the federal government's broad constitutional power to include "determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization."[21] State statutes denying work have been held to be equivalent to denial of entry and abode.[22]

The federal immigration power is authoritative, especially when it is understood as interwoven with power over foreign affairs. *Hines v. Davidowitz* established that federal power in the field of foreign affairs, including power over immigration, is supreme and that federal power in the field affecting foreign relations must be left entirely free from local interference.[23] In *American Insurance Association v. Garamendi*, the Court held that a state law was preempted because of a *potential* foreign affairs issue.[24] Supreme Court cases

17. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1184(g)(8) (2012).

18. *See Arizona*, 132 S. Ct. at 2498 (describing the federal government's "inherent power as sovereign to control and conduct relations with foreign nations").

19. 299 U.S. 304, 315–18 (1936).

20. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632–33 (1992).

21. 334 U.S. 410, 419 (1948). "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." *Id.* at 415; *see also* David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1089–91 (1979) (arguing that *Takahashi* requires equal treatment of aliens through preemption because if states deny aliens the right to work, they violate the "federal pledge of equal treatment").

22. *See* Truax v. Raich, 239 U.S. 33, 42–43 (1915).

23. 312 U.S. 52, 62–63 (1941); *see also* Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."). *But see* Zadvydas v. Davis, 533 U.S. 678, 695–96 (2001) (noting that this power is "subject to important constitutional limitations").

24. 539 U.S. 396, 427–30 (2003). "[E]xercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of foreign relations power to the National Government in the first place." *Id.* at 413 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964)); *see also* Arizona v. United States, 132 S. Ct. 2492, 2502 (2012) ("The framework enacted by Congress leads to the conclusion here, as it did in *Hines*, that the Federal Government has occupied the field of alien registration.").

have recognized the preeminent role of the federal government in regulating noncitizens in the United States and "have also been at pains to note the substantial limitations upon the authority of the States in making classifications based upon alienage."[25]

2. Statutory and Regulatory Context

The Supreme Court has afforded great deference to congressional enactments made pursuant to constitutional power over immigration.[26] The recent history of immigration legislation shows Congress's determination to shift the focus of immigration policy to employment. Significant changes to the Immigration and Nationality Act (INA) in 1990 substantially increased the number of employment-based visas and created new categories.[27] The congressional turn toward employment-based immigration, and its purpose to encourage noncitizens to work in needed areas of the economy, is reflected in the legislative history.[28] The Judiciary Committee Report commented:

> The U.S. labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages.[29]

A move toward a workforce-centered immigration policy has continued to the present, with a series of bills expanding the availability of employment-based visas. The American Competitiveness and Workforce Improvement Act of 1998[30] increased the number of available employment-based H-1B visas. Just two years later, the American Competitiveness in the Twenty-First Century Act of 2000 again raised the number of employment-based H-1B visas by 297,500 over three years and excluded from the new ceiling all H-1B nonimmigrants who work for universities and nonprofit research facilities.[31]

Creating employment-based visas for citizens from specific countries has become part of U.S. foreign policy. In 2003, Congress passed legislation

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25. Toll v. Moreno, 458 U.S. 1, 10 (1982).

26. *See* Fed. Mar. Comm'n v. Pac. Mar. Ass'n, 435 U.S. 40, 54 (1978); *see also* Elkins v. Moreno, 435 U.S. 647, 664 (1978) (explaining that the Immigration and Nationality Act represents a "comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents").

27. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

28. *See* H.R. REP. NO. 101-723, pt. 1, at 37 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6716 ("Immigrants with more education or training will likely make the greatest contributions to the U.S. economy.").

29. *Id.* at 41.

30. American Competitiveness and Workforce Improvement Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

31. American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

implementing the Chile[32] and Singapore Free Trade Agreements[33] providing for employment-based immigration. In 2005, Congress exempted up to 20,000 aliens holding a master's or higher degree from the cap on H-1B visas, again expanding the number of employment-based noncitizens, particularly in higher skilled professions. In 2005, Congress created the E-3 treaty professional visa for citizens of Australia.[34]

Many employment-based visas are not simply a temporary work program, but are a de facto way many people immigrate and eventually become citizens of the United States. Congress approved of this reality when it codified the permissible "dual-intent" of H1-B visa holders. This means that noncitizens that enter the United States under H-1B visas can become legal permanent residents without breaking their commitment to reside in the United States only temporarily.[35]

An increase in the federal government's use of its power to regulate the employment of noncitizens has coincided with the increase in employment-based immigration. In the 1960s, for the first time, the federal government asserted its power to designate whether certain aliens were eligible for employment authorization, even when such employment authorization was not incident to their immigration status.[36] The power of federal agencies to make these designations is expressly authorized by the INA.[37] After the passage of the Immigration Control Reform and Control Act (IRCA) in 1986, the INS published extensive regulations governing employment authorization of noncitizens.[38] These regulations specifically and comprehensively regulate em-

32. United States–Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (2003).

33. United States–Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, 117 Stat. 948 (2003).

34. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, § 501, 119 Stat. 231 (2005).

35. *See* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002) (removing the six-year limitation on H-1B status for certain nonimmigrants to allow time for pending applications for employment-based immigrant petitions); 8 C.F.R. § 214.2(h)(16)(i) ("The alien may legitimately come to the United States for a temporary period as an H-1C or H-1B nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States."); *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL ch. 23.2 (2014), *available at* http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html.

36. *See* Paul Wickham Schmidt, *Employment Authorization for Aliens: Part I*, 89-5 IMMIGR. BRIEFINGS, May 1989, at 1. Policies governing the grant or denial of employment authorization to noncitizens were codified for the first time in 1981 in Immigration and Naturalization Service (INS) regulations. *See* Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25,079-03, 25,080 (May 5, 1981) (The INS performed immigration control before this function was incorporated into the Department of Homeland Security.).

37. *See* 8 U.S.C. § 1324a(a) (2012).

38. *See* Control of Employment of Aliens, 52 Fed. Reg. 16,216-28 (May 1, 1987) (adding 8 C.F.R. § 274a.12-.14 (2013) and superseding 8 C.F.R. § 109 (2013)).

ployment of noncitizens and include controls over who can and who cannot be employed.[39]

The Supreme Court has recognized this substantial change in federal policy. In *DeCanas v. Bica*, decided before IRCA was passed, the Court found that federal immigration law did not intend to preclude harmonious state regulation of the employment of illegal aliens.[40] Recognizing that the congressional enactment of IRCA changed the federal scheme, the Supreme Court recently held in *Chamber of Commerce v. Whiting*, that "state laws imposing civil fines for the employment of unauthorized workers like the one we upheld in *DeCanas* are now expressly preempted."[41]

There is now a comprehensive federal scheme for regulating the employment of noncitizens. Federal law establishes that only legal permanent residents or those "authorized to be so employed by this chapter or by the Attorney General" may be employed.[42] The statute lays out nonimmigrant categories that authorize employment[43] and delegates power to the Attorney General to designate other categories of noncitizens authorized to work.[44] Federal regulation implements this federal power over work authorization by setting out the categories of noncitizens eligible for employment authorization.[45]

### B. STATE LICENSING LAWS

Occupational licensing is a traditional area of state police power, grounded in states' power to protect the public health, safety, and welfare.[46] As part of this power, states can establish standards for licensing and regulating the practice of

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39. *See* Helen M. Harnett, *State and Local Anti-Immigrant Initiatives: Can They Withstand Legal Scrutiny?*, 17 WIDENER L.J. 365, 374 (2008) ("IRCA is so comprehensive that any state law trying to regulate workers based on immigration status would either be duplicative of the federal law or conflict with the federal law."); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1581–85 (2008) (noting that IRCA shifted federal control of immigration to focus on the interior by expanding federal immigration enforcement into employment, an area of traditional state concern); *see, e.g.*, 8 U.S.C. §§ 1101(a)(15)(H) (2012); La. Forestry Ass'n v. Solis, 889 F. Supp. 2d 711, 723 (E.D. Pa. 2012) ("The INA vests the DHS with broad and clear authority to regulate the form and content of an H-2B visa petition and to determine the conditions and procedures for admission to the country under the H-2B program.").

40. 424 U.S. 351, 362 (1976).

41. 131 S. Ct. 1968, 1975 (2011). Citations to *DeCanas* that are used to support the position that Congress did not intend to oust states from regulating the employment of noncitizens do not take account of this history. *See, e.g.*, LeClerc v. Webb, 419 F.3d 405, 425 (5th Cir. 2005).

42. 8 U.S.C. § 1324a(h)(3)(B) (2012).

43. *See* 8 U.S.C. § 1101 (2012).

44. *See* 8 U.S.C. § 1103(g) (2012).

45. *See* 8 C.F.R. § 274a.12 (2013); *see also* 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 7.03(2)(d)(i) (rev. ed. 2013).

46. *See* Bos. Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877) ("Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals.").

professions.[47] An individual's interest in practicing a profession or occupation has been held to be subservient to states' power and authority to regulate professional licenses,[48] as long as the licensure requirement is reasonable and not arbitrary.[49]

States have exercised this power to require licenses for a wide variety of professions and occupations. Every state licenses medical doctors, lawyers, nurses, chiropractors, architects, surveyors, barbers, pest control applicators, vegetation pesticide handlers, emergency medical technicians, truck drivers, school bus drivers, city bus drivers, skin care specialists, manicurists, and cosmetologists.[50] The licensing of other occupations varies from state to state. As of 2012, states licensed between 32 occupations (Washington) and 285 occupations (California), with 35 states licensing over 100 occupations.[51] Further, states have collectively required the licensing of over one hundred occupations. One hundred ninety-one occupations out of eight hundred occupations required licenses by at least one state during 2009.[52]

### C. INTERSECTION OF STATE OCCUPATIONAL LICENSING LAWS AND IMMIGRATION LAW

Whether states have the power to condition license eligibility on immigration status has long been contested. Although state police power to regulate for health and safety is well established, there is also long history of the courts holding state occupational licenses based on alienage unconstitutional as a violation of equal protection. Those cases demonstrate that there are constitutional limitations on state authority even in traditional areas of state control.[53] In *Yick Wo v. Hopkins* in 1886, the Supreme Court held that a city may not administer a local ordinance in such a manner as to preclude its alien inhabitants from having access to licenses to operate laundries on equal protection grounds.[54] Since then, most courts have held that state restrictions on licenses based on alienage are unconstitutional.[55] However, a minority of cases upheld alienage restrictions on licenses in occupations, especially when occupations were consid-

47. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992); Goldfarb v. Va. State Bar, 421 U.S. 773, 792–93 (1975); Brazee v. Michigan, 241 U.S. 340, 343 (1916) ("[A] state, exercising its police power, may require licenses for employment agencies, and prescribe reasonable regulations in respect of them, to be enforced according to the legal discretion of a commissioner."); Dent v. West Virginia, 129 U.S. 114, 128 (1889).

48. *See* Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1051 (9th Cir. 2000).

49. *See* Allhusen v. State, 898 P.2d 878, 885 (Wyo. 1995).

50. *See* Schlomach, *supra* note 1.

51. *Id.* at 26; *see also* Dick M. Carpenter II et al., *License to Work: A National Study of Burdens from Occupational Licensing*, INST. FOR JUST. (May 2012), http://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf.

52. Carpenter II et al., *supra* note 51, at 6.

53. *See infra* Appendix 1 for a complete list of these cases.

54. 118 U.S. 356, 374 (1886).

55. *See infra* note 56; *see also infra* Appendix 1.

ered "harmful" such as selling liquor or operating a poolroom.[56]

The Supreme Court has defined the outer boundaries of states' ability to regulate occupational licenses based on alienage: states cannot restrict professional licenses to citizens only and cannot declare legal permanent residents ineligible for professional licenses.[57] However, states can restrict noncitizens from performing governmental or self-governance functions, such as being police officers or public school teachers.

Even though the Supreme Court has declared it is unconstitutional to require full citizenship and exclude legal permanent residents, some states still have licensing laws that restrict certain nongovernmental professions to citizens only. Presumably, if these state laws limiting occupational licenses to citizens were challenged in court, they would be held unconstitutional and preempted, but these laws still remain on the books. Although it is beyond the scope of this Note to investigate how these laws are enforced, these laws show how states approach the question of licensing.

Other states have occupational licensing laws that condition eligibility on certain immigration categories, and some states provide licenses to those who are lawfully present. As discussed in Part III, the "lawfully present" category comprises a larger group of people than those identified in 8 U.S.C. § 1621. A chart in Appendix 2 details some examples of various state restrictions on licensing; some restrict licensing to citizens, some to citizens and legal permanent residents, and some to broader categories of lawfully present individuals. Although the chart is not comprehensive, these examples show both the breadth and variation in eligibility conditions for licenses on certain citizenship or alienage categories. The Supreme Court has not resolved the issue of whether states can deny consideration for occupational licenses to legally present

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56. *See* Ohio *ex rel.* Clark v. Deckebach, 274 U.S. 392, 397 (1927) (finding that ordinance forbidding licensing aliens to operate poolroom does not deny equal protection because of the harmful and vicious tendencies of public poolrooms); *see also* LeClerc v. Webb, 419 F.3d 405, 424 (5th Cir. 2005) (finding that state can prevent nonimmigrant aliens from sitting for the bar); *In re* Naka's License, 9 Alaska 1, 6, 9–10 (D. Alaska 1934) (finding that noncitizen could be prohibited from obtaining a beer and wine license because states can discriminate based on alienage when regulating a business that is not "useful" but that is harmful and vicious); Wright v. May, 149 N.W. 9, 11 (Minn. 1914) (denying aliens the right to act as auctioneers does not violate equal protection because of the harm it could cause to the community and analogy to administrative officer of the state); *cf.* League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 533 (6th Cir. 2007) (issuing only certificate for driving to temporary residents in lieu of drivers' licenses did not discriminate against suspect class, and thus rational basis review applied in evaluating equal protection claim).

57. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216 (1984) (notary public); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976) (engineer); *In re* Griffiths, 413 U.S. 717 (1973) (bar exam); Sugarman v. Dougall, 413 U.S. 634 (1973) (civil service); Szeto v. La. State Bd. of Dentistry, 508 F. Supp. 268 (E.D. La. 1981) (dentist); Kulkarni v. Nyquist, 446 F. Supp. 1269 (N.D.N.Y. 1977) (engineer and physical therapist); Wong v. Hohnstrom, 405 F. Supp. 727 (D. Minn. 1975) (pharmacist); Arias v. Examining Bd. of Refrigeration & Air Conditioning Technicians, 353 F. Supp. 857 (D.P.R. 1972) (air conditioning technicians); Lipkin v. Duffy, 119 N.J.L. 366 (N.J. 1938) (junk yard operator); Nielsen v. Wash. State Bar Ass'n, 585 P.2d 1191 (Wash. 1978) (bar exam); State *ex rel.* Mansfield v. State Bd. of Law Exam'rs, 601 P.2d 174 (Wyo. 1979) (bar exam).

noncitizens who are not legal permanent residents.[58] As explained in more detail below, the circuit courts are split over this issue.[59]

### D. PARAMETERS OF PREEMPTION OF STATE LICENSING LAWS

State occupational-licensing laws that make certain legally present noncitizens ineligible to become licensed sit at the fault lines of federal and state powers. The intersection of state and federal power in licensing is a contentious area of the law. State licensing laws have the potential to conflict with federal law and the dormant Commerce Clause. In 1824, the Supreme Court decided in *Gibbons v. Ogden* that although a state has the power to "regulate its police, its domestic trade, and to govern its own citizens," a state license granting individuals exclusive rights to navigate within state waters was preempted by a federal license granted to a different steamboat owner because of the federal power to regulate commerce.[60]

In considering the constitutionality of modern state occupational-licensing statutes that make certain alien category a condition for eligibility, the following parameters have thus been established. First, the federal government has near plenary power over immigration; however, not all state laws that regulate aliens necessarily regulate immigration. Second, states have a strong and long-recognized interest in occupational licensing that stems from their general police power. Third, states generally cannot prevent at least legally permanent residents from gaining licenses. However, in core government functions that relate to state sovereignty (such as who can be a police officer), this state interest can be so strong that eligibility may be conditioned on citizenship—a restriction that would otherwise be impermissible. The open issue is whether states can preclude occupational licenses to categories of lawfully present noncitizens, including those specifically admitted to the country based on their occupational qualifications and those with explicit federal work authorization.

This longstanding debate about which level of government in our federalist system has the ultimate power over licensing is being played out in conflicting judicial interpretations of denial of eligibility for occupational licenses to

58. Most recently, the Supreme Court denied certiorari in *LeClerc v. Webb*, 551 U.S. 1158 (2007). *See also* Justin Hess, *Nonimmigrants, Equal Protection, and the Supremacy Clause*, 2010 BYU L. REV. 2277, 2295 (2010) (recognizing that this area of law is unsettled and suggesting that courts should first evaluate state laws under the Supremacy Clause and then apply an intermediate standard of review for equal protection analysis); Justin Storch, *Legal Impediments Facing Nonimmigrants Entering Licensed Professions*, 7 MOD. AM. 12, 13 (2011) (arguing that distinctions between immigrants and nonimmigrants that deny professional licenses are preempted and violate equal protection).

59. *Compare* Dandamudi v. Tisch, 686 F.3d 66 (2d Cir. 2012) (holding unconstitutional a state statute that prohibited noncitizens from obtaining a pharmacist license in New York), *with* LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005) (upholding the constitutionality of a state bar rule allowing only permanent residents to be licensed by the Louisiana Bar).

60. 22 U.S. (9 Wheat.) 1, 208, 221 (1824).

legally present noncitizens. In *Dandamudi v. Tisch*, individuals with H-1B[61] work visas and in the TN category challenged a New York licensing law that required citizenship or legal-permanent-resident status to be eligible for a pharmacist license.[62] The Second Circuit stated that this statute impermissibly excluded the plaintiffs, who were lawfully present and had employment authorization, from being eligible. The court held that the New York state law was preempted by federal immigration law and unconstitutional under the Supremacy Clause.[63] The state statute stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, (i.e. providing permission to be in the country and work capacity to noncitizens) by imposing an additional burden not sanctioned by Congress.[64] Under the Second Circuit's analysis, states cannot restrict licenses to any certain categories of noncitizens who have federal permission to be in the United States and federal employment authorization.

In contrast, in *LeClerc v. Webb*, the Fifth Circuit held that a Louisiana Supreme Court rule requiring that every applicant to the Louisiana bar be a U.S. citizen or legal permanent resident was constitutional and not preempted.[65] Like in *Dandamudi*, the plaintiffs in *LeClerc* were lawfully present, including having a H-1B work visa and a J-1[66] student visa.[67] One plaintiff was licensed as an attorney in England and Wales and another graduated with a law degree from Tulane University Law School. The Fifth Circuit reasoned that the field of alien employment tolerates harmonious state regulation, that the rule was within the traditional state power, and that the restriction was consistent with the provisions of the INA.[68]

The above background of federal power over immigration, state power over occupational licensing, a brief history of the case law that has so far defined the intersection of these two areas, and parameters of preemption, sets the context for analyzing the constitutionality of state occupational-licensing laws that condition eligibility on immigrant status. The following section incorporates this background in a preemption analysis that lays out the contours of federal

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61. 8 U.S.C. § 1101(a)(15)(H) admits a nonimmigrant alien "who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee . . . in a training program that is not designed primarily to provide productive employment."

62. 686 F.3d at 71–72.

63. *See id.* at 69, 80. This case was also decided on equal protection grounds because those in the TN category could not assert preemption under the NAFTA Implementation Act. *See id.* at 79.

64. *Id.* at 80; *see also* Dingemans v. Bd. of Bar Exam'rs, 568 A.2d 354, 357 (Vt. 1989) (finding the bar practice rule that denied law license based on alienage preempted because it imposed additional burdens not contemplated by the federal immigration regulatory scheme).

65. 419 F.3d 405, 424 (5th Cir. 2005).

66. *See* 8 U.S.C. § 1101(a)(15)(J) (2012).

67. 419 F.3d at 410–11.

68. *See id.* at 424; *see also* Van Staden v. St. Martin, 664 F.3d 56, 61–62 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 110 (2012) (holding the Louisiana state statute requiring nursing applicants to be permanent residents or citizens constitutional).

and state power in occupational licensing of noncitizens. The last section considers the role of a federal statute that includes language about professional licensing of noncitizens.

## II. PREEMPTION ANALYSIS

State-level occupational-licensing laws that make citizenship or particular immigration status, such as legal permanent residence, a condition for eligibility present a difficult issue of preemption because they exist at the intersection of federal and state power. These laws regulate and exclude noncitizens that the federal government has allowed to live and work in the United States pursuant to the federal power over immigration, a power that is interwoven with foreign affairs. The federal government controls the admission, removal, and terms and conditions of an alien's presence in the United States including whether the individual can work.

However, the exclusive federal power over immigration does not automatically preempt every state law that pertains to immigrants. In *DeCanas v. Bica*, the Court said that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[69] In *Chamber of Commerce v. Whiting*, a plurality of the Court again made this distinction, stating, "[r]egulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern."[70]

Some scholars have argued for a more formal distinction, that state laws regulating the behavior of noncitizens who are already present, sometimes referred to as "alienage laws,"[71] are,[72] or should be,[73] distinct from immigration

69. 424 U.S. 351, 355 (1976).

70. 131 S. Ct. 1968, 1983 (2011).

71. *See* Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202 (1994). ("'[I]mmigration law' concerns the admission and expulsion of aliens, and 'alienage law' embraces other matters relating to their legal status. 'Alienage' issues include access to public education, welfare benefits, government employment, and the ballot box, to name just a few of the most prominent.").

72. *See* Linda S. Bosniak, Commentary, *Immigrants, Preemption and Equality*, 35 VA. J. INT'L L. 179, 184–90 (1994) (suggesting that "alienage" law governing access to public education, welfare benefits, and government employment is different than "immigration law," which covers admission, exclusion, and naturalization, and therefore are not necessarily preempted by federal immigration power); *see also* Abriel, *supra* note 10, at 1627.

73. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1897 (1993) (explaining that before the 1876 decision in *Chy Lung v. Freeman,* 92 U.S. 275, 278 (1876), "the issues of crime, poverty and disease among immigrants were treated as matters of legitimate local concern. . . . To the extent that immigration regulation today turns on these issues (which is substantial), the equation of immigration with foreign policy is a fiction"); *see also* JAMES T. O'REILLY, FEDERAL PREEMPTION OF STATE AND LOCAL LAW 12 (2006); Joseph F. Zimmerman, *Federal Preemption of State and Local Government Activities*, 13 SETON HALL LEGIS. J. 25, 40 (1989) (noting that Congress "may lack essential complementary powers to ensure that it is able to successfully execute a preempted function").

law, which is admittedly a field occupied by the federal government. This is a tenuous distinction because even accepting its premise that there is a distinction to be made, "alienage" rules may be surrogates for "immigration" rules; therefore "[o]ften, the intended and/or actual effect of an alienage rule is to affect immigration patterns."[74]

Even though regulating licenses is a traditional area of state power, the presumption against preemption likely would not apply. Thus the preemption analysis cannot be avoided through reliance on the presumption-against-preemption doctrine.[75] The Court has held that when Congress legislates in a field traditionally occupied by the states, the constitutional analysis will start with the assumption that the historic police powers are not preempted unless Congress makes this intention clear.[76] However, this presumption does not operate in the immigration context because of pervasive congressional action and the uniquely federal interest at issue. The pervasiveness of congressional action in the area of immigration changes the background presumption that states can regulate in an area of traditional state power.[77] Additionally, immigration is a uniquely federal interest, and therefore Congress is not presumed to have to "tread carefully," but instead "can be assumed to exercise its powers broadly, including the power to preempt state law, thereby fully protecting the federal interest by occupying the regulatory field."[78]

The following sections consider whether different forms of preemption analysis can define the contours of federal and state power in state occupational licensing. Although the Supreme Court has acknowledged that "the categories of preemption are not 'rigidly distinct,'"[79] considering the different forms of preemption individually provides a helpful framework. Whereas express preemption, conflict preemption, and field preemption all prove irreconcilable with the necessary respect for state police power, obstacle preemption guides the most plausible division of power. State laws that make professional licenses contingent on an alienage status are preempted by federal power over immigration. These state laws are an obstacle to congressional authority in a field where the national government has been held to have near plenary power. Although the federal scheme does incorporate state law by requiring state licensing for certain

74. Motomura, *supra* note 71, at 202.

75. *See* LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 224–27 (2008).

76. "Where . . . the field which Congress is said to have pre-empted has been traditionally occupied by the States 'we 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.'" Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citations omitted) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2097 (2000) (noting the Court has recognized the assumption as one of two "general principles" of preemption analysis).

77. *See* Dinh, *supra* note 76, at 2106.

78. *Id.* at 2107.

79. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 n.6 (2000) (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990)).

employment-based visas, this does not give the states authority to make licensing decisions *based on immigration status*. The incorporation of state law merely indicates that Congress acknowledged that states have the power to determine the professional competencies (such as education levels) required for professional licenses for all individuals who want to practice a profession within that state.

### A. EXPRESS PREEMPTION

Express preemption occurs when Congress demonstrates its intent to displace state regulation through a clause that directly instructs that states' laws are preempted, leaving no role for state regulation.[80] The language of the statutes and implementing regulations that provide a federal grant of employment authorization to certain noncitizens could arguably be read as an express-preemption provision. This would mean that federal law could be read as preempting *any* state restrictions on location or type of employment of certain categories of nonimmigrant aliens. However, such an interpretation is illogical when considered in the context of our federalist system.

Congress has designated noncitizen categories that have employment authorization and designated to the executive the authority to specify other noncitizen categories that have work authorization.[81] The Department of Homeland Security regulation lists numerous categories of aliens, including nonimmigrant aliens, who "are authorized to be employed in the United States *without restrictions as to location or type of employment.*"[82] These categories include refugees, nonimmigrant fiancés, asylees, aliens whose enforced departure from the United States has been deferred in accordance with a directive from the President of the United States to the Secretary, parents or children of a permanent resident, nonimmigrant spouses, individuals whose deportation or removal has been withheld, victims of certain crimes, and victims of a severe form of trafficking in persons, among others.[83] Despite the fact the text could be read as a broad express preemption provision, constitutional principles make evident

80. *See English*, 496 U.S. at 78–79. For examples of express-preemption clauses, see Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b) (2012); Flammable Fabrics Act, 15 U.S.C. § 1203(a) (2012); Poison Prevention Packaging Act, 15 U.S.C. § 1476(a) (2012); Consumer Product Safety Act, 15 U.S.C. § 2075(a) (2012); Federal Boat Safety Act, 46 U.S.C. § 4306 (2012).

81. *See* 8 U.S.C. § 1101 (2012); 8 C.F.R. § 274a.12 (2013).

82. 8 C.F.R. § 274a.12(a) (2013) (emphasis added).

83. *See id.* § 274a.12(a)(3) (refugees); *id.* § 274a.12(a)(4) (paroled into the US as a refugee); *id.* § 274a.12(a)(5) (asylee); *id.* § 274a.12(a)(6) (nonimmigrant fiancé); *id.* § 274a.12(a)(7) (parent or child of permanent resident); *id.* § 274a.12(a)(8) (nonimmigrant pursuant to the Compact of Free Association between the United States and of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau); *id.* § 274a.12(a)(9) (nonimmigrant spouse); *id.* § 274a.12(a)(10) (withholding of deportation or removal); *id.* § 274a.12(a)(11) (deferred enforced departure in accordance with a directive from the President of the United States to the Secretary); *id.* § 274a.12(a)(12) (Temporary Protected Status); *id.* § 274a.12(a)(15) (spouse or child of LPR); *id.* § 274a.12(a)(16) (victim of a severe form of trafficking in persons); *id.* § 274a.12(a)(19) (victim of certain crimes); *id.* § 274a.12(a)(20) (same).

that this provision cannot be read through such a broad and rigid interpretation. In our federalist system, states retain general police powers to regulate the conduct of those who live within their sovereign bounds.[84] Thus, this federal provision could not prevent a state from placing the same restrictions on noncitizens that the state places on citizens. For example, state occupational-licensing laws that require passing a certain test or paying a fee create restrictions on the type of employment a noncitizen can do, yet it is implausible that these are preempted by federal law.

Even though the text of the employment-authorization provisions for certain noncitizens seems to instruct boundless employment authorization, the disruption this would cause with our federalist system shows that express preemption is not the proper doctrinal tool for analyzing the conflicts presented by state occupational licensees. Yet, state laws that use particular immigration categories as eligibility criteria may still impermissibly restrict the "type of employment" and amount to a substantial restriction on location by only allowing an individual to practice his or her trade in certain states or in no state. This cannot be resolved by the principles governing express preemption.[85] The real question is whether state licensing laws that make the opportunity to be considered for a professional license *conditioned* on immigration status are in conflict with the federal immigration power. Consideration of this question requires turning to other doctrinal tools of preemption.[86]

### B. CONFLICT PREEMPTION

Conflict preemption exists where a state law conflicts with a substantive provision of a federal statute.[87] State laws denying professional licenses to certain noncitizens undermine, and possibly conflict with, the federal statutory and regulatory intent in creating noncitizen visas that are specifically tied to performing a particular kind of work that the federal government has approved an individual to perform.[88] If conflict preemption applies, then any state licensing

84. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) ("Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'" (citing United States v. Morrison, 529 U.S. 598, 618–19 (2000))); Bos. Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877) ("[T]here seems to be no doubt that [the police power] does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals.").

85. *See* Dinh, *supra* note 76, at 2100 (noting that express preemption relies on statutory construction, which is "anything but plain and simple" and "a matter of considerable dispute" for discerning congressional intent).

86. This possible express preemption provision does not foreclose consideration of other forms of preemption, both because it governs only a narrow set of the immigration categories at issue in this question and because the Supreme Court has held that express preemption does not necessarily preclude implied preemption. *See* Freightliner Corp. v. Myrick, 514 U.S. 280, 289 (1995); Dinh, *supra* note 76, at 2102–03.

87. *See* Dinh, *supra* note 76, at 2102.

88. *See* 8 C.F.R. § 274a.12(b); *see also* 1 GORDON ET AL., *supra* note 45, § 7.03; 2 *id.* § 12.11.

requirements, even qualifications requirements, could arguably be preempted as conflicting with the federal government's decision to allow certain noncitizens to enter the United States to perform a particular job. Visas that include federal work authorization include those issued to temporary workers or trainees (H-1A, H-1B, H-2A, H-2B, H-3); exchange visitors (J-1); principal treaty traders (E-1); principal treaty investors (E-2); intra-company transferees (L-1); Mexican and Canadian professionals under the North American Free Trade Agreement (TN); employees of foreign government officials (A-3); extraordinary aliens (O-1) and certain accompanying aliens (O-2); athletes, artists, and entertainers (P-1, P-2, P-3); cultural-exchange visitors (Q); religious workers (R-1); NATO aliens; personal employees of officials or representatives of an international organization (G-5); and principal foreign-media representatives (I).[89]

The conflict created by state laws that deny the opportunity to nonimmigrants to be considered for professional licenses can be seen in the case of H-1B[90] and H-2B[91] visa holders. These visas are tied to specific employment types and require a determination by a federal agency that the visa holder's employment in that job is desirable. In fact, a noncitizen cannot be admitted *unless* the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that "there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor."[92] The federal government, in granting an individual entry, has made the affirmative decision that the person can be admitted to perform a specific type of job. If a state denies a license for that job based on alien status, the state foils the judgment and desired outcome of the federal government. Arguably, there is a conflict because it is impossible for one individual to simultaneously be determined by the federal government to have a particular occupation and not eligible for the same occupation by state law. Applying conflict preemption principles, the Supremacy Clause gives precedence to the federal law.[93]

However, immigration laws are not quite so neat; they sometimes recognize the terrain of dual sovereignty and sometimes expressly incorporate state laws. For example, some federal visas require state licenses *before* the issuance

89. *See* 1 GORDON ET AL., *supra* note 45, § 7.03; 2 *id.* § 12.11.

90. H-1B visa holders are noncitizens admitted to work in a "specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012). When Congress enacted the Immigration and Nationality Act of 1952, it envisioned H-1 nonimmigrants as aliens of "distinguished merit and ability" who were filling temporary positions. Pub. L. No. 414, § 15(H)(i), 66 Stat. 163, 168 (1952).

91. 8 C.F.R. § 214.2(h)(6)(iv) (2013).

92. 8 U.S.C. § 1182(a)(5)(A)(i) (2012); *see also id.* § 1182(n)(1)(E)(i) (describing condition that employer cannot displace a U.S. worker in order to hire an H-1B nonimmigrant); 8 C.F.R. § 214.2(h)(6)(iv) (2013) (requiring that "qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers").

93. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 38–40 (1824); Dinh, *supra* note 76, at 2102.

of a federal visa, including H-1B visas[94] and E-3 visas.[95] In a brief opposing certiorari in *Wallace v. Calogero* (companion case to *LeClerc v. Webb*), the federal government made the following argument:

> By expressly incorporating a *state law* license as a *precondition* for obtaining permission to come to this country for a temporary period of time to practice law, and by failing to set any limitations on the standards a State may establish for obtaining such a license, Congress left the States largely free to determine those standards.[96]

In *LeClerc v. Webb*, the Fifth Circuit reasoned that it is not impossible for individuals to be subject to both state and federal laws.[97] The court found that a noncitizen with an H-1B visa can work in a specialty field, as allowed by the federal government, but not necessarily have a license for a particular profession in that field, as denied by the state.[98] Thus, the court concluded that someone who is otherwise qualified to be a lawyer would presumably still fulfill the H-1B criteria by being a paralegal.[99]

This reading cannot be correct because it would allow a state law to nullify a federal judgment enacted through its immigration power. States lack the power to trump federal law, especially in the field of immigration and in the determination of the conditions of entrance for a noncitizen. As discussed above,[100] in granting an H-1B visa the Secretary of Labor affirmatively certifies that individual may be admitted to "perform such skilled . . . labor."[101] If states could entirely preclude eligibility for noncitizens in occupations for which the federal

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94. *See* 8 U.S.C. § 1184(i)(2)(A) (2012) (stating that full state licensure is required to get H-1B visa "if such licensure is required to practice" in the specialty occupation); 8 C.F.R. § 214.2(h)(4)(v)(A) (2013) ("If an occupation requires a state or local license for an individual to fully perform the duties of the occupation," an alien "must have that license prior to approval."); *In re* St. Joseph's Hospital, 14 I. & N. Dec. 202, 203 (B.I.A. 1972) ("[I]n an H-1 case where the beneficiary is coming to the United States temporarily, it must be established that the alien will be able to engage in his profession immediately."); U.S. CITIZEN & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., OMB NO. 1615-0009, INSTRUCTIONS FOR FORM I-129, PETITION FOR A NONIMMIGRANT WORKER 5–6 (2011) ("The petition must be filed by the U.S. employer and must be filed with . . . [a] copy of any required license or other official permission to practice the occupation in the state of intended employment."). *See generally* AUSTIN T. FRAGOMEN JR. ET AL., 1 IMMIGRATION LAW AND BUSINESS § 6:50 (2d ed. 2013); 2 *id.* § 16.55.

95. U.S. consular posts generally require the following documents to establish eligibility for E-3 visa issuance: "a certified copy of any required license or other official permission to practice the occupation in the state of intended employment, if necessary, or evidence that the applicant will be obtaining the required license or permission within a reasonable time after admission." AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION LEGISLATION HANDBOOK § 3:5 (2013).

96. Brief for the United States as Amicus Curiae opposing Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Wallace v. Calogero, 551 U.S. 1158 (2007) (Nos. 05-1645, 06-11), 2007 WL 1520968, at *8.

97. *See* 419 F.3d 405, 424 (5th Cir. 2005).

98. *See id*. at 423.

99. *See id.* at 425.

100. *See supra* text accompanying notes 91–93.

101. 8 U.S.C. § 1182(a)(5)(A)(i)(I) (2012); *see also* 8 C.F.R. § 214.2(h)(6)(iv) (2013).

government grants employment-based visas, states would impermissibly be able to use licensing laws to take away what the federal government granted. Yet, a state still has a strong interest in ensuring that those practicing professions in that state have the educational and other qualifications the state requires.

Conflict preemption is too rigid to provide an analysis that accounts for the intersection of both federal and state law. This terrain lacks a bright line to separate to one side where only federal law operates and to the other side where state law is operative. The federal government retains and has exercised its power to determine who may enter the United States and under what terms, including providing work authorization for particular employment. However, because the federal government has also expressly recognized a role for state licensing laws, the Supremacy Clause does not operate to fully push all the criteria of state licensing laws aside, despite potential conflicts with the rest of the federal immigration power.

### C. FIELD PREEMPTION

In field preemption, even state laws that in no way interfere with federal law or its implementation are preempted because federal law is exclusive in the area.[102] This approach does not see federal and state regulation operating together, but rather adopts a "dualist approach to preemption" that attempts to separate state and federal spheres of power.[103] There are two conditions, either of which, if present, can create field preemption. There are arguments that either, or both, of the conditions for field preemption exist in the area of occupational licensing. However, what is less clear, and ultimately irresolvable by field-preemption analysis, is whether occupational licensing is part of the immigration field. If field preemption applied, then all state laws regulating occupational licenses, including qualification requirements, would be vulnerable to preemption.

First, field preemption will be found when Congress legislates "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[104] The federal government's enumerated and implied powers over immigration establish its primacy in this field; it is an area where states cannot operate. *Hines v. Davidowitz* established that "[federal] power in the general field of foreign affairs, including power over immigration, naturalization and deportation" is

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102. "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." Charleston & W. Carolina Ry. Co. v Varnville Furntiture Co., 237 U.S. 597, 604 (1915).

103. Robert A. Schapiro, *From Dualism to Polyphony*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 33, 50–51 (William W. Buzbee ed., 2009).

104. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see* Viet D. Dinh, *Federal Displacement of State Law: The Nineteenth-Century View*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 27, 39 (Richard A. Epstein & Michael S. Greve eds., 2007); Dinh, *supra* note 76, at 2107.

supreme and that this federal power in the field affecting foreign relations must be left entirely free from local interference.[105] In *Hines*, the Court held that a federal law preempted a state law operating in a traditional area of state power, requiring noncitizens to register with a state authority.[106]

State statutes that make certain noncitizen categories a precondition for professional licenses could be understood as a regulation on the conditions of the abode of noncitizens, and thus within the federal immigration field. These laws significantly limit potential work opportunities for noncitizens and so conflict with the federal power to determine the admission and exclusion of aliens. By regulating opportunities for work, states could in practice be deciding whether aliens can enter the country and attempting to control the conditions of abode.[107]

Second, field preemption can also be found when considering Congress's intent. It could be argued that congressional legislation in this area is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[108] According to this contention, Congress and the President have enacted extensive legislation and regulations regarding the employment of noncitizens that have been identified by the Supreme Court as comprehensive, as discussed more fully in section I.A.

Despite these arguments, field preemption cannot eviscerate the legitimate claim that states have on regulating for the health and safety within their sovereign boundaries. Completely ousting the state from this field, which can be broad enough to include licensing, gives short shrift to the power of states. *Zschernig v. Miller* shows the severity of field preemption.[109] In *Zschernig*, the Court held that an Oregon state law regulating how an alien not residing in the United States could take property in Oregon by succession or testamentary disposition was an impermissible "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[110] Although the Court recognized that the descent and distribution of estates are "traditionally regulated" by the states, it concluded "those regulations must give way" when they "affect[] international relations in a persistent and subtle way."[111] The effect that a state law must have on foreign affairs to be impermissible is not a bright line. However, *Zschernig* shows the strictures of this

105. 312 U.S. 52, 62–63 (1941).

106. *See id.* at 74.

107. *See* THOMAS ALEXANDER ALEINIKOFF, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 162–224 (2011).

108. *Rice*, 331 U.S. at 230; *see* Christopher H. Schroeder, *Supreme Court Preemption Doctrine*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 119, 127 (William W. Buzbee ed., 2009) ("[D]efining the field that has been occupied by federal legislation demands a close reading of the legislative history and intent."); Dinh, *supra* note 104, at 39 (explaining that courts must look to congressional intent to understand what the field of the federal law is).

109. 389 U.S. 429 (1968).

110. *Id.* at 432.

111. *Id.* at 440.

limitation, explicitly acknowledging that the intrusion does not need to be "gross" but just that it must have an impact that "*may well* adversely affect the power of the central government."[112]

If field preemption were applied to state occupational-licensing laws, then all requirements that states mandate (including professional competencies) could be vulnerable to preemption. The argument would be that any requirements, such as requiring that noncitizens pass a certain test for a professional license, "may well" adversely affect the federal government's power to regulate immigration or negotiate treaties with immigration provisions. However, then the legitimate state interests regarding professional competence are not satisfied.

### D. RESOLUTION THROUGH OBSTACLE PREEMPTION

The preemption approaches discussed above are inadequate to chart the contours of federal and state power in occupational licensing of noncitizens. In this terrain, both the federal government and the state government have strong claims on power, *and* the federal government has legislated to explicitly recognize and incorporate this state power. Thus, no matter how express, conflicting, or powerful federal law is regarding immigration and noncitizen employment, some role of states in occupational licensing cannot be swept aside through the operation of the Supremacy Clause. Such sweeping preemption would ignore the dictates of federal law to look to state law. It is equally evident that there is a tension between the federal immigration power and certain state licensing laws that cannot be reconciled. When state licensing laws expressly condition eligibility for professional licenses on one's immigration category, they interfere with federal immigration power.[113] State laws do not interfere with the federal immigration power when they impose the same qualifications on citizens and lawfully present noncitizens alike.

Obstacle-preemption analysis provides the best way to understand the overlapping roles of state and federal power, while also recognizing that ultimately state power must yield to federal authority in the immigration field. Obstacle preemption is found when a state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[114] The

112. *Id.* at 441 (emphasis added).

113. Congress's failure to set express boundaries of what states can include in regulations on licensing cannot be persuasively interpreted to imply an approval for states to include restrictions on occupational licenses based on citizenship. Congress can depend on courts to dependably apply implied preemption. In *Crosby v. National Foreign Trade Council*, the Court held "[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply." 530 U.S. 363, 387–88 (2000).

114. Felder v. Casey, 487 U.S. 131, 138 (1988) (quoting Perez v. Campbell, 402 U.S. 637, 649 (1971) (internal quotation mark omitted)); *see, e.g.*, Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896) ("[A]n attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these

Supreme Court has referred to this as an "unbroken rule that has come down through the years."[115]

Congressional purpose is the touchstone of obstacle preemption analysis.[116] State laws that prevent lawfully present noncitizens from being considered for professional licenses stand as an obstacle to the full purpose and intent of Congress in immigration law and policy that address the legal permission for noncitizens to be present and to be employed in the United States.[117] However, state laws that establish professional competencies and requirements for occupational licenses are in an area of traditional state police power[118] and do not interfere with the purpose or intent of Congress—thus remaining untouched by federal preemption. The elements of state laws that condition eligibility on a particular immigration status touch on immigration, and (through immigration) on foreign affairs. When this contact is made, state laws impermissibly create an obstacle to the full purposes of Congress and activate the Supremacy Clause, which operates to prevent the implementation of these preempted state laws.

The Fifth Circuit and the Second Circuit are split over whether preemption applies to state occupational licenses for noncitizens. The Fifth Circuit in *LeClerc* gave determinative effect to the observation that professional licenses implicate health and safety concerns central to the state's police power, asserting that some lawfully present noncitizens' terminable status could make regulation of them more difficult.[119] However, this approach does not give enough weight to the federalist structure that reserves powers to the states only until they touch the power of the federal government. Regardless of the permissibil-

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agencies of the federal government to discharge the duties for the performance of which they were created.").

115. Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 240 (1967).

116. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." (internal quotation marks omitted) (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996))).

117. *See* Arizona v. United States, 132 S. Ct. 2492, 2495 (2012).

118. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) ("Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'" (citation omitted)); Bond v. United States, 131 S. Ct. 2355, 2364 (2011) ("The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.").

119. *See* LeClerc v. Webb, 419 F.3d 405, 423 (5th Cir. 2005) ("The Louisiana Supreme Court was rationally entitled to conclude that the temporary status of nonimmigrant aliens could impede the Bar's regulatory and disciplinary efforts."); *see also* Van Staden v. St. Martin, 664 F.3d 56, 61 (5th Cir. 2011), *cert. denied*, 133 St. Ct. 110 (2012). Other courts have disputed the assertion that nonimmigrant status, by itself, implicates health and safety concerns governed by the state. *See* Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 606 (1976) (noting that U.S. citizenship "bears no particular or rational relationship to skill, competence, or financial responsibility"); Dandamudi v. Tisch, 686 F.3d 66, 79 (2d Cir. 2012) ("[W]e agree with the district court that there is no evidence 'that transience amongst New York pharmacists threatens public health or that nonimmigrant pharmacists, as a class, are in fact considerably more transient than LPR and citizen pharmacists.'" (quoting Adusumelli v. Steiner, 740 F. Supp. 2d 582, 598 (2010))). However, the federal government's power over immigration makes this inquiry unnecessary.

ity of state regulation on its own, once it is in conflict with federal power, state laws are preempted through the Supremacy Clause.[120] The Fifth Circuit's position would negate the federal laws that regulate employment of noncitizens and the federal purpose of encouraging certain work in the country because all noncitizens have a status that could be terminated. Even permanent residents can be removed in some circumstances.

The Second Circuit rejected the argument that federal law contemplates allowing states to deny eligibility for licenses based on noncitizen category in *Dandamudi v. Tisch*.[121] Federal law does recognize that states have a legitimate interest that an individual meet the educational and experiential qualifications necessary for a particular position. But the Second Circuit cautions, "that traditional police power cannot morph into a determination that a certain subclass of immigrants is not qualified for licensure merely because of their immigration status."[122] *Dandamundi* recognizes federal objectives of national control over who can be present in the country without state conditions that impede this determination. Further, the Second Circuit recognizes the federal authority over who can be employed in the country, while accepting a state interest in education and other criteria applied to citizens and noncitizens alike. The court stated that an interpretation that allows states to deny eligibility based on immigration category would impermissibly "make the 'federal laws creating H-1B and TN . . . advisory.'"[123] Federal law provides whether noncitizens should be admitted to the country and whether they have employment authorization. Allowing states to decide whether noncitizens (as a class, not as individuals) should not be permitted to work in an occupation would mean states could choose not to comply with federal law.[124] States cannot exclude noncitizens who are lawfully present (meaning those who have federal permission to be in the country) or with federal employment authorization from being eligible for an occupational license. The Second Circuit analysis reasoned that a state cannot choose what categories of noncitizens it would license, but only what professional standards an individual must meet.

Obstacle preemption analysis helps to resolve the conflict between federal and state laws. Congressional purpose is the touchstone of obstacle preemption

120. *See* Hines v. Davidowitz, 312 U.S. 52, 65–66 (1941) ("Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials—thus bears an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one. . . . even though they may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs."); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

121. 686 F.3d 66, 80 (2d Cir. 2012).

122. *Id.*

123. *Id.* (quoting Adusumelli v. Steiner, 740 F. Supp. 2d 582, 600 (2010)).

124. *See id.*

analysis.[125] To determine the full purpose and intent of Congress, the Supreme Court has considered the text and structure of the statute,[126] the entire federal scheme (both express and implied),[127] the subject matter,[128] and the history of the federal regulation,[129] and has held that purpose and intent can be broadly defined.[130] The overarching congressional purpose in immigration policy is to ensure that noncitizens are economically self-sufficient, that the employment needs of our economy are met, and that federal law controls the presence of all noncitizens without state impediments as to where, or under what conditions, noncitizens can live in the United States.

Applying these considerations reveals that state laws that make certain immigration categories a condition of eligibility for occupational licenses are an obstacle to the full purposes of Congress in three ways. First, such state laws make work and self-sufficiency more difficult for noncitizens to attain. Second, they prevent noncitizens from engaging in the employments for which they have federal authorization to work. Third, they restrict the conditions of federal permission to be in the United States. However, a state's use of its traditional power to determine professional competencies does not interfere with the federal purposes.

The first congressional purpose is reflected in the text and history of the Personal Responsibility and Work Opportunity Act,[131] now codified as part of the INA. State statutes that prevent noncitizens from having the opportunity to qualify for state professional licenses undermine this purpose. 8 U.S.C. § 1601(1) states:

> Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes. . . . It continues to be the immigration policy of the United States that . . . aliens within the Nation's

125. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted)).

126. *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 545 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

127. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) ("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."); Savage v. Jones, 225 U.S. 501, 533 (1912) ("[W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.").

128. *See Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in the judgment in part and dissenting in part).

129. In *Wyeth*, the Court looked to the history of the federal regulation to determine the "purpose of Congress." 555 U.S. at 566 (internal quotation marks omitted).

130. *See* Dinh, *supra* note 76, at 2104 (citing Felder v. Casey, 487 U.S. 131, 141 (1988)).

131. H.R. REP. NO. 104-651, at 6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2187 ("The congressional welfare reform strategy ends the role of welfare as an immigration magnet and goes significantly farther than the President's proposals in discouraging welfare-based immigration.").

> borders not depend on public resources to meet their needs, but rather rely on their own capabilities . . .[132]

The importance of work and self-sufficiency in the immigration scheme is also shown in the fact that an alien that is likely to "become a public charge is inadmissible."[133] The purpose of federal immigration law to further an employed and self-sufficient immigrant population is also visible in trade agreements with foreign nations, which specifically allow the entry of noncitizens with certain occupational skills.

A second federal immigration law goal is to encourage immigrants to fulfill the employment needs of the U.S. economy. States undermine this purpose if they prevent lawfully present noncitizens from being eligible for licenses necessary for employment. The purpose and intent of Congress in legislating to incorporate state license requirements is to reserve to the states the power to determine the qualifications for that profession within its borders, not to allow states to condition the opportunity to be considered for a professional license on a particular immigrant category. The federal regulations governing the implementation of work-tethered immigration visas demonstrate this intent. For example, in the case of H-1B, H1-B1, and E-3 visas, employers are required to pay the nonimmigrant wages for the specific performance of her visa as she waits to get a state license.[134] An employer must attest that "it will pay these nonimmigrants the required wage for time in nonproductive status due to a decision of the employer or *due to the nonimmigrant's lack of a permit or license*."[135] An H-1B nonimmigrant "shall" receive the required pay beginning on the date set forth in the approved H-1B petition or set by DHS for adjustment of status, whichever is later.[136] Studying or waiting for a state license to be able to perform the occupation that is a subject of the H-1B visas falls under this section, and the nonimmigrant must be paid as if she were performing that job.[137]

In *Greater Missouri Medical Pro-Care Providers, Inc.*, an administrative law judge ordered an employer to pay more than $350,000 in back pay to occupational and physical therapists with H-1B status for the salary they were owed for the time before they acquired a Missouri therapy license, but after they arrived in Joplin, Missouri and thus entered their employment.[138] The federal regula-

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132. 8 U.S.C. § 1601(1) (2012).

133. 8 U.S.C. § 1182(4)(A) (2012).

134. *See* U.S. DEP'T OF LABOR, LABOR CONDITION APPLICATION FOR NONIMMIGRANT WORKERS, ETA FORM 9035CP—GENERAL INSTRUCTIONS FOR THE 9035 & 9035E, http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9035CP.pdf (last updated Feb. 11, 2013).

135. *Id.* (emphasis added); *see* 20 C.F.R. § 655.731(c)(7)(i) (2013).

136. 20 C.F.R. § 655.731(c)(6) (2013).

137. *See In re* Chelladurai, ARB Case No. 03-072, 2006 WL 1151942, at *5 (Admin. Rev. Bd. Apr. 26, 2006) (finding that H-1B beneficiary considered to have "enter[ed] into employment when she first [made] herself available for work or otherwise [came] under the control of the employer, such as by . . . studying for a licensing examination" (internal quotation marks omitted)).

138. ARB Case No. 2008-LCA-26, 2014 WL 469269, at *18–19 (Admin. Rev. Bd. Oct. 18, 2011); *see* AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION LEGISLATION HANDBOOK § 10:27 (2013).

tions clearly contemplate that a noncitizen will not be categorically barred from getting that license.

A third federal immigration law purpose is to centralize and unify who has permission to be in the United States and under what conditions, including permission to work.[139] The context of the field in which Congress legislated also helps to define the congressional purpose. Congress legislated extensively in the field of employment for noncitizens (as more fully described in section I.A.). This context illuminates the permissible range of state action. Federal law preserves the traditional state power to determine the professional qualifications, for example, educational degrees, which all individuals must meet to be licensed for a particular profession in that state. Allowing states to discriminate on the basis of alienage would be in conflict with the rest of the federal immigration power, which gives the federal government the power to decide who can come into the United States based on work requirements and the general federal authority to determine which noncitizens have permission to work. This would be a substantial invasion into the federal immigration power. State employment-licensing laws are abundant. One in three U.S. workers needs state-government permission through licensing to work.[140] Collectively, state licensing laws are a significant invasion into the federal government's decision to allow certain noncitizens to work and to allow them to live in the country.

The importance of the context of the immigration field comes not only from the implied federal power over foreign affairs, but also from the text of the Constitution. The Naturalization Clause empowers Congress to create a singular "[r]ule of [n]aturalization."[141] While state professional licensing is not a straightforward question of the naturalization process, divergent state programs that base eligibility on alienage status undermine the policy of uniformity.[142] Considering the text and history of the federal statute governing state licensing laws, the federal scheme conveying the need for federal employment authorization, and the subject matter, obstacle preemption instructs that state laws that make certain immigration categories a condition of eligibility for an occupational license are an obstacle to the full purposes of Congress, but states still maintain the use of their traditional power to determine professional competencies.

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139. *See* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012); Hines v. Davidowitz, 312 U.S. 52, 73 (1941).

140. Carpenter II et al., *supra* note 51, at 7.

141. Graham v. Richardson, 403 U.S. 365, 382 (1971) (internal quotation mark omitted). Federal authorization for state alienage classifications impermissibly delegates power that is exclusively federal under the Naturalization Clause. *See* Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 630–38 (1994).

142. *See Graham*, 403 U.S. at 382 ("A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene [the] explicit constitutional requirement of uniformity.").

## III. A FEDERAL STATUTE AT THE INTERSECTION OF IMMIGRATION AND STATE OCCUPATIONAL LICENSING LAWS MAKES ALL LAWFULLY PRESENT NONCITIZENS ELIGIBLE FOR STATE LICENSES

Some have argued that a federal statute, 8 U.S.C. § 1621, acknowledges a role for states in licensing noncitizens, further unsettling this difficult terrain. The decisions in *Dandamudi* and *LeClerc* do not mention § 1621,[143] therefore implying that the statute was irrelevant to the issues in those cases. Further, applying obstacle preemption, the Second Circuit in *Dandamudi* stated that New York's law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" because it precluded licenses to those who were legally present and had authorization to work.[144] The court did not address § 1621, implying that it did not need to, in order to find obstacle preemption of a state licensing law that afforded licenses to permanent residents but not other categories of noncitizens. However, the Florida Supreme Court recently decided that § 1621 makes an individual with employment authorization and permission to stay in the United States under "Deferred Action for Childhood Arrivals" (DACA) ineligible to be licensed by the Florida State Bar.[145] Because § 1621 sits at the intersection of federal and state power, a full exploration of the preemption analysis requires its careful consideration.[146]

Under a correct interpretation of § 1621, as further explained below, legally present noncitizens must be eligible for occupational licenses. However, a state must pass legislation if the state wants to provide professional licensing to "illegal" aliens, meaning those noncitizens who are not "lawfully present," but not impose restrictions on licenses for categories of lawfully present noncitizens, especially those with employment authorization.[147] This interpretation best comports with the history and structure of § 1621, the principles of statutory construction to avoid an interpretation that raises constitutional questions, and preemption analysis.

### A. HISTORY AND STRUCTURE OF SECTION 1621

8 U.S.C. § 1621 was passed as part of the 1996 Personal Responsibility and Work Opportunity Act, the legislation codifying comprehensive welfare re-

143. *See* Dandamudi v. Tisch, 686 F.3d 66 (2d Cir. 2012); LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005).

144. *Dandamudi*, 686 F.3d at 80 (internal quotation marks omitted). The *Dandamudi* plaintiffs were in H and TN categories. *See id.*

145. Fla. Bd. of Bar Exam'rs re Question, No. SC11-2568, 2014 WL 866065, at *3–4 (Fla. Mar. 6, 2014).

146. This statute was also discussed by the Supreme Court of California in *In re Garcia*, a case considering attorney licensing for undocumented immigrants. 315 P.3d 117, 121 (Cal. 2014).

147. Some have argued that this statute even so interpreted is unconstitutional under the Tenth Amendment because of its coercive effect on states. *See* Brief for Dream Bar Ass'n et al. as Amici Curiae Supporting Sergio C. Garcia, *In re* Garcia, 315 P.3d 117 (Cal. 2014) (No. S202512). Others have argued that the statute violates equal protection. *See* BICKEL & BREWER LATINO INST. FOR HUMAN RIGHTS, LIFTING THE BAR: UNDOCUMENTED LAW GRADUATES & ACCESS TO LAW LICENSES 18 (2014). These arguments may have validity but are beyond the scope of this Note.

form.[148] This complicated and lengthy bill, which includes over 900 sections, focused on means-tested welfare benefits, not on preventing access to work.[149] Section 1621 is part of Title IV of the Act entitled "Restricting Welfare and Public Benefits for Aliens."[150] None of the legislative history discusses occupational licensing.[151]

Section 1621(d) is entitled "State authority to provide for eligibility of illegal aliens for State and local public benefits." Section 1621 also defines "state benefit" as including "any . . . professional license . . . provided by an agency of a State or local government or by appropriated funds of a State or local government."[152] It thus appears that states can provide licenses to lawfully present noncitizens without a specific state statute. However, in an amicus brief involving bar admission, the Department of Justice (DOJ) took the position that § 1621 only allowed states to provide licenses to specific limited categories of noncitizens and not all those lawfully present with work authorization.[153] To do so, it pointed to the U.S. Code version of § 1621(a), which, as explained below, is not the official version of the statute. Section (a) designates categories of aliens eligible for state benefits.[154] It includes three categories of aliens: qualified aliens (as defined in section 431, codified at 8 U.S.C. § 1641), nonimmigrants under the INA, and aliens paroled into the United States.[155]

The DOJ position's result is that if a noncitizen is in a category that is neither

148. 8 U.S.C. § 1621 (2012).

149. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996); *In re* Garcia, 315 P.3d 117, 125–26 (Cal. 2014).

150. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 411, 110 Stat. at 2268.

151. *See* H.R. REP. No. 104-651, at 6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2187; H.R. REP. 104-651, at 1445. This observation provides background context for understanding where § 1621 fits in the legislative scheme, while recognizing courts ordinarily believe that "[s]ilence in the legislative history about a particular provision . . . is not a good guide to statutory interpretation." Am. Online, Inc. v. United States, 64 Fed. Cl. 571, 578 (Fed. Cl. 2005); *see* Harrison v. PPG Indus., Inc., 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."). *But see* Chisom v. Roemer, 501 U.S. 380, 396 (1991) (holding that when Congress amended a statute that had previously covered judges and no legislator identified or mentioned that the amendment would mean the statute no longer covered judges, Congress did not necessarily intend this change). *See generally* JELLUM, *supra* note 75, at 179–83.

152. 8 U.S.C. § 1621(c)(1)(A) (2012).

153. Brief for the United States as Amicus Curiae *In re* Garcia, 315 P.3d 117 (Cal. 2014) (No. S202512), 2012 WL 3822246, at *3.

154. *See* 8 U.S.C. § 1621(a) (2012) ("[A]n alien who is *not*—(1) a qualified alien (as defined in section 1641 of this title), (2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. § 1101 et seq.], or (3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. § 1182(d)(5)] for less than one year, *is not eligible* for any State or local public benefit (as defined in subsection (c) of this section)." (emphases added)). Exceptions to state or local benefits are listed in § 1621(b) and the very narrow groups excluded from this provision are identified in § 1621(c)(2), none of which are relevant to this analysis.

155. *Id.*; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title IV, § 411, 110 Stat. 2268 (1996).

encompassed in the narrowly interpreted categories in section (a) nor "illegal" and thus covered by section (d), the noncitizen is left in limbo. However, as discussed in the following two sections, the legally binding text, principles of statutory interpretation, and preemption require that all lawfully present noncitizens in any category are eligible for professional licenses.

### B. ALL LAWFULLY PRESENT NONCITIZENS ARE INCLUDED IN ELIGIBILITY FOR OCCUPATIONAL LICENSES UNDER SECTION 1621

All nonimmigrants broadly defined under all provisions of the INA are eligible for professional licenses, under 8 U.S.C. § 1621, despite the fact that the version of this provision codified in the U.S. Code appears to include only those nonimmigrants defined in 8 U.S.C. § 1101. The text of 8 U.S.C. § 1621(a)(2) that was passed by Congress and published in the Statutes at Large defines eligible nonimmigrants as "a nonimmigrant under the Immigration and Nationality Act."[156] The version published in the U.S. Code modifies this subpart to include a reference to "8 U.S.C. § 1101 et seq.," purporting to define nonimmigrants under the INA by reference to this definitional section.[157] The version published in the Statutes at Large trumps, because it is the legal evidence of the governing law, while the version in the U.S. Code is only prima facie evidence of the law.[158]

Congress's broad inclusion of all nonimmigrants makes sense given the basic structure of immigration law and general nomenclature, which identifies three general categories of noncitizens: immigrants (legal permanent residents), nonimmigrants (others lawfully present but not permanent residents), and those who are "undocumented" or unauthorized (those without lawful presence).[159]

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156. 8 U.S.C. § 1621(a)(2) (2012).

157. *Id.* (referring to "a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.]").

158. 1 U.S.C. § 112 (2012) ("The United States Statutes at Large shall be legal evidence of laws . . . in all the courts of the United States, the several States . . . .") (first passed in 1895). *See generally* JOHN V. SULLIVAN, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 110-49, at 53–54 (2007). Title 8 is not one of the twenty-four of the fifty titles have been revised and enacted into positive law. *See United States Code*, U.S. GOV'T PRINTING OFFICE, http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE (last visited Feb. 16, 2014) ("Of the 51 titles, the following titles have been enacted into positive (statutory) law: 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 40, 41, 44, 46, 49, and 51. When a title of the Code was enacted into positive law, the text of the title became legal evidence of the law. Titles that have not been enacted into positive law are only prima facie evidence of the law. In that case, the Statutes at Large still govern.").

159. *See* STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., REVIEW OF THE PRESENT-LAW TAX AND IMMIGRATION TREATMENT OF RELINQUISHMENT OF CITIZENSHIP AND TERMINATION OF LONG-TERM RESIDENCY 48 (Comm. Print 2003) (citations omitted) ("Noncitizens fall into three categories for purposes of U.S. immigration law. First, noncitizens who enter illegally or who violate the terms of their visa status are referred to as 'unlawful' or 'unauthorized.' Second, individuals who are admitted temporarily as visitors for a specific purpose are 'nonimmigrants.' Nonimmigrants are required to leave the country at the end of the time allotted them for the specific purpose. Third, noncitizens who receive permission to live and work permanently in the United States are called by various names, including 'immigrants,' 'resident aliens,' 'lawful permanent residents,' 'permanent residents,' or may be referred to as 'green card

In *In re Garcia*, the DOJ argued that § 1621 makes all categories of aliens who are not identified in § 1621(a) presumptively ineligible for professional licenses.[160] The DOJ asserted that those who are not lawfully present and additional categories of lawfully present aliens who presumptively ineligible for professional licenses under § 1621. The DOJ acknowledged that in § 1621, Congress only created a "default rule (alterable by the states)."[161] However, its hyper-literal interpretation seems to argue that states are prevented from altering the default rule for all legally present aliens.

The legally applicable text of § 1621 shows that Congress was using the term "nonimmigrant" broadly to mean those lawfully present under the INA (other than permanent residents) and not to a specific statutory definition. The definitional reference to 8 U.S.C. § 1101 was not added until it was codified in the U.S. Code. Section 1101 does not include *all* legally present noncitizens, not even all legally present noncitizens who are eligible for other federal benefits or are authorized to work by federal law and regulations. Other provisions of the INA define these other categories of lawful presence or authorize the Attorney General to use discretion to do so. For example, refugees seeking asylum,[162] withholding of removal,[163] and protection under the Convention Against Torture[164] have work authorization[165] and are expected to be long-term U.S. residents because by definition they remain in the United States to avoid persecution.[166] As shown in the chart in Appendix 3, many more categories of lawfully present noncitizens are determined to be eligible under the Affordable Care Act to enroll in state or federally run health insurance programs and to apply for premium tax credits[167] than those lawfully present noncitizens defined in § 1101.[168]

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holders.'"); *see also* RUTH ELLEN WASEM, CONG. RESEARCH SERV., RS20916, IMMIGRATION AND NATURALIZATION FUNDAMENTALS 1 (2003) ("The two basic types of legal aliens are *immigrants* and *nonimmigrants*.")

160. *See* Brief for the United States as Amicus Curiae *In re* Garcia, 315 P.3d 117 (Cal. 2014) (No. S202512), 2012 WL 3822246, at *3.

161. *Id.* at *6.

162. *See* Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2012).

163. *See* Immigration and Nationality Act § 241, 8 U.S.C. § 1231 (2012).

164. *See* 8 C.F.R. § 208.16–.18 (2013).

165. *See* 45 C.F.R. § 152.2(5) (2011).

166. *See* 8 U.S.C. § 1231(d)(3)(A) (2012). *See generally* 8 U.S.C. § 1158(b)(1)(A) (2012) (eligibility for asylum); 8 U.S.C. § 1101(a)(42)(A) (2012) (definition of refugee).

167. *See* 35 C.F.R. § 155.2 (2012); 26 C.F.R. § 1.36B-1(g) (2013); Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (codified at 26 C.F.R. pts. 1 & 620); Exchange Standards for Employers, 77 Fed. Reg. 18,310 (Mar. 27, 2012) (codified at 45 C.F.R. pts. 155–57).

168. *See infra* Appendix 3. *See generally "Lawfully Present" Individuals Eligible Under the Affordable Care Act*, NAT'L IMMIGRATION LAW CTR. (Sept. 2012), http://www.nilc.org/document.html?id=809 (describing categories of people included under the term "lawfully present" for the purposes of determining Affordable Care Act eligibility). The following noncitizens are considered "lawfully present" *and* eligible under the Affordable Care Act (ACA), 45 C.F.R. § 152.2, *and* for state and local benefits under 8 U.S.C. § 1621:

> (1) a qualified alien as defined in section 431 of the Personal Responsibility and Work Opportunity Act (PRWORA) (8 U.S.C. § 1641); (2) an alien in nonimmigrant status who has

Further, with regard to permission to work, a federal regulation implementing the INA provides employment authorization to legally present noncitizens, including categories not included in the definition section of § 1101.[169] The authority for this regulation comes from provisions of the INA.[170] Authorization to work in the United States further implies lawful presence because it is impossible to work in the United States without being lawfully present. There may be some ambiguity about whether these other legally present noncitizens would be included in the version of the text of this provision in the U.S. Code that specifically refers to the narrower definition in § 1101. However, under the broader, legally binding language in the Statutes at Large (referring to the INA as a whole), all the categories of lawfully present and work-authorized noncitizens should be included.

This interpretation is supported by the analysis of the Second Circuit in *Dandamudi*. The plaintiffs in *Dandamudi* were noncitizens in H and TN categories. Those in the H category are defined in section 1101 of the INA. Those in the TN category are considered in the general concept of nonimmigrants, and the court referred to them as such. However, TN is not included in the definition of nonimmigrant under section1101 of the immigration law. The TN category was established through NAFTA. The Second Circuit stated that the application of obstacle preemption would resolve the issue of the unconstitutionality of the state restriction on licensing of lawfully present noncitizens but for a procedural limitation in NAFTA.[171] The plaintiffs in the TN category could not argue that the state law is preempted because the NAFTA Implementation Act allows only the United States to bring actions against state laws inconsistent with NAFTA.[172] Therefore, the court also applied an equal protection analysis to hold the statute unconstitutional.[173] In finding that, but for the procedural limitation of NAFTA, the New York statute would be preempted, the Second Circuit did not need to mention § 1621 because it must have considered this statute as encompassing nonimmigrants broadly (not limited by the reference in § 1621(a) to § 1101) and determined that states are preempted from disqualifying legally present noncitizens with employment authorization.[174]

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> not violated the terms of the status under which he or she was admitted or to which he or she has changed after admission; (3) an alien who has been paroled into the United States pursuant to section 212(d)(5) of the Immigration and Nationality Act (INA) (8 U.S.C. § 1182(d)(5)) for less than 1 year, except for an alien paroled for prosecution, for deferred inspection or pending removal proceedings.

45 C.F.R. § 152.2 (2012). *See, e.g.*, *id.* § 274a.

169. *See* Control of Employment of Aliens, 8 C.F.R. § 274a.12 (2013) (referring to "[c]lasses of aliens authorized to accept employment").

170. *See, e.g.*, *id.* § 274a (noting the following: "AUTHORITY: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2").

171. Dandamudi v. Tisch, 686 F.3d 66, 81 (2d Cir. 2012).

172. *See* 19 U.S.C. § 3312(b)(2) (2012).

173. *Dandamudi*, 686 F.3d at 81.

174. *See id.* at 80.

Including all noncitizens legally present under immigration law and practice generally, and not only those in the limited nonimmigrant-definition provision, also makes common sense considering the reality that immigration law is enormously complicated, nuanced, and often changing. Discussion of immigration reform indicates that we could soon have legislation that would likely create many more lawfully present categories of noncitizens authorized to work in the United States.[175] As immigration law is consistently evolving, that the statute includes the flexibility to incorporate new categories so that there is consistency in the treatment of noncitizens is the most logical interpretation.

The interpretation of § 1621 to include all legally present noncitizens is further bolstered by the legislative history of the statute and principles of constitutional avoidance. Reading § 1621 in the context of its legislative history supports the conclusion that states were not preserved the power to make only certain categories of lawfully present noncitizens eligible for professional licenses. The structure of the statute indicates that the congressional objective was to exclude "illegal" aliens from receiving state benefits, including licenses, unless a state passes a specific statute.[176] The DOJ recently argued that § 1621 was "plainly designed to preclude undocumented aliens from receiving commercial and professional licenses issued by States and the federal government,"[177] and in deciding *In re Garcia*, the court described this provision as one "that generally restricts an undocumented immigrant's eligibility to obtain a professional license."[178] This provision, focused on undocumented immigrants, should not be interpreted as Congress allowing states to impose additional restrictions on legally present noncitizens.

The doctrine of constitutional avoidance also supports this statutory interpretation. This doctrine directs that if there are different reasonable interpretations of statutory language, the statute should be interpreted to avoid raising constitutional issues.[179] The Supreme Court has identified this doctrine as a "cardinal principle" that "has for so long been applied by the Court that it is beyond debate."[180] The constitutional avoidance doctrine does not require a determination that a particular interpretation would be unconstitutional, only that it would

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175. *See, e.g.*, IMMIGRATION POLICY CTR., A GUIDE TO S.744: UNDERSTANDING THE 2013 SENATE IMMIGRATION BILL 7–12 (2013) (explaining provisions of Title II: Immigrant Visas).

176. *See* 8 U.S.C. § 1621 (2012).

177. Brief for the United States as Amicus Curiae *In re* Garcia, 315 P.3d 117 (Cal. 2014) (No. S202512), 2012 WL 3822246, at *7.

178. *In re* Garcia, 315 P.3d 117, 121 (Cal. 2014).

179. *See* Almendarez-Torres v. United States, 523 U.S. 224, 250 (1998) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopted the latter." (internal quotation marks omitted)); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."); UNIF. STATUTE & RULE CONSTR. ACT § 18(a)(3), 14 U.L.A. 57 (1995) ("A statute or rule is construed, if possible, to . . . avoid an unconstitutional . . . result."). *See generally* JELLUM, *supra* note 75, at 235–37.

180. *Almendarez-Torres*, 523 U.S. at 250 (internal quotation marks omitted).

create constitutional doubt.[181]

Interpreting § 1621 to allow states to exclude certain categories of noncitizens for eligibility for licenses would raise serious equal protection concerns, in at least three ways.[182] First, it would treat lawfully present noncitizens with work authorization differently than legal permanent residents, the disparate treatment that the Second Circuit held to be a violation of equal protection in *Dandamudi*.[183] Second, it would allow states to afford licensing to short-term noncitizens, for example, those on a visitors visa, who do not have federal work authorization and who violate the terms of their visas by working, but would not allow states to provide professional licenses to those in categories that provide for longer term presence in the United States with federal employment authorization. Third, allowing licenses on only nonimmigrants included in the definition section of § 1101 would give states the power to provide professional licensing for noncitizens who are *not* legally present that states could not provide to *lawfully* present noncitizens who are not identified in § 1101. Section 1621(d) instructs that states may provide benefits to "illegal aliens" who are "not lawfully present" by passing an affirmative state statute after 1996.[184] A narrow interpretation would leave legally present noncitizens not identified in § 1101 with fewer rights than illegal aliens. Thus, this interpretation would put the constitutionality of the statute into doubt.[185] To avoid the constitutional question, § 1621 should be interpreted as making all legally present noncitizens, especially those with federal employment authorization, eligible for state professional licenses, providing they meet state established qualification requirements.[186] Such a construction should also be avoided as it would border on

181. *See id.*

182. *See infra* Appendix 1 (listing cases that hold state occupational licenses and limitations based on immigration category unconstitutional and in violation of the Equal Protection Clause).

183. *See* Dandamudi v. Tisch, 686 F.3d 66, 78–79 (2d Cir. 2012).

184. 8 U.S.C. § 1621(d) (2012) (declaring that a state "may provide that an alien who is *not lawfully present* in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility" (emphases added)). Recently, the California Supreme Court decided that undocumented immigrants could receive a law license because the legislature passed a bill that meets the terms of § 1621(d). *See In re* Garcia, 315 P.3d 117, 127 (Cal. 2014) (interpreting CAL. BUS. & PROF. CODE § 6064 (West 2014)); *see also* Martinez v. Regents of Univ. of Cal., 241 P.3d 855 (Cal. 2010) (upholding the exemption for certain undocumented immigrants from having to pay non-resident tuition in California state colleges and universities because state statute met the requirement of § 1621(d)).

185. *See infra* Appendix 1 (listing cases holding state occupational licenses unconstitutional in violation of equal protection).

186. Interestingly, after the Second Circuit decided *Dandamudi*, the New York Education Department changed its licensing standards to include the classifications in § 1621(a) but not to include all people legally present. For example, see applications for licenses from the New York State Education Department, Form 1IS, *available at* http://www.op.nysed.gov/documents/form1is.pdf, http://www.op.nysed.gov/prof/nurse/nurse1.pdf (nurse), http://www.op.nysed.gov/prof/ot/ot1.pdf (occupational therapy assistant). Whether this New York practice complies with the equal protection analysis of *Dandamudi* is questionable, but beyond the scope of this Note.

creating an absurd result.[187]

Section 1621 should not be interpreted to create a ceiling on the categories of lawfully present noncitizens that are eligible for state occupational licenses.[188] Interpreting § 1621 to include all legally present noncitizens is not only most faithful to the statutory text—it also has the virtue of avoiding serious constitutional concerns.

### C. SECTION 1621 IS NOT A SAVINGS CLAUSE, AND EVEN IF IT WERE, STATE LICENSING LAWS THAT STAND AS AN OBSTACLE TO FEDERAL IMMIGRATION LAW ARE PREEMPTED

Although the preemption analysis of state licensing laws leads to the conclusion that states are preempted from making any legally present noncitizens ineligible for licenses, the text of 8 U.S.C. § 1621 could be read as creating ambiguity over whether states retain the power to make only certain noncitizens eligible for state professional licenses. The text defines those noncitizens eligible for state or local benefits as a double negative (an alien who is *not* included in § 1621(a) is *not* eligible for any state or local public benefit). It does not use terms such as "must" or "shall" to direct states. Because that statute arguably leaves room for state law, one could argue that the statute should be interpreted as a savings clause, making it permissible (but not mandatory) for states to provide state benefits to certain categories of noncitizens.

A savings clause preserves claims that are not expressly preempted, leaving intact state law claims whose enforcement would not interfere with the matter preempted by federal regulation.[189] An example of a savings clause, from the

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187. The absurdity doctrine, also known as the golden rule, counsels that if the implementation of a statute according to its plain meaning would lead to absurd results, judges can interpret the statute in a way that eliminates or diminishes the absurdity because the legislature would not have intended an absurd result. *See* Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892) ("[A] consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."); River Wear Comm'rs v. Adamson, [1877] 2 App. Cas. 743 (H.L.) 764 ("[W]e are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification . . . ."); *see also* Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 455 (1989). *See generally* JELLUM, *supra* note 75, at 71–75 (explaining the absurdity doctrine). While this canon of statutory interpretation is generally understood to allow judges to avoid the ordinary meaning of a statute, if a judge can interpret a statute in violation of its ordinary meaning to avoid absurd results, then absurdity is also relevant when a judge is interpreting an arguably ambiguous provision. Interpreting an ambiguous provision is less controversial and does less violence to the plain text than applying a doctrine to find the plain text does not apply.

188. *See* WILLIAM W. BUZBEE, *Federal Floors, Ceilings, and the Benefits of Federalism's Institutional Diversity*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 98, 98 (William W. Buzbee ed., 2009) ("Regulatory ceilings involve federal actions or standard setting that preclude additional, more protective regulatory choices by other levels of government . . . ."). *See generally* Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13, 14–17 (William W. Buzbee ed., 2009) (addressing the benefits of federalism in general).

189. *See* 6 FEDERAL PROCEDURAL FORMS § 15:257 (2013).

Federal Boat Safety Act of 1971, reads "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."[190] The existence of a savings clause, however, does not end the inquiry into the applicability of state laws, because a savings clause cannot prevent the ordinary workings of preemption.[191]

If the statute were interpreted as a savings clause, then its permissive language could give states the choice to make licenses available to any legally present noncitizens and allow states to make distinctions between people in different immigration categories. Each state's choice in what occupational licenses to make available to noncitizens would be "saved" from the preemptive power of federal law working through the Supremacy Clause. However, the text, the context of the provision, and the principles of statutory interpretation (discussed in the previous section) all show that § 1621 should not be treated as a savings clause.

The text of § 1621 is not analogous to the provisions recently identified by the Supreme Court as savings clauses. For example, the text the Court identified as a savings clause in *AT&T Mobility LLC v. Concepcion* reads, "save upon such grounds as exist at law or in equity for the revocation of any contract."[192] The text interpreted as a savings clause in *Chamber of Commerce v. Whiting* states that "[f]ederal immigration law expressly preempts 'any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ . . . unauthorized aliens.'"[193] In contrast, § 1621 is a substantive and nuanced provision that does not carve out certain state functions from the rest of the workings of the statute, but instead affirmatively sets out a scheme for the interaction between state and federal law in an area where both sovereigns claim power.

Further, interpreting § 1621 as a savings clause makes it more likely that state licensing laws would be irreconcilable with and preempted by federal law. Current state laws that make noncitizens who are identified as "legally present" ineligible for occupational licenses (see chart in Appendix 2 for examples) would be subject to conflicting interpretations. The same individual would be legally present according to parts of federal law, but not eligible for a state occupational license if states could decide to make eligible only certain limited categories of lawfully present noncitizens and "illegal aliens."[194] Any ambiguity

190. 46 U.S.C. § 4311(g) (2006); *see* Sprietsma v. Mercury Marine, 537 U.S. 51, 59 (2002) (noting that this provision acts as a savings clause).

191. Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000) ("We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.").

192. 131 S. Ct. 1740, 1745 (2011) (quoting 9 U.S.C. § 2 (2006)) (internal quotation marks omitted).

193. 131 S. Ct. 1968, 1973 (2011) (emphasis added) (quoting 8 U.S.C. § 1324a(h)(2) (2006)).

194. *See infra* Appendix 3. *Compare* 8 U.S.C. § 1621(a) (2012) (providing that certain categories of aliens are ineligible for state and local public benefits), *with* 26 C.F.R. § 1.36B-1(g) (2013) (providing that certain categories of aliens excluded from receiving state and local public benefits nonetheless

in § 1621 should be resolved in favor of an interpretation that best harmonizes federal and state laws and the U.S. Code as a whole.[195]

Even if § 1621 were interpreted as a savings clause allowing states the power to decide whether to make legally present noncitizens eligible for professional licenses, it would not be shielded from the normal workings of preemption.[196] As Professor Viet D. Dinh explained in *Reassessing the Law of Preemption*, Congress cannot "tell a court to resolve the conflict in favor of the state laws" because this would violate the Supremacy Clause.[197] The Supreme Court stated in *Crosby v. National Foreign Trade Council* that "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict."[198] The Supreme Court has found that even if Congress expressly includes a savings clause that reserves certain powers within a federal regulatory scheme to the states, state laws within this savings-clause realm that stand as an obstacle to Congress are still preempted.[199]

## CONCLUSION

A familiar division of power between federal and state governments emerges through analyzing the preemption of state laws that deny the consideration of legally present noncitizens for occupational licenses. The federal authority in the field of immigration power and specific provisions in federal law related to employment of noncitizens preempt states from excluding lawfully present noncitizens and employment-authorized noncitizens from being considered for state professional licenses. The federal government controls who has the right to come into and work in the United States, and thus who can be considered for licenses. However, a state maintains the power to set the professional competence necessary (for example, educational degrees, experience, and skills) for an individual to be qualified to practice the profession in that state.[200]

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qualify as "lawfully present"), *and* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (noting this discrepancy).

195. *See* JELLUM, *supra* note 75, at 245–46. The doctrine of *in pari materia* counsels that the whole code concerning the same subject should be interpreted harmoniously. *Id.* at 99–102.

196. If there is not preemption, then the definition of "professional license, or commercial license" in 8 U.S.C. § 1621(c)(1)(A) would be of central importance. Not all employment licenses are necessarily "professional" or "commercial." For example, a landscaping license may not be considered a "professional license" because a landscaper is not ordinarily considered a "professional" occupation. *See* 8 U.S.C. § 1101(a)(32) (2006) ("The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.").

197. Dinh, *supra* note 76, at 2091.

198. 530 U.S. 363, 388 (2000).

199. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000).

200. *See* Dandamudi v. Tisch, 686 F.3d 66, 80 (2d Cir. 2012). *But see* Surmeli v. New York, 412 F. Supp. 394, 397 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 560 (2d Cir. 1976) (noting that state's requirement that persons licensed as physicians become U.S. citizens within ten years of licensure as a condition of

In the uncertain terrain of state occupational licenses, the doctrinal tools of preemption helpfully frame and direct the necessary analysis. Although express preemption, conflict preemption, and field preemption fail to adequately resolve the conflict between federal and state power, obstacle preemption provides the solution. Using congressional purpose as the touchstone—as well as carefully considering the text, structure, subject matter, and history of immigration law and policy within the context of the entire federal scheme—obstacle-preemption analysis directs that eligibility for state occupational licenses cannot be conditioned on certain specific noncitizen categories, but that states maintain the power to determine occupational competencies.

This interpretation has two conceptual virtues. First, it preserves and reconciles power for both federal and state sovereigns. This follows the mandate from the Supreme Court that when regulatory systems overlap, the court must attempt to "reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'"[201] Second, it prevents state laws from circumventing[202] and undermining congressional power to control immigration, thus violating the Supremacy Clause. When a state restricts licensing based on alien category rather than professional competencies, it acts as a control on migration.[203] This interpretation protects the constitutional balance of powers as designed by the Framers who intended, as James Madison wrote, that federal powers "suppose the disposition which will evade them" through the Supremacy Clause.[204]

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continued licensure bears no logical relationship to professional competence and thus lacks a rational basis).

201. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973) (quoting Silver v. N.Y. Stock Exch., 373 U.S. 341, 357 (1963)); O'REILLY, *supra* note 73, at 74; *accord* William W. Buzbee, *Federal Floors, Ceilings, and the Benefits of Federalism's Institutional Diversity*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 98, 101 (William W. Buzbee ed., 2009) ("In the modern political realm and contemporary administrative state, however, dual federalism approaches are a rarity. Instead, Congress has repeatedly chosen to create regulatory schemes that call on a role for federal, state, and sometimes even local governments."); *cf.* Dinh, *supra* note 76, at 2113 (contending that two provisions in a federal statute should be read together and each given full meaning).

202. *See* Richard A. Epstein & Michael S. Greve, *Conclusion: Preemption Doctrine and Its Limits*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 309, 313 (Richard A. Epstein & Michael S. Greve eds., 2007).

203. *See* Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187,* 35 VA. J. INT'L L. 201, 202 (1994).

204. Epstein & Greve, *supra* note 202, at 314 (citing Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* WRITINGS 142, 146 (Jack N. Rakove ed., 1999)).

## APPENDIX 1: CASES THAT HOLD EQUAL PROTECTION IS VIOLATED BY STATE LAWS LIMITING OCCUPATIONAL LICENSES AND OPPORTUNITIES BASED ON IMMIGRATION CATEGORY

### SUPREME COURT CASES

- *Bernal v. Fainter*, 467 U.S. 216 (1984) (state statute permitting only U.S. citizens to become notaries public violates the Equal Protection Clause);
- *C.D.R. Enters., Ltd. v. Bd. of Educ.*, 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd sub nom. Lefkowitz v. C.D.R. Enters., Ltd.*, 429 U.S. 1031 (1977) (unconstitutional for state to require preference for state citizens in construction of public works);
- *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (Puerto Rico statute permitting only U.S. citizens to practice as private civil engineers violated either due process or equal protection);
- *Ind. Real Estate Comm'n v. Satoskar*, 417 U.S. 938 (1974) (invalidated state statute precluding aliens from obtaining a real estate license);
- *Sugarman v. Dougall*, 413 U.S. 634 (1973) (state statute barring all aliens from holding permanent positions in the competitive class of civil service positions violates the Equal Protection Clause);
- In re *Griffiths*, 413 U.S. 717 (1973) (although a state has wide freedom to gauge the fitness of a particular applicant to practice law, it cannot preclude all aliens from taking the state bar examination);
- *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (invalidated restriction of commercial fishing licenses to only those eligible for citizenship);
- *Truax v. Raich*, 239 U.S. 33 (1915) (unconstitutional violation of equal protection for a state to require private employers to employ at least eighty percent qualified electors or native-born citizens);
- *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (a city may not administer a local ordinance in such a manner as to preclude its alien inhabitants from operating laundries).

### OTHER FEDERAL CASES

- *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012) (state law excluding subclass of aliens who were lawfully admitted to United States pursuant to policy granting those aliens right to work in United States was subject to strict scrutiny review);
- *Kirk v. N.Y. State Dep't of Educ.*, 562 F. Supp. 2d 405 (W.D.N.Y. 2008) (state law restricting the granting of professional veterinarian licenses to U.S. citizens and lawful permanent residents was subject to strict scrutiny and violated the Equal Protection Clause);

- *Szeto v. La. State Bd. of Dentistry*, 508 F. Supp. 268 (E.D. La. 1981) (state law prohibiting aliens from being licensed to practice dentistry unconstitutional);
- *Kulkarni v. Nyquist*, 446 F. Supp. 1269 (N.D.N.Y. 1977) (state statute imposing a U.S. citizenship requirement for the licensing of a physical therapist unconstitutional);
- *Surmeli v. New York*, 412 F. Supp. 394 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 560 (2d Cir. 1976) (state law requiring that persons licensed as physicians become U.S. citizens within ten years of licensure as a condition of continued licensure bears no logical relationship to continued professional competence, and thus lacks a rational basis);
- *Wong v. Hohnstrom*, 405 F. Supp. 727 (D. Minn. 1975) (state law requiring U.S. citizenship for examination for registration as a pharmacist unconstitutional);
- *Arias v. Examining Bd. of Refrigeration & Air Conditioning Technicians*, 353 F. Supp. 857 (D.P.R. 1972) (law requiring citizenship as prerequisite for obtaining an air conditioning technician's license unconstitutional).

STATE COURT CASES

- In re *Park*, 484 P.2d 690 (Alaska 1971) (state law excluding aliens from bar membership unconstitutional with no rational connection to an applicant's fitness to practice law);
- *Ariz. State Liquor Bd. of Dep't of Liquor Licenses & Control v. Ali*, 550 P.2d 663 (Ariz. Ct. App. 1976) (state statute making citizenship one of the requirements for obtaining a liquor license unconstitutional);
- *Raffaelli v Comm. of Bar Exam'rs*, 496 P.2d 1264 (Cal. 1972) (state statute conditioning admission to the bar on citizenship violated the Equal Protection Clause);
- *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249 (Fla. 1987) (state law restricting business agent licenses to citizens violated the Equal Protection Clause);
- In re *Estate of Fernandez*, 335 So. 2d 829 (Fla. 1976) (state law allowing only citizens to apply for letters of administration violated the Equal Protection Clause);
- *Templar v. Mich. State Bd. of Exam'rs of Barbers*, 90 N.W. 1058 (Mich. 1902) (state statute prohibiting aliens from being licensed as barbers held invalid denial of equal protection);
- *Lipkin v. Duffy*, 196 A. 434 (N.J. 1938) (city ordinance excluding nonresidents from license to operate junkyard held impermissibly discriminatory);
- *Wormsen v. Moss*, 29 N.Y.S.2d 798 (N.Y. Sup. Ct. 1941) (state statute requiring massage operators to be citizens for at least two years held not related to the general welfare and impermissibly discriminatory);

- *Nielsen v. Wash. State Bar Ass'n*, 585 P.2d 1191 (Wash. 1978) (en banc) (state rule requiring bar examination applicants to be citizens or intend to pursue citizenship unconstitutional);
- *State ex rel. Mansfield v. State Bd. of Law Exam'rs*, 601 P.2d 174 (Wyo. 1979) (state law permitting only U.S. citizens to be admitted to the bar unconstitutional).[205]

205. *Cf.* Aliessa *ex rel.* Fayad v. Novello, 754 N.E.2d 1085 (N.Y. 2001) (statute terminating Medicaid benefits for non-qualified aliens held unconstitutional under the Equal Protection Clause); Ellen M. Yacknin, Aliessa *and Equal Protection for Immigrants*, 58 N.Y.U. ANN. SURV. AM. L. 391, 392 (2002) ("New York State's highest court held that states may not discriminate against lawful immigrants on the basis of alienage without violating the equal protection guarantees of the federal Constitution, notwithstanding congressional authorization to do so.").

## APPENDIX 2: EXAMPLES OF STATE OCCUPATIONAL LICENSING LAWS REQUIRING CERTAIN STATUS

| Occupation | State | Law | Citizenship/Alienage requirement |
|---|---|---|---|
| Athletic Trainer | Nevada | NEV. REV. STAT. § 640B.310 | (b) Be a citizen of the United States or lawfully entitled to remain and work in the United States; |
| Auctioneer | West Virginia | W. VA. CODE § 19-2C-5 | (e) That he or she is a citizen of the United States; |
| Breeder (game animals or game birds) | Delaware | DEL. CODE ANN. tit. 7, § 543 | [S]hall be issued only to citizens of the United States . . . . |
| Broker | Massachusetts | MASS. GEN. LAWS ANN. ch. 112, § 87TT | Every applicant for a license shall furnish evidence that he is a citizen of the United States or shall present to the board a copy of his declaration of intention to become a citizen of the United States, certified by the clerk of the court in which it was filed, or a certificate from the Immigration and Naturalization Service of the United States, showing that, in accordance with law, he has declared his intention to become such citizen. . . . |
| Commercial Fisher | South Carolina | S.C. CODE ANN. § 50-9-30(A)(6)(a) | For purposes of obtaining . . . a commercial license, permit, or tag, "resident" means a United States citizen who has been domiciled in this State for three hundred sixty-five consecutive days or more immediately preceding the date of application; |
| Court Reporter | Utah | UTAH CODE ANN. § 58-74-302 | (b) [B]e a citizen of the United States; |
| Day Care Center Operator | Arizona | ARIZ. REV. STAT. ANN. § 36-889 | [S]hall be a citizen of the [U]nited [S]tates who is a resident of this state, or a legal resident alien who is a resident of this state. |
| Dentistry or Dental Hygiene | South Dakota | S.D. CODIFIED LAWS § 36-6A-44 | (8) [C]itizen of the United States or lawfully admitted alien, or he shall file an affidavit with the board indicating his intent to become a citizen of the United States. However, if citizenship has not been attained within eight years from the filing of such affidavit, he forfeits the right to be licensed under this chapter. |
| Employment and Temporary Work Agencies | Arkansas | ARK. CODE ANN. § 11-11-210 | (a) To be eligible for application for an employment counselor's license, the applicant shall be: (1) A citizen of the United States; |
| Employment and Temporary Work Agencies | Minnesota | MINN. STAT. § 184.26 | An applicant for an employment agency's license shall be a citizen of the United States or resident alien . . . . |

| Occupation | State | Law | Citizenship/Alienage requirement |
|---|---|---|---|
| Employment and Temporary Work Agencies | West Virginia | W. VA. CODE ANN. § 21-2-8 | License to operate as an employment agent shall be issued only to citizens of the United States. |
| Engineer & Engineer-in-training | District of Columbia | D.C. CODE § 47-2886.08 | (2)(A) To register as a professional engineer any person of good character and repute who is a citizen of the United States . . . (4) [A]ny person who is not a citizen of the United States [can obtain temporary registration] . . . to engage in the practice of engineering only for the duration of and in connection with a specific project for which it was granted, and shall be subject to annual renewal and to suspension or revocation. . . . |
| Funeral Home Director | Alabama | ALA. CODE § 34-13-72 | (1) Is a citizen of the United States or legally present in this state. |
| Funeral Home Director | Massachusetts | MASS. GEN. LAWS ANN. ch. 112, § 83 | [A] citizen of the United States . . . . |
| Funeral Home Director | New Jersey | N.J. STAT. ANN. 45:7-50 | (1)(a) He is a citizen of the United States and has been a resident of the State of New Jersey for a period of at least 6 months prior to the date of the examination; |
| Funeral Home Director | New York | N.Y. PUB. HEALTH LAW § 3421 (McKinney) | (2)(a) [I]s a citizen of the United States or an alien lawfully admitted for permanent residence in the United States; |
| Funeral Home Director | Oklahoma | OKLA. STAT. tit. 59, § 396.3 | (B) [A] citizen or permanent resident of the United States . . . . |
| Funeral Home Director | Pennsylvania | 63 PA. STAT. ANN. § 479.3 | (b) Each applicant shall be a citizen of the United States . . . . |
| Funeral Home Director | Rhode Island | R.I. GEN. LAWS § 5-33.2-6 | (2) Be a citizen of the United States or have lawful entry into the country; |
| Funeral Home Director | South Dakota | S.D. CODIFIED LAWS § 36-19-21 | [Must] be a citizen of the United States or a resident of South Dakota . . . . |
| Funeral Home Director | Tennessee | TENN. CODE ANN. § 62-5-305 | (b)(2) Is a citizen of the United States . . . . |
| Funeral Home Director | West Virginia | W. VA. CODE ANN. § 30-6-8 | (a)(3) Is a citizen of the United States or is eligible for employment in the United States; |
| Homeopathic Medicine | Nevada | NEV. REV. STAT. ANN. § 630A.230 | (2)(a) Is a citizen of the United States or is lawfully entitled to remain and work in the United States; |
| Licensed Practical Nurse | Indiana | IND. CODE ANN. § 25-23-1-4 | (a)(1) [B]e a citizen of the United States; |

| Occupation | State | Law | Citizenship/Alienage requirement |
|---|---|---|---|
| Long-term Care Administrator | Kentucky | KY. REV. STAT. ANN. § 216A.080 | (1)(b) He or she is a citizen of the United States or has declared his or her intent to become a citizen of the United States; |
| Manager of Collection Agency | New Mexico | N.M. STAT. ANN. § 61-18A-11 | (A) [B]e a citizen of the United States; |
| Marine Pilot | Alaska | ALASKA STAT. ANN. § 08.62.100 | (a)(1) [I]s a citizen of the United States; |
| Marital and Family Therapist | Missouri | MO. ANN. STAT. § 337.715 | (1)(5) . . . is a United States citizen or has status as a legal resident alien . . . . |
| Massage Therapist | Texas | TEX. OCC. CODE ANN. § 455.202 | (b)(1) . . . a United States citizen or a legal permanent resident with a valid work permit; |
| Massage Therapist | Georgia | GA. CODE ANN. § 43-24A-8 | (b)(3) . . . a citizen of the United States or a permanent resident of the United States; |
| Massage Therapist | New York | N.Y. EDUC. LAW § 7804 | (5) Citizenship or immigration status: be a United States citizen or an alien lawfully admitted for permanent residence in the United States; |
| Medication Attendant in Licensed Nursing Homes | Louisiana | LA. REV. STAT. ANN. § 37:1026.7 | (1) Be a citizen of the United States, a United States national, or an alien lawfully admitted for permanent residency in the United States. |
| Midwife | New York | N.Y. EDUC. LAW § 6955 | (6) [B]e a United States citizen or an alien lawfully admitted for permanent residence in the United States. |
| Nursing Home Administrator | Pennsylvania | 63 PA. STAT. ANN. § 1106 | (a) . . . a citizen of the United States, or that he has duly declared his intention of becoming a citizen of the United States. |
| Occupational Therapist | Alabama | ALA. CODE § 34-39-8 | [S]hall be a citizen of the United States or, if not a citizen of the United States, a person who is legally present in the United States with appropriate documentation . . . . |
| Occupational Therapist | Alaska | ALASKA STAT. ANN. § 08.84.032 | (a)(4) [H]ave met applicable requirements under the federal Immigration and Nationality Act (8 U.S.C. 1101 et seq.), unless a United States citizen; |
| Operator of a Steam Generator | New Jersey | N.J. STAT. ANN. § 34:7-2 | An applicant must be a citizen of the United States or have officially declared his intention of becoming a citizen. |
| Optician | Nevada | NEV. REV. STAT. ANN. § 637.127 | (1)(c) Is a citizen of the United States or is lawfully entitled to remain and work in the United States; |
| Optometrist | New Mexico | N.M. STAT. ANN. § 61-2-8 | (D) [I]s a citizen of the United States or has taken out his first naturalization papers; |

| Occupation | State | Law | Citizenship/Alienage requirement |
|---|---|---|---|
| Optometrist | Guam | 10 GUAM CODE ANN. § 12506 | (d) [I]s a citizen of the United States or is a permanent resident of the United States; |
| Optometrist | New Jersey | N.J. STAT. ANN. § 45:12-7 | [A] [C]itizen of the United States, or has declared his intention to become such a citizen . . . . |
| Osteopathic Physician or Surgeon | Arizona | ARIZ. REV. STAT. ANN. § 32-1822 | (A)(2) Is a citizen of the United States or a resident alien. |
| Pharmacist | Nebraska | NEB. REV. STAT. § 38-2853 | A temporary pharmacist license may be granted to persons meeting all of the qualifications for a pharmacist license except the requirement that they be citizens of the United States . . . if the person so licensed has not become a citizen of the United States within five years of the date such temporary license was issued, such license shall terminate and the person so licensed shall have no further right to practice pharmacy in this state. |
| Pharmacist | Illinois | 225 ILL. COMP. STAT. ANN. 85/6 | (1) [T]hat he or she is a United States citizen or legally admitted alien; |
| Pharmacist | Pennsylvania | 63 PA. STAT. ANN. § 390-3 | (1) . . . citizen of the United States; |
| Physical Therapist | Alabama | ALA. CODE § 34-24-211 | Each applicant shall also be a citizen of the United States or, if not a citizen of the United States, a person who is legally present in the United States with appropriate documentation from the federal government. |
| Physical Therapist | Louisiana | LA. REV. STAT. ANN. 37:2409 | (2) Be a citizen of the United States or have obtained legal authority to work in the United States, and have proper documentation evidencing this fact. |
| Physical Therapist | West Virginia | W. VA. CODE § 30-20-11 | (a)(6) Is a citizen of the United States or is eligible for employment in the United States; |
| Physical Therapist | Guam | 10 GUAM CODE ANN. § 121506 | (2) [B]e a United States citizen or legal alien; |
| Podiatry | Nevada | NEV. REV. STAT. ANN. § 635.082 | (2)(a) Is a citizen of the United States or is lawfully entitled to remain and work in the United States. |
| Polygraph Examiner | South Carolina | S.C. CODE ANN. § 40-53-70 | (2) [I]s a citizen of the United States; |
| Polygraph Examiner | Alabama | ALA. CODE § 34-25-24 | (2) He is a citizen of the United States; |
| Port Watchman | New Jersey | N.J. STAT. ANN. § 32:23-40 | (c) The citizenship of the applicant and, if he is a naturalized citizen of the United States, the court and date of his naturalization; |

| Occupation | State | Law | Citizenship/Alienage requirement |
|---|---|---|---|
| Poultry Technician | Pennsylvania | 63 PA. STAT. ANN. § 642 | . . . a citizen of the United States, or has legally declared his intention to become such. |
| Practical Nurse | Pennsylvania | 63 PA. STAT. ANN. § 655 | . . . is a citizen of the United States or has legally declared intention to become such. |
| Private Detective | Pennsylvania | 22 PA. STAT. ANN. § 14 | (a) The application shall state. . . that he is a citizen of the United States. |
| Private Investigator | South Carolina | S.C. CODE ANN. § 40-18-70 | (E)(3) [I]s a citizen of the United States; |
| Private Investigator | Louisiana | LA. REV. STAT. ANN. § 37:3507 | (A)(2) Is a citizen of the United States or a resident alien holding proper documentation to work in the United States. |
| Private Investigator | Tennessee | TENN. CODE ANN. § 62-26-207 | (a)(2) Be a citizen of the United States or a resident alien; |
| Private Protection Service License | Tennessee | TENN. CODE ANN. § 62-35-106 | (2) Be a citizen of the United States or a resident alien; |
| Private Security Guard | Virgin Island | V.I. CODE ANN. tit. 23, § 1308 | (b)(3) Grounds for denial of licence shall be . . . [l]ack of United States citizenship, permanent resident status . . . . |
| Psychologist | Tennessee | TENN. CODE ANN. § 63-11-207 | (a)(3)(B) Is a citizen of the United States; |
| Real Estate Agent or Broker | Alabama | ALA. CODE § 34-27-32 | (a)(4) Is a citizen of the United States or . . . is an alien with permanent resident status. |
| Real Estate Agent or Broker | Hawaii | HAW. REV. STAT. § 467-9.5 | (a)(1) A United States citizen, a United States national, or an alien authorized to work in the United States . . . . |
| Real Estate Agent or Broker | Massachusetts | MASS. GEN. LAWS ANN. ch. 112 § 87TT | Every applicant for a license shall furnish evidence that he is a citizen of the United States or shall present to the board a copy of his declaration of intention to become a citizen of the United States, certified by the clerk of the court in which it was filed, or a certificate from the Immigration and Naturalization Service of the United States, showing that, in accordance with law, he has declared his intention to become such citizen. |
| Real Estate Agent or Broker | Rhode Island | R.I. GEN. LAWS § 5-20.5-3 | (c) [B]e a citizen or legal resident of the United States . . . . |
| Real Estate Agent or Broker | South Dakota | S.D. CODIFIED LAWS § 36-21A-30 | No one except a citizen of the United States of America, or resident of South Dakota, is eligible to secure a license as a broker, except as otherwise provided by this chapter. |
| Real Estate Agent or Broker | Texas | TEX. OCC. CODE ANN. § 1101.354 | (1)(B) [B]e a citizen of the United States or a lawfully admitted alien; |

| Occupation | State | Law | Citizenship/Alienage requirement |
|---|---|---|---|
| Real Estate Agent or Broker | Virgin Islands | V.I. CODE ANN. tit. 27, § 423 | (b)(2) [A] citizen of the United States or a permanent resident alien . . . . |
| Real Estate Broker | Guam | 21 GUAM CODE ANN. § 104202 | The Commissioner shall not grant an original real estate broker's license to any person who is not a citizen of the United States. |
| Registered Nurse | Indiana | IND. CODE ANN. § 25-23-1-4 | (a)(1) [B]e a citizen of the United States; |
| Ticket Resaler | Pennsylvania | 4 PA. STAT. ANN. § 203 | (d) If the applicant is an individual, his application shall show that the applicant is a citizen of the United States and has been a resident of this Commonwealth for at least one year immediately preceding his application. |
| Veterinarian | Tennessee | TENN. CODE ANN. § 63-12-112 | (b)(4) Is a citizen of the United States or Canada or legally entitled to live within the United States; |
| Veterinarian | Nevada | NEV. REV. STAT. ANN. § 638.100 | (2)(d) Is a citizen of the United States or is lawfully entitled to remain and work in the United States. |
| Veterinarian | West Virginia | W. VA. CODE ANN. § 30-10-8 | (a)(5) Be a citizen of the United States or be eligible for employment in the United States; |
| Veterinary technician | Arkansas | ARK. CODE ANN. § 17-101-306 | (c)(1)(A) A citizen of the United States or an applicant for citizenship; |
| Video Lottery Operator's License | West Virginia | W. VA. CODE ANN. § 29-22B-503 | (a)(1)(A) If the applicant is an individual, the applicant has been a citizen of the United States and a resident of this State for the four year period immediately preceding the application; |
| Water Well Contractor's License | Illinois | 225 ILL. COMP. STAT. ANN. 345/9 | (b) [I]s a citizen of the United States or has declared his intention to become a citizen of the United States . . . . |

## APPENDIX 3: NONCITIZENS "LAWFULLY PRESENT" UNDER AFFORDABLE CARE ACT[206] BUT *NOT* INCLUDED IN 8 U.S.C. § 1621

| Summary of Category | ACA Regulation | INA Provision |
|---|---|---|
| Aliens under Temporary Protected Status and pending applicants for Temporary Protected Status who have been granted employment authorization.[207] | 45 C.F.R. § 152.2(4)(ii) | 8 U.S.C. § 1254a |
| Special agricultural workers lawfully admitted for temporary residence | 45 C.F.R. § 152.2(4)(i) | 8 U.S.C. § 1160 |
| Special Agricultural Workers who have completed legalization applications pursuant to this section and have been granted work authorization | 45 C.F.R. § 152.2(4)(iii) | 8 CFR § 274a.12(c)(20) |
| Entrants before January 1, 1982 admitted for lawful temporary residence status | 45 C.F.R. § 152.2(4)(i) | 8 U.S.C. § 1255a |
| Entrants before January 1, 1982 who have completed legalization applications pursuant to § 8 U.S.C. 1255a and have been granted work authorization | 45 C.F.R. § 152.2(4)(iii) | 8 CFR § 274a.12(c)(22) |
| Noncitizens who have been granted work authorization including an alien who has filed a pending application for adjustment of status to become a Lawful Permanent Resident and has work authorization | 45 C.F.R. § 152.2(4) | 8 CFR § 274a.12(c)(9) |
| An alien who has properly filed an application for suspension of deportation or cancellation of removal that has been accepted by INS or EOIR and has work authorization | 45 C.F.R. § 152.2(4) | 8 CFR § 274a.12(c)(10) |
| An alien who has filed an application for creation of a record of lawful admission for permanent residence and has work authorization | 45 C.F.R. § 152.2(4) | 8 CFR § 274a.12(c)(16) |

206. Exchange Standards for Employers, 77 Fed. Reg. 18,310 (Mar. 27, 2012) (codified at 45 C.F.R. pts. 155–57); Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (codified at 26 C.F.R. pts. 1 & 620).

207. Temporary Protected Status is granted if the person is a foreign national of a state that the Attorney General has found to have an ongoing armed conflict within the state, which would pose a serious threat to the foreign national's personal safety; there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected and the state cannot handle the return of the foreign national; or other extraordinary conditions that prevent foreign nationals from returning to the state safely.

| Summary of Category | ACA Regulation | INA Provision |
|---|---|---|
| An alien whose removal is refused, as impracticable or contrary to the public interest and has work authorization | 45 C.F.R. § 152.2(4) | 8 CFR § 274a.12(c)(18) |
| An alien who has filed an application for adjustment of status pursuant to the Legal Immigration Family Equity Act and has work authorization | 45 C.F.R. § 152.2(4) | 8 CFR § 274a.12(c)(24) |
| Family Unity beneficiaries pursuant to section 301 of Public Law 101–649 as amended | 45 C.F.R. § 152.2(4)(iv) | 8 U.S.C.A. § 1255a(d)(2)(B)(i) |
| Aliens currently under Deferred Enforced Departure (DED) pursuant to a decision made by the President | 45 C.F.R. § 152.2(4)(v) | By executive order. *See, e.g.*, Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 11, 1990) (deferring departure of certain Chinese nationals); Memorandum from President Barack Obama to Janet Napolitano, Secretary of Homeland Security (Mar. 20, 2009), *available at* http://www.whitehouse.gov/the—press—office/Presidential-Memorandum-Regarding-Deferred-Enforced-Departure-for-Liberians (extending deferred enforced departure for Liberians). |
| Aliens currently in deferred action status | 45 C.F.R. § 152.2(4)(vi) | 8 CFR § 274a.12(c)(14) |
| Aliens whose visa petitions have been approved and who have a pending application for adjustment of status | 45 C.F.R. § 152.2(4)(vii) | |
| A pending applicant for asylum under section 208(a) of the INA (8 U.S.C. 1158) or for withholding of removal under section 241(b)(3) of the INA (8 U.S.C. 1231) or under the Convention Against Torture who has been granted employment authorization, and such an applicant under the age of 14 who has had an application pending for at least 180 days | 45 C.F.R. § 152.2(5) | 8 U.S.C. §§ 1158, 1231 |
| An alien who has been granted withholding of removal under the Convention Against Torture | 45 C.F.R. § 152.2(6) | 8 C.F.R. § 1208.17 |
| A child who has a pending application for Special Immigrant Juvenile status | 45 C.F.R. § 152.2(7) | 8 U.S.C. § 1101(a)(27)(J) |