



**STATEMENT OF THE PENNSYLVANIA BAR ASSOCIATION
TO THE HOUSE STATE GOVERNMENT COMMITTEE
FOR HEARINGS AUGUST 30 AND 31, 2011
NATIONAL SECURITY BEGINS AT HOME LEGISLATIVE PACKAGE**

To: Members of the House State Government Committee

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The Pennsylvania Bar Association appreciates the opportunity to submit a written statement to the House State Government Committee concerning the various legislative proposals that the Committee has grouped together under the title “National Security Begins At Home Legislative Package.” These bills address the perceived impact of unauthorized (“undocumented”) immigrants present in Pennsylvania which is being referred to erroneously as an “illegal alien” problem.¹

This package of bills rests on a flawed perception of the behavior of immigrants and their economic impact on the Commonwealth. Many of the proposals fail to respect the limited role of state governments in the regulation of immigration. The PBA supports federal pre-emption and uniform laws governing immigrants and immigration; legislation based on empirical facts, not myths; and laws that promote the economic well-being of our state while protecting the civil rights of all our residents. Hence, this package of bills is generally opposed by the PBA.

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Assumptions Underlying the Legislative Package

This series of anti-immigrant bills rests on many flawed assumptions. The “Invasion PA” materials produced in promoting many of these bills assert that immigrants are threats, rather than hard working individuals who contribute to our state’s economic growth and vitality.² A major unsupported assumption is that the federal government is not enforcing our immigration laws despite an increase in resources for immigration law enforcement over the last several years.³ Additional assumptions are that immigrants commit a disproportionate number of crimes, and that immigrants, including unauthorized immigrants, are a drain on the economy.

In its 2007 study of the City of Hazleton, Zogby International concluded that immigrants were not a drain on police, health care, or public services, and recommended the city embrace immigrants as a solution to its aging population.⁴ The same is true for all of Pennsylvania, which ranks fifth in the nation with respect to the number of elderly, and second, following Florida, with the proportion of elderly over 65 compared to the rest of the population.⁵ Our state relies on younger immigrant workers to maintain our population and labor force.⁶ The Zogby study also found that Hazleton’s immigration ordinances, which represent a similar approach and mindset to the bills presently before the Legislature, tore away at the city’s economic and social fabric, and divided the community rather than united it. Indeed, the local anti-immigrant ordinances in Hazleton had the unfortunate impact of driving out immigrants with perfectly legal status due to the anti-immigrant sentiment and climate the very public “crackdown” generated.

Data reflects significant positive contributions by immigrant populations to the U.S. economy.⁷ The 2010 U.S. census supports the conclusion that foreign born individuals have been critical in reversing the population decline of Pennsylvania and many other states where the median age of U.S.-born individuals has been increasing and historical migration patterns within the United States have resulted in a shift of population from the Northeastern U.S.⁸ Pennsylvania's population grew 3.4 percent from 2000 to 2010. Census data reflects that absent Hispanic including Puerto Rican citizens and Asian newcomers, it would not have grown at all and instead would have declined.⁹

With respect to crime, economist Ann Morrison Piehl testified before Congress in 2007 that “There is no empirical evidence that immigrants pose a particular crime threat. In contrast, the evidence points to immigrants having lower involvement in crime than natives.”¹⁰ Daniel Griswold of the CATO Institute, who will be testifying before this Committee agrees, “Like all those Jewish ‘racketeers’ of the Depression era, today’s low-skilled Hispanic migrants are victims of a stereotype unsupported by the preponderance of the evidence.”¹¹

Immigrants generally are not crime risks because they come here to work, as revealed by the recent experience of the American economy: the number of unauthorized immigrants fell during the recent recession.¹² They come because, as a 2007 Council on Foreign Relations report notes, the percentage of “working-age native-born U.S. residents with less than twelve years of

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schooling” dropped from 50 to 12 percent between 1960 and 2000, but there is still demand for low-skilled workers, and immigrants can earn more here than at home.¹³

Nor are undocumented immigrants milking public benefits, as they are ineligible for almost all such benefits, with the exception of emergency Medicaid for emergency medical conditions and WIC nutrition benefits for pregnant women, if they otherwise qualify. Both of these are required by federal law. Federal law also mandates that children be educated and that everyone receive emergency medical care until they are stabilized. Other than these benefits and services, little or nothing is freely available to undocumented immigrants.

Moreover, the economic benefit these immigrants provide far offsets the costs of any assistance. There is broad agreement among economists that immigrants have a positive effect on the economy and wages. Immigrants purchase goods and services, which in turn creates additional demand for goods and services, thereby expanding the economy. A 2009 CATO Institute Study¹⁴ found that “tighter border enforcement” would produce a net loss to American households by 2019 of \$80 billion (in 2009 dollars) annually, due to “the loss of output from reduced immigrant labor, the less-well-paid mix of jobs occupied by Americans, reduced earnings and taxes from capital, and reduced employment of U.S. workers,” while tighter internal enforcement would produce a net loss of \$65 billion annually due to internal enforcement costs imposed on employers who need to hire professionals such as attorneys and accountants. One recent report demonstrates that in Arizona, full implementation of Arizona’s SB 1070 would eliminate 571,000 jobs and increase unemployment 17.1 percent.¹⁵ In Georgia, which passed legislation similar to Arizona’s SB 1070 and HB 738, the Georgia Agribusiness Council estimated they faced a crop loss of \$300 million that could rise to \$1 billion if the labor force that harvested the crops leaves the state.¹⁶ Like Georgia, agriculture and farming are critical to Pennsylvania’s economy generating over \$6.1 billion in cash receipts.¹⁷ In Texas, the state’s relatively healthy economy has been bolstered by contributions made by undocumented immigrants, causing the Texas Association of Business and the state Chamber of Commerce to advocate against state regulation of immigration.¹⁸

Although “unauthorized” immigrant populations are frequently presumed not to pay taxes, the Immigration Policy Center of the nonprofit American Immigration Council recently released estimates produced by the nonprofit Institute for Taxation and Economic Policy (ITEP) of the amount of state and local taxes paid in 2010 by households that are headed by unauthorized immigrants. Collectively, these households paid \$11.2 billion in state and local taxes. That included \$1.2 billion in personal income taxes, \$1.6 billion in property taxes and \$8.4 billion in sales taxes. In Pennsylvania, the ITEP study estimated that families headed by unauthorized immigrants paid a total of about \$135 million in taxes consisting of \$34.85 million in personal income taxes, \$7.02 million in property taxes and \$93.10 million in sales taxes.¹⁹ Immigrants purchase goods and services and pay for housing, thereby paying sales tax, real estate tax through rent, and even stimulate the payment of the capital stock and franchise tax and the corporate net income tax.

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Some argue that recent Hispanic immigrants do not assimilate as did our ancestors. Evidence proves otherwise. In 2007 the Pew Hispanic Center²⁰ found that while 23 percent of Hispanic immigrants speak English “very well,” that figure rises to 88 percent for the second generation and 94 percent for further generations. Reading figures are similar. Citing earlier 2002 research, the Pew Report notes that “Latinos believe that English is necessary for success in the United States.” The report also found that the move to speaking English among Hispanic generations “appears to be similar” to that found among the immigrant community of our grandparents and great-grandparents. Similarly, Linda Chavez, from President Reagan’s Administration, writes that intermarriage among Hispanics exceeds intermarriage of other immigrant European Americans at a similar time with respect to their migration to the US.²¹

We also seem to have forgotten the extent to which earlier immigrants interacted in their native tongue. For example, there were scores of Yiddish theatre companies performing in the United States between 1890 and 1940,²² and *The Forward*, a daily Yiddish language newspaper, had a readership of more than 275,000 as late as the early 1930s.²³

The Role of the Federal Government in the Regulation of Immigration

The Pennsylvania Bar Association has more than 26,000 members, from every Commonwealth county. Throughout its history, the PBA has played an active role in legislative issues. The PBA has addressed issues relating to immigration in a series of resolutions adopted by the PBA House of Delegates, its policymaking body.

On June 22, 2007 the PBA House of Delegates adopted a resolution that stated, in part:

The Pennsylvania Bar Association supports federal government enforcement of immigration law and ongoing efforts to develop and enact comprehensive immigration reform legislation and opposes local or state laws or regulations seeking to regulate immigration or immigrants.

For more than 150 years, the U.S. Supreme Court has held that immigration matters were reserved exclusively to the federal government, as a power of the sovereign over its borders.²⁴ (1889). The primary role of the federal government in developing and implementing immigration policy was invoked in *Hines v. Davidowitz*,²⁵ a 1941 U.S. Supreme Court striking down Pennsylvania’s effort to force legal residents to register with the state. The Court stated “where the federal government, in the exercise of its superior authority in [the immigration] field, has enacted a complete scheme of regulation, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.” When a state attempts to set national immigration policy that interferes or conflicts with federal policy, these policies are pre-empted by federal law.²⁶

While the U.S. Supreme Court has recognized limited statutorily permitted exceptions in the context of licensing laws²⁷ to the general rule of federal pre-emption of state regulation of immigration law, federal courts continue to bar states and local governments from intruding into federal regulation of immigration law. In May 2011 the U.S. Supreme Court stated the federal

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Immigration Reform and Control Act (IRCA) “expressly preempts ‘any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, recruit or refer for a fee for employment, unauthorized aliens.’”²⁸

The “National Security Begins At Home” Legislative Package includes legislative provisions that federal courts already have ruled are pre-empted by federal law. Adoption of such legislation would undoubtedly result in costly legal battles for the Commonwealth to defend constitutionally invalid legislation.²⁹ The effect of federal pre-emption on different bills before this Committee is discussed more fully below.

Involvement of Local Police in the Enforcement of Federal Immigration Law

The PBA House of Delegates in May 2004 adopted a resolution opposing:

“...legislation or administrative measures designed to criminalize civil immigration law violations, and to engage state and local police in the investigation, apprehension, detention, and removal of undocumented immigrants.”

The PBA position is consistent with the position of major law enforcement organizations, particularly those involved in community policing.³⁰ Philadelphia's police commissioners, beginning with former Police Commissioner John Timoney, have articulated the position of the national Major Cities Chiefs Association that law enforcement needs to reach out to victims of crime in immigrant communities and that it is inappropriate for local police to involve themselves in immigration law enforcement.³¹

DISCUSSION OF SPECIFIC LEGISLATIVE PROPOSALS

The specific legislative proposals contained within the “package” of bills are quite numerous, and many have overlapping and duplicative provisions. We have divided up the bills into the following topic areas (although some bills fall into more than one topic area): law enforcement and the criminalization of immigration status along with restrictions on “sanctuary cities;” employment; enhanced identification requirements for public benefits; and denial of citizenship to immigrant children born in the U.S.

LAW ENFORCEMENT

The following bills relate at least in part to law enforcement and the criminalization of immigration status. They also include proposals for restrictions on those “sanctuary cities” where local police and government recognize the important degree to which immigrants should be encouraged to contact police if they are victims of crime.

Bill	Committee's Description
HB 738, PN 755 (Metcalf)	HB738 which is modeled after the recent law passed in Arizona, and would provide state and local law enforcement with full authority to apprehend illegal aliens.

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Bill	Committee's Description
HB 355, PN 320 (Readshaw)	HB 355 is an attempt to take on federal immigration functions in the areas of law enforcement and verification of eligibility for employment, public benefits and issuance of primary identification documents. The legislation would require any county, municipal or regional jail authority to make a "reasonable effort" to determine the citizenship status of any person charged with a felony or DUI and detained for any length of time by the jail.
HB 798, PN 818 (Creighton)	HB798 would authorize citizenship or immigration status of those arrested to be included in the repository of criminal history records maintained by the Pennsylvania State Police. It would also be included on criminal history reports.
HB 856, PN 894 (Kauffman)	HB856 would amend Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes to prohibit the smuggling of human beings. Smuggling of human beings would be defined as transporting, securing transportation and using property by a person or an entity know that the person(s) are unlawfully present in the United States. Those convicted would face a fine of up to \$15,000 and/or a maximum prison sentence of up to seven years.
HB 799, PN 819 (Creighton)	HB799 would authorize the Pennsylvania State Police to negotiate a memorandum of understanding with the U.S. Department of justice or the U.S. Department of Homeland Security concerning enforcement of federal immigration and customs laws.
HB 801, PN 820 (Creighton)	HB801 would help support law enforcement authorities when dealing with individuals with questionable immigration status by providing that no official or agency of the Commonwealth or political subdivision shall adopt a policy that limits or restricts enforcement of federal immigration law to less than the full extent of that allowed by federal law.
HB 810, PN 835 (Perry)	HB810 would penalize any municipality determined to encourage illegal immigrants. The legislation would withhold state funding from any municipality found to be a "sanctuary city."
HB 865, PN 903 (Knowles)	HB865 would create another exception to the shield of governmental immunity to any municipality which adopted policies to encourage unauthorized aliens to take up residence could be held liable for damages to persons or property as a result of criminal activity by unauthorized aliens. The municipality will be held liable if the alien has resided in the municipality for at least 6 months, was convicted of a crime and the crime was the proximate cause of injury.

HB 738 and Companion Bills Contain Sections Determined by Federal Courts to be Pre-empted by Federal Law

HB 738 and HB 355 are comprehensive bills that include provisions for the local enforcement of immigration laws. HB 738, entitled Support Our Law Enforcement and Safe Neighborhoods Act, bears the same name as Arizona's SB 1070³² and is described by its prime sponsor Chairman Metcalfe as having been modeled on the Arizona law. The Ninth Circuit in April 2011 upheld a District Court injunction against several key portions of Arizona's SB 1070 that contain the same or very similar wording as sections of HB 738 on the grounds that these sections are pre-empted by federal law.³³ Those injunctions against Arizona's SB 1070 are not affected by the subsequent May 2011 U.S. Supreme Court decision permitting Arizona's statutorily permitted regulation of licensing of business in relationship to employment verification and remain in effect.³⁴

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As the U.S. Department of Justice and the Ninth Circuit have established, the intent of state laws “to make attrition through enforcement” points to the impermissible efforts of states to enforce federal immigration laws.³⁵ The identical language of this legislative intent that appears in Arizona’s SB 1070 is contained in HB 738, sec. 2. As the Ninth Circuit Court pointed out when it enjoined portions of Arizona’s 1070, if each of the 50 states passes its own enforcement laws, the fundamental nature of a federal immigration scheme is called into question. Federal authority over immigration matters is critical and in our national interest because, among other reasons, relationships with the foreign-born have international consequences. In the case of Arizona, Mexico was joined by diverse nations, ranging from Chile to Micronesia opposing the law.³⁶ Pennsylvania would surely face the same global isolation and derision.

Turning Local Law Enforcement Officers into Immigration Agents Diverts Resources and is Contrary to Federal Priorities.

The bills require law enforcement to check the immigration status of anyone who has an encounter with law enforcement, (HB 738, for example) or those arrested, but not convicted (HB 798, for example). HB 738 and HB 801 provide for the warrantless arrest of a person police believe to have committed an offense making them deportable. Similar provisions have been enjoined in June 2011 by the federal Southern District Court of Indiana as being pre-empted by federal law, and as violations of the Fourth Amendment and Due Process Clauses of the U.S. Constitution. As that court stated:

Considering that the determination of whether a crime constitutes an aggravated felony is often such a complex and confusing undertaking, and that there is no guidance [in Section 19 of the Indiana statute] as to how a state or local officer should make that determination, the power to arrest on that basis threatens serious abuses.³⁷

HB 738 and HB 801 authorize a law enforcement agency to transport an unauthorized alien in its custody to a federal facility, when federal authorities may not have the detention of such immigrants as a priority. Not only do these bills force local enforcement to make complex decisions about federal immigration status when such decisions are increasingly difficult for even seasoned, well trained DHS Immigration and Customs (ICE) officers to make, but they also divert increasingly limited resources both on a local and federal level from addressing critical and time-sensitive law enforcement safety issues.

Locally, police officers will have to communicate with federal officials if they have a reasonable suspicion that the person is undocumented. But many immigrants, including those in the U.S. under the visa waiver program, victims of domestic violence and trafficking, unaccompanied youth and others, may be lawfully present in the U.S. without documentation. Nevertheless, these people would be subject to increased detention and inquisitions.³⁸ Federal agencies would be swamped with requests and unable to fulfill their own priorities of removing serious criminal offenders. Federal courts have recognized this problem when issuing injunctions against similar provisions. The mandatory immigration verification of a person’s status, even for minor summary traffic stops, flies in the face of federal priorities to focus on those convicted of

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significant crimes and repeat immigration offenders.³⁹ Moreover, it will subject the Commonwealth to unnecessary and expensive lawsuits where improper decisions regarding authorized status have been made by law enforcement.

Another example of a violation of federal regulation of immigration laws is in HB 738, sec. 6, which makes it a crime to fail to apply for “alien registration” or “carry alien registration documents.” The creation of such a state crime, when there is no federal crime for this civil violation, is both pre-empted and an impermissible use of state power. Similar requirements have been enjoined by federal courts on that basis. Working without authorization is a civil violation under federal law. HB 738 makes it unlawful for unauthorized immigrants to work. Criminalizing work was enjoined by the Ninth Circuit Court in ruling on a similar provision in Arizona’s law.⁴⁰

Climate of Hostility and Suspicion

In HB 738 and HB 858, anyone can submit a complaint that a co-worker is undocumented and this complaint must be investigated by the local district attorney (HB 738) or Secretary of State (HB 858). In HB 738, such a complaint can be anonymous. One can envision a disgruntled worker making a claim, forcing the D.A. to drop other investigations in favor of ascertaining that an employee is unauthorized. These types of provisions create a climate of suspicion and distrust directed against the foreign born. Moreover, the inclusion of such a provision opens the door to suits against employers that could be brought by the U.S Department of Justice, Office of Special Counsel, which handles cases of employment discrimination based on immigration status.

Bills Use Improper Legal Standards in Defining Harboring and Smuggling

There are various efforts to make “harboring” an immigrant a state crime (HB 738, HB 355). The definition of “harboring” is very broad and could include, just by way of illustration, a person driving someone to a religious service. In enjoining a similar provision in Georgia, the federal court held that harboring is a narrow concept, not meant to subject people to criminal sanctions if they are “giving rides” to their friends and neighbors.”⁴¹

The same analysis applies to HB 856 and sections of HB 738 with respect to “smuggling.” Smuggling is a serious federal offense meant to deter individuals from bringing unauthorized people into the U.S. and actively promoting those persons to further the violation of the law.⁴² Under the federal “smuggling” statute a high level of intent is needed. The federal Sixth Circuit has ruled that the federal smuggling provision is not violated if a person transports a person known to be undocumented unless it is in active furtherance of the non-citizen’s violation of law.⁴³ Other federal courts agree that transporting an undocumented immigrant is “smuggling” only if such transport bears a direct and substantial relationship to further a person’s presence in the US. The Ninth Circuit found that a foreman who was paid by his reforestation company to drive an immigrant he knew to be undocumented to the job site was not “smuggling,” as this type of transportation was incidental to the furtherance of the violation of

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the law.⁴⁴ In the federal statute a person must have knowledge or "reckless disregard" of the fact person entered or remained in U.S.

Smuggling is defined differently in two of the Pennsylvania bills and also requires a different standard of knowledge (HB 738 and HB 856). In the bills, smuggling means transportation, procurement of transportation or use of property or real property "for profit or other commercial purposes" and could mean a relative or co-worker driving a person to work and asking for gas money. The standard in the Pennsylvania bills "knowing or having reason to know" that persons are transported or who will be transported are unlawfully present is lower than the federal standard. This variance with federal law can be clearly challenged as being preempted by federal law; equally important, it is such a vague standard it would be subject to lengthy and costly litigation over the level of knowledge required for criminal sanctions. HB 856 calls upon local law enforcement agents to enforce the state smuggling law, even though it is contrary to federal standard, and provides that a local officer can stop a person driving a vehicle if the law enforcement officer has reasonable suspicion that the person violates any provision of the motor vehicle laws. Under this plan, a law enforcement officer must make two determinations: first they must determine that they can enforce a smuggling law of questionable legality, and second, they must determine that a person violated any provision of the motor vehicle code. This does not support local law enforcement; rather, it places an officer in the impossible situation of making determinations he or she is not equipped to make.

The Use of Local and State Police

HB 355 Section 2809-D enables state and local enforcement of federal immigration law through a Memorandum of Understanding (MOU) between DHS and the Attorney General for the Commonwealth. Because of the federal exclusivity in regulating immigration, state and local law enforcement should not be engaged in the complexities of immigration law determinations. As Section 2807-D recognizes by the number of exceptions listed, "lawful presence" is a complex decision based on many factors not immediately apparent to even an experienced practitioner. Many Pennsylvania county and municipal law enforcement agencies have declined to enforce federal immigration law on the grounds that it interfered with their community policing efforts. HB 355 prohibits Commonwealth agencies and local subdivisions from refusing to enforce immigration law and sharing information about local criminals with ICE. The PBA believes that state and local enforcement of federal immigration law undermines local law enforcement by preventing otherwise willing witnesses from coming forward. Additionally, more errors will occur in decisions about lawful presence when the determinations are delegated to persons not experienced with the immigration law.

Law enforcement measures that turn local officers into immigration enforcers undermine community policing. HB 799 provides for an MOU between Pennsylvania and the Department of Justice to train local law enforcement to enforce immigration laws pursuant to sec. 287(g) of the Immigration and Nationality Act. Many local law enforcement officers rely on the trust of the immigrant community in their efforts to combat serious crime. When local law enforcement

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officers double as immigration agents, these bonds of trust are broken. The lack of guidelines and oversight of 287(g) programs has been criticized by the DHS Office of the Inspector General (stating where performance measurements do not focus on aliens who are a threat to the community, the goals of the program are not being met).⁴⁵ The PBA opposes HB 799 on the grounds that Commonwealth law enforcement agencies, including the State Police, are not the appropriate entities to enforce immigration law.

“Sanctuary City” Penalties

HB 810 seeks to delegate federal enforcement of U.S. immigration law to municipal agencies by prohibiting them from declining to participate in regulating immigration. Any municipality, whether by ordinance or policy, that prohibits its employees from sharing local law enforcement information or inquiring into the status of individuals will be deemed a “sanctuary municipality” by the Commonwealth and will have state funds withheld in escrow for not less than 30 days. The PBA objects to this back-door approach to imposing federal enforcement duties upon Pennsylvania municipalities, many of whom lack the financial means to assume another unfunded mandate. HB 810 would remove any local discretion that municipalities had in law enforcement and other ministerial functions.

HB 801 takes the opposite approach, requiring all Commonwealth political subdivisions to enforce, to the fullest extent allowed, federal immigration law. HB 801 removes all local discretion in law enforcement. Any agency that declines to enforce immigration law is subject to suit by private parties for fines up to \$5,000 per day of violation, legal fees and court costs. The PBA opposes HB 801 on the grounds that it imposes federal immigration enforcement duties upon Pennsylvania’s local subdivisions, with the requirement that they engage in determinations of “lawful presence,” which already has been exclusively reserved to the federal immigration judges.

HB 810 and HB 801 ignore the valid law enforcement reasons for local police to prioritize the health and safety of their communities residents and not make immigrant communities the victims of criminals who would target them knowing that they would not seek protection from law enforcement.

LEGISLATION RELATED TO EMPLOYMENT

The following bills relate at least in part to employment.

Bill	Committee’s Description
HB 858, PN 896 (Metcalf)	HB858 would require all Commonwealth employers and government entities to enroll in the federal government’s free E-Verify program to confirm Social Security numbers of prospective employees.
HB 355, PN 320 (Readshaw)	HB 355 is an attempt to take on federal immigration functions in the areas of ... verification of eligibility for employment...

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Bill	Committee's Description
HB 439, PN 410 (Mustio)	HB 439 would revoke the license of any licensed professional who knowingly employs or permits the employment of an unauthorized alien.

In *Chamber of Commerce of United States of America v. Whiting*,⁴⁶ the U.S. Supreme Court held the Legal Arizona Workers Act of 2007 (LAWA) not pre-empted by federal law. Although LAWA contained provisions penalizing employers for hiring "unauthorized aliens" and the requirement for all employers to use the E-verify system, its consequences were parallel with those established under federal law. An employer who failed to use the E-Verify system would only lose a "rebuttable presumption that it complied with the law." The Court recognized that LAWA did address the licensure issue consistent with the savings clause in the Immigration Reform and Control Act of 1986 (IRCA). State enforcement was limited to complaints filed with the Arizona Attorney General. *Whiting* recognized the primacy of federal law in regulating immigration, but considered LAWA sufficiently narrowly tailored to fall within the savings clause carved out by Congress.

In contrast, HB 858 enables local jurisdictions to allow complainants to seek treble damages and attorney's fees against the offending employer. Unlike LAWA, it does not limit the determination of the employee's work authorization to the federal government pursuant to 8 U.S.C. sec. 1373(c). IRCA allows civil fines of \$250 to \$16,000 per unauthorized worker, sec. 1324a(e)(4)(A), but makes no mention of treble damages or attorney's fees. As drafted, HB 858 should be pre-empted by federal law.

HB 858 goes further in enabling local jurisdictions to restrict rental housing to aliens unlawfully present in the U.S. This provision does not track any federal immigration law nor limit the determination of lawful presence to a federal immigration law judge. Since it does not follow the savings clause in IRCA sec. 1324a, it should be pre-empted as well.

HB 355 sec. 2806-D requires public and private employers to join the E-Verify program. It does not clearly specify penalties for non-compliance until a U.S. citizen is discharged while an unauthorized alien remains employed. In that event, the citizen has a cause of action under the Unfair Trade Practices and Consumer Protection Law (UTPCPL) which is brought in state court. The remedies for unfair methods of competition under the UTPCPL are damages, punitive damages, and reasonable counsel fees and costs. The UTPCPL does not address the loss of licensure or corporate registration as in LAWA. The UTPCPL damages are inconsistent with IRCA's savings clause and do not rely on a federal determination pursuant to 8 U.S.C. sec. 1373(c). For those two reasons, HB 355 should be subject to federal pre-emption.

HB 439 is a superfluous and confusing piece of legislation. It calls for the revocation of a license if a licensing board or commission finds that a licensee "knowingly employ[s] or permit[s] the employment of an unauthorized alien." It then provides that it is an affirmative defense to any action if the employer shows they complied with sec. 274A of the INA. In order to comply with Sec. 274A of the INA, an employer must require that all employees complete an

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I-9 form and provide a selected list of identity and immigration/citizenship documents to ensure an employee is authorized to work. This means an employer who completes their I-9 forms is protected from revocation. However, HB 439 requires Pennsylvania courts to make the final determination as to immigration status of employee. Under this procedure, a Pennsylvania court will be asked to determine whether an employee complied with federal law, and whether the I-9 and supporting documentation for the questioned employee is valid. The U.S. Supreme Court in *Whiting* made it clear that for a licensing statute to be valid, it must rely only on a determination by the federal government.

PUBLIC BENEFITS

The following bills relate at least in part to enhanced identification requirements for public benefits.

Bill	Committee's Description
SB 9, PN: P1240 (Scarnati)	SB 9 would require anyone requesting public benefits in the Commonwealth, including Medicaid, welfare and in-state college tuition, to provide identification proving they are legal residents.
HB 41, PN 16 (Marsico)	HB 41 would require anyone requesting public benefits in the Commonwealth, including Medicaid, welfare and in-state college tuition, to provide identification proving they are legal residents.
HB 809, PN 834 (Perry)	HB809 809 would prevent taxpayer money being spent on illegal immigrants through a requirement of proof of legal status. If the person cannot prove legal status in the country, that person would not be eligible for public assistance programs.
HB 355, PN 320 (Readshaw)	HB 355 is an attempt to take on federal immigration functions in the areas of ... public benefits and issuance of primary identification documents....

The PBA is aware that comprehensive substantive written testimony is being submitted on the provisions of SB 9 and HB 41 and refers the Committee to that testimony for a substantive examination of the technical defects in these bills. Defects in those bills as identified therein are mirrored in the portions of HB 355 addressing public benefits.

HB41 and SB9 are unnecessary and costly. Undocumented immigrants are already ineligible for the benefits these bills are designed to prohibit and the bills allow them to receive the benefits for which they can be eligible.

In 2007, it was determined that a similar Colorado law cost that state \$2 million to enforce and did not create any savings.⁴⁷ Pennsylvania's poverty population is more than double that of Colorado's.⁴⁸ In 2008, after the Colorado law went into effect, US Citizen and Immigration Services increased its search rates so that today use of the SAVE database costs between \$0.50-\$2.00 per search, per person with a monthly \$25.00 charge.⁴⁹ With most benefits requiring recertification twice a year these costs can quickly add up. These costs do not include technological upgrades and staff training.

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Furthermore, agencies such as DPW already avail themselves of the SAVE database when they are uncertain as to whether someone is eligible for public benefits. Using SAVE for every individual would be rather costly. In fact, DPW has been recognized by the federal government for the cost effective way in which they prevent fraud while minimizing the costs of identifying and prosecuting fraudulent activity.⁵⁰

We also have learned through increased documentation requirements in the Medicaid program that additional documentation requirements tend to hurt low income whites and African Americans, not undocumented immigrants.⁵¹

HB 809 defines “Unauthorized Alien” as someone who is not authorized to work in the U.S. There are categories of foreign born persons who may be eligible to receive certain public benefits prior to receipt of employment authorization. For example, asylees, victims of domestic violence and of human trafficking may be eligible to receive public benefits as they seek work authorization. Because of the inconsistent definitions, members of these groups who are lawfully present in the U.S. would be required to sign an affidavit that is inconsistent with federal definitions and could risk jeopardizing their petitions. Further, HB 809 could be read to prohibit education for undocumented students which would be unconstitutional,⁵² and would also prohibit provision of education services to visitors (including exchange students) who are here only on a student visa as they would not be work authorized.

DENIAL OF CITIZENSHIP TO IMMIGRANT CHILDREN BORN IN THE U.S.

The following bills relate to denial of citizenship to immigrant children born in the U.S.

Bill	Committee Description
HB 857, PN 895 (Metcalf)	HB857 is a two-part legislative approach that corrects the misapplication of the 14th Amendment by clarifying the original intent of the phrase “subject to the jurisdiction thereof” to eliminate the anchor baby status in Pennsylvania. The second part, an interstate compact, allows states to join together to further clarify “subject to the jurisdiction thereof” by granting the ability to notate “natural-born citizen” on a birth certificate.
HB 474, PN 888 (Cox)	HB 474 would authorize Pennsylvania to enter into a compact with other states to provide distinctions on state birth records to allow both states and the federal government to distinguish between citizens and non-citizens. The compact would not take effect until Congressional approval has been obtained.

The Fourteenth Amendment is enshrined in U.S. history as the cornerstone of American civil rights. Equally as important as the due process and equal protection clauses, the birthright citizenship clause states that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.” The citizenship clause was not a legal innovation of the Fourteenth Amendment, but, rather, a restoration of the long-standing English common law doctrine of *jus soli*, or citizenship by place

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of birth. Originally embraced in early American jurisprudence, it had been cast aside in the infamous Dred Scott decision in 1857⁵³ which denied birthright citizenship to the descendants of slaves. Congress approved the citizenship clause to overrule Dred Scott, and with ratification in 1868 of the Fourteenth Amendment, elevated *jus soli* to the status of constitutional law. Subsequent court decisions solidified the concept of birthright citizenship for more than a hundred years.

Nevertheless, there has been a concerted effort by a national group of state lawmakers to “restore the original intent” of the birthright citizenship clause. This year the group announced their model state legislation to both narrowly interpret the birthright citizenship clause, and to form state compacts calling for separate, or different classes of, birth certificates depending on the parents’ legal status – in an effort to deny American citizenship to children born in those states to undocumented immigrants.

In Pennsylvania, HB 857, the Commonwealth Citizenship Act and HB 474, the Interstate Compact, reflect this concerted effort. The underlying premise of both HB 857 and HB 474 is based on the identical interpretation of the meaning of the phrase “subject to the jurisdiction of the United States” whereby a child born to undocumented immigrants is not subject to the jurisdiction of the United States.

HB 857 and HB 474 are contrary to U.S Supreme Court case law establishing that children born on United States soil are U.S. citizens, regardless of the immigration status of their parents. That has been the well-settled interpretation of the birthright citizenship clause of the Fourteenth Amendment for over a hundred years.

In the seminal U.S. Supreme Court case of *U.S. v. Wong Kim Ark*,⁵⁴ the Court ruled that the birthright citizenship language in the Fourteenth Amendment could not be limited in its effect by an act of Congress. Thus, the restrictions of the Chinese Exclusion Act did not apply to Wong since he was a U.S. citizen from birth. Wong had been born in the U.S. to parents of Chinese descent, who, at the time of his birth, were subjects of the Emperor of China, but had permanent domicile and residence in the U.S., and were not employed in any diplomatic or official capacity for the Emperor. When Wong went to visit China and attempted to later re-enter the country, officials attempted to exclude him under the Chinese Exclusion Act. In a 6-2 decision, the Court ruled held that Wong had acquired U.S. citizenship at birth, which could not be later taken away by legislative act. As the Court stated, “to hold that the 14th Amendment of the Constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.” Since *Wong*, the citizenship clause and the phrase “subject to the jurisdiction thereof” has been interpreted as only excluding children born to foreign diplomatic personnel and children born to an occupying enemy force during any foreign occupation.⁵⁵ Thus, there is a long history of legal precedent supporting the proposition that those born on United States soil acquired citizenship at birth, regardless of whether their parents

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were citizens or not. HB 857 and HB 474, if passed, would be contrary to over a hundred years of U.S. Supreme Court, well-settled precedent.

As Christina Rodriguez, NYU Law Professor and former law clerk to Justice Sandra Day O'Connor, notes, the legislation's "implicit premise, that children of parents who have broken the law do not deserve U.S. citizenship, contradicts a basic American value: the sins of the parents should not be visited upon the children."⁵⁶ Justice Robert Jackson, in his dissent in *Korematsu v. United States*,⁵⁷ which found Japanese internment policies during World War II constitutional, stated, "if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable." Similarly, in *Plyler v. Doe*,⁵⁸ when the U.S. Supreme Court struck down a Texas law that would have denied undocumented children access to public schools, Justice Harry Blackmun wrote, "frustration with illegal immigration ought not lead to unequal treatment of children who had no hand in creating their illegality." As Rodriguez describes it, the citizenship clause "operates as a constitutional reset button. Each generation born in the U.S. stands on its own, with equal citizenship status, regardless of parentage. Given our history as a society of immigrants, this rule has been crucial to our development into a cohesive political community and to our ability to integrate each new immigrant cohort."⁵⁹

It is an accepted principle of law that the federal government is the sole authority with respect to naturalization and citizenship. Congress codified birth right citizenship within federal immigration law about 58 years ago at 8 U.S.C. § 1401(a), "National and Citizens of United States at Birth," stating: "The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof." Nevertheless, HB 474 and HB 857 rest on the principle that the phrase, "subject to the jurisdiction thereof" does not apply to the children of undocumented immigrants because such persons are not subject to U.S. jurisdiction. But "subject to the jurisdiction" of the U.S. is simply to be subject to the authority of the U.S. government, meaning required to obey U.S. laws. Obedience of U.S. laws does not turn on immigration status, national allegiance, or past compliance. Speaking of a person who is subject to U.S. jurisdiction does not mean speaking of a person who has sworn allegiance to the U.S. The jurisdictional requirement excludes only those who, for some reason, are not required to obey U.S. law, namely, foreign diplomats and enemy soldiers – notwithstanding their presence within the U.S. Accordingly, children born to foreign diplomats, who enjoy diplomatic immunity, and children born to enemy soldiers during wartime occupation of U.S. territory – are not entitled to birthright citizenship under the Fourteenth Amendment.

As a practical matter, bills such as HB 857, which purports to re-define state citizenship through state legislation, will accomplish little, other than undermining principles of federalism and the uniform rule of national citizenship.

Just as importantly, bills such as HB 857 and HB 474 are bad public policy that will engender bad results. If children of undocumented immigrants are denied citizenship, the new

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second class of citizenship may become vulnerable to abuse and discrimination. It would increase, not decrease, the number of people in the U.S. without legal immigration status. The impact of this initiative would be felt well beyond the undocumented population, and American parents would have to prove the citizenship status of their children. American parents may find themselves trying to prove that their children derive citizenship through one or both parents, a process that can be difficult. Moreover, establishing citizenship other than by birth in the U.S. is complex, as U.S. law with regard to derivative citizenship is extremely complex. Lastly, Americans could be denied citizenship because of a mistake – insomuch as government workers at the state and local level responsible for issuing birth certificates might not understand the complexities of determining the immigration status of the parents of a baby.

Lawmakers in Arizona recently recognized the potential pitfalls of this same type of legislation, in March of this year voting down legislation that ban U.S. citizenship for babies born to parents who are undocumented immigrants. There is no reason to believe that HB 857 and HB 474 would receive a different reception in Pennsylvania. These bills would damage the state's reputation nationwide and worldwide, spread divisiveness and distrust among its residents, and undermine economic recovery. As a statewide bar association, it is incumbent upon the PBA to oppose legislation that is so clearly unconstitutional and contrary to the rule of law, against public policy and principles of fairness and equality, and fundamentally flawed in conception.

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In closing, the Pennsylvania Bar Association thanks the Committee for the opportunity to submit this testimony. Should you have any questions, please do not hesitate to contact the PBA at 800-932-0311.

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<sup>1</sup> It is important to note that “entry without inspection” and overstaying a lawful issued visa are civil immigration law violations which may make an individual subject to removal from the country. However, in most instances neither of these civil immigration law violations is a criminal law violation. One of the most recent federal court decisions enjoining enforcement of recently enacted Georgia state law provisions similar to many of the legislative proposals before this Committee held:

...mere presence in this country without authorization is not a federal crime. Enforcement of civil immigration offenses is not "a field which the States have traditionally occupied." *Wyeth v. Levine*, [555 U.S. 555, 129 S. Ct. 1187, 1194, (2009)].

See *Georgia Latino Alliance for Human Rights, v. Deal*, 2011 U.S. Dist. LEXIS 69600, *Slip Op.* at 21 (Civil Action: 1:11-CV-1804-TWT (ND GA, June 27, 2011). [http://www.gand.uscourts.gov/pdf/111cv1804\\_order.pdf](http://www.gand.uscourts.gov/pdf/111cv1804_order.pdf). As will be discussed more fully below, the PBA House of Delegates in May 2004 adopted a resolution specifically opposing criminalization of civil immigration law violations.

The distinction between the civil law enforcement of immigration law by the Department of Homeland Security and classification of ‘unauthorized’ immigrants as “illegal” is highlighted by recent DHS policy actions. On August 18, 2011, DHS Secretary Janet Napolitano announced that the priorities of DHS were to identify and remove immigrants convicted of crimes and repeat offenders. Immigrants brought to the U.S. at a young age who completed high school and immigrants without criminal records are among those who would be subject to prosecutorial discretion, consistent with earlier guidelines issued by John Morton, the Director of U.S. Immigration and Customs Enforcement (ICE). These guidelines are available at <http://www.nilc.org/immlawpolicy/DREAM/Napolitano-response-to-senators-2011-08-18.pdf> and <http://www.nilc.org/immlawpolicy/arrestdet/prosecutorial-discretion-J-Morton-2011-06-17.pdf>.

<sup>2</sup> In the early part of the Twentieth Century Congress enacted legislation limiting immigration, based in large part on race or ethnicity. The justification for these limitations is strikingly familiar. The language in some of the current legislation states, “Illegal immigration is causing economic hardship and lawlessness in this Commonwealth.” Now note the comments of Senator Henry Cabot Lodge in 1909:

[T]he immigrants excluded by the illiteracy test are those who remain for the most part in congested masses in our great cities. They furnish . . . a large proportion of the population of the slums. . . . illiteracy runs parallel with the slum population, with criminals, paupers, and juvenile delinquents of foreign birth or parentage, whose percentage is out of all proportion to their share of the total population, when compared with the percentage of the same classes among the native born. It also appears . . . that the immigrants who would be shut out by the illiteracy test are those who bring least money to the country and come most quickly upon private or public charity for support.

[http://us.history.wisc.edu/hist102/pdocs/lodge\\_immigration.pdf](http://us.history.wisc.edu/hist102/pdocs/lodge_immigration.pdf). Who were these immigrants according to Lodge? “Italians, Russians, Poles, Hungarians, Greeks, and Asiatics,” and presumably, but not stated, Jews. Earlier, the Irish were targeted, as reflected by *The Chicago Post* when it wrote, “The Irish fill our prisons, our poor houses. . . . Scratch a convict or a pauper, and the chances are that you tickle the skin of an Irish Catholic. Putting them on a boat and sending them home would end crime in this country.” Commenting on the Know-Nothing Party, which was hostile to immigration, Abraham Lincoln wrote in 1855,

As a nation, we began by declaring that “all men are created equal.” We now practically read it “all men are created equal, except negroes” [sic] When the Know-Nothings get control, it will read “all men are created equal, except negroes, and foreigners, and Catholics.” When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty -- to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy [sic].

<http://showcase.netins.net/web/creative/lincoln/speeches/speed.htm>.

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So, who were these immigrants—they were our grandparents, great-grandparents, and great great-grandparents. Few of us think of these family members as paupers, criminals, and delinquents, because they were not.

<sup>3</sup> As the United States District Court for the Northern District Court of Georgia stated in June 2011 in enjoining Georgia's HB 87 law, which is similar to Pennsylvania's HB 738:

"The widespread belief that the federal government is doing nothing about illegal immigration is the belief in a myth. Although the Defendants characterize federal enforcement as "passive," that assertion has no basis in fact. On an average day, Immigration and Customs Enforcement officers arrest approximately 816 aliens for administrative immigration violations and remove approximately 912 aliens, including 456 criminal aliens, from the United States."

*Georgia Latino Alliance for Human Rights, v. Deal, supra, Slip Op.* at 33 citing to Declaration of Daniel Ragsdale, Executive Associate Director of ICE explaining the federal government's increased enforcement of immigration laws.

<sup>4</sup> See <http://old.zogby.com/soundbites/ReadClips.cfm?ID=15764>. The full August 2007 Zogby International report is available at <http://www.wbcitizensvoice.com/pdfs/HazletonFinalReport.pdf>.

<sup>5</sup> See The Gerontology Center of Penn State at <http://gerontology.ssri.psu.edu/aging-and-pennsylvania>.

<sup>6</sup> See Center for Labor Market Studies at Northeastern University in Boston's February 2006 paper, "New Immigrant Workers and the Labor Market in the U.S." <http://www.skillscommission.org/wp-content/uploads/2010/05/NewForeignImmigrantWorkers.pdf>.

<sup>7</sup> See the National Immigration Law Center's 2006 article, "Paying Their Way and Then Some: Facts about the Contributions of Immigrants to Economic Growth and Public Investment," from the Sept. 29, 2006, edition of *Immigrants' Rights Update*. [www.nilc.org/immspbs/research/research003.htm](http://www.nilc.org/immspbs/research/research003.htm).

<sup>8</sup> See <http://www.census.gov/population/www/pop-profile/natproj.html>.

<sup>9</sup> See U.S. Census Bureau, Pennsylvania State Data Center at <http://pasdc.hbg.psu.edu>.

<sup>10</sup> See <http://www.aila.org/content/fileviewer.aspx?docid=22935&linkid=163705>

<sup>11</sup> Daniel Griswold, "Higher Immigration, Lower Crime." *Commentary*, Dec., 2009. <http://www.commentarymagazine.com/article/higher-immigration-lower-crime/>

<sup>12</sup> Rakesh Kochhar, Assoc. Director for Research, Pew Hispanic Center, Written Testimony submitted to the Judiciary Subcommittee on Immigration Policy and Enforcement, Mar. 10, 2011. <http://pewhispanic.org/files/reports/138.pdf>. Griswold.

<sup>13</sup> Gordon H. Hanson, *The Economic Logic of Illegal Immigration*. Council on Foreign Relations, CSR No. 26, Apr. 2007.

<sup>14</sup> Peter B. Dixon and Maureen T. Rimmer, "Restriction or Legalization? Measuring the Economic Benefits of Immigration Reform," Center for Trade Policy, CATO Institute, Aug. 13, 2009.

<sup>15</sup> Raul Hinojosa-Ojeda and Marshall Fitz, "A Rising Tide or Shrinking Pie: The Economic Impact Legalization versus Deportation in Arizona," Immigration Policy Center and the Center for American Progress, (March, 2011) [http://www.americanprogress.org/issues/2011/03/pdf/rising\\_tide.pdf](http://www.americanprogress.org/issues/2011/03/pdf/rising_tide.pdf)

<sup>16</sup> GBP news, June 23, 2011. <http://www.gfb.org/gfbnews/GFBNewsMoreInfo.asp?RecordID=1757>.

<sup>17</sup> Pennsylvania Department of Agriculture, [http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS\\_0\\_2\\_24476\\_10297\\_0\\_43/AgWebsite/Page.aspx?name=About-PDA&navid=30&parentnavid=0&pageid=9&](http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_24476_10297_0_43/AgWebsite/Page.aspx?name=About-PDA&navid=30&parentnavid=0&pageid=9&).

<sup>18</sup> "Immigration issue could be Perry liability," *The Philadelphia Inquirer*, Aug. 12, 2011.

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<sup>19</sup> See <http://www.immigrationpolicy.org/just-facts/unauthorized-immigrants-pay-taxes-too>.

<sup>20</sup> Shirin Hakimzadeh & D'Vera Cohn, *English Usage Among Hispanics in the United States*, Pew Hispanic Center, Nov.29, 2007. <http://pewhispanic.org/files/reports/82.pdf>.

<sup>21</sup> Linda Chavez, "Hispanic Population in U.S. Growing, Assimilating", *Dispatch Politics*, Mar. 28, 2011. <http://www.dispatch.com/content/stories/editorials/2011/03/28/hispanic-population-in-u-s--growing-assimilating.html>.

<sup>22</sup> *Yiddish Theatre in America*, Jewish Virtual Library. <http://www.jewishvirtuallibrary.org/jsource/US-Israel/Yiddish.html>.

<sup>23</sup> *The Jewish Daily Forward*, History. <http://www.forward.com/about/history/>.

<sup>24</sup> See *Chae Chan Ping v. United States*, 130 US 581, 9 S. Ct. 623 (1889).

<sup>25</sup> 312 US 52, 66-67 (1941).

<sup>26</sup> The Supreme Court decision in *Hines v. Davidowitz*, *supra*, was discussed extensively in one of the most recent federal District Court opinions addressing the continuing scope of federal preemption of state regulation of immigration law. See *Georgia Latino Alliance For Human Rights, v. Deal*, 2011 U.S. Dist. LEXIS 69600, (Civil Action: 1:11-CV-1804-TWT (ND GA, June 27, 2011) ([http://www.gand.uscourts.gov/pdf/111cv1804\\_order.pdf](http://www.gand.uscourts.gov/pdf/111cv1804_order.pdf)) which invalidated recently enacted Georgia state statutes which are similar to many before this Committee. The court stated:

Seventy years ago the United States Supreme Court declared that the federal government had the exclusive right to legislate in the general field of foreign affairs, including power over immigration, naturalization and deportation. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941):

When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute, for Article VI of the Constitution provides that 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' The Federal Government, representing as it does the collective interests of the ... states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.

*Id.* at 62-63(footnotes deleted). In striking down a [Pennsylvania] state alien registration law, the Court emphasized the close connection between foreign relations and regulation of immigration:

One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government. This country, like other nations, has entered into numerous treaties of amity and commerce since its inception-treaties entered into under express constitutional authority, and binding upon the states as well as the nation. Among those treaties have been many which not only promised and guaranteed broad rights and privileges to aliens sojourning in our own territory, but secured reciprocal promises and guarantees for our own citizens while in other lands. And apart from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents-duties

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which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad. In general, both treaties and international practices have been aimed at preventing injurious discriminations against aliens. Concerning such treaties, this Court has said: 'While treaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both of the parties may not be able to demand against their own government, the general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against the citizens of the other.'

*Id.* at 64-65. Accordingly, the states are not permitted to subject aliens to burdens that are unique to them:

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. Laws imposing such burdens are not mere census requirements, and even though they may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs. And specialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider in discharging its constitutional duty 'To establish a uniform Rule of Naturalization \* \* \*.' It cannot be doubted that both the state and the federal registration laws belong 'to that class of laws which concern the exterior relation of this whole nation with other nations and governments.' Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.' And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

*Id.* at 66-67. That remains the law of the land.

Georgia Latino Alliance For Human Rights, v. Deal, *supra*, Slip Op. at 18-20.

<sup>27</sup> See Chamber of Commerce of United States of America v. Whiting, 563 U.S. \_\_\_, 131 S. Ct. 1968 (May 26, 2011).

<sup>28</sup> *Whiting*.

<sup>29</sup> For example, the Committee chair's description of H.B. 738, is that it "...is modeled after the recent law passed in Arizona, and would provide state and local law enforcement with full authority to apprehend illegal aliens." That law --Arizona's SB 1070 -- has been enjoined by federal courts. See *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), affirming *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010).

<sup>30</sup> See Statement of Tsiwen Law for the PBA before House Republican Policy Committee July 27, 2006.

[http://www.pabar.org/public/committees/civileql/resolutions/Republican\\_House\\_Policy\\_Committee\\_Draft\\_Testimony%20of%20Tsiwen%20M\\_Law.pdf](http://www.pabar.org/public/committees/civileql/resolutions/Republican_House_Policy_Committee_Draft_Testimony%20of%20Tsiwen%20M_Law.pdf).

<sup>31</sup> See:

"Big-City Police Chiefs Urge Overhaul of Immigration Policy," *New York Times* July 1, 2009.

<http://www.nytimes.com/2009/07/02/us/02florida.html>.

Major Cities Chiefs June 2006 adoption of "M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS For Enforcement of Immigration Laws By Local Police Agencies."

[http://www.houstontx.gov/police/pdfs/mcc\\_position.pdf](http://www.houstontx.gov/police/pdfs/mcc_position.pdf).

Testimony of then Philadelphia Police Commissioner Sylvester M. Johnson Before the U.S. Senate Judiciary Committee (July 5, 2006). [http://www.pabar.org/public/committees/civileql/resolutions/Sylvester\\_Johnson.pdf](http://www.pabar.org/public/committees/civileql/resolutions/Sylvester_Johnson.pdf).

<sup>32</sup> 2011 WL 134945

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<sup>33</sup> *United States of America v. State of Arizona*, 641 F.3d 339 (9<sup>th</sup> Cir. April 11, 2011), affirming *United States of America v. State of Arizona*, 703 F. Supp. 2d 980 (D.Az. July 28, 2010).

<sup>34</sup> *United States of America v. State of Arizona*, was decided on grounds completely unrelated to the holding in *Chamber of Commerce of United States of America v. Whiting*.

<sup>35</sup> *United States of America v. State of Arizona*, 641 F.3d at 351.

<sup>36</sup> The Ninth Circuit Opinion noted:

Thus far, the following foreign leaders and bodies have publicly criticized Arizona's law: The Presidents of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil, Colombia, Honduras, and Nicaragua; the national assemblies in Ecuador and Nicaragua and the Central American Parliament; six human rights experts at the United Nations; the Secretary General and many permanent representatives of the Organization of American States; the Inter-American Commission on Human Rights; and the Union of South American Nations.

*United States of America v. State of Arizona*, 641 F.3d at 351.

<sup>37</sup> *Buquer v. the City of Indianapolis*, 2011 U.S. Dist. Lexis 68326, at 63836 (S.D. IN, No. 1:11-cv-708-SEB-MJD, June 24 2011)

<sup>38</sup> See discussion above at n. 29 of *Hines v. Davidowitz*, 312 U.S. at 67.

<sup>39</sup> On August 18, 2011, DHS Secretary Janet Napolitano announced that the priorities of DHS were to identify and remove immigrants convicted of crimes and repeat offenders. Immigrants brought to the U.S. at a young age who completed high school and immigrants without criminal records are among those who would be subject to prosecutorial discretion, consistent with earlier guidelines issued by John Morton, the Director of ICE. <http://www.nilc.org/immlawpolicy/DREAM/Napolitano-response-to-senators-2011-08-18.pdf> and <http://www.nilc.org/immlawpolicy/arrestdet/prosecutorial-discretion-J-Morton-2011-06-17.pdf>.

<sup>40</sup> See *United States of America v. State of Arizona*, 641 F.3d at 360

<sup>41</sup> See, *Georgia Latino Alliance For Human Rights, v. Deal*, Slip Op. at 41.

<sup>42</sup> 8 U.S.C.S. Sec. 1324 (a)(1), INA 274 (a) , *United States v. Morales-Rosales*, 838 F.2d 1359

<sup>43</sup> *United States v. 1982 Ford Pick-up*, 873 F.2d 947, 1989 U.S. App. LEXIS 5936 (6th Cir. Ky. 1989)

<sup>44</sup> *United States v. Moreno*, 561 F.2d 1321, 1323(1977).

<sup>45</sup> See [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_10-63\\_Mar10.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf).

<sup>46</sup> 563 U.S. \_\_\_, 131 S. Ct. 1968 (May 26, 2011).

<sup>47</sup> Mark P. Couch, "Colorado Immigration Law Falls Short of Goal; State Agencies: \$2 Million Cost and No Savings," *Denver Post*, Jan. 25, 2007. [http://www.denverpost.com/ci\\_5081255](http://www.denverpost.com/ci_5081255).

<sup>48</sup> American Community Survey, *Number and Percentage of People in Poverty in the Past 12 months by State and Puerto Rico: 2008 and 2009*, U.S. Census Bureau 2009. <http://www.census.gov/hhes/www/poverty/data/acs/2009/tablefigures.pdf>.

<sup>49</sup> USCIS, *SAVE Access Methods and Transaction Charges*. <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=cd32c2ec0c7c8110VgnVCM1000004718190aRCRD&vgnnextchannel=cd32c2ec0c7c8110VgnVCM1000004718190aRCRD>.

<sup>50</sup> Dichter, Harriet, Written Testimony for The House Republican Policy Committee on Stopping and Preventing Fraud and Abuse in Department of Public Welfare Programs, June 2, 2010.

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<sup>51</sup> Donna Cohen Ross, Center on Budget and Policy Priorities, “Medicaid Documentation Requirement Disproportionately Harms Non-Hispanics, New State Date Show: Rule Mostly Hurts U.S. Citizen Children, Not Undocumented Immigrants,” July 10, 2007. <http://www.cbpp.org/cms/?fa=view&id=471>.

<sup>52</sup> See *Plyler v. Doe*, 457 U.S. 202 (1982)

<sup>53</sup> *Scott v. Sanford*, 60 U.S. 393 (1857).

<sup>54</sup> 169 U.S. 649 (1898).

<sup>55</sup> *Wong*, 169 U.S. at 693. See also *Plyler v. Doe*, 457 U.S. 202 (1982) (14<sup>th</sup> Amendment applies to all aliens, who after their illegal entry into this country are indeed physically within the jurisdiction of a state); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Taliban fighter was U.S. citizen based on birth in Louisiana although parents were aliens on temporary work visas).

<sup>56</sup> “14<sup>th</sup> Amendment is Key to the American Experiment,” Cristina Rodriguez, Special to CNN, Aug, 2010, <http://edition.cnn.com/2010/OPINION/08/17/rodriguez.14th.amendment/#fbid=JlvKAymY7Av&wom=false>.

<sup>57</sup> 323 U.S. 214 (1944).

<sup>58</sup> 457 U.S. 202 (1982).

<sup>59</sup> Rodriguez, Special to CNN, Aug. 17, 2010.