ESSAY: In Opposition to the Suffolk County Legislature's Introductory Resolution 2025

Andrea Callan*

In August 2006, the Suffolk County Legislature debated Introductory Resolution 2025, which would require all companies doing business with Suffolk County under county contracts to ensure and validate that all of their employees have proper working status in the United States. The statute would further impose criminal penalties upon violators in addition to fines up to 1,000 per violation. If a company is found to have three or more violations, they will be barred from ever doing business with Suffolk County again. [1] The legislation was an effort by Suffolk County to step in where it believes the twenty-year old Federal Immigration and Nationality Act (INA) regulation requiring such a verification of workers' status has failed the county due to lack of enforcement. [2]

As a member and representative of the Suffolk County New York Civil Liberties Union, I testified in opposition to this bill. My position relied upon three essential arguments: (I) that immigration regulation is an exclusive Federal power; (II) that IR 2025 is pre-empted by existing federal law; and (III) that IR 2025 would raise concerns under Federal Civil Rights statutes.

I. The United States Constitution grants the federal government the exclusive power to "establish a uniform rule of Naturalization," U.S. Const. art. I, §8, cl. 4. The Supreme Court has long held that the "power to regulate immigration is unquestionably exclusively a federal power."[3] Pursuant to this power, the INA prescribes a comprehensive system of laws, regulations, procedures, and administrative agencies that determine which individuals may enter and work in the United States. The INA provides a scheme in which employers who hire non-citizens are subject to criminal and civil sanctions. The federal law also includes provisions describing proper identification and verification of workers and bars discrimination by employers against those prospective employees who appear to be illegal immigrants. Finally, the INA

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* Jacob D. Fuchsberg Touro Law Center, J.D. 2007.

[1] Madore, James T., *Worker status check; Levy's bill would require contractors with county to certify their employees are legally eligible to work,* Newsday (New York) July 13, 2006 pg. A03.

[2] INA §274A.

[3] DeCanas v. Bica, 424 U.S. 351, 354-355 (1976), *citing* Passenger Cases, 7 How, 283, 12, L.Ed. 702 (1849); Henderson v. Mayor of New York, 92 U.S. 259 (1876); Chy Lung v. Freeman, 92 U.S. 275 (1876); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

provides for protection of employers who hire undocumented workers under a good faith belief that the employee is in fact able to work legally in the United States. [4]

The passage of IR 2025 by the Suffolk County legislature is an unconstitutional attempt to transfer a duty of the federal government over to the local county administration because the U.S. Constitution has conferred the power to regulate immigration upon the federal government exclusively.[5]

II. In certain circumstances federal law may preempt state or local laws under the Supremacy Clause. Article VI, Section 2, of the United States Constitution states:

> 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 Supreme Court has articulated several tests to be used to determine when federal law may preempt local statutes. If the local statute fails any one of the following three tests it is preempted: (1) Congress intended to occupy the particular field which the local law seeks to regulate; (2) Congress includes in its federal legislation an express statement of preemption, denying state and local governments the ability to regulate in that area ; (3) requirements within local law conflict with requirements of federal law, making it impossible to comply with both; or (4) state or local law impedes the achievement of a federal objective. [6]

The proposed Suffolk County legislation fails the above tests laid out by the Supreme Court.

As stated above, pursuant to the U.S. Constitution, the federal government is to "establish a uniform rule of Naturalization."[7] A uniform system of naturalization regulates those who enter the country as immigrants who desire to become permanent American citizens. Since US-born people automatically are

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[4] INA §274A.
[5] U.S. Const. art. I, §8, cl. 4.
[6] *See, e.g.,* Silkwood v. Kerr-McGee Corp, 464 U.S. 238, 248-249 (1984); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 203-204 (1983).
[7] U.S. Const. art. I, §8, cl. 4.

citizens, immigrants are the only class to whom naturalization applies. Since the federal government has the exclusive authority to regulate immigration, it therefore has occupied the entire field with the INA. Since the INA has already provided for many of the provisions in IR 2025, including the requirement to verify worker status, impose criminal and civil sanctions against violators, and protect employers who hire illegal workers in good faith, there is no room left for Suffolk County to occupy the field of immigration here because the local legislation provides for the same and the two laws cannot operate alongside one another without creating conflict in enforcement. The federal government enacted the INA in order to govern and occupy the field of immigration. [8]

Congress included in the INA a clause expressly preempting local and state law with respect to additional civil fines or criminal sanctions on employers who violate federal law and hire undocumented immigrants. "[T]he provisions of this section preempt any State or Local law imposing civil or criminal sanctions upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[9] The Suffolk County legislation flies in the face of federal law by imposing additional criminal and civil sanctions in addition to what an offender may have to pay for a federal violation. Not only will employers working for the county be required to pay the fines associated with violating the long-existing federal law, but employers will also be required to pay county violation fees as well. Further, since there is criminal liability built into both the federal and county legislation, it would be similar to double jeopardy for the offender to face trial under both statutes.

Finally, it will be impossible to comply with both the federal and county legislation simultaneously because the INA provides a list of acceptable documents to prove employment status and the Suffolk County legislation restricts this list by accepting a lesser range of documents. For example, the INA accepts US Military Cards for military personnel and allows for the submission of tribal documents for Native American workers, both of which the Suffolk County legislation does not accept as valid forms of proof of work status. If a potential employee seeks to prove his or her employment status with either of these two documents, they will not satisfy the county statute and will be denied employment that they are in fact qualified for.

IR 2025 is pre-empted by federal law because Congress intended to occupy the field of immigration through the enactment of the INA, Congress included express statements in the INA as to its exclusive authority to legislate in

[8] INA §274A.
[9] Id.

this arena, and it would be impossible to comply with both the federal and Suffolk County legislation.

III. Title VII of the Civil Rights Act prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin.[10] Moreover, under 42 U.S.C. §1981 and the Civil Rights Act of 1870:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The Supreme Court has held that Section 1981 prohibits government discrimination based on citizenship status,[11] and the Second Circuit has extended that protection as applied to private actors as well.[12]

There is a danger that employers doing business with Suffolk County will subject themselves to civil discrimination lawsuits by failing to hire a prospective employee because he or she appears to be of a foreign descent and the employer fears violation of the legislation and does not want to risk his work with the county. These acts will cause employers to violate Title VII and Section 1981 and will open the employers up to an even more serious violation of the law.

Pursuant to the arguments stated above, the New York Civil Liberties Union formally opposed IR 2025 and submitted a memo to the legislature outlining its position, which contained the same legal arguments discussed in this article. The NYCLU Legislative Counsel, Udi Ofer, accompanied me in testifying in opposition to this legislation and submitted a written legal memorandum to the members of the legislature.

My testimony of August 22, 2006 before the Suffolk County Legislature is as follows:

My name is Andrea Callan. I am a resident of Suffolk County and a member of the Board of Directors of the Suffolk County New York Civil Liberties Union. The

[10] 42 U.S.C. §2000e-2.
[11] Takahahsi v. Fish & Game Com., 334 U.S. 410 (1948).
[12] Anderson v. Conboy, 156 F.3d 167 (1998).

NYCLU is the New York State affiliate of the ACLU. We are a non-partisan organization with 5,000 members in Suffolk County and 48,000 members statewide.

I stand before you today to testify in strong opposition to Introductory Resolution 2025. The proposed legislation is unconstitutional and will only result in discrimination against Suffolk County residents who look Latino or foreign-born, regardless of their actual citizenship status. The legislation attempts to enter the national debate over immigration reform by inserting the county into an area that is beyond its constitutional authority. Moreover, the legislation will lead to expensive lawsuits against both the county and private employers. I for one do not want my tax dollars going into defending lawsuits that can be prevented here today, nor do I want to expose Suffolk County employers to new liabilities under federal civil rights laws.

This resolution is unconstitutional since it functions as a regulation of immigration and legislates in an area preempted by federal law. State and local governments simply do not have the authority to make laws of the kind which are being debated here. The Supreme Court has long held that under the United States Constitution, which is the Supreme Law of this land, the federal government is the only body that has the power to regulate in the area of immigration. The federal government has done so through the Immigration and Nationality Act (INA), and through the establishment of a comprehensive system of laws and regulations on who may enter or work in the United States.

If IR 2025 passes today, it will be impossible to fulfill the requirements of the federal law and the local law simultaneously, since in certain areas the two conflict directly, and since Congress has already acted by legislating in this field. The Supreme Court has long stated that when federal and local legislation conflict, or when Congress intended for federal law to block similar local legislation, as is the case here, then the two cannot survive simultaneously and federal law will preempt local law.

The proposed legislation is drafted so vaguely and broadly that employers will have no idea how to comply with it, thus exposing employers to serious liability. Further, there is no real need for IR 2025 because the INA already provides for many of the provisions in this bill, including the prohibition against employers hiring undocumented immigrants, and sanctions against employers who fail to comply with the law. Suffolk County should not use its valuable resources to duplicate a law that is pre-empted.

Let's not forget that we are a country with a bleak past in dealing with issues of racism and equal rights and protections. If this legislation passes, we will only expose our immigrant friends and neighbors to rampant discrimination just because they appear to be from certain countries. Employers will face discrimination lawsuits because they may deny jobs to anyone they suspect is an undocumented immigrant, exposing them to serious financial liability and hurting all county residents.

Isn't it our duty to continue to strive for a path of equality? As a county, we must not make decisions that will only drive a further divide between the immigrant community and all other county residents. Instead, Suffolk County should be known as a place which promotes tolerance in its communities and among it vast diversity of people.

For the reasons I have stated before you today, and as a member or your constituency, I urge you to vote in opposition to IR 2025.

Ultimately, the Suffolk County Legislature passed IR 2025. The original resolution did not include protections pertaining to employers who might find themselves subject to civil liability under federal civil rights statutes for unlawfully denying employment to qualified immigrants, but the final form of the bill did contain such protections. The resolution took effect January 1, 2007.