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ILLEGAL IMMIGRATION, SOCIAL SECURITY NUMBERS, AND THE FEDERAL PRIVACY ACT: A SUGGESTED AVENUE OF LITIGATION

INTRODUCTION

In the summer of 2007, Gwinnett County, Georgia, passed an ordinance that included the section, “Employment of Unauthorized Aliens Prohibited.”¹ It stated:

The County shall not enter into a contract for the physical performance of services within the state of Georgia unless the contractor shall provide evidence on County-provided forms that it and its subcontractors have within the previous 12-month period conducted a verification of the social security numbers of all employees who will perform work on the County contract to ensure that no unauthorized aliens will be employed.²

Social Security numbers (SSN), though created for the purposes of administering Social Security benefits, now essentially serve as a national identification number.³ In the private arena they are used for tracking financial information (including credit reports), identifying university students, and are commonly indicated on medical records.⁴ Publicly, they are used for tax purposes, employment verification, and for law enforcement purposes, among others.⁵ Flavio Komuves

1. Gwinnett County, Ga., Ordinance to Revise the Gwinnett County Purchasing Ordinance (June 26, 2007) (4th Revision), at 6(I)(D) (on file with author) [hereinafter Gwinnett County Ordinance I]. The ordinance has been modified and renewed (5th Revision) and is available at http://www.gwinnettcountry.com/departments/financialservices/pdf/Purchasing_Ordinance5_2008.pdf. [hereinafter Gwinnett County Ordinance II] The new version no longer requires direct submission of social security numbers, instead requiring the bidder to utilize the system outlined in O.C.G.A. §§ 13-10-90 to -91 (Supp. 2008). See also discussion *infra* Parts I.A.2 and III.B.3.

2. *Id.*

3. Flavio L. Komuves, *We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529, 531–32 (1998).

4. Komuves, *supra* note 3, at 536–40.

5. Komuves, *supra* note 3, at 540–49; Jacqueline Láinez, *To File or Not to File: Tax Compliance Among Undocumented Immigrant Workers*, 3 AM. U. BUS. L. BRIEF 23, 23 (2007).

points out that it is “ironic . . . that the one area in which a person can refuse the number[] but receive benefits is Social Security itself.”⁶

As the use of the Internet has increased, so have concerns about data privacy and the increasing use of SSNs.⁷ However, SSNs continue to be widely used; recent changes in illegal immigration law, including the Gwinnett County Ordinance, reflect this trend.⁸

Part I of this Note briefly reviews examples of recent legislation in the area of illegal immigration, with a particular focus on Georgia, and why such legislation’s use of SSNs is of concern.⁹ Part II discusses the new proposed amendments to Department of Homeland Security (DHS) employment verification procedures, a resulting lawsuit, and possible challenges under the Federal Privacy Act.¹⁰ Part III examines various state and local legislation regarding employment eligibility verification with a focus on Georgia and possible challenges under constitutional law and under the Federal Privacy Act.¹¹

I. RECENT LEGISLATION AND WHY WE SHOULD BE WORRIED

A. Snapshot of Immigration Legislation at Federal, State, and Local Levels

Illegal immigration and immigration policy are near-constant topics of discussion in the news today.¹² The following sections

6. Komuves, *supra* note 3, at 549.

7. See generally Judith Beth Prowda, *Report: A Lawyer's Ramble Down the Information Superhighway: Privacy and Security of Data*, 64 FORDHAM L. REV. 738 (1995).

8. See *infra* Part I; Gwinnett County Ordinance I & II, *supra* note 1.

9. See *infra* Part I.

10. See *infra* Part II.

11. See *infra* Part III.

12. See Valerie Barney, Katharine Field & Nichole Hair, Peach Sheet, *Professions and Business*, 23 GA. ST. U. L. REV. 247, 249 (2006) (describing illegal immigration as “one of the most controversial issues in the United States today”). For example, from October 10th to 17th, 2007, the New York Times featured eight articles on the topic, describing a variety of new federal, state and local immigration legislation and associated issues. Randal C. Archibold, *State Strikes Balance on Immigration*, N.Y. TIMES, Oct. 14, 2007, at A27; Editorial, *A Crackdown on Hold*, N.Y. TIMES, Oct. 12, 2007, at A26; Steven Greenhouse, *Immigrant Crackdown Upends a Slaughterhouse's Work Force*, N.Y. TIMES, Oct. 12, 2007, at A1; Danny Hakim, *D.M.V. Chief is Pressed to Defend Plan to Give Licenses to Illegal Immigrants*, N.Y. TIMES, Oct. 16, 2007, at B1; Jonathan Miller, *A Mayor with a Tough Stance on Immigration is on Both Sides Now*, N.Y. TIMES, Oct. 16, 2007, at B6; Julia Preston, *Judge Suspends Key*

explore three current examples of legislation that use SSNs as an enforcement tool in illegal immigration: one federal, one by the state of Georgia, and one by a Georgia county.¹³

1. Federal Legislation

At the federal level, the DHS recently announced increased enforcement of illegal immigration laws, including more workplace raids and harsher criminal and civil penalties for employers who hire illegal immigrants.¹⁴ This new policy came to national attention with the May 12, 2008 raid on the Agriprocessors meat packing plant in Postville, Iowa.¹⁵ Over 300 workers were arrested.¹⁶ The controversial processes resulted in many workers pleading to jail time and deportation after being charged with social security fraud for using false numbers.¹⁷

The new DHS regulations also included increased penalties for employers who ignore “no-match” letters sent by the Social Security

Bush Effort in Immigration; N.Y. TIMES, Oct. 11, 2007, at A1 [hereinafter Preston I]; Julia Preston, *No Need for a Warrant, You're an Immigrant*, N.Y. TIMES, Oct. 14, 2007, at 43 [hereinafter Preston II]; *Two Hires a Mistake, Mayor Says*, N.Y. TIMES, Oct. 14, 2007, at A40.

13. See *infra* notes 20, 24, 28.

14. Julia Preston, *U.S. Set for a Crackdown on Illegal Hiring*, N.Y. TIMES, Aug. 8, 2007, at A1 [hereinafter Preston III]. Concerns have been raised about the use of these raids to bring sanctions against employers. See Kevin R. Lashus, Magali S. Candler, & Robert F. Lourghran, *Fear the ICE Man: Lessons from the Swift Raids to Warm You Up—The New Government Perspective on Employer Sanctions*, 32 NOVA L. REV. 391, 391–92 (2008). Some of these workplace raids have resulted in the detention of U.S. citizens. See Emily Bazar, *Citizens Sue After Being Detained in Workplace: An Inconvenience or a Violation of Rights?*, USA TODAY, June 25, 2008, at 1A.

15. Adam Belz, *Hundreds of Detainees Await Fate After Raid*, THE GAZETTE (Cedar Rapids, IA), May 13, 2008, at 1A; Press Release, U.S. Attorney's Office, N. D. Iowa, ICE and Department of Justice Joint Enforcement Action Initiated at Iowa Meatpacking Plant (May 12, 2008), available at http://www.usdoj.gov/usao/ian/press/May_08/5_12_08_Agriprocessors.html.

16. *Immigration Raid in Iowa Largest Ever in U.S.*, LINCOLN J. STAR (Lincoln, NE), May 14, 2008, at A11; Henry C. Jackson, *Iowa Raid Called Largest in U.S.*, CHI. TRIB., May 14, 2008, at C6.

17. See *The Arrest, Prosecution and Conviction of 297 Undocumented Workers in Potsville, Iowa, from May 12 to 22, 2008: Hearing Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law*, 110th Cong. (2008) (statement of Dr. Erik Camayd-Freixas, Fed. Certified Interpreter), available at <http://judiciary.house.gov/hearings/pdf/Camayd-Freixas080724.pdf>; Trish Mehaffey, *234 Detainees Sentenced in Potsville Raid*, THE GAZETTE (Cedar Rapids, IA), May 23, 2008, at 1A, available at <http://www.gazetteonline.com/apps/pbcs.dll/article?AID=/20080522/NEWS/503716059/1006/news>; Julia Preston, *270 Immigrants Sent to Prison in Federal Push*, N.Y. TIMES, May 24, 2008, at A1 [hereinafter Preston IV]; Julia Preston, *An Interpreter Speaking Up for Migrants*, N.Y. TIMES, July 11, 2008, at A1 [hereinafter Preston V].

Administration (SSA).¹⁸ No-match letters are sent by the SSA to inform employers that worker names and SSNs submitted by the employer do not match agency records.¹⁹ Subsequently, on October 11, 2007, the Northern District of California issued a preliminary injunction barring the use of SSA no-match letters as an exclusive basis for employer notice requirements.²⁰ DHS, however, continues to encourage use of its Basic Pilot/Employment Eligibility Verification program, which uses SSNs to allow employers to match employee information against an online database.²¹ DHS Secretary Michael Chertoff defended the system in a June 9, 2008 press conference.²²

2. State Legislation²³

At the state level, the Georgia General Assembly recently passed Senate Bill 529, making it the first state to enact such a large collection of anti-immigration measures.²⁴ The Act includes such

18. Preston III, *supra* note 14, at A1.

19. Preston III, *supra* note 14.

20. *Am. Fed'n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1002, 1006 (N.D. Cal. 2007); Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34281 (June 14, 2006) (to be codified at 8 C.F.R. pt. 274a) [hereinafter Safe-Harbor Procedures].

21. See U.S. Dep't of Homeland Security Press Office, *Fact Sheet: E-Verify* (Aug. 9, 2007), available at http://www.nilc.org/immsemplymnt/ircaempverif/E-Verify_Fact_Sheet_2007-08-09.pdf. The Basic Pilot/Employment Eligibility Verification program has been re-branded "E-Verify" and is described as "a free and simple to use Web-based system that electronically verifies the employment eligibility of newly hired employees." *Id.* According to the press release, it is "being re-branded to highlight key enhancements in the program, including a new photo screening tool that helps employers to detect forged or faked immigration documents." *Id.*

22. Press Release, U.S. Dep't of Homeland Security, Remarks by Homeland Security Secretary Michael Chertoff and Department of Commerce Secretary Gutierrez at the State of Immigration Address (June 9, 2008), available at http://www.dhs.gov/xnews/releases/pr_1213101513448.shtm.

23. Although this Note focuses on Georgia, there has been a huge amount of state immigration legislation. See Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 459 (2008) (reporting 1,562 immigration bills introduced in 2007 state legislative sessions); NAT'L CONFERENCE OF STATE LEGISLATURES IMMIGRANT POLICY PROJECT, STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION, JAN. 1-JUNE 30 1 (2008), available at <http://www.ncsl.org/print/immig/immigreptjuly2008.pdf> (reporting 1,267 bills introduced in the first half of 2008). State laws commonly address issues of "law enforcement, employment, housing, and identification documents." Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2055 (2008).

24. Georgia Security and Immigration Compliance Act, 2006 Ga. Laws 105 (codified as amended at O.C.G.A. §§ 13-10-90 to -91, 16-5-46, 35-2-14, 42-4-14, 43-20a-1 to -4, 50-36-1 (Supp. 2008)); see also Barney, Field & Hair, *supra* note 12, at 270.

varied provisions as: regulating public employers and contracts, providing criminal penalties for human trafficking, authorizing local law enforcement of federal immigration laws, regulating immigration assistance services, and denying tax deductions to employers who pay wages to unauthorized workers.²⁵ Section 2 of Senate Bill 529 put forth new work eligibility verification requirements that apply to Georgia's public employers and their contractors and subcontractors.²⁶ All of these groups are now required to verify the work eligibility of all newly hired employees through the electronic federal work authorization program, effective as of July 1, 2007 for businesses of more than 500 employees, as of July 1, 2008 for businesses of more than 100 employees, and for all public employers, contractors, or subcontractors on July 1, 2009.²⁷

3. Local Legislation

Following the passage of SB 529, Gwinnett County, Georgia, passed an ordinance requiring county contractors to verify all employee SSNs.²⁸ The ordinance further authorizes the county to perform audits to ensure contractors have collected and verified the SSNs. Failure to do so may result in an order to terminate employees, the termination of the contract, or both.²⁹ Additionally, over thirty towns nationwide have passed various anti-immigration laws that penalize employers who hire illegal immigrants or landlords who rent

25. Georgia Security and Immigration Compliance Act; "Georgia Security and Immigration Compliance Act," 2006 Ga. Laws 105 (codified as amended at O.C.G.A. §§ 13-10-90 to -91, 16-5-46, 35-2-14, 42-4-14, 43-20a-1 to -4, 50-36-1 (Supp. 2008)); *see also* Barney, Field & Hair, *supra* note 12, at 261-62.

26. Georgia Security and Immigration Compliance Act, 2006 Ga. Laws 105, at § 2 (codified as amended at O.C.G.A. § 13-10-90 (Supp. 2008)); *see also* Barney, Field & Hair, *supra* note 12, at 261-62.

27. O.C.G.A. § 13-10-91(b)(3) (2008).

28. Gwinnett County Ordinance I, *supra* note 1, pt. 6, § 1(D).

29. Gwinnett County Ordinance I & II, *supra* note 1. The statutory language is somewhat ambiguous in regard to who, specifically, will be affected: it states at one point that "the County shall not enter into a contract" unless the employer provides SSNs, which implies that this would not apply to pre-existing contracts). *Id.* But then it states that "[t]he Purchasing Division shall further be authorized to conduct periodic inspections to ensure that *no* County contractor or subcontractor employs unauthorized aliens on County contracts. By entering into a contract with the County, the contractor and subcontractors agree to cooperate with any such investigation." *Id.* (emphasis added.). This section implies that pre-existing contracts are also subject to such inspections.

to them.³⁰ One of the most well-known of the local ordinances is that of Hazleton, Pennsylvania, which required tenants to apply for an occupancy permit to live within the town limits. The permit itself required proof of legal residency.³¹

Some of the above laws require a verification process, direct or indirect, in which an individual's SSN is matched against federal records through the Department of Homeland Security (DHS) online database, known as E-Verify.³² Although originally requiring direct submission of social security numbers, the Gwinnett County Ordinance was later modified to require the use of E-Verify as outlined in the state law.³³ Other laws are more vague regarding the process by which an individual's immigration status will be verified: Hazleton's ordinance required "proper identification showing proof of legal citizenship and/or residency," which the district court found too vague to conduct the necessary privacy claim inquiry.³⁴

B. Risks of the Use of Social Security Numbers in Immigration Law

Recent legislation has created concern in legal, business, and labor communities about what these restrictions mean and how they will be enforced.³⁵ Specifically, there has been criticism from immigration lawyers regarding the web-based verification programs touted by DHS.³⁶ In addition, with the increased use of SSNs in government

30. See Ken Belson and Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, NY TIMES, Sept. 26, 2007, at A1; see also Motomura, *supra* note 23, at 2055–67 (discussing the role of state and local laws in illegal immigration enforcement, and the federalism issues implicit in such arrangements).

31. Hazleton's ordinance was struck down by the district court on July 26, 2007. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 529 (M.D. Pa. 2007).

32. E.g., O.C.G.A. § 13-10-91 (2006); Gwinnett County Ordinance, *supra* note 1, pt 6, § 1(D).

33. Compare Gwinnett County Ordinance I, *supra* note 1 (requiring direct submission of social security numbers to county in order to be eligible for contracts), with Gwinnett County Ordinance II, *supra* note 1 (requiring use of federal authorization program) and O.C.G.A. §§ 13-10-90 to -91 (Supp. 2008) (outlining federal authorization program requirements).

34. *Lozano*, 496 F. Supp. 2d at 530–31.

35. See, e.g., ABA Center for Continuing Legal Education, New Rule on Social Security "No-Match" Letters, available at <http://www.abanet.org/cle/programs/t07ssn1.html>.

36. Concerns include the possibility that databases contain mistakes that, when matched against records, will result in loss of employment for U.S. citizens and legal residents. See, e.g., NATIONAL IMMIGRATION LAW CENTER, BASIC PILOT/E-VERIFY: NOT A MAGIC BULLET (2007), http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_nomagicbullet_2007-09-17.pdf. For more on

databases, the risk of harm increases due to loss of data privacy and identity theft.³⁷ It is extremely difficult to repair the damage of identity theft, of which there were over 9.9 million cases in 2003, 27.3 million American identity theft victims from 1998–2003, with billions of dollars in losses.³⁸ There are multiple problems that can arise from SSN abuse, and identity theft is not the only one—good faith mistakes in the use of SSNs can wreak havoc on any person's credit history or personal records.³⁹ Additionally, there are concerns that SSNs have become essentially a national identification number, and in 1974 the Senate Committee stated that the use of SSNs as universal identification numbers is “one of the most serious manifestations of privacy concerns in the nation.”⁴⁰ There is also an underlying values concern: as one author points out, “[w]e associate the treatment of people as numbers with totalitarian regimes,” and a national numbering system enables our identities to become commodities.⁴¹

Controlling the dissemination of SSNs is incredibly difficult; there is no unifying federal law regarding the regulation of public records, or specifically of SSNs as indicated in public records.⁴² The new immigration laws described in the above section appear to spark such concerns; the Gwinnett County Ordinance provides that the county may audit employers to ensure that they complied with the

the problems associated with E-Verify, see generally Micah Bump, *Immigration, Technology, and the Worksite: The Challenges of Electronic Employment Verification*, 22 GEO. IMMIGR. L.J. 391 (2008) (discussing concerns of accuracy, scalability, accessibility and privacy); GOVERNMENT ACCOUNTABILITY OFFICE, PUBL'N NO. GAO-05-813, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 22–26 (2005) (indicating that “the [Basic Pilot] program cannot currently help employers detect identity fraud,” and citing delays in updating databases, though noting that the system is being improved).

37. See Lora M. Jennings, *Paying the Price for Privacy: Using the Private Facts Tort to Control Social Security Number Dissemination and the Risk of Identity Theft*, 43 WASHBURN L.J. 725, 726 (2004).

38. *Id.* at 725 n.1.

39. Komuves, *supra* note 3, at 534–35.

40. Komuves, *supra* note 3, at 531–32 (quoting S. Rep. No. 1183, 93rd Cong., as reprinted in 1974 U.S.C.C.A.N. 6916, 6943).

41. Komuves, *supra* note 3, at 571–72.

42. See Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137, 1172 (2002). Instead there are a wide variety of state laws, with no two states exactly the same. *Id.*

verification process.⁴³ However, the ordinance makes no mention of the actual process by which SSNs will be audited by the county, nor how the numbers will be secured in this process.⁴⁴ DHS has noted that “any system involving SSNs shall be treated as having at least a moderate potential impact on an individual regarding the loss of confidentiality.”⁴⁵ As technology becomes more invasive, however, traditional privacy rights diminish. In a tort claim, many courts have rejected the idea that an individual has any reasonable expectation of privacy in a SSN as it is known to so many businesses and disclosed in so many public records.⁴⁶ Therefore, the use of SSNs in order to enforce immigration law is of concern to all United States residents, regardless of whether they are citizens, legal or illegal immigrants.⁴⁷ The Federal Privacy Act may be one avenue to protect privacy interests in SSNs as they are increasingly used in efforts to control illegal immigration.⁴⁸

II. THE NEW DHS POLICY AND POTENTIAL CHALLENGES UNDER THE FEDERAL PRIVACY ACT

A. *The Federal Privacy Act*

1. *The Statute*

The Federal Privacy Act protects multiple kinds of personal information and was adopted to permit individuals to learn which of their personal records are kept by federal agencies, as well as to allow some degree of control over the use of personal information by the government.⁴⁹ It was adopted in light of “the increasing use of

43. Gwinnett County Ordinance II, *supra* note 1, pt. 6, § 1(D).

44. Gwinnett County Ordinance II, *supra* note 1.

45. Memorandum from Hugo Teufel III, Chief Privacy Officer, Department of Homeland Security (June 4, 2007), available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_policyguide_2007-2.pdf.

46. Komuves, *supra* note 3, at 572–73; see also Jennings, *supra* note 37, at 726–27 (proposing that the tort of public disclosure of private facts should be redefined to include the dissemination of SSNs).

47. See generally Komuves, *supra* note 3.

48. Federal Privacy Act, Pub. L. No. 93-579, 88 Stat 1896 (1974).

49. *Id.* § 2(b)(1)–(2).

computers and sophisticated information technology, [which] while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information.”⁵⁰ Section 7 of the Federal Privacy Act of 1974 states, “[i]t shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number.”⁵¹ This law provides the primary source of restrictions on government use of SSNs.⁵²

The Senate Committee, in its report endorsing the Federal Privacy Act, “stated that the extensive use of SSNs as universal identifiers is ‘one of the most serious manifestations of privacy concerns in the nation.’”⁵³ Section 7 of the Privacy Act is unique in that it applies to state and local agencies as well as federal agencies, ostensibly providing a greater degree of protection specifically in regard to SSNs.⁵⁴ However, the Act does not apply to “any disclosure which is required by Federal statute.”⁵⁵ This exception has proved very broad: “when one considers how many exceptions Congress has granted for SSN collection and use, the exceptions clearly swallow the general rule.”⁵⁶ However, the exceptions previously made by Congress are worth examining in light of illegal immigration policy.

2. *The Exceptions to the Federal Privacy Act*

The exceptions by federal statute, stating that SSNs may be required, have included tax forms, public assistance applications, and motor vehicle registration.⁵⁷ However, employment eligibility

50. *Id.* § 2(a)(2).

51. *Id.* § 7(a)(1).

52. Komuves, *supra* note 3, at 549.

53. *Id.* at 532 (quoting S. Rep. No. 1183, 93rd Cong., as reprinted in 1974 U.S.C.C.A.N. 6916, 6943).

54. Federal Privacy Act, Pub.L. No. 93-579, § 7(a)(1), 88 Stat. 1896 (1974).

55. *Id.* § 7(a)(2)(A).

56. Komuves, *supra* note 3, at 550.

57. 42 U.S.C. § 405(c)(2)(C)(i) (2000).

verification is not excluded by statute.⁵⁸ DHS Form I-9 states that “[e]mployers **CANNOT** specify which document(s) they will accept from an employee” for verification. A social security card is only one of the acceptable documents.⁵⁹ Additionally, Form I-9 specifically includes a Privacy Act notice, specifying that the 1986 Immigration Reform and Control Act (IRCA) is the authority for collecting the information, and that “[t]his information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States.”⁶⁰

B. DHS's Proposed Amendments to Social Security Agency No-Match Letters

In recent years, fears of terrorist attacks have caused concerns that illegal immigration could result in terrorists gaining a foothold in the United States and that the use of false SSNs or increased use of Individual Taxpayer Identification Numbers could help enable this process.⁶¹ On June 14, 2006, DHS proposed a new regulation regarding employer-supplied SSNs.⁶² It amended the regulation of IRCA—the federal statute penalizing employers for knowingly hiring illegal aliens.⁶³ Under IRCA, to verify an employee's work eligibility the employer completes Form I-9 based on documents provided by the employee.⁶⁴ The documents will be retained by the employer “and made available for inspection by officials of the U.S. Immigration and Customs Enforcement, Department of Labor and Office of Special Counsel for Immigration Related Unfair Employment Practices.”⁶⁵ If the employee provides a social security

58. Employment Eligibility Verification Form I-9, available at <http://www.uscis.gov/files/form/i-9.pdf> [hereinafter Form I-9].

59. *Id.* at 1, 3 (emphasis in original).

60. *Id.* at 1. Other acceptable documents include a Certification of Birth Abroad issued by the Department of State, a U.S. birth certificate, a Native American tribal document, a U.S. Citizen ID card, an ID Card for use of Resident Citizen in the United States, or an unexpired employment authorization document issued by DHS. *Id.* at 3.

61. Komuves, *supra* note 3.

62. Safe-Harbor Procedures, *supra* note 20.

63. Control of Employment of Aliens, 8 C.F.R. § 274a.1 (2008).

64. Form I-9, *supra* note 58, at 1.

65. *Id.*

card for the Form I-9 and the SSA cannot match the SSN on the form with its records, then the worker's earnings that were earmarked for social security benefits are posted to the SSA's Earnings Suspense File and a no-match letter is sent to the employer alerting him of the discrepancy.⁶⁶

Traditionally, a no-match letter by the SSA included a statement indicating that receipt of the letter was not an indication of the employee's immigration status.⁶⁷ However, under the new regulations proposed by DHS, a DHS insert would be included with the SSA no-match letter indicating that its receipt could serve as notice that the employer has hired unauthorized workers, and if the discrepancy is not resolved within ninety days, the employer could be subjected to criminal and civil liability.⁶⁸ These contentious new efforts to bring criminal charges against employers who ignore no-match letters have created dissent among farmers and those in other industries.⁶⁹ However, on September 1, 2007, Judge Maxine Chesney of the Northern District of California issued a temporary restraining order preventing the new DHS insert from being mailed prior to the court's consideration of the claims in *American Federation of Labor v. Chertoff*.⁷⁰

1. American Federation of Labor v. Chertoff

Plaintiffs, which included multiple unions and business groups, sued DHS and its head, Michael Chertoff, and requested a preliminary injunction.⁷¹ On October 10, 2007, Judge Charles R. Breyer of the Northern District of California granted the plaintiff's motion for a preliminary injunction, thus delaying the DHS from

66. 20 C.F.R. § 422.120(a) (2008); *Am. Fed'n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1002 (N.D. Cal. 2007).

67. *Chertoff*, 552 F. Supp. 2d at 1002.

68. *Id.* at 1003–04.

69. Julia Preston, *Farmers Call Crackdown on Illegal Workers Unfair*, N.Y. TIMES, August 11, 2007, at A10 [hereinafter Preston VI].

70. See Julia Preston, *Rules on Hiring Illegal Workers are Delayed*, N.Y. TIMES, Sept. 1, 2007, at A10 [hereinafter Preston VII].

71. *Chertoff*, 552 F. Supp. 2d at 1001–02.

implementing its new no-match process.⁷² Included in plaintiffs' arguments, accepted by the court and resulting in a preliminary injunction, were arguments regarding the risks of using the no-match SSN program in stepped-up enforcement of illegal immigration.⁷³ The government stated during oral arguments that if the preliminary injunction was not granted, the SSA would mail "approximately 140,000 no-match letters to employers, pertaining to approximately 8 million employees."⁷⁴ Under the modified DHS policy as articulated in a letter to employers, employers would not be liable under the Immigration and Nationality Act's anti-discrimination provision if they terminated employees after a no-match situation could not be resolved within ninety days.⁷⁵ The court ruled that "[a]s demonstrated by plaintiffs, the government's proposal . . . will, under the mandated time line, result in the termination of employment to lawfully employed workers . . . because . . . the no-match letters are based on SSA records that include numerous errors."⁷⁶ Therefore, the mailing of these letters "would result in irreparable harm to innocent workers and employers," and the preliminary injunction was granted.⁷⁷

The granting of the preliminary injunction was based, *inter alia*, on the balance of hardships test and the plaintiffs' ability to raise serious questions about whether the rule was arbitrary and capricious.⁷⁸ The next section outlines another possible avenue of challenging the DHS policy: Section 7 of the Federal Privacy Act.

2. Challenging the New DHS Policy Under Section 7 of the Federal Privacy Act

The Federal Privacy Act cannot generally be used as a tool against federal legislation as it is subject to exception by federal statute, and

72. *Id.*

73. *Id.* at 1006–07.

74. *Id.* at 1005.

75. *Id.* at 1004.

76. *Id.* at 1005.

77. *Chertoff*, 552 F. Supp.2d at 1005.

78. *Id.* at 1005–10.

Congress has carved out multiple exceptions.⁷⁹ However, *Chertoff* provides some language that may enable the use of the Federal Privacy Act in subsequent litigation, discussing whether DHS had overstepped its authority under congressional statute.⁸⁰ Specifically, the court notes that “[i]t is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress. Plaintiffs have raised a serious question whether DHS exceeded its authority by interpreting the anti-discrimination provisions of the IRCA.”⁸¹

Because IRCA is not subject to a statutory exemption under Section 7 of the Federal Privacy Act, it is possible that similar reasoning could apply to the DHS use of SSNs.⁸² One of the requirements under the new DHS policy is that an employer who receives a no-match letter must go through a series of steps, including filling out another Form I-9, though these steps may likely fail to resolve the discrepancy within ninety days.⁸³ As IRCA is not exempted by federal statute under Section 7 of the Privacy Act, the employee may refuse to provide his SSN in filling out the Form I-9.⁸⁴ In this scenario, according to the DHS, the employee may be fired and the employer will not be prosecuted by the United States under the Immigration and Nationality Act’s discrimination provision.⁸⁵ DHS may have exceeded its authority in using SSNs to enforce immigration law in this manner, especially in light of the Privacy Act’s specific statement:

The purpose of this act is to . . . collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its

79. Federal Privacy Act, Pub. L. No. 93-579, § 7(a)(2), 88 Stat. 1896 (1974); *see also* 42 U.S.C. § 405(c)(2)(C)(i) (2000) (authorizing SSN use for taxes, public assistance, and motor vehicle registration).

80. *Chertoff*, 552 F. Supp. 2d at 1010.

81. *Id.* (internal citations omitted).

82. *See* Form I-9, *supra* note 58, at 1, 3; *infra* Part II.B.2.

83. *Chertoff*, 552 F. Supp. 2d at 1004.

84. Form I-9, *supra* note 58, at 3.

85. *Chertoff*, 552 F. Supp. 2d at 1004–05.

intended use, and that adequate safeguards are provided to prevent misuse of such information.⁸⁶

Additionally, if the employee has been denied a “right, benefit, or privilege provided by law because of [his] refusal to disclose his social security account number,” he could have a private cause of action against DHS under Section 7 of the Federal Privacy Act.⁸⁷ However, the circuits are currently split on whether Section 7 allows a private right of action.⁸⁸ The parameters of what constitutes a “right, benefit, or privilege” will be further discussed in Part III.B.2.a.⁸⁹

III. *LOZANO V. HAZLETON*, RECENT GEORGIA STATE AND LOCAL LEGISLATION AND POSSIBLE CHALLENGES

A. *Additional Possible Remedies under Federal Law, as Outlined in Lozano v. Hazleton*

The Federal Privacy Act is but one of many remedies under recent state and federal legislation regarding local and state ordinances; a recent case in which many of these remedies were argued is the July 26, 2007 Middle District of Pennsylvania’s *Lozano v. Hazleton*.⁹⁰ This section provides a brief description of some of the arguments made and how they might translate to litigation challenging the use of SSNs in immigration law.⁹¹

The City of Hazleton passed two ordinances in the summer of 2006 relating to illegal immigration.⁹² The first, the “Illegal Immigration Relief Act Ordinance,” prohibited the employment of illegal immigrants, and the second, the “Tenant Registration

86. Federal Privacy Act, Pub. L. No. 93-579, § 2(B)(4), 88 Stat. 1896 (1974).

87. *Id.* § 7(A)(1).

88. *Compare* *Schwier v. Cox*, 340 F.3d 1284, 1286 (11th Cir. 2006) (holding a private right of action exists), *with* *Dittman v. California*, 191 F.3d 1020, 1026 (9th Cir. 1999) (holding the Privacy Act provides no private right of action against state agencies).

89. Federal Privacy Act, Pub. L. No. 93-579, § 7(A)(1), 88 Stat. 1896 (1974); *see infra* Part III.B.2.a.

90. *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 484–85 (M.D. Pa 2007).

91. *See infra* Part III.A.1–3.

92. *Lozano*, 496 F. Supp. 2d at 484–85.

Ordinance,” required tenants to obtain an occupancy permit, which requires proof of legal immigration status in order to rent an apartment in Hazleton.⁹³

1. *Equal Protection*

The *Lozano* plaintiffs failed in their attempt at an equal protection argument because they were unable to show discriminatory intent on the part of city officials.⁹⁴ Hazleton had amended its ordinance before trial to remove any reference to the use of race or national origin in determining who had violated the ordinance.⁹⁵ Plaintiffs maintained that the intent to discriminate was still present, and thus the ordinance violated equal protection.⁹⁶ But the court held that neither the amendment of the ordinance nor the testimony of city officials demonstrated discriminatory intent.⁹⁷ Although Latino workers in industries heavily populated by illegal immigrants would likely suffer on account of the measure, statutes are unlikely to clearly indicate such intent.⁹⁸

2. *Privacy Rights*

The *Lozano* court concluded that the ordinance in question was too vague for the court to perform the required balancing test for evaluating the privacy right in disclosing personal information since the ordinance did not state what constituted “[p]roper identification showing proof of legal citizenship and/or residency.”⁹⁹ In the case of SSN disclosure, courts would likely utilize the test of “balanc[ing] a

93. *Id.*

94. *Id.* at 540.

95. *Id.* at 539–40.

96. *Id.* (“The equal protection ‘clause prohibits states from intentionally discriminating between individuals on the basis of race’”) (quoting *Antonelli v. New Jersey*, 419 F.3d 267, 247 (3d Cir. 2005)).

97. *Lozano*, 496 F. Supp. 2d at 540 (“To prove intentional discrimination by a facially neutral policy, a plaintiff must show that the relevant decision maker . . . adopted the policy at issue ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”) (quoting *Pryor v. NCAA*, 288 F.3d 548, 562 (3d Cir. 2002)).

98. See *Preston VI*, *supra* note 69 (indicating that Latinos in the agricultural, meat-packing, construction and health care industries are especially vulnerable).

99. *Lozano*, 496 F. Supp. 2d at 542–43.

possible and responsible government interest in disclosure against the individual's privacy interests."¹⁰⁰

3. Federal Pre-Emption

One of the strongest arguments against local anti-illegal immigration measures is federal pre-emption under the Supremacy Clause, as illustrated in *Lozano*.¹⁰¹ The court held that "[i]mmigration is an area of the law where there is a history of significant federal presence and where the States have not traditionally occupied the field. In fact . . . immigration is a federal concern not a state or local matter."¹⁰² As noted above, immigration law has been traditionally controlled by federal statutes such as IRCA, and pre-emption should be one of the most successful arguments when challenging a state or local statute.¹⁰³

B. Challenges Under Section 7 of the Federal Privacy Act

As mentioned above, Section 7 of the Federal Privacy Act is unique in that it applies to state and local agencies in addition to federal agencies.¹⁰⁴ Georgia law has also previously expressed concern about issues of SSN privacy, providing a long list of documents which are not required to be publicly disclosed; this includes an individual's SSN, which, in various situations and document types, may be redacted from public records.¹⁰⁵ The Federal Privacy Act is a possible tool in challenging state and local legislation that rely on collecting SSNs.¹⁰⁶

100. *Id.* at 544 (quoting *Sterling v. Borough of Minersville*, 232 F.3d 190, 195 (3d Cir. 2000)).

101. *Id.* at 517–529.

102. *Lozano*, 496 F. Supp. 2d at 518 n.41. *But see* *Ariz. Contractors v. Goddard*, 534 F. Supp. 2d 1036, 1046–47, 1052 (2008); *Gray v. City of Valley Park*, No. 4:07CV00881, 2008 U.S. Dist. LEXIS 7238 at *23–*25, *61 (both holding that a state act regarding licensing sanctions was consistent with federal immigration law and therefore not pre-empted).

103. 8 U.S.C. § 1324 (2006); *see also* *Lozano*, 496 F. Supp. 2d at 518 n.41. *But see* *Motomura*, *supra* note 23, at 2060–65 (noting “a spectrum of views” in recent federal cases regarding whether “subfederal” immigration enforcement conflicts with federal law).

104. Federal Privacy Act, Pub. L. No. 93-579, § 7(A)(1), 88 Stat. 1896 (1974).

105. O.C.G.A. § 50-18-72 (Supp. 2008).

106. *See, e.g.,* *Komuves*, *supra* note 3, at 552 (1998).

1. *Previous Applications of the Privacy Act*

Several cases in Georgia have evaluated the applicability of the Privacy Act to SSN requests on gun permit applications and voter registration forms.¹⁰⁷ In *Schwier v. Cox*, plaintiffs submitted their voter registration applications without supplying their SSNs and were told that their applications would be rejected unless they supplied the information.¹⁰⁸ The district court originally held that Section 7 of the Federal Privacy Act did not entitle private plaintiffs to a cause of action; the Court of Appeals of the Eleventh Circuit reversed and remanded.¹⁰⁹ On remand, the Northern District of Georgia rejected the argument of the state government, stating,

Plaintiffs correctly indicate that Congress has made some exceptions to the Privacy Act, allowing states to require disclosure of one's SSN before receiving some benefit . . . citing exceptions for jury selection lists . . . driver's licenses and motor vehicle registration . . . and various other licenses. Congress has not made an exception for voter registration. . . . Accordingly, the ball is in Congress' court.¹¹⁰

In *Camp v. Cason*, the Eleventh Circuit Court of Appeals held the district court had mistakenly dismissed the plaintiff's claims as moot when he challenged the need for his SSN to be included on a gun license application.¹¹¹ The court held that the revised form, indicating that disclosure was "optional," did not satisfy Camp's claim that the form still violated Section 7(b)—requiring that the agency "shall inform . . . by what statutory or other authority such number is solicited, and what uses will be made of it."¹¹² However, other cases have held that many challenges fall under the federal exemption

107. *Camp v. Cason*, 220 Fed. Appx. 976 (11th Cir. 2007), available at 2007 U.S. App. LEXIS 6882; *Schwier v. Cox*, 340 F.3d 1285–86 (11th Cir. 2005).

108. *Schwier*, 340 F.3d at 1285–86.

109. *Id.* at 1288, 1297.

110. *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1274 (N.D. Ga. 2005).

111. *Camp v. Cason*, 220 Fed. App'x. 976, at *14 (11th Cir. 2007), available at 2007 U.S. App. LEXIS 6882.

112. *Id.* *8 (quoting Federal Privacy Act, Pub. L. No. 93-579, § 7(A)(2), 88 Stat. 1896, 1909 (1974)).

clause of the Privacy Act,¹¹³ including driver's licenses,¹¹⁴ public assistance,¹¹⁵ or denial of a service by a private company.¹¹⁶

2. Using the Federal Privacy Act to Challenge Georgia's State and Local Immigration Law

Since the Eleventh Circuit has held the Federal Privacy Act provides a valid cause of action for an individual, it is a possible avenue of litigation regarding recent state and local legislation.¹¹⁷ One essential question when evaluating the usefulness of the Federal Privacy Act in challenging legislation is what qualifies as a "right, benefit, or privilege provided by law."¹¹⁸

a. In Georgia, What Qualifies as a Right, Benefit, or Privilege Provided by Law?

Picture the following scenario: a county auditor, as authorized in a recent county ordinance, pays a visit to an employer who is either an existing county contractor or competing for a county contract.¹¹⁹ To verify whether the employer has complied with the employee verification process as outlined in the ordinance—"Ordinance to Revise the Gwinnett County Purchasing Ordinance"—he requests the employees provide him with their SSNs.¹²⁰ One employee refuses, and as a result the employer is told he must fire the employee or lose

113. Federal Privacy Act, Pub. L. No. 93-579, § 7(A)(2), 88 Stat. 1896 (1974). Thus, even if the use of the SSN is enabled by statute, the government still has a responsibility to inform the public why the number is required. *See, e.g.*, Georgia Department of Human Resources, Application for TANF (Temporary Assistance for Needy Families), Food Stamps, and Medical Assistance, at 2, <http://www.dhr.georgia.gov/portal/site/DHR/> (follow "How do I apply for Medicaid?" hyperlink; then follow "Get Application (English)" hyperlink) (indicating that the SSN is voluntary but persons who do not supply it will not be eligible for benefits, and that SSNs will be used to verify family income and be matched against other government agency databases).

114. 42 U.S.C. § 405(c)(2)(C)(i) (2006).

115. *Id.*

116. *Ford v. Bank of Am.*, 221 F.3d 1351, 2000 WL 1028238 (10th Cir. July 26, 2000).

117. *Schwier v. Cox*, 340 F.3d 1284, 1285–86 (11th Cir. 2005).

118. Federal Privacy Act, Pub. L. No. 93-579, § 7(A)(1), 88 Stat. 1896 (1974).

119. Gwinnett County Ordinance II, *supra* note 1. Although the ordinance has now been modified to no longer require direct submission of SSNs, SSNs must still be supplied to the E-Verify system as outlined in state law. *See discussion supra* Part III.B.3.

120. Gwinnett County Ordinance II, *supra* note 1.

the contract.¹²¹ Has a violation of the Federal Privacy Act taken place? That depends on whether the three possible losses in this scenario—an existing county contract, a bid at a county contract, or an employee’s job with the subcontractor—qualify as a “right, benefit, or privilege as provided by law.”¹²²

b. Right to Employment

Under the original Gwinnett County ordinance, if an employee refused to supply his SSN to a county contractor, he could be fired.¹²³ In Georgia, the right to employment will likely not be recognized; in 1997, the Eleventh Circuit stated in *DeKalb Stone v. DeKalb County*: “[A]ny property interest in employment [is] a state-created right . . . rights created by state law . . . are protected by procedural, not substantive, due process because substantive due process protects only rights created in the Constitution.”¹²⁴ However, the Supreme Court has held that although the liberty interest guaranteed by the Fourteenth Amendment includes the right “to engage in any of the common occupations of life,” it may be limited to those denials that deal with “‘a complete prohibition of the right to engage in a calling,’ and not merely a ‘brief interruption’” in one’s access to work in a given field.¹²⁵ Relying on this ruling, the Ninth Circuit stated that if the denial of a professional permit would prohibit an individual from employment in an entire field, it would qualify as a right, benefit, or privilege protected under the Privacy Act.¹²⁶ Although *American Federation of Labor v. Chertoff* noted, the “[l]oss of a job is an economic injury that constitutes injury in fact for standing,” whether loss of a job qualifies as denial of a right, benefit, or privilege under Section 7 of the Federal Privacy Act is highly questionable.¹²⁷

121. *Id.*

122. Federal Privacy Act, Pub. L. No. 93-579, § 7(A)(1), 88 Stat. 1896 (1974).

123. Gwinnett County Ordinance I, *supra* note 1.

124. *DeKalb Stone Inc. v. DeKalb County*, 106 F.2d 956, 960 (11th Cir. 1997).

125. *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972); *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999).

126. *Dittman*, 191 F.3d 1029–30.

127. *Am. Fed’n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1014 (N.D. Cal. 2007).

c. Right to Contract

Is a government contract a “right, benefit, or privilege provided by law” and thus protected under the Federal Privacy Act?¹²⁸ In Georgia, at least one case refers to government contracts as a “benefit.”¹²⁹ Additionally, Georgia law has a history of protecting the right to contract; in 1987, the Georgia Supreme Court stated:

This court has repeatedly declared that the right to contract, and for the seller and purchaser to agree upon a price, is a property right protected by the due-process clause of our Constitution, and unless it is a business *affected with a public interest*, the General Assembly is without authority to abridge that right.¹³⁰

However, there has been mixed precedent regarding to what extent Georgia’s government can infringe upon the right to contract,¹³¹ government contracts would likely be designated as businesses “affected with a public interest.”¹³² For an industry or any particular business to become “affected with a public interest,” it is required to “be so applied to the public as to authorize the conclusion that it has been devoted to a public use and thereby its use, in effect, granted to the public;” government contracts, funded with tax dollars, would seem to fall into this category.¹³³

Additionally, the phrasing of the relevant statutes gives counties a good deal of discretion in selecting bids for county contracts.¹³⁴ O.C.G.A. § 36-19-2.2 states that when a public works contract comes

128. Federal Privacy Act, Pub. L. No. 93-579, § 7(A)(1), 88 Stat. 1896 (1974).

129. “We have held that only as a ‘last resort’ may race be used in awarding valuable public *benefits* such as government contracts.” *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1254 (11th Cir. 2001) (emphasis added).

130. *Strickland v. Ports Petroleum Co.*, 353 S.E.2d 17, 18 (Ga. 1987) (holding that the gasoline industry is not affected with a public interest) (internal quotations omitted; emphasis in original). See also Anthony B. Sanders, *The “New Judicial Federalism” Before its Time*, 55 AM. U. L. REV., 457 (2005) (reviewing right to contract precedent in state courts).

131. See *O’Brien v. Union Oil Co.*, 699 F. Supp 1562, 1568 (N.D. Ga. 1988) (commenting that the court must make its decision “in view of [] somewhat inconsistent” precedent regarding the right to contract).

132. See *Executive Town & Country Servs., Inc. v. Young*, 376 S.E.2d 190, 193 (1989).

133. *Id.* (quoting *Harris v. Duncan*, 208 Ga. 561, 564 (1951)).

134. O.C.G.A. § 36-19-2.1 (Supp. 2008).

up for bid, the contract “shall be let to the lowest responsible bidder, but the governing authority of any such county shall have the right to reject any or all bids for any such contract.”¹³⁵ However, in *Metric Constructors, Inc. v. Gwinnett County*—involving the lowest bidder on a construction project suing after he was not awarded the contract—the court stated that “a disappointed bidder may possess a protected property interest under Georgia Law.”¹³⁶ As property interests are protected under both the U.S. and Georgia Constitutions, a protected property interest under the law would seem to fall into the category of “a right, benefit, or privilege afforded by law.”¹³⁷

An existing contract, by the reasoning of *Metric Constructors*, would seem to be an even clearer example of a protected property interest.¹³⁸ But the case law on this topic is also mixed: in *Bank of Jackson County v. Cherry*, the Eleventh Circuit noted that “[c]ourts have consistently held that no citizen has a right . . . to do business with the government.”¹³⁹

3. Testing the Legality of the Employment Verification Process Dictated by the Georgia Security and Immigration Compliance Act

Under the new Georgia state law, every public employer, public contractor, or subcontractor must register and participate in the federal work authorization program to confirm employment eligibility of all new employees.¹⁴⁰ The “[f]ederal work authorization program” is defined as “any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or any equivalent federal work authorization program operated by the United States Department of Homeland

135. O.C.G.A. § 36-19-2.2 (Supp. 2008).

136. *Metric Constructors, Inc. v. Gwinnett County*, 729 F. Supp. 101, 102 (N.D. Ga. 1990). However, the court held that because the bidding statute allowed the county a good deal of discretion in awarding the contract, a cause of action could stand only “if it alleges that the county abused its discretion in rejecting its bid.” *Id.* at 103.

137. U.S. CONST. amend. XIV § 1; GA. CONST. art. I, § 1.

138. See *Metric Constructors*, 729 F. Supp. at 101.

139. *Bank of Jackson County v. Cherry*, 980 F.2d 1362, 1366 (11th Cir. 1993) (internal quotations omitted).

140. O.C.G.A. § 13-10-91 (Supp. 2008).

Security to verify information of newly hired employees.”¹⁴¹ The statute directs the Commissioner of the Georgia Department of Labor to create forms, rules, and regulations to effectuate this law and publish those materials on the Georgia Department of Labor website.¹⁴²

In accordance with the Act, the Georgia Department of Labor published rules on its website entitled “Public Employers, their Contractors and Subcontractors Required to Verify New Employee Work Eligibility Through a Federal Work Authorization Program: Rules of General Applicability.”¹⁴³ The rules state that public employers, contractors, and subcontractors “shall comply with [] this rule by utilizing the EEV [Employment Eligibility Verification] / Basic Pilot Program.”¹⁴⁴ This program is a DHS system designed for voluntary use by employers and run “in partnership with the Social Security Administration.”¹⁴⁵ In order to participate in the program, employers must go through a registration process and then sign a Memorandum of Understanding among the employer, the SSA, and DHS.¹⁴⁶ DHS states that the advantages of participating include that “[t]he EEV virtually eliminates Social Security mismatch letters, improves the accuracy of wage and tax reporting, protects jobs for authorized U.S. workers, and helps U.S. employers maintain a legal workforce.”¹⁴⁷ It appears to require employees’ SSNs, though the information provided does not state so directly: “(u)sing an automated system, the program involves verification checks of SSA and DHS databases. The EEV MOU, User Manual and Tutorial contain instructions . . . on EEV procedures and requirements.”¹⁴⁸

141. O.C.G.A. § 13-10-90(b)(2) (Supp. 2008).

142. O.C.G.A. § 13-10-91(d) (Supp. 2008).

143. GA. COMP. R. & REGS. 300-10-1 (2007).

144. *Id.* ch. 300-10-1-.02(3).

145. U.S. CITIZENSHIP & IMMIGRATION SERVICES, “I AM AN EMPLOYER . . . HOW DO I . . . USE THE EMPLOYMENT ELIGIBILITY VERIFICATION/BASIC PILOT PROGRAM?” 1 (2007), available at http://www.USCIS.gov/files/nativedocuments/EEV_FS.pdf.

146. *Id.*

147. *Id.*

148. *Id.* at 2.

There are significant concerns about data privacy and the use of the EEV/Basic Pilot Program.¹⁴⁹ The National Immigration Law Center reported that “[t]he House Oversight and Government Reform Committee gave a ‘D’ to DHS in computer security for 2006 (up from a ‘F’ for the previous 3 years),” and that the FBI was investigating a recent “cyber break-in.”¹⁵⁰ Under the new law, the use of this system is now mandatory in the state of Georgia for all government employers, contractors, and subcontractors.¹⁵¹ Because a state agency is requiring disclosure of SSNs, this process should fall under Section 7 of the Federal Privacy Act.¹⁵² If an employee refuses to disclose his SSN for this purpose, he could be fired, or the contractor could be denied the contract.¹⁵³ As discussed above, if access to employment or contracts are deemed to be a “right, benefit, or privilege as provided by law,” by enacting O.C.G.A. § 13-10-91, Georgia has violated Section 7 of the Federal Privacy Act, and the law should be struck down.¹⁵⁴

CONCLUSION

The widespread use of SSNs should be of concern to all residents of the United States.¹⁵⁵ One area in which SSNs are frequently used is in federal, state, and local immigration law.¹⁵⁶ The recent cases of *American Federation of Labor v. Chertoff* and *Lozano v. Hazleton* illustrate recent successful challenges to federal and local laws that may involve the use of SSNs.¹⁵⁷ In *Chertoff*, a preliminary injunction was granted, temporarily barring the new federal rules from being

149. See, e.g., National Immigration Law Center, *Basic Pilot/E-Verify: Not a Magic Bullet*, Sept. 17, 2007, at 2, http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_nomagicbullet_2007-09-17.pdf.

150. *Id.*; see also FISMA Grades, available at <http://republicans.oversight.house.gov/FISMA/> (last visited Jan. 8, 2009); Ellen Nakashima and Brian Krebs, *Contractor Blamed in DHS Data Breaches*, WASH. POST, Sept. 24, 2007, at A1.

151. Federal Privacy Act of 1974, Pub. L. No. 93-579, § 2(B)(1-2), 88 Stat. 1896 (1974).

152. *Id.*

153. O.C.G.A. § 13-10-91(b)(1-2) (2008).

154. See *id.*; *supra* Part III.B.2.

155. See *supra* Part I.B.

156. *Id.*

157. *Am. Fed’n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1002 (N.D. Cal. 2007); *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 484-85 (M.D. Pa 2007).

enforced.¹⁵⁸ The injunction was based on plaintiffs' balance of hardships argument that enforcement could result in a loss of their employment.¹⁵⁹ In *Lozano*, plaintiffs successfully argued federal preemption in striking down a local ordinance.¹⁶⁰ This note has outlined an additional avenue of litigation for immigration laws that rely on use of SSNs: the Federal Privacy Act.¹⁶¹ In Georgia, both the original version of a local Gwinnett County ordinance and the state's Georgia Security and Immigration Compliance Act appear to violate the Federal Privacy Act by requiring an individual's SSN.¹⁶²

Political and practical backlash against stringent local immigration laws, combined with ongoing litigation, may affect state and local government's willingness to create and enforce such laws.¹⁶³ Some towns have had such ordinances struck down in court while others have willingly repealed the laws due to the legal and economic consequences.¹⁶⁴ The regulation of immigration is an extremely contentious issue.¹⁶⁵ However, it is essential that privacy concerns regarding SSNs not be overlooked in the battle over immigration legislation.¹⁶⁶

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158. *Chertoff*, 552 F. Supp. 2d at 1002.

159. *Id.*; see *supra* Part II.B.1.

160. See *supra* Part III.A.3.

161. See *supra* Parts II–III.

162. See *supra* Part III.

163. See, e.g., Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1 (describing the exodus of town residents after immigration ordinances were enacted, the subsequent negative economic effects on the town, and the financial toll of defending lawsuits challenging the ordinances); see also Alex Kotlowitz, *Our Town*, N.Y. TIMES, Aug. 5, 2007, (magazine), at 30 (describing political, social, and ethnic divisions in an Illinois town as a result of proposed illegal immigration ordinances).

164. See Belson & Capuzzo, *supra* note 163 (stating that Riverside, New Jersey chose to rescind its ordinance penalizing landlords who rented to or employed illegal immigrants, "joining a small but growing list of municipalities nationwide that have begun rethinking such laws as their legal and economic consequences have become clearer.").

165. See *supra* INTRODUCTION.

166. See *supra* Part I.B.