No. 09-115

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA *et al.*,
Petitioners,

v.

CRISS CANDELARIA *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

2. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note.

3. Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens.

PARTIES TO THE PROCEEDING

Petitioners, which were plaintiffs/appellants below, are Chamber of Commerce of the United States of America; Arizona Contractors Association; Arizona Chamber of Commerce; Arizona Employers for Immigration Reform; Arizona Farm Bureau Federation; Arizona Hispanic Chamber of Commerce; Arizona Landscape Contractors Association; Arizona Restaurant and Hospitality Association; Arizona Roofing Contractors Association; Associated Minority Contractors of America; Chicanos Por La Causa; Somos America; Valle Del Sol, Inc.; National Roofing Contractors Association; and Wake Up Arizona! Inc.

Respondents, who were defendants/appellees below, are Criss Candelaria; Kenny Angle; Melvin R. Bowers Jr.; Martin Brannan; James Currier; Daisy Flores; Fidelis V. Garcia; Gale Garriott; Terry Goddard; Terrence Haner; Barbara Lawall; Janet Napolitano; Sheila Polk; Derek D. Rapier; Ed Rheinheimer; George Silva; Jon Smith; Matthew J. Smith; Andrew P. Thomas; and James P. Walsh.

There are no parent corporations or publicly held corporations that own 10% or more of the stock of any of Petitioners.

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The opinions of the United States District Court for the District of Arizona are published at 534 F. Supp. 2d 1036 and 526 F. Supp. 2d 968, and reproduced at Pet. App. 49a-94a, 95a-126a. The Ninth Circuit's opinion is published at 544 F.3d 976, and reproduced at Pet. App. 26a-48a. The Ninth Circuit's order amending its opinion, and denying rehearing and rehearing en banc, is published at 558 F.3d 856, and reproduced at Pet. App. 1a-25a.

JURISDICTION

The Ninth Circuit entered judgment on September 17, 2008, and denied a timely petition for rehearing and rehearing en banc on March 9, 2009. On June 2, 2009, Justice Kennedy granted an extension of time to and including July 24, 2009, to file a petition for a writ of certiorari. The petition was filed on July 24, 2009, and granted on June 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause provides that "the Laws of the United States … shall be the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Relevant provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, codified at 8 U.S.C. § 1324a and § 1324b, are reproduced at Pet. App. 127a-147a and at Add1-Add15 of the addendum to this brief. Relevant provisions of the pre-amendment version of the Migrant and Seasonal Agricultural Worker Protection Act, co-

dified at 29 U.S.C. §§ 1801-1816, 1851-1863, and 1871-1872 (1985), as well as the conforming amendments in IRCA § 101(b), are reproduced at Add16-Add38 of the addendum. Relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, set forth in a note to 8 U.S.C. § 1324a, are reproduced at Pet. App. 147a-168a.

Relevant provisions of the Legal Arizona Workers Act (LAWA), Ariz. Rev. Stat. §§ 23-211 to -216 (2009), and recent amendments to certain of those provisions, are reproduced at Pet. App. 169a-192a and at Add39-Add41 of the addendum.

STATEMENT OF THE CASE

In IRCA, Congress created a comprehensive scheme for regulating the employment of aliens, including the methods by which to verify a job applicant's eligibility for employment. It balanced multiple, sometimes competing, objectives: deterring illegal immigration, protecting applicants from discrimination, accommodating privacy concerns, and minimizing burdens on employers. This scheme was intended to be "uniform[ ]," IRCA § 115, and exclusive of state regulation: Congress broadly and expressly preempted state laws that regulate the employment of unauthorized workers, 8 U.S.C. § 1324a(h)(2), and imposed precise sanctions for violations of federal law, *id.* § 1324a(e), (f). Congress left a narrow exception for sanctions imposed "through licensing and similar laws," *id.* § 1324a(h)(2), which serves the limited purpose of preserving aspects of traditional state and local licensing authority.

Arizona has done precisely what federal law says it cannot. Using the "licensing" exception as its own license to regulate, it has enacted a statute that does

not remotely resemble a licensing law, nor any traditional exercise of licensing authority. Rather, the "Legal Arizona Workers Act" is a regime by which the State purports to regulate and enforce employment status verification. It authorizes state officials to adjudicate employment eligibility. It imposes sanctions more severe than those carefully calibrated by federal law, including withdrawal of a company's charters and articles of incorporation—the "business death penalty," as the then-Arizona governor accurately described it. J.A. 399. This separate system of regulating and enforcing work-status authorization is utterly unlike the very limited state licensing authority that Congress meant to preserve, and is expressly preempted by and conflicts with the federal system enacted by Congress.

Confirming the extraordinary nature of Arizona's overreach, the State has arrogated to itself the power to mandate participation in a federal verification system that Congress repeatedly and explicitly has declared to be voluntary. At a minimum, Arizona has undermined Congress's objectives in adopting and enacting a non-mandatory verification system.

A. Federal Regulation Of Immigration.

This Court long has recognized that most questions involving immigration are regulated exclusively by the federal government. *Hines* v. *Davidowitz*, 312 U.S. 52, 60-62 (1941). One exception used to be the employment of aliens. Prior to 1986, it could fairly be said that federal law (in the form of the then-controlling Immigration and Nationality Act, ch. 447, 66 Stat. 163 (1952)) had only "a peripheral concern with employment of illegal entrants." *De Canas* v. *Bica*, 424 U.S. 351, 360 (1976). This fundamentally changed when Congress enacted IRCA. That statute, which President Reagan termed "the product of one of

the longest and most difficult legislative undertakings in recent memory,"[1] created a "comprehensive scheme prohibiting the employment of illegal aliens in the United States" and it "forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137, 147 (2002) (alterations and internal quotation marks omitted); see also *INS* v. *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 194 n.8 (1991). Congress was explicit that enforcement was to be "uniform[ ]." IRCA § 115.

1. IRCA prohibits hiring unauthorized workers, and establishes a federal system for verifying work-authorization status and defining, investigating, and adjudicating violations. Under IRCA, it is unlawful to "hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1). An "unauthorized alien" is defined by federal law as one who is (i) not "lawfully admitted for permanent residence" or (ii) not "authorized to be so employed by this chapter or by the Attorney General." *Id.* § 1324a(h)(3). Whether a worker is "authorized" is not coextensive with citizenship or immigration status: The Attorney General has promulgated an array of rules setting forth allowances and exclusions for dozens of classes of individuals who are "authorized" to be employed in this country. See, *e.g.*, 8 C.F.R. § 274a.12.[2] Federal statutes and regulations vest ex-

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[1] Statement of the President Upon Signing S. 1200, Nov. 10, 1986, *reprinted in* 1986 U.S.C.C.A.N. 5856-1; *see also* H.R. Rep. No. 99-682(I), at 51-56 (1986) (discussing 15-year history of IRCA); S. Rep. No. 99-132, at 18-26 (1985) (same).

[2] For example, 8 C.F.R. § 274a.12(a) and (c) allow work authorization for lawful permanent residents; lawful temporary resi-

clusive authority to administer these requirements in the Departments of State, Labor, Homeland Security (DHS), and Justice. See, *e.g.*, 6 U.S.C. §§ 236, 271; 8 U.S.C. §§ 1103(a), 1103(g), 1151, 1153, 1182(a)(5), 1201; 8 C.F.R. § 274a.12; *id.* pt. 1003; 20 C.F.R. pts. 655, 656.

Alleged violations are investigated by federal immigration officials. 8 U.S.C. § 1324a(e)(2); see 6 U.S.C. § 557 (noting the transfer of certain authority to DHS). The Attorney General must provide to the employer formal notice of the allegations and an opportunity for a hearing. 8 U.S.C. § 1324a(e)(3)(A). That hearing must be held before a federal administrative law judge at the time and place prescribed by federal statute and regulation. *Id.* § 1324a(e)(3)(B); 8 C.F.R. § 274a.9. The federal government bears the burden of proof, and every aspect of the procedures—from the admissibility of evidence to the size of the paper on which pleadings are submitted—is spelled out by federal law. 28 C.F.R. pt. 68. The employer is further guaranteed the right to appeal an adverse finding through an administrative review process (including, in certain circumstances, review by the At-

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dents; refugees; asylees; persons granted withholding of removal, extended voluntary departure, or temporary protective status; persons subject to a final order of removal; parents or children of certain lawful permanent residents; certain spouses, fiancées, and dependents of holders of A, G, K, and J visas; persons subject to the federal government's "Family Unity Program"; certain persons holding E, F, G, H, I, J, L, O, P, Q, R, S, T, U, and V visas, and certain Mexican and Canadian holders of A, E, G, H, I, J, L, O, P, and R visas under NAFTA; certain applicants for asylum, withholding of removal, cancellation of removal, and suspension of deportation; certain staff and employees of holders of B, E, F, H, I, J, and L visas; and battered spouses and children under the federal Violence Against Women Act.

torney General), and to petition for review in a federal court of appeals. 8 U.S.C. § 1324a(e)(7)-(8). Orders issued under these provisions may be enforced through a suit brought by the Attorney General "in any appropriate district court of the United States." *Id.* § 1324a(e)(9).

IRCA also carefully regulates the penalties that may be assessed against employers. *Id.* § 1324a(e)(4). The administrative law judge is required to impose a monetary fine of "not less than $250 and not more than $2,000 for each unauthorized alien" for a first violation. *Id.* Penalties increase to $2,000-$5,000 for a second violation, and $3,000-$10,000 for subsequent violations.[3] *Id.* An employer that engages in a "pattern or practice" of violations is subject to criminal fines of $3,000 and six months' imprisonment for each unauthorized alien. *Id.* § 1324a(f).

2. IRCA does not focus single-mindedly on enforcement and punishment. To the contrary, Congress recognized other, ofttimes-competing goals. In particular, it intended IRCA to be the "least disruptive to the American businessman … [while] also minimiz[ing] the possibility of employment discrimination." H.R. Rep. No. 99-682(I), at 56; S. Rep. No. 99-132, at 8-9 (same).

Over the course of the lengthy legislative debates, particular concern arose that imposing penalties on businesses could cause employers to discriminate against job applicants based on perceived national origin. The fear was that employers would simply choose to hire candidates who safely "appear" employable, rather than risk violating federal law. To

[3] These penalties have been increased by regulation to account for inflation. 8 C.F.R. § 274a.10.

combat that danger, IRCA specifically prohibits discrimination by employers on the basis of nationality or citizenship. 8 U.S.C. § 1324b; see H.R. Rep. No. 99-682(I), at 69-70 (discussing anti-discrimination provisions); H.R. Conf. Rep. No. 99-1000, at 87 (1986). The statute prescribes escalating fines for violations of this prohibition, which precisely mirror the fines for knowingly employing an unauthorized worker. Compare 8 U.S.C. § 1324a(e)(4) (unauthorized worker violations), with *id.* § 1324b(g)(2)(B)(iv) (discrimination violations); see H.R. Rep. No. 99-682(I), at 56.

These same considerations were reflected in the I-9 process that Congress created for determining a prospective employee's work-authorization status. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). That process directs employers to provide a new employee with a list of the types of documents that he or she may submit as proof of identity and employment authorization. 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(a)(2), (3). The employee may choose any of the permissible documents to submit to the employer. 8 U.S.C. § 1324a(b)(1)(A). So long as the documents "reasonably appear[ ] on [their] face to be genuine," the employer must accept them as proof of identity or work authorization, and is forbidden from requesting different or additional documents. *Id.* An employer who complies with these requirements "in good faith" cannot be held liable for knowingly hiring an unauthorized worker, notwithstanding "a technical or procedural failure to meet [a prescribed] requirement," and even if the individual is later revealed to have been unauthorized to work. *Id.* § 1324a(a)(3), (b)(6). The I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of" the INA. *Id.* § 1324a(b)(5).

In addition to providing a means to ensure verification of employees, see H.R. Rep. No. 99-682(I), at 56, Congress anticipated that the I-9 process and related good-faith defense would decrease burdens on employers, and prevent them from making personal or unnecessary inquiries that would intrude on privacy and might result in discrimination. *Id.*; S. Rep. No. 99-132, at 8-9 (describing as "imperative" the need for a "formal, effective verification system combined with an affirmative defense for those [employers] who in good faith follow the proper procedure," in order to ensure that employers do not "seek to avoid penalties by avoiding persons they suspect might be illegal aliens").

Having balanced these considerations and calibrated its chosen enforcement mechanisms, Congress asserted the primacy of its authority: It expressly preempted "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Even within the federal government, changes to the congressional design would require significant study and advance warning. The statute required the Comptroller General to prepare annual studies for several years, so that Congress could consider refinements. IRCA § 101(a)(1) (codified at 8 U.S.C. § 1324a(j)(1) (1986)). IRCA requires the President to monitor the effectiveness of the verification system, and to transmit to Congress detailed written reports of proposed changes well in advance of their effective date. 8 U.S.C. § 1324a(d). Any change in the documents used to prove work-authorization status is a "major change" requiring two years' written notice to Congress. *Id.* § 1324a(d)(3)(A)(iii), (D)(i).

3. For a decade, the I-9 process was the exclusive means for verifying employees' work-authorization status. In 1996, Congress established three "pilot programs" for status verification, IIRIRA § 401, in which employers could "[v]oluntar[il]y elect[ ]" to participate, *id.* § 402. The only pilot program that remains in existence[4] is an Internet-based program—first called the Basic Pilot Program and currently known as E-Verify—that is administered by the Secretary of Homeland Security. *Id.* § 403.[5] Employers who choose to participate in the program still must utilize the I-9 form. *Id.* § 403(a)(1); see U.S. Citizenship & Immigration Servs., *E-Verify User Manual for Employers* 13 (June 2010), *available at* http://www.uscis.gov. Participating employers submit status-verification information about new employees to the federal government over the Internet, which the government checks against databases. Privacy Act: Verification Information System Records Notice, 72 Fed. Reg. 17,569 (Apr. 9, 2007). The employer then receives either confirmation that the employee is work-authorized, or a tentative response of non-confirmation. IIRIRA § 403(a). In the latter case, the employee bears the burden of contesting the response with the federal government. *Id.* § 403(a)(4)(B). Participating employers are prohibited from terminating an employee because of the tentative non-

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[4] *See* DHS, *Report to Congress on the Basic Pilot Program* 1 (June 2004), *available at* http://www.nilc.org/immsemplymnt/ircaempverif/basicpilot_uscis_rprt_to_congress_2004-06.pdf.

[5] Responsibility for administering E-Verify was initially vested in the Attorney General, *see* IIRIRA § 403, and later transferred to the Secretary of DHS, *see* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, §§ 3-4, 117 Stat. 1944, 1944-45.

confirmation during his or her challenge to a tentative non-confirmation. *Id.*

From E-Verify's inception, the program has been designed and implemented as experimental, and explicitly declared to be "voluntary." *Id.* § 402. Congress directed that the Secretary of Homeland Security "may not require any person or other entity to participate" in the program, *id.*, subject to limited, enumerated exceptions covering the federal government and IRCA violators, *id.* § 402(e). Congress has reauthorized and modified the program on several occasions,[6] and has repeatedly declined to act on proposals to make E-Verify or a similar program mandatory.[7]

B. The Legal Arizona Workers Act And Other State Laws.

Arizona enacted the Legal Arizona Workers Act in 2007. Ariz. Rev. Stat. §§ 23-211 to -214. Arizona's governor declared in signing the legislation: "Because of Congress' failure to act, States like Arizona

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[6] *E.g.*, Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, § 2, 115 Stat. 2407, 2407; Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, §§ 3-4, 117 Stat. at 1944-45; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, Div. A, § 143, 122 Stat. 3574, 3580 (2008); Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 547, 123 Stat. 2142, 2177 (2009).

[7] *E.g.*, H.R. 2083, 111th Cong. § 8 (2009); H.R. 3308, 111th Cong. § 201 (2009); S. 1505, 111th Cong. §§ 201-202 (2009); H.R. 1951, 110th Cong. § 3 (2007); H.R. 19, 110th Cong. § 3 (2007); S. 2611, 109th Cong. § 301(a) (2006); S. 1348, 110th Cong. § 301(a) (2007); *cf.* American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. § 1114 (2009) (rejected proposal to require contractors receiving stimulus funds to participate in E-Verify).

have no choice but to take strong action to discourage the further flow of illegal immigration through our borders." J.A. 397. While nominally recognizing that "[i]mmigration is a federal responsibility," Arizona decided that "Congress [is] incapable of coping with the comprehensive immigration reforms of our country's needs." J.A. 394. Multiple States and localities followed Arizona's lead, enacting their own independent systems by which they purport to regulate authorization to work in the United States.

1. The Arizona Act has two principal parts: a regime to define who is an unauthorized worker and to adjudicate and impose sanctions on those who employ one; and an E-Verify mandate.

a. The Arizona Act creates a new state-law offense of "knowingly" or "intentionally" employing "an unauthorized alien." Ariz. Rev. Stat. §§ 23-212(A), 23-212.01(A). It also establishes a state-law enforcement regime to enforce this prohibition. The Act directs Arizona's attorney general to "prescribe a complaint form for a person to allege," including "anonymous[ly]," that an employer is employing an unauthorized alien. *Id.* §§ 23-212(B), 23-212.01(B). Upon receiving any complaint that is not both "false and frivolous," the attorney general or county attorney must notify federal immigration enforcement officials and "local law enforcement" officials "of the unauthorized alien." *Id.* §§ 23-212(C), 23.212.01(C). Moreover, the attorney general must "notify the appropriate county attorney to bring" an enforcement action against the employer in state court "in the county where the unauthorized alien employee is or was employed by the employer." *Id.* §§ 23-212(C)-(D), 23-212.01(C)-(D).

The Arizona Act defines "unauthorized alien" by reference to that term's federal definition, *id.* § 23-

211(11) (citing 8 U.S.C. § 1324a(h)(3)), and specifies how to adjudicate such status. It directs state courts, in "determining whether an employee is an unauthorized alien," to "consider only the federal government's determination pursuant to 8 United States Code § 1373(c)." *Id.* §§ 23-212(H), 23-212.01(H). Section 1373(c), however, directs federal officials to respond to state inquiries about "citizenship or immigration status," not work authorization. *Infra* pp. 40-42; cf. *supra* note 2 (identifying classes of individuals with work authorization but not necessarily immigration status). In addition, the federal government's determination creates only "a rebuttable presumption of the employee's lawful status." Ariz. Rev. Stat. §§ 23-212(H), 23-212.01(H). Thus, a state court can reject immigration status information received from the federal government under § 1373(c), and reach its own determination under the Arizona Act whether an employee is an "unauthorized alien" and whether the employer knowingly or intentionally employed such an unauthorized worker. *Id.* §§ 23-212(I), 23-212.01(I); see also *id.* §§ 23-212(J), 23-212.01(J) (establishing defense of "good faith" compliance with federal I-9 process, as determined by state court).

In addition to the new state-law prohibition and system of investigation and adjudication, the Arizona Act establishes a range of sanctions. For any violation, the court must order the employer "to terminate the employment of all unauthorized aliens" and to file quarterly reports with the county attorney listing new employees hired. *Id.* §§ 23-212(F)(1), 23-212.01(F)(1). In addition, for a first "knowing" violation, a state court may direct the suspension of an employer's "licenses." *Id.* § 23-212(F)(1). The court must direct suspension of an employer's "licenses" upon a first "intentional" violation, *id.* § 23-

212.01(F)(1), and for a second "knowing" or "intentional" violation, the court must order state agencies to "permanently revoke all licenses," *id.* §§ 23-212(F)(2), 23-212.01(F)(2).

The Act does not use the term "license" as it is used elsewhere in Arizona law; rather, it specially defines the term to include "any agency permit, certificate, approval, registration, charter, or similar form of authorization," as well as a company's foundational documents, such as "[a]rticles of incorporation" and "certificate[s] of partnership." *Id.* § 23-211(9). The definition expressly excludes "[a]ny professional license." *Id.* § 23-211(9)(ii). Thus, a company found to have violated Arizona's law faces not only losing the ability to engage in a particular business, but also having its existence extinguished.

b. The Act also requires all Arizona employers to participate in E-Verify. *Id.* § 23-214(A). Employers must provide proof of E-Verify registration to any state entity from which they seek any "grant, loan or performance-based incentive." *Id.* § 23-214(B). An employer that fails to participate in E-Verify will be denied these incentives, and forced to repay any benefits it previously obtained. *Id.*

2. As the governor forthrightly predicted, J.A. 397, States and municipalities across the country have followed Arizona's lead, enacting an array of different laws. The National Conference of State Legislatures reports that thousands of immigration bills have been introduced by state legislatures in the last five years, with hundreds enacted into law.[8] The re-

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[8] Nat'l Conf. of State Legislatures, *2010 Immigration-Related Bills and Resolutions in the States* (July 20, 2010), *available at* http://www.ncsl.org/default.aspx?TabId=20881; *see also* Nat'l

sult has been a radical departure from the "uniform and uniformly enforced immigration law" that even Arizona's governor agreed is necessary. *Id.* These laws impose a variety of different and sometimes conflicting obligations on employers, and subject them to a range of penalties for unauthorized worker violations, including in some cases imprisonment.[9] This variability particularly plagues legislation concerning E-Verify, with some States requiring participation, others attempting to preclude it, and various alternatives in-between.[10] These statutes have created a

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Conf. of State Legislatures, *2009 Immigration-Related Bills and Resolutions in the States* (Apr. 22, 2009), *available at* http://www.ncsl.org/documents/Immig/ImmigrationReportJAN2009.pdf.

[9] *Compare* Miss. Code Ann. § 71-11-3(7)(e) (imposing so-called "licensing" sanctions similar to Arizona's); Mo. Rev. Stat. §§ 285-525, -530; S.C. Code Ann. § 41-8-50; Tenn. Code Ann. § 50-1-103(e); W. Va. Code § 21-1B-7; Albertville, Ala., Resolution No. 945-08 § 4; Apple Valley, Cal., Resolution No. 2006-82; Hazleton, Pa., Ordinance No. 2006-18 § 4(B), *held preempted in Lozano* v. *City of Hazleton*, 496 F. Supp. 2d 477, 520-29 (M.D. Pa. 2007), *and* Okla. Stat. tit. 25, § 1313(C) (subjecting employers found to have violated state immigration laws to tort liability and civil damages), *held preempted in Chamber of Commerce of U.S.* v. *Edmondson*, 594 F.3d 742, 765-70 (10th Cir. 2010); La. Rev. Stat. Ann. § 23:994; Miss. Code Ann. § 71-11-3(4)(d); Hazleton, Pa., Ordinance No. 2006-18 § 4(E), *held preempted in Lozano*, 496 F. Supp. 2d at 520-29, *with* La. Rev. Stat. Ann. § 23:993 (imposing civil and criminal penalties on employers deemed to have hired unauthorized workers); W. Va. Code § 21-1B-5.

[10] *Compare* Ariz. Rev. Stat. § 23-214 (requiring E-Verify of all employers); Miss. Code Ann. § 71-11-3(3)(d), (4)(b)(i); Utah Code Ann. § 13-47-201; Va. Code Ann. § 40.1-11.2, *and* Colo. Rev. Stat. § 8-17.5-102 (requiring E-Verify for businesses seeking public contracts); Ga. Code Ann. § 13-10-91; Exec. Order No. 08-01 (Minn. Jan. 7, 2008); Mo. Rev. Stat. §§ 285-525, -530; Exec. Order No. 08-01 (R.I. Mar. 27, 2008); Albertville, Ala., Resolu-

"patchwork of … [different] laws, rules, and regulations," which is difficult for employers and employees to understand, much less to follow. *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008).

C. Procedural Background.

A strikingly diverse group of business, labor, and civil rights groups challenged the constitutionality of the Arizona Act in the United States District Court for the District of Arizona. They alleged, among other things, that the Act was expressly and impliedly preempted by IRCA. The multiple similar lawsuits later were consolidated for decision. Pet. App. 6a, 12a, 107a-09a.

The district court held the Act not preempted. With respect to express preemption, it acknowledged that the penalties imposed by the Act are "sanctions" within the meaning of IRCA's preemption provision. Pet. App. 61a-76a. It concluded, however, that the Act constituted a "licensing [or] similar law[ ]," and so fell within the preemption provision's savings clause. *Id.* The court further held that the Act's provisions concerning E-Verify were not impliedly preempted. *Id.* at 82a-85a. Although it recognized that Congress had made E-Verify voluntary, the court found no preemption because Congress had not explicitly precluded States from making the program mandatory. *Id.*

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tion No. 945-08 § 4; Mission Viejo, Cal., Ordinance No. 07-260 § 1; Hazleton, Pa., Ordinance No. 2006-18 § 4(D), *held preempted in Lozano*, 496 F. Supp. 2d at 526-29, *and* Okla. Stat. tit. 25, §§ 1312, 1313(B)(2) (requiring employers to use a state-created employment verification system, which may or may not be compatible with E-Verify), *with* 820 Ill. Comp. Stat. 55/12(a) (forbidding employers to participate in E-Verify), *held preempted in United States* v. *Illinois*, No. 07-3261, 2009 WL 662703, at *2-3 (C.D. Ill. Mar. 12, 2009).

The Ninth Circuit affirmed. It agreed with the district court that, because Arizona had defined the Act's sanctions to be "licensing" penalties, the statute fell within IRCA's savings clause. Pet. App. 14a-19a. It also agreed that, because Congress "could have, but did not, expressly forbid state laws from requiring E-Verify participation," Arizona's E-Verify mandate was not preempted. *Id.* at 20a. Both the district court and the Ninth Circuit viewed themselves as largely bound by this Court's 1976 decision in *De Canas*. See *id.* at 15a-16a, 69a-70a. The Ninth Circuit followed *De Canas*, notwithstanding its recognition that IRCA's enactment had dramatically changed the legal landscape. See *id.* at 15a-16a.

SUMMARY OF ARGUMENT

1. The Ninth Circuit erred when it held that the Arizona Act is saved from preemption as a "licensing [or] similar law[ ]" because one of the various possible consequences under the comprehensive regulatory regime enacted by Arizona is to deny or revoke a "license" as Arizona has redefined that term. Pet. App. 14a-19a. On this theory, a State may regulate work-authorization status in whatever fashion it wishes—so long as, at the end of the day, something labeled a license may be affected.

This conclusion distorts the meaning of the statute, and subverts congressional intent. If this is all that is required to constitute a "licensing [or] similar law[ ]," the preemption clause is meaningless, as this very case demonstrates. Nothing about the Arizona Act remotely resembles a "licensing law." In purpose and function, it is a law regulating the employment of unauthorized workers. It establishes state law prohibitions against employing unauthorized workers; creates methods under state law (different from those

under federal law) for investigating and adjudicating violations, including methods (different from those under federal law) for determining who is an unauthorized worker; and authorizes an array of sanctions for violations (of which a license sanction is just one) having little to do with "licensing" in the traditional sense. If this regime is not preempted, then IRCA's fundamental purpose of establishing a national and "uniform[ ]" system of regulating alien employment, IRCA § 115, is utterly without effect.

IRCA's history and structure demonstrate that the savings clause targeted a narrow purpose: ensuring that States could rely on federal determinations of compliance with federal immigration laws when issuing business licenses or permits to farm labor contractors. This purpose is clear from the legislative history and is reflected in IRCA's conforming amendments to the federal Migrant and Seasonal Agricultural Worker Protection Act (AWPA). These amendments removed AWPA's independent prohibition against hiring unauthorized workers, which had been enforced through federal administrative proceedings, and substituted a requirement of a predicate IRCA determination. See 29 U.S.C. § 1813(a)(6). IRCA's displacement of other federal enforcement provisions demonstrates the statute's sharply preemptive effect, and belies any suggestion that IRCA was intended to allow States to judge for themselves an individual's work-authorization status.

At most, a state statute is a "licensing [or] similar law" under IRCA if it conditions the issuance or retention of a genuine license—a registration or permit governing "fitness to do business," H.R. Rep. No. 99-682(I), at 58—on a prior federal determination of noncompliance with federal immigration law. The savings clause permits States to tack on certain sanc-

tions—in the form of the "suspension, revocation or refusal to reissue a license"—for persons "who ha[ve] been found to have violated the sanctions provisions *in this legislation*." *Id.*[11] IRCA provides for these determinations to be made by federal officials, in specialized administrative proceedings conducted under federal rules and regulations, see 8 U.S.C. § 1324a(e); 28 C.F.R. pt. 68, and nothing in the statute hints at authorizing States to adjudicate immigration status or employment eligibility—much less in the face of a contrary federal determination. Quite the contrary, the preemption provision was aimed at displacing existing state statutes that undertook just such regulation.

The preemption provision in fact confirms what would already be the case: Competing state regulatory schemes like Arizona's conflict with the comprehensive system that Congress crafted in IRCA. IRCA represents a careful compromise among multiple interests and objectives beyond enforcement—preventing discrimination, protecting privacy, and avoiding undue burdens on business. The balance struck by Congress is reflected in IRCA's detailed administrative scheme for investigating, adjudicating, and sanctioning unauthorized worker violations, with corresponding anti-discrimination protections and a right to petition for federal judicial review. The Arizona scheme upsets this balance. It imposes sanctions that federal law does not allow, through an adjudicatory process that federal law does not contemplate, and without providing the rights of fair process and appeal that federal law guarantees. In short, Arizona has created its own separate status-

[11] Emphases are added throughout unless otherwise noted.

verification system that, in focusing exclusively on enforcement, ignores the methods Congress chose and subverts the public interest balance Congress struck.

2. The Ninth Circuit further erred in authorizing Arizona to make mandatory the voluntary federal E-Verify program. Federal law repeatedly and expressly makes clear that E-Verify is, and must be administered as, a voluntary program. This is clear from the very title of the authorizing statute: "*Voluntary Election* to Participate in a Pilot Program." IIRIRA § 402. The statute affords employers the choice whether to participate: "[A]ny person or other entity that conducts any hiring … *may elect* to participate in that pilot program." *Id.* § 402(a). And, the Secretary of Homeland Security is required to "widely publicize … the voluntary nature of the pilot programs." *Id.* § 402(d)(2).

Congress made E-Verify voluntary for good reason. E-Verify was initiated as an experimental program, to assess its viability as an alternative to the I-9 process and its acceptance by the business community. It never has been made permanent. It historically has been error-prone, and requires participating employers to weigh possible benefits against serious burdens. Congress considered these issues in enacting IIRIRA, making the I-9 process (with a variety of document-based verification methods) mandatory, while instituting E-Verify as a voluntary test program—"the Basic *Pilot* Program"—that employers may choose to use. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). Arizona's decision to make E-Verify mandatory conflicts directly with Congress's decision to make it voluntary, and the state law therefore is preempted.

ARGUMENT

I. THE UNAUTHORIZED WORKER PROVISIONS OF THE ARIZONA ACT ARE PREEMPTED.

A. The Unauthorized Worker Provisions Are Expressly Preempted.

A cornerstone of our constitutional structure is the supremacy of federal law. *E.g.*, *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Statutes passed by Congress are "the supreme Law of the Land," and cannot be nullified, contradicted, or frustrated by local regulation. *Altria Group* v. *Good*, 129 S. Ct. 538, 543 (2008) (quoting U.S. Const. art. VI, cl. 2). State laws that conflict with federal provisions—whether because Congress explicitly foreclosed state regulation in the field, or because state regulation would impede the operation or objectives of federal law—are thus "without effect." *Id.*; *CSX Transp.* v. *Easterwood*, 507 U.S. 658, 663 (1993); *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 152-53 (1982). The Arizona Act runs afoul of these basic principles.

IRCA expressly preempts state law, and it does so broadly: The preemption provision covers "any" state law that imposes sanctions on those who hire unauthorized workers.

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1324a(h)(2).

It is undisputed that the unauthorized worker provisions of the Arizona Act constitute "sanctions" with-

in the meaning of this provision. Pet. App. 14a-19a; see Pet. 23 n.10; BIO 4. This concession is plainly correct: Those provisions prohibit employers from hiring unauthorized workers, establish a state process for adjudicating violations, and impose penalties for violations. Ariz. Rev. Stat. § 23-212(A)-(J). The unauthorized worker provisions therefore are saved from preemption only if they are a "licensing [or] similar law[ ]." They are not.

1. The Ninth Circuit's Interpretation Of The Preemption Provision Does Violence To Its Language And Purposes.

The Ninth Circuit interpreted IRCA's savings clause in a boundless fashion that would nullify the preemption provision to which it is a limited exception. First, the Ninth Circuit discussed at some length this Court's earlier decision in *De Canas*, 424 U.S. 351. But *De Canas* concerned implied field rather than express preemption, *id.* at 356—indeed, it was decided before IRCA's express preemption provision was enacted—and its discussion even of implied preemption has been overtaken by the comprehensive legislation that Congress subsequently enacted in IRCA and IIRIRA. *Infra* pp. 46-47.

The Ninth Circuit's express preemption theory is contained within just a few sentences. Because "[t]he Act provides for the suspension of employers' licenses," the court reasoned, "the savings clause therefore exempts such state licensing regulation from express preemption." Pet. App. 17a. Arizona has advocated this same capacious interpretation. In its view, the Arizona Act is "permitted by federal law" because "it provides for the suspension or revocation of business licenses under certain circumstances." Defs.-Appellees' Consolidated Answering Br. 19 (9th Cir.

Dkt. No. 51). In short, any law that could lead to sanctions being imposed against what the State labels a license would be saved from preemption, regardless what else that law purports to regulate or how it seeks to do so.

If this is all that is required to satisfy the savings clause, the preemption provision is a nullity. On this reasoning, a State could—as Arizona has done here—evade IRCA's broad preemption provision through the artifice of redefining "licensing" differently from any traditional meaning. Indeed, the Arizona Act goes so far as to define "license" differently even from the term's usual meaning under *Arizona* law: It *excludes* "professional license[s]," Ariz. Rev. Stat. § 23-211(9)(c)(ii), but *includes* a broad swath of other forms of documents, such as

- a "transaction privilege tax license," which is required under Arizona law for "[e]very person who receives gross proceeds of sales or gross income … desiring to engage or continue in business," *id.* §§ 42-5005(A), 42-5008;
- "[a] grant of authority issued under title 10, chapter 15," under which foreign corporations transact business within the State, *id.* §§ 10-1501, 10-1505, 10-1530; and, most notably,
- "[a] certificate of partnership" and "[a]rticles of incorporation."

Id. § 23-211(9)(b); see *supra* pp. 12-13.

Under the Ninth Circuit's reasoning, a State could evade the force of Congress's prohibition by disguising any sanction as a "licensing fee" to be levied on any employer found to have hired unauthorized workers. Or, it could "impute" an "employment li-

cense" to every employer, then suspend that "license" for knowingly or intentionally hiring an unauthorized alien—which, in fact, is what South Carolina has done. S.C. Code Ann. §§ 41-8-20(A), 41-8-50(D)(2)-(4). Or it could, as Arizona has done here, create an entire regulatory structure for determining who is lawfully in the country and authorized to work, enforced through a sanction—seizing a company's articles of incorporation—that is unlike "licensing" in any traditional sense.

Had Congress intended to allow States such a role in regulating and enforcing work authorization, it surely would have said so in some less obscure fashion than using the term "licensing" in a parenthetical. "Congress … does not … hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). When Congress desires state involvement in immigration enforcement, it commonly makes that purpose clear. *E.g.*, 8 U.S.C. §§ 1226(d), 1357(g). Simply put, if Congress meant to reach this counter-intuitive result, "it chose a singularly odd word with which to do it." *Medtronic* v. *Lohr*, 518 U.S. 470, 487 (1996) (plurality).[12]

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[12] The Medicare Modernization Act contains a preemption provision and savings clause that closely track those in IRCA: "The standards established under this part shall supersede any State law or regulation (*other than State licensing laws* or State laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part." 42 U.S.C. § 1395w-26(b)(3). The agency responsible for implementing this provision has noted that "licensing" must be defined narrowly, and cannot include even the conditions for keeping the license, because such a broad definition of licensing could allow the State to regulate in preempted areas. Medicare Program, 69 Fed. Reg. 46,866, 46,904 (proposed Aug. 3, 2004).

There must, in short, be some limit on the meaning of the term "licensing and similar laws" beyond, as the Ninth Circuit concluded here, any statute that uses the word "license." As we discuss next, at most the term as used in IRCA refers to traditional regulation of fitness to engage in a profession, such as the farm labor contractor businesses that were the focus of Congress's attention. But, whatever the precise boundaries of the term, there is no need to "par[e] the term … down to the definitional bone" to see that the scheme enacted by Arizona is not a "licensing" law in any sense of the word. *Foster* v. *Love*, 522 U.S. 67, 72 (1997); *Bonito Boats* v. *Thunder Craft Boats*, 489 U.S. 141, 157 (1989) ("It is readily apparent that the Florida statute does not operate to prohibit 'unfair competition' in the usual sense that the term is understood."); see *Morales* v. *Trans World Airlines*, 504 U.S. 374, 390 (1992) ("[T]he present litigation plainly does not present a borderline question [on the reach of the preemption provision], and we express no views about where it would be appropriate to draw the line.").

2. The Phrase "Licensing And Similar Laws" Was Aimed At Very Specific State Laws And Certainly Does No More Than Preserve Genuine Licensing Laws Governing Fitness To Do Business.

The meaning of the term "licensing and similar laws" in IRCA is a matter of federal law. See *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989) ("[I]n the absence of a plain indication to the contrary ... Congress when it enacts a statute is *not* making the application of the federal act dependent on state law."). Federal law establishes the metes and bounds of the term, in accordance with the statute's language and structure, and Congress's objec-

tives and expectations. See *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252-53 (2004); see also, *e.g.*, *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 223-24 (1995). A State may not evade the statute's strictures by seeking to define them away. Cf. *Int'l Paper* v. *Ouellette*, 479 U.S. 481, 495 (1987) (declining to interpret a savings clause to permit "States [to] do indirectly what they could not do directly").

"'[T]he purpose of Congress is the touchstone' in every pre-emption case." *Medtronic*, 518 U.S. at 485. Here, when Congress preserved sanctions imposed through "licensing and similar laws" from express preemption, it had in mind a particular type of state statute: "'fitness to do business laws,' such as state farm labor contractor laws." H.R. Rep. No. 99-682(I), at 58. At the time IRCA was enacted, approximately 12 States had enacted laws requiring a state license or registration certificate to engage in the business of farm labor contracting.[13] These laws typically conditioned such licenses on specified qualifications and

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[13] *See* Cal. Lab. Code §§ 1693-1694 (1986); Fla. Stat. §§ 450.28-.35 (1986); 225 Ill. Comp. Stat. 505/6 (1986); Md. Code Ann., Labor & Empl. § 100-80A to -80E (1986); Mich. Comp. Laws §§ 286.651-.657 (1986); Neb. Rev. Stat. §§ 48-1701 to -1714 (1986); N.J. Stat. Ann. § 34:8A-11 (1986); N.Y. Lab. Law § 212-a (1986); Or. Rev. Stat. §§ 658.405-.503 (1986); 43 Pa. Stat. Ann. §§ 1301.501-.505 (1983); Tex. Rev. Civ. Stat. Ann. art. 5221a-5 (1986); Wash. Rev. Code § 19.30 (1986). Few of these laws independently prohibited the hiring of unauthorized workers. *See* Or. Rev. Stat. § 658.440(3)(d) (1986); 43 Pa. Stat. Ann. § 1301.505 (1983). These provisions essentially replicated the prohibition then found in AWPA (and which at the time were permitted by AWPA's savings clause), and were preempted when Congress conformed AWPA to IRCA. *See* IRCA § 101(b); *infra* pp. 32-34.

requirements that demonstrated the contractor's fitness, *e.g.*, Cal. Lab. Code §§ 1693-1694 (1986), and most conditioned issuance or maintenance of a license upon the contractor's record of compliance with federal law, *e.g.*, *id.* § 1690; 225 Ill. Comp. Stat. 505/6 (1986).[14]

That Congress had such laws in mind is confirmed by the interrelationship between IRCA and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801-1872. As discussed in further detail below, *infra* pp. 32-34, IRCA modified the AWPA through a set of conforming amendments. And, pertinent here, the AWPA is a classic fitness-to-do-business provision: It prohibits individuals and businesses from engaging in any "farm labor contracting activity" (*i.e.*, "employing, furnishing, or transporting any migrant or seasonal agricultural worker," 29 U.S.C. § 1802) without first securing a registration certificate from the Department of Labor. 29 U.S.C. § 1811. To obtain that certificate, the applicant must certify that it "has [not] been found to have violated" IRCA's prohibition against hiring unauthorized workers. *Id.* § 1813(a)(6).

If the licensing proviso preserves anything more than farm labor contracting and similar laws, it certainly permits no more than sanctions imposed through traditional "fitness to do business laws." H.R. Rep. No. 99-682(I), at 58. Statutory interpreta-

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[14] Several of these state laws described the license as a "certificate of registration." *E.g.*, 225 Ill. Comp. Stat. 505/3. This explains why § 1324a(h)(2) refers to "licensing *and similar* laws": Congress wished to ensure that all such state laws—regardless of the superficial language used by a State—would be preserved.

tion requires more than reliance on dictionaries,[15] but they demonstrate that fitness to do business is a common meaning of the term "license." *E.g.*, *Webster's Third New International Dictionary* 1304 (1993) (defining "license" as "a right or permission granted in accordance with law by a competent authority to engage in some business or occupation"); *Random House Webster's Unabridged Dictionary* 1109 (2d ed. 1997) (similar); *Oxford English Dictionary* 891 (2d ed. 1989) ("To grant (a person) a licence or authoritative permission to hold a certain status or to do certain things, e.g. to practise some trade or profession …."); see also *Cleveland* v. *United States*, 531 U.S. 12, 21 (2000) ("licensing schemes long characterized by this Court as exercises of state police powers" include "license to transport alcoholic beverages," "license to sell corporate stock," "ferry license," and "license to sell liquor").

Other federal statutes use "licensing" in this same manner. *E.g.*, 7 U.S.C. § 499c (commission merchant licensing); 19 U.S.C. § 1641(b)(2) (customs broker licensing). Such statutes often impose a condition of complying with other specified laws or regulations. *E.g.*, 18 U.S.C. § 923(d)(1)(F) (certain firearms dealer licenses); 49 U.S.C. § 41304(c) (foreign air carrier certificate). Particularly telling here, Arizona itself uses

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[15] *E.g.*, *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 226 (1994) (in interpreting a statutory term, the Court "d[oes] not rely exclusively upon dictionary definitions, but also upon contextual indications"); *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 454-55 (1989) ("it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish") (quoting *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945)).

the term "licensing"—outside of this one context—to mean fitness to do business, and defines it as the

> process by which an agency of government grants permission … to engage in a given occupation on finding that the applicant has attained the minimal degree of competency required to ensure that the public health, safety and welfare will be reasonably protected.

See *Arizona Legislative Bill Drafting Manual* § 4.21 (2009), *available at* http://www.azleg.gov/alisPDFs/council/2010%20Bill%20Drafting%20Manual.pdf; see also Business Licenses by Agency or Department, https://az.gov/app/license/bus.xhtml (last visited Aug. 31, 2010) (listing forms of Arizona business licenses and linking to governing provisions).

In short, when Congress used the term "licensing" in IRCA, it was referring to traditional licensing and registration schemes, like AWPA, that condition permission to engage in a business—such as the labor contracting businesses that were the focus of Congress's attention—on a record of compliance with federal immigration law. This understanding takes account of the accepted understanding of "licensing"; preserves traditional state authority to set conditions on issuing licenses; and, at the same time, ensures that the regulation of those who "employ … unauthorized aliens," 8 U.S.C. § 1324a(h)(2), remains a uniform matter of federal law.

3. IRCA Preempted Alternate Regimes For Adjudicating Unauthorized Worker Violations.

At the core of what Congress meant to displace were regimes, like Arizona's, that established unauthorized worker prohibitions and mechanisms for enforcement and adjudication separate from IRCA. For

this reason as well, the Arizona Act is not a "licensing [or] similar law[ ]," because it creates a separate regime regulating the employment of unauthorized workers, and would predicate violations on state-court adjudication of a state-defined offense.

a. This interpretation of IRCA flows first from its language. By its terms, the savings clause allows States only to impose a particular type of "sanction" on employers found to have hired "unauthorized aliens." 8 U.S.C. § 1324a(h)(2). It does not authorize a State to define the core federal question of who is "unauthorized," nor to adjudicate whether a worker is unauthorized or whether an employer knowingly hired such a person. See *id.* To the contrary, IRCA defines "unauthorized alien" as a matter of federal law, *id.* § 1324a(h)(3); it establishes "employ[ing]" an "unauthorized alien" as a violation of federal law, *id.* § 1324a(a); and it vests authority over those determinations in the U.S. Attorney General, *id.* The "licensing laws" preserved by the savings clause are "lawful state or local processes concerning the suspension, revocation, or refusal to reissue a license to any person who has been found to have violated the sanctions provisions *in this legislation*." H.R. Rep. No. 99-682(I), at 58.

The statutory structure demonstrates plainly that Congress expected violations of IRCA giving rise to licensing sanctions to be adjudicated exclusively by the federal government. Congress established a "uniform[ ]" nationwide system for regulating employment verification and authorization, IRCA § 115, and expressly forbade use of the verification information for purposes other than enforcement of the INA and enumerated prohibitions against false statements, 8 U.S.C. § 1324a(b)(5). Congress carefully calibrated procedures for adjudicating alleged violations

through federal agency procedures (including a right to seek federal judicial review). *Supra* pp. 4-6. In the debates that raged in Congress for over a decade about how to craft federal policy concerning the employment of aliens, the only issue that seems never to have been in doubt was the need for federal primacy. See, *e.g.*, S. Rep. No. 99-132, at 18-26; H.R. Rep. No. 99-682(I), at 51-56. There is no inkling in IRCA's text, its purpose, or its legislative debates that, having created this "comprehensive" and "uniform" system, Congress meant to give States carte blanche to establish independent adjudicatory procedures for determining who is and who is not authorized to work.

b. On the contrary, IRCA's historical backdrop shows that Congress's very purpose was to get States out of the business of adjudicating unauthorized worker violations. At the time IRCA was enacted, there were two principal groups of state statutes touching on work-authorization status. There were the fitness-to-do-business laws governing farm labor contractors, which Congress meant to preserve. *Supra* pp. 25-28. There also existed another 14 or so state laws that prohibited the employment of, for instance, people "not entitled to lawful residence in the United States."[16] These laws directly regulated employers, typically through fines and other sanctions unrelated to licensing, and many created separate

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[16] Cal. Lab. Code § 2805 (1984); Conn. Gen. Stat. § 31-51k (1972); Del. Code Ann. tit. 19, § 705 (1977); Fla. Stat. § 448.09 (1973); Kan. Stat. Ann. § 21-4409 (1977); La. Rev. Stat. Ann. § 23:995 (1985); Me. Rev. Stat. tit. 26, § 871 (1977); Mass. Gen. Laws ch. 149, § 19C (1976); Mont. Code Ann. § 41-121 (1977); N.H. Rev. Stat. Ann. § 275-A:4-a (1976); N.J. Stat. Ann. § 34:9-1 (1977); Tenn. Code Ann. § 50-1-103(b) (1986); Vt. Stat. Ann. tit. 21, § 444a (1977); Va. Code Ann. § 40.1-11.1 (1977).

state administrative regimes for ensuring compliance. *E.g.*, Conn. Gen. Stat. § 31-51k(c) (1972); Me. Rev. Stat. tit. 26, § 871(3) (1977); Mass. Gen. Laws ch. 149, § 19C (1976). It was these laws that Congress meant to preempt. These statutes were brought repeatedly to Congress's attention over the course of the legislative debates leading to IRCA.[17] Indeed, the California statute upheld in *De Canas* was one of these statutes, and *De Canas* led quickly to calls for preemption of such state statutes,[18] which were followed by the first IRCA precursors containing preemption provisions. See S. 2252, 95th Cong. § 5(a)(3) (1977); H.R. 9531, 95th Cong. § 5(a)(3) (1977).

The licensing proviso certainly offers no contrary indication that it was intended to authorize States to create separate adjudicatory mechanisms. Obtaining or retaining a license commonly is predicated on compliance with specified laws, but a licensing authority would not itself typically have the time, expertise, or resources independently to adjudicate whether the prospective licensee violated the law of

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[17] H.R. Rep. No. 94-506, at 7 (1975) ("many states have recognized the need for criminal sanctions against employers of illegal aliens"); *see, e.g.*, *Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary*, 97th Cong. 1251 (1981) (statement of Roger Conner, Federation for American Immigration Reform); *Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary,* pt. 1, 92d Cong. 149-62 (1971) (Statement of Hon. Dixon Arnett, California State Assemblyman).

[18] *E.g.*, *Hearings Before the Subcomm. on Immigration and Naturalization, S. Comm. on the Judiciary*, 94th Cong. 25 (1976) (statement of Leonard F. Chapman, Jr., Commissioner, INS); *id.* at 103 (statement of Stanley Mailman, President, Association of Immigration and Nationality Lawyers).

some other jurisdiction, much less one outside the licensor's core expertise. A State's insurance commissioner, for instance, is an unlikely candidate to adjudicate whether the applicant committed a felony under the laws of some other State—but can reasonably take note of whether an insurance producer was "*convicted* of a felony." Ariz. Rev. Stat. § 20-295(A)(6).[19] This is all the more true in a specialized administrative framework like immigration and work-authorization status, in which the fact of whether a worker is "unauthorized" is immensely complicated and governed by extensive federal regulation. See, *e.g.*, *supra* pp. 4-6 & note 2.

c. Congress's desire to centralize the regulation of work-authorization status through IRCA is confirmed by the manner in which IRCA amended AWPA to harmonize the two statutes. See *Lorillard Tobacco* v. *Reilly*, 533 U.S. 525, 542 (2001) ("We are aided in our interpretation by considering the predecessor preemption provision and the circumstances in which the current language was adopted."). Prior to IRCA's

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[19] This generally has been true of farm labor contractor laws. *Supra* pp. 25-26 & note 13; *e.g.,* Cal. Lab. Code § 1690 (1986) (authorizing license suspension, revocation, or denial if a farm labor contractor "has been found, *by a court or the [U.S.] Secretary of Labor*, to have violated any provision of the Federal Farm Labor Contractor Registration Act"); 225 Ill. Comp. Stat. 505/6(d) (1986) (authorizing license suspension, revocation, or denial if a contractor "*has been convicted* of violating any provision of … federal law").

It also remains true of numerous other state licensing regimes, including in Arizona. *E.g.*, Ariz. Rev. Stat. § 32-2124(M) (Department of Real Estate may not issue license to certain convicted felons); *id.* § 20-295(A)(13) (insurance producer's license may be suspended or revoked for violations of regulations governing premium finance companies).

enactment, AWPA contained its own independent prohibition on hiring unauthorized workers. 29 U.S.C. § 1816(a) (1985).[20] AWPA also provided for criminal penalties, *id.* § 1851, and a separate good-faith defense to a charge of knowingly hiring unauthorized workers, *id.* § 1816(b). The Secretary of Labor promulgated regulations addressing verification of work authorization, 29 C.F.R. §§ 500.58-.59 (1984), and adjudicated whether an employer had hired unauthorized workers. *E.g.*, *In re Garcia*, No. 86-MSP-107, 1991 WL 733599 (Sec'y of Labor Oct. 10, 1991). AWPA also specifically permitted complementary state regulation: "This chapter is intended to supplement State law, and compliance with this chapter shall not excuse any person from compliance with appropriate State law and regulation." 29 U.S.C. § 1871 (1985).

Congress repealed these separate prohibitions concerning employment status verification in a series of "conforming amendments" to AWPA. IRCA § 101(b). IRCA repealed AWPA's independent prohibition on unauthorized workers, and made corresponding changes to AWPA's defenses and penalties. *Id.* With these amendments, an AWPA registration certificate could be suspended or revoked based only on a predicate violation of IRCA—*i.e.*, if the employer "has been found to have violated" 8 U.S.C. § 1324a(a). *Id.* And, Congress added the separate provision of IRCA expressly preempting state laws (which previously had been allowed under AWPA's broad savings clause), with only the limited exception for "licensing"

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[20] AWPA was the successor to the Farm Labor Contractor Registration Act, Pub. L. No. 88-582, 78 Stat. 920 (1964), which, as amended, also independently prohibited the hiring of unauthorized workers. 7 U.S.C. §§ 2044(b)(6), 2045(f) (1976).

schemes. *Id.* § 101(a)(1) (codified at 8 U.S.C. § 1324a(h)(2)).

This history confirms the narrow scope of the "licensing" exception. IRCA displaced alternate regimes—including those under federal law governing status verification. At the same time, it avoided interfering with the traditional authority of States and localities to enforce laws which, like AWPA, conditioned a license or registration to engage in the business of labor contracting on compliance with IRCA's fundamental prohibition on unauthorized workers. See H.R. Rep. No. 99-682(I), at 58 (describing "licensing" laws as those "concerning the suspension, revocation, or refusal to reissue a license to any person *who has been found to have violated the sanctions provisions in this legislation*"). Without the savings clause, local officials would have been unable to bar a labor contracting business found to have violated the federal prohibition on hiring unauthorized workers from operating within their jurisdiction, even though AWPA contemplated this very result. See 29 U.S.C. §§ 1813(a)(6), 1871. It was such authority that the savings clause was intended to preserve. See *Ouellette*, 479 U.S. at 497 ("This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns"). Congress did not intend, however, to authorize States in the guise of "licensing" to return to adjudicating in this domain.

4. The Arizona Act Is Not A Licensing Or Similar Law.

Arizona's law departs wildly from any traditional understanding of a "licensing" law, and undertakes precisely the regulation of employment authorization that Congress meant to preempt. The Act does not speak to a company's fitness to engage in any particu-

lar type of business, and it establishes no conditions for issuing a "license" or registration of any sort. See Ariz. Rev. Stat. §§ 23-211 to 23-212.01.

Rather, in purpose and effect it establishes a regulatory system for determining employment authorization. It contains numerous provisions prohibiting the employment of unauthorized workers and establishing procedures for investigating and adjudicating violations thereof. See *supra* pp. 11-13. Yet it refers to a "license" only in those few sections that grant authority to state court judges to direct, as one among multiple possible penalties against the employer,[21] "the appropriate agencies to suspend [or] … to permanently revoke all licenses that are held by the employer." Ariz. Rev. Stat. §§ 23-212(F), 23-212.01(F). And, even where the statute does authorize sanctions against what it terms "licenses," it does so through a special definition that is unlike the ordinary meaning of that term. The Act defines "license" to exclude "professional licenses," *id.* § 23-211(9)(c)(ii), and to include various foundational corporate documents that are not "licenses" in any common sense of the term, including a "transaction privilege tax license," and certificates of partnership and articles of incorporation, *id.* § 23-211(9)(b). Withdrawing a company's charter—the "business death penalty," J.A. 399—is not a traditional "licensing" sanction; it does not act against a license; and it is not anything Congress reasonably anticipated.

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[21] The Arizona Act also allows for several sanctions which, even under the Act's strained definition, do not affect a "license" at all, including an injunction directing the employer "to terminate the employment of all unauthorized aliens" and to file periodic status and compliance reports to county officials. Ariz. Rev. Stat. § 23-212(F).

In contrast to its merely incidental relationship to traditional licensure, the Arizona Act directly regulates the hiring of unauthorized workers. It establishes an independent state prohibition on hiring unauthorized workers, Ariz. Rev. Stat. § 23-212(A), creates an independent state process for investigating, adjudicating, and sanctioning violations of the state prohibition, *id.* § 23-212(B)-(J), and establishes independent standards for state judges to determine employment authorization status, even if that determination conflicts with the prior decision of a federal official, *id.* § 23-212(I). *Supra* pp. 11-13. Far from simply imposing "sanctions," much less a sanction in the sense of "licensing," the Arizona Act sets up its own competing regulatory and enforcement system.

The fact that Congress thought it necessary to repeal AWPA's separate prohibition concerning unauthorized workers belies any suggestion that IRCA meant to authorize each of the 50 States (and indeed every locality) to impose its own separate prohibition. See, *e.g.*, *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 451-53 (2005) (cautioning against an interpretation of a savings clause that would allow for "50 different [regulatory] regimes"); see also *Riegel* v. *Medtronic*, 552 U.S. 312, 326 (2008); *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001). To permit Arizona to regulate in this fashion, in the face of the careful balancing undertaken by Congress, is to permit IRCA "to destroy itself," *AT&T* v. *Cent. Office Tel.*, 524 U.S. 214, 228 (1998), and would violate the settled rule against "giv[ing] broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law," *United States* v. *Locke*, 529 U.S. 89, 106 (2000).

B. The Unauthorized Worker Provisions Are Impliedly Preempted.

The unauthorized worker provisions of the Arizona Act also are impliedly preempted. The existence of an express preemption provision (or savings clause) does not "bar the ordinary working of conflict preemption principles," or impose any "special burden" on demonstrating preemption. *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 869-72 (2000); see *Buckman*, 531 U.S. at 348-51; *Altria*, 129 S. Ct. at 543; *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287-89 (1995); see also *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1220 (2009) (Alito, J., dissenting); *Rush Prudential HMD* v. *Moran*, 536 U.S. 355, 392-93 (2002) (Thomas, J., dissenting); *Cipollone* v. *Liggett Group*, 505 U.S. 504, 547-48 (1992) (Scalia, J., dissenting). Rather, the question here, as in any other implied preemption case, is whether the state statute "conflicts" with the federal scheme, either because the federal and state statutes create contradictory rights or obligations, or because the state statute otherwise frustrates the federal scheme. *Geier*, 529 U.S. at 872-74; see also *Wyeth*, 129 S. Ct. at 1215-16 (Thomas, J., dissenting).

Arizona's unauthorized worker provisions establish an investigatory and adjudicatory process at odds with the procedures set forth in IRCA, and they disrupt the careful balance that Congress struck among competing interests when it enacted IRCA. For both of those reasons, the Arizona Act is impliedly preempted.

1. The Unauthorized Worker Provisions Conflict With IRCA's Structure And Operation.

a. There is "clear evidence" that, with respect to employment authorization, "Congress intended to

centralize all authority over the regulated area in one decisionmaker: the Federal Government." *Buckman*, 531 U.S. at 352; *Freightliner*, 514 U.S. at 292. As set forth above in the context of express preemption, see *supra* pp. 28-34,[22] IRCA contemplates a predicate federal adjudication by expert federal officials. And more generally, it creates a detailed process for investigating and adjudicating issues related to work-authorization status. *Supra* pp. 4-6. Befitting a regime implicating immigration status, IRCA directs "the Attorney General of the United States" to define the classes of individuals who are "authorized" to be employed in this country, to establish procedures governing the submission of complaints alleging unauthorized worker violations, and to promulgate rules "for the investigation of those complaints which, on their face, have substantial probability of validity." 8 U.S.C. § 1324a(e), (h)(3).

The statute accords "authority in investigations" only to "immigration officers," "administrative law judges," and "the Attorney General." *Id.* § 1324a(e)(1)-(2). It prohibits the imposition of sanctions until "the Attorney General … provide[s] the person or entity with notice and, upon request made within a reasonable time[,] … a hearing respecting the violation," *id.* § 1324a(e)(3), which must be held before an "administrative law judge" and conducted "in accordance with the requirements of the [Admin-

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[22] *English* v. *Gen. Elec.*, 496 U.S. 72, 79 n.5 (1990) ("By referring to these three categories [of express, field, and conflict preemption], we should not be taken to mean that they are rigidly distinct."), *quoted in Crosby*, 530 U.S. at 372 & n.6; *cf.* 1 L. Tribe, *American Constitutional Law* 1177 (3d ed. 2000) ("field" preemption may fall into any of the categories of express, implied, or conflict preemption).

istrative Procedure Act]," *id.* IRCA also guarantees the employer the right to petition for review of an adverse order "in the Court of Appeals for the appropriate circuit." *Id.* § 1324a(e)(8).

There is no room in this scheme for alternative investigatory and adjudicatory systems. See *Geier*, 529 U.S. at 883 ("Congress has delegated to [a federal agency] authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive"); see also *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-87 (2006) (same). Such a system would be managed by state officials, rather than the federal officials specifically granted authority under IRCA. They would be conducted under procedures that do not provide the safeguards required under IRCA, including notice and a hearing by the U.S. Attorney General, and would not be subject to oversight by federal immigration officials. They would also deny to employers the right to seek federal appellate review that is guaranteed to them by federal law.[23]

The Arizona Act illustrates vividly why Congress properly intended the federal system to be exclusive. Rather than investigation by federal officials expert in matters of immigration, the Arizona Act directs state officials—including the local county attorney—to investigate, assisted by "[t]he county sheriff or other local law enforcement agency." Ariz. Rev. Stat. § 23-212(B). Upon finding that a complaint is "not

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[23] *See Adams Fruit* v. *Barrett*, 494 U.S. 638, 649-50 (1996) (state law that denies right accorded under federal law is preempted); *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32-33 (1996) (same); *de la Cuesta*, 458 U.S. at 154-59 (same); *Lawrence County* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 267-68 (1985) (same).

false and frivolous," the investigating official must notify both "the United States immigration and customs enforcement" and "the local law enforcement agency" of the identity "of the unauthorized alien," and the attorney general must "notify the appropriate county attorney to bring an action." *Id.* §§ 23-212(C), 23-212.01(C). The action is not adjudicated before an agency expert in the complicated questions of citizenship status or work-authorization status, *e.g.*, *supra* pp. 4-6 & note 2 (examples of federal regulations governing work authorization), but in state superior court "in the county where the unauthorized alien employee is or was employed." Ariz. Rev. Stat. § 23-212(C)-(D). There is no explicit procedure for further judicial review, see *id.* § 23-212(E), and certainly not through the federal courts of appeals as guaranteed by IRCA.

The Arizona Act demonstrates the mischief that has been and will be wrought if States are permitted under the cover of "licensing" to create their own separate systems for adjudicating violations of IRCA (or, as here, of similar state prohibitions). Most strikingly, the Arizona Act purports to authorize state officials to disregard federal findings concerning federal work-authorization status. An Arizona state court evaluating an alleged violation will accord "the federal government's determination" of work-authorization status only "a *rebuttable presumption* of the employee's lawful status." *Id.* § 23-212(H). This provision flatly contradicts IRCA's provisions placing responsibility for status determination with federal officials, and violates the longstanding principle that "federal power in the field affecting foreign relations"—particularly the conditions for admission of individuals into this country—"be left entirely free from local interference." *Am. Ins. Ass'n* v. *Garamen-*

di, 539 U.S. 396, 418 (2003) (quoting *Hines*, 312 U.S. at 63); see also *Chy Lung* v. *Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.").

Compounding this fundamental defect, and confirming the incoherence of Arizona's scheme, is the fashion in which Arizona's evaluation of work-authorization status is tied to "the federal government's determination pursuant to 8 [U.S.C. §] 1373(c)." Ariz. Rev. Stat. § 23.212(H). Section 1373(c) provides for no "determination" by the federal government at all, and it is wholly separate from the detailed procedure required under federal law to determine whether an employer knowingly hired an unauthorized worker. Rather, § 1373(c) directs federal officials to disclose "information," and it is the wrong information at that: Section 1373(c) has the federal government disclose information concerning an individual's "citizenship or immigration status"—not "employment authorization" or "employment eligibility," as would be relevant to determining work-authorization status.[24] Work-authorization status and immigration status are separate inquiries, and although certain categories of immigration status can determine employment authorization, *e.g.*, 8 C.F.R. § 274a.12(a), in numerous circumstances individuals

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[24] *See* Privacy Act of 1974; System of Records, 66 Fed. Reg. 46,812, 46,812, 46,815 (Sept. 7, 2001); *see also* 8 U.S.C. § 1254a (distinguishing between "immigration status" and "work authorization"); 8 C.F.R. pt. 274a, subpt. B (addressing "Employment Authorization"); Privacy Act of 1974; USCIS–004 Verification Information System (VIS) System of Records Notice, 73 Fed. Reg. 75,445, 75,448 (Dec. 11, 2008) (same).

without status under the immigration laws are authorized to work. *Supra* note 2. In addition, the information provided in response to a § 1373 request does not necessarily reflect the individual's authorization status *at the time of employment*, see 66 Fed. Reg. at 46,812-15, and thus cannot properly be relied upon to support an alleged violation of an unauthorized worker prohibition.

Moreover, the Arizona Act calls for the use of employment verification information in ways that Congress proscribed. Under IRCA, the I-9 form and "any information contained in or appended to" it "may not be used for purposes other than for enforcement of this chapter" and specified federal criminal laws. 8 U.S.C. § 1324a(b)(5); see also *id.* § 1324a(b)(4) (limiting copying and retention of identification documents); *id.* § 1324a(d)(2)(F) (similar prohibition on use of I-9 system; specifically forbidding use of information for "law enforcement purposes"); IIRIRA § 404(h)(1) (similar prohibition on use of E-Verify system). Yet, the Arizona Act has critical aspects of its regulatory scheme turn on questions—such as proof of compliance with the I-9 process and with E-Verify—that would require the use of just such information, contrary to the federal prohibition. Ariz. Rev. Stat. §§ 23-212(J); see also *id.* § 23-212(C)-(D) (requiring that information be shared with "local law enforcement agency").

b. Finally, Arizona's unauthorized worker regime disrupts the balance that Congress struck among its various policy objectives. "An interpretation of the saving clause that preserved actions brought under [the] State's law would disrupt this balance of interests." *Ouellette*, 479 U.S. at 494-96.

One of those objectives—but only one—was to deter unlawful immigration. 8 U.S.C. § 1324a(a); see also,

e.g., H.R. Rep. No. 99-682(I), at 51-56; S. Rep. No. 99-132, at 1, 18-26. Congress, however, did not intend to pursue enforcement at all costs. It also gave effect to other objectives, some of which would be impaired by a strategy of maximal enforcement. H.R. Rep. No. 99-682(I), at 56; S. Rep. No. 99-132, at 8-9. For instance, Congress intended to minimize burdens on employers. See, *e.g.*, IRCA § 101(a)(1) (codified at 8 U.S.C. § 1324a(j)(1)(c) (1986)) (requiring GAO to study, and issue reports concerning, whether "an unnecessary regulatory burden has been created for employers"). To that end, Congress established a verification system that allows employers to rely on facially reasonable documents as proof of employment authorization status. 8 U.S.C. § 1324a(a)(3), (b)(1); see S. Rep. No. 99-132, at 10-12, 32; H.R. Rep. No. 99-682(I), at 52-56, 60-62. Employers would not bear the burden of verifying that the documents presented by the employee actually were valid, and would benefit from a good-faith defense for following the statutory requirements. 8 U.S.C. § 1324a(a)(3), (b)(1)(A), (b)(6). Congress likewise sought to protect the privacy of prospective employees, and so permitted individuals to select the form of documentation with which to establish authorization status; prohibited employers from asking for additional documentation; and barred immigration authorities from establishing a "national identification card." *Id.* § 1324a(b)(1), (b)(2), (c); see H.R. Rep. No. 99-682(I), at 49, 68.

Perhaps most significant, Congress was deeply concerned that too heavy a thumb on the side of enforcement would cause employers to discriminate against prospective employees on the basis of actual or perceived national origin. *Supra* pp. 6-8. This concern was behind Congress's prohibition against employers asking for additional proof of identity or

employment authorization. *Supra* pp. 7-8. Congress in IRCA also expressly and independently "prohibit[ed] … discrimination based on national origin or citizenship status." 8 U.S.C. § 1324b. And, for this same reason, Congress created a graduated schedule of civil monetary penalties for discrimination violations that matches precisely the penalties available for unauthorized worker violations. See *id.* § 1324b(g)(2)(B)(iv); *supra* p. 7; see also, *e.g.*, H.R. Conf. Rep. No. 99-1000, at 87 ("The antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in that context."); H.R. Rep. No. 99-682(I), at 49, 68 (same).

Finally, Congress considered and balanced the respective roles of federal and state regulation. 8 U.S.C. § 1324a(h)(2). Immigration and employment authorization are matters of national concern properly subject to federal governance. States and localities, however, have traditional authority over licensing. And, States in the past had relied on federal findings of violations of federal law—including federal immigration law—as predicates for registration and licensing schemes, particularly in the field of farm labor contracting. See H.R. Rep. No. 99-682(I), at 58. Congress therefore allowed States to deny or revoke such licenses and similar registrations based on a violation of IRCA. See 8 U.S.C. § 1324a(h)(2). The narrowness of this exception reflects again the care that Congress took in balancing all of the relevant interests, and its concern that additional sanctions—beyond those associated with traditional "licensing" decisions—would disrupt the federal system. H.R. Rep. No. 99-682(I), at 58; S. Rep. No. 99-132, at 8-12 (level of sanctions is reasonable in light of competing concerns); see also H.R. Conf. Rep. No. 99-1000, at 86 (detailing graduated sanctions scheme).

It is inconceivable that, having resolved for itself the appropriate balance of these competing interests, Congress intended—through the oblique reference to "licensing"—to permit States to re-weigh those interests and craft a different system, with different adjudicatory standards and different penalties. "Where," as here, "it is clear how the [federal] laws strike that [congressional] balance in a particular circumstance, that is not a judgment the States may second-guess." *Bonito Boats*, 489 U.S. at 152. This is precisely what Arizona has done.

Arizona's statute pursues a single goal—the prevention of unlawful immigration—to the exclusion of all others. It has adopted an enforcement-at-all costs strategy, with the solitary goal of "stop[ping] illegal immigration." J.A. 395. "[T]he inconsistency of sanctions here undermines the congressional calibration of force." *Crosby*, 530 U.S. at 380; cf. *Am. Ins. Ass'n*, 539 U.S. at 427 ("The basic fact is that [the State] seeks to use an iron fist where the President has consistently chosen kid gloves."). Arizona has not made even a passing nod to the other considerations that Congress weighed and sought to effectuate. The Arizona Act includes no anti-discrimination provision concerning employers—a fact that concerned Governor Napolitano when she signed the legislation, J.A. 399. And, considerations of limiting burdens on employers never have entered the picture; on the contrary, Arizona's chosen method is the *in terrorem* effect of the "business death penalty." In these ways, the Arizona system "exert[s] an extraneous pull on the scheme established by Congress, and is therefore pre-empted by that scheme." *Buckman*, 531 U.S. at 353.

That Arizona purports to share *one* of the concerns that motivated Congress—enforcement of the unau-

thorized worker prohibition—does not mean that it may re-craft federal policy to single-mindedly pursue its own preferred goal by its own preferred methods. "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Locke*, 529 U.S. at 115; *Crosby*, 530 U.S. at 379 ("The fact of a common end hardly neutralizes conflicting means ...."). [25] The Arizona Act "go[es] farther than Congress has seen fit to go," and is thus preempted.

2. *De Canas* Does Not Require A Different Result.

The decisions below interpreted this Court's decision in *De Canas* as holding that unauthorized worker provisions like those enacted by Arizona cannot be impliedly preempted by federal law. Pet. App. 39a-40a, 67a-68a, 73a. This reflects a fundamental misunderstanding of *De Canas* and subsequent changes in federal immigration law.

The legal landscape that *De Canas* surveyed is utterly unlike the one that exists today. *De Canas* was decided in 1976, a decade before the passage of IRCA, and held that *at that time* federal immigration law

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[25] *Fla. Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963) ("The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."); *see Foster*, 522 U.S. at 73 (Congress may "remedy more than one evil" at a time); *see also Wyeth*, 129 S. Ct. at 1215 ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

evinced "at best … a peripheral concern with employment of illegal entrants." 424 U.S. at 360. IRCA amended federal immigration law to fill precisely this gap. It made the regulation of unauthorized workers "forcefully" the subject of federal law, *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. at 194 n.8; see also *Hoffman*, 535 U.S. at 152, and expressly preempted state systems imposing sanctions for unauthorized worker violations, 8 U.S.C. § 1324a(h)(2). Nothing demonstrates more clearly the limited current relevance of *De Canas* than the fact that the state statute there at issue—which imposed fines for employers found to hire unauthorized workers, see 424 U.S. at 352 n.1—now is expressly preempted by § 1324a(h)(2). Moreover, *De Canas* involved field preemption, not conflict preemption. *Id.* at 356-58. And, finally, *De Canas* relied upon a provision of the Farm Labor Contractor Registration Act that saved state authority, *id.* at 361-62; see *Toll* v. *Moreno*, 458 U.S. 1, 13 n.18 (1982), and which subsequently was limited by IRCA itself, *supra* pp. 32-34 & note 20. Given the fundamentally different context in which *De Canas* arose, it is not controlling here.

II. ARIZONA'S E-VERIFY MANDATE IS IMPLIEDLY PREEMPTED.

Arizona further requires employers to participate in the federal E-Verify program that federal law explicitly makes voluntary. Ariz. Rev. Stat. § 23-214. That mandate conflicts with federal law, and therefore is preempted.

1. There can be no doubt that Congress intended E-Verify to operate as a voluntary program, in which employers could choose whether to participate. The statutory provision defining the program's applicability is titled "*Voluntary* Election to Participate in a Pilot Program." IIRIRA § 402. The statute provides

that employers "may *elect* to participate in that pilot program." *Id.* § 402(a); see also *id.* § 402(c)(2)(A) (a participating employer is an "electing person"). And the Secretary of Homeland Security—the official authorized under IIRIRA to administer the program—is expressly prohibited from "requir[ing] any person or other entity to participate" in E-Verify, *id.* § 402(a), and is further directed to "widely publicize … the *voluntary* nature of the pilot programs," *id.* § 402(d)(2); accord *id.* § 402(d)(3)(A). Everything about E-Verify is voluntary, other than a small handful of specified exceptions,[26] the enumeration of which demonstrates the otherwise blanket nature of the rule. *Id.* § 402; see *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) ("*Inclusio unius, exclusio alterius*.").

Congress made E-Verify voluntary for good reasons. It was designed as a "pilot program"—temporary and experimental in nature—to test as a possible alternative to the document-based I-9 process. IIRIRA § 402. By making the program voluntary, Congress could avoid imposing serious burdens on employers and the federal government while it tested whether the new program effectively served Congress's multiple goals, including "assist[ing] employers in complying with

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[26] E-Verify is mandatory for certain entities within the federal government, *see* IIRIRA § 402(e)(1), and under IIRIRA § 402(e)(2) one who violates specified provisions of IRCA may be required under an IRCA enforcement order to participate in a pilot program. The federal government also by rule has made E-Verify mandatory for certain federal contractors. *See* Employment Eligibility Verification, 73 Fed. Reg. 67,651 (Nov. 14, 2008). Over a legal challenge, a district court held, among other things, that the rule did not make E-Verify "mandatory" because a business always can choose not to undertake government contracting. *See Chamber of Commerce* v. *Napolitano*, 648 F. Supp. 2d 726, 736 (D. Md. 2009).

the laws" against hiring unauthorized aliens, "prevent[ing] unlawful discrimination and privacy violations," and "minimiz[ing] the burden on business." S. Rep. No. 104-249, at 9 (1996). It could also thereby assess any problems with E-Verify, to determine whether it ever could prove workable for employers.[27] For all of these reasons, Congress deliberately made the I-9 process (with a variety of document-based verification methods) mandatory, and created E-Verify as a voluntary and experimental system, which em-

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[27] A recent DHS-commissioned study of E-Verify found that foreign-born, work-authorized individuals were 20 times more likely to receive an erroneous tentative nonconfirmation than U.S.-born individuals and, notably, that States that require the use of E-Verify have higher error rates than employers in States with no such requirement. Westat, *Findings of the E-Verify Program Evaluation* 122, 235 (Dec. 2009), *available at* http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf. These errors impose significant costs on employers and employees. Under federal law, an employer is not permitted to rely on a "tentative nonconfirmation" to take adverse action against the employee. IIRIRA § 403(a)(4)(B)(iii). The employer must allow the employee to lodge a challenge, and then must wait until a federal agency has resolved the challenge, before taking any action. *Id.* The burdens of this process are particularly acute for small businesses, which cannot afford significant delays in training and transitioning new employees. Westat, *Findings of the Web Basic Pilot Evaluation* xxii-xxiii, 24, 97 (Sept. 2007), *available at* http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf. And, of course, employees who receive a "tentative nonconfirmation"—even if they later succeed in challenging that designation—can lose valuable training opportunities and may suffer harassment or other forms of discrimination. *Id.* While the most recent study of E-Verify reported improvement in the system's accuracy rates, the pattern of error reinforces why the program has remained voluntary and experimental. *See, e.g.*, H.R. Rep. No. 108-304(I), at 26-27 (2003) (statement by Rep. Berman regarding E-Verify error rates and consequences for employees).

ployers may choose to use—or not—in their discretion. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b).

2. It is not for Arizona, or any other State, to disregard Congress's judgment. In enacting E-Verify as a voluntary program, Congress "weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via [federal law]." *Medtronic*, 518 U.S. at 501. It "deliberately sought variety" in the field of employment verification by approving "a mix of several different" options, including the mandatory I-9 process and the voluntary E-Verify program, to reach its regulatory goal. *Geier*, 529 U.S. at 878.

The Ninth Circuit concluded that this provision expressly limits only the *federal* government, and so does not apply to state statutes like Arizona's. Pet. App. 20a. In short, it concluded that what DHS Secretary Napolitano now is expressly forbidden from doing as a federal official, she—and her fellow 49 governors—were free to do as state executives. Nothing in IIRIRA supports this counterintuitive result.

That IIRIRA explicitly precludes only the "Secretary of Homeland Security" from mandating participation in E-Verify does not suggest that States are free to alter E-Verify requirements or mandate participation. E-Verify is a federally created program, administered exclusively by federal authorities. See *Buckman*, 531 U.S. at 347 ("[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law."). Indeed, if the 49 other States followed Arizona's lead, the state-mandated

drain on federal resources would overwhelm the federal system and render it completely ineffective, thereby defeating Congress's primary objective in establishing E-Verify. See, *e.g.*, *Bates*, 544 U.S. at 451-53 (noting potential burdens imposed by "50 different [regulatory] regimes"); see also *Riegel*, 552 U.S. at 322; *Buckman*, 531 U.S. at 351. There is simply no reason to believe that Congress anticipated that States would have any role in enforcing E-Verify.

In this light, the fact that IIRIRA refers only to the Secretary of Homeland Security makes perfect sense: the Secretary is the only official authorized under IIRIRA to administer the program, and the only one potentially empowered to mandate participation in E-Verify. See IIRIRA § 402. Far from suggesting a broad exception for States to mandate E-Verify participation, the provision confirms Congress's understanding that other officials—particularly state officials—would lack authority to administer or mandate participation in E-Verify.

The E-Verify mandate of the Arizona Act, like the unauthorized worker provisions, conflicts with the language, structure, and intent of federal immigration law. The state law is therefore preempted.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeals for the Ninth Circuit with instructions to vacate the judgment of the District Court.

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