No. 11-182

IN THE

Supreme Court of the United States

STATE OF ARIZONA and JANICE K. BREWER, Governor of the State of Arizona, in her official capacity,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, UNITED FARM WORKERS OF AMERICA, AND CHANGE TO WIN AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amicus curiae Service Employees International Union ("SEIU") is an international labor organization that represents more than two million working men and women in the United States and Canada employed in the private and public sectors, including in Arizona. Many of SEIU's members are foreign-born U.S. citizens and immigrant aliens authorized to work in the United States. As set out in SEIU's Constitution, it is an essential part of SEIU's mission to act as an "advocacy organization for working people" and to oppose not only "discrimination based on gender, race, ethnicity, religion, age, sexual orientation and physical ability," but also discrimination based on "immigration status." SEIU is a plaintiff in another case challenging the Arizona law at issue here: *Friendly House v. Whiting*, Case No. CV-10-01061-PHX-SRB (D. Ariz.).

Amicus curiae United Food and Commercial Workers International Union ("UFCW") represents more than 1.3 million workers, primarily in the retail, meatpacking, food processing, and poultry industries in the United States and Canada, including in Arizona. UFCW represents workers who comprise a range of races and ethnicities. UFCW's Constitution includes within its objectives "to organize, unite, and assist persons, without regard to race, creed, color, sex, religion, age, disability, sexual orientation, national origin, or ethnic background, engaged in the performance of work within its jurisdiction for the purpose of improving wages, hours, benefits, and working conditions on local, national, or international levels" and "to advance and safeguard the full employment, economic security, and social welfare of its members and of workers generally." UFCW is a plaintiff in *Friendly House*.

Amicus curiae International Brotherhood of Teamsters ("IBT") represents the interests of 1.4 million mem-

bers in the United States and Canada, including freight drivers and warehouse workers, as well as workers in numerous other occupations in the private and public sector. The IBT's affiliates represent diverse workers, including many racial and ethnic minorities. This includes a number of affiliates which represent agricultural workers, many of whom are Hispanic. In particular, at least one IBT affiliate represents agricultural workers who work seasonally in the State of Arizona. The IBT's Constitution includes within its objectives "to secure improved wages, hours, working conditions, and other economic advantages through organization, negotiations and collective bargaining, through advancement of our standing in the community and in the labor movement through legal and economic means, and all other lawful methods" and "to advance the rights of workers, farmers, and consumers, and the security and welfare of all the people by political, educational, and other community activity."

Amicus curiae United Farm Workers of America ("UFW") primarily represents migrant farm workers in California, Oregon, and Washington, but has members throughout the United States. Many of UFW's members migrate to Arizona throughout the year to follow seasonal work available in that state. The vast majority of UFW's members are Hispanic, and are predominantly immigrant workers from Mexico, although UFW represents many immigrant workers of different nationalities and has represented workers from Thailand, India, and Africa. UFW seeks to improve the lives, wages, and working conditions of agricultural workers and their families through collective bargaining, worker education, and state and federal legislation.

Amicus curiae Change to Win ("CTW") is a federation of four labor unions—the International Brotherhood of

Teamsters, United Farmworkers of America, United Food and Commercial Workers International Union, and Service Employees International Union—which collectively represent 5.5 million working men and women. CTW's Constitution includes within its objectives "to fight for fair treatment and legal protection for immigrant workers in this country."[1]

This case presents an important question concerning the nature and extent of the pre-emptive effect of the Immigration Reform and Control Act of 1986 on State and local laws that impose sanctions on aliens who engage in unauthorized work. SEIU, UFCW, IBT, and UFW, which are affiliated with Change to Win, represent workers employed throughout the United States. *Amici* therefore have a strong interest in the uniform application of federal law prohibiting unauthorized work.[2]

STATEMENT

On April 23, 2010, the Governor of Arizona signed into law the Support Our Law Enforcement and Safe Neighborhoods Act ("S.B. 1070"). Section 1 of the Act states that its intent "is to make attrition through enforcement the public policy of all state and local government agencies in Arizona" and that the "provisions of this act

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[1] Petitioners and Respondent have filed letters with the Court consenting to the filing of *amicus* briefs supporting either party. No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* submit this brief to address only whether Section 5(C) of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, which imposes criminal sanctions on aliens who solicit, accept, or engage in unauthorized work, is pre-empted by federal law. *Amici* support the position of Respondent that the other provisions of that law at issue in this case are also preempted, but do not write separately on them.

are intended to work together to discourage and deter the unlawful entry and presence of aliens." S.B. 1070 §1. Among other things, the Act makes it "unlawful for a person who is unlawfully in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in" Arizona. S.B. 1070 §5(C). A violation of this provision is a class 1 misdemeanor and is punishable by up to six months of imprisonment, a $2,500 fine, and three years of probation. S.B. 1070 §5(F); Ariz. Rev. Stat. §§13-707(A)(1), 13-802(A), 13-902(A)(5).

Respondent United States filed suit in the U.S. District Court for the District of Arizona seeking to enjoin this and other provisions of the law from going into effect. The United States contended that the law's provisions are preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603. The district court agreed that "Arizona's new crime for working without authorization, set forth in Section 5(C) of S.B. 1070, conflicts with a comprehensive federal scheme and is preempted," and enjoined its enforcement. *United States v. Arizona*, 703 F.Supp.2d 980, 1001 (D. Ariz. 2010). On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's injunction, holding that "Section 5(C), 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *United States v. Arizona*, 641 F.3d 339, 360 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

SUMMARY OF ARGUMENT

Amici address whether S.B. 1070's prohibition on "knowingly apply[ing] for work, solicit[ing] work in a public place or perform[ing] work as an employee or independent contractor" by an alien without work authorization is preempted by federal law.

With the enactment of IRCA, the Congress of the United States implemented a comprehensive and nuanced scheme for discouraging unlawful entry to the United States and the employment of unauthorized aliens. Congress considered, and explicitly rejected, the imposition of criminal penalties on aliens who engage in unauthorized work. Congress chose instead to discourage illegal immigration through an escalating series of civil and criminal penalties for employers that knowingly hire aliens who are not authorized to work. *See* 8 U.S.C. §1324a. Under the scheme Congress chose, aliens who engage in unauthorized work are subject only to certain federal administrative immigration consequences. And whether such aliens are subject to certain federal immigration consequences at all is determined by the federal government and may depend on a variety of factors Congress deemed important in setting the immigration policy of the United States, including the alien's familial relationship to U.S. citizens, whether the alien has fled particular dictatorial regimes, and whether the alien possesses certain valuable job skills.

Without regard for the comprehensive scheme Congress created in enacting IRCA and the Immigration and Nationality Act ("INA"), Arizona has adopted its own separate policy for the deterrence of illegal immigration. *See* S.B. 1070 §1. Although Congress explicitly considered and rejected criminal sanctions on aliens solely for engaging in unauthorized work, Section 5(C) of S.B. 1070 imposes criminal sanctions on nationals of foreign countries who engage in unauthorized work in the United States. Arizona's attempt to "deter the unlawful entry and presence of aliens" (S.B. 1070 §1) by imposing sanctions that Congress expressly rejected in exercising its authority to set the immigration policy of the United States is preempted. As this Court has recognized, "[w]here a comprehensive federal scheme intentionally

leaves a portion of the regulated field without controls, then the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action." *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). Otherwise each of the 50 states could set 50 separate work-related criminal provisions.

Arizona has not only imposed sanctions Congress explicitly rejected, it has chosen extraordinarily severe sanctions that are more harsh than even those that Congress imposed on employers under IRCA's central employer sanctions provisions. Where the federal government has carefully calibrated the level of sanctions and struck a "delicate balance of statutory objectives," Arizona may not undermine it. *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001).

That conclusion is bolstered because Section 5(C) intrudes on an area of traditional federal power: foreign affairs and the regulation of immigration. A state's authority to impose its laws solely on a group of aliens is limited, and where the federal government has acted, state laws must yield. *See Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941).

Finally, contrary to the arguments of Petitioners and their *amici*, nothing in *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968 (2011), is to the contrary. *Whiting*, which addressed an Arizona statute that required the suspension or revocation of the licenses of employers that knowingly or intentionally employ unauthorized aliens, did not involve a state statute that imposed criminal sanctions of a kind Congress expressly rejected. Nor, unlike in *Whiting*, does any savings clause expressly exempt from preemption state statutes that impose sanctions on unauthorized workers. Because Section 5(C) "stands as an obstacle to the accomplish-

ment and execution of the full purposes and objectives of" Congress' comprehensive scheme for regulating unauthorized workers, it is preempted.

ARGUMENT

I. SECTION 5(C) IS IMPLIEDLY PREEMPTED BY THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

A cornerstone of our constitutional structure is the supremacy of federal law. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). State laws that "frustrate[]" a federal statutory scheme and stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" are preempted. *CSX Transp. v. Easterwood*, 507 U.S. 658, 663 (1993); *Hines*, 312 U.S. at 67; *accord Wyeth v. Levine*, 555 U.S. 555, 577 (2009).

Arizona's criminal sanctions on unauthorized workers establish a penalty that Congress intentionally excluded from its "comprehensive [federal] scheme" for discouraging unauthorized employment. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002); *see also Isla*, 485 U.S. at 503. They also are an attempt by Arizona to create its own separate and conflicting state policy for deterring the "unlawful entry and presence of aliens." S.B. 1070 §1. They are therefore impliedly preempted.

A. In Enacting The Comprehensive Immigration Policy Of The United States, Congress Explicitly Rejected Criminal Sanctions On Unauthorized Workers In Favor Of A Complex And Nuanced Scheme Of Employer Sanctions And Administrative Immigration Consequences

1. In 1952, Congress enacted the Immigration and Nationality Act, 66 Stat. 163, as amended, 8 U.S.C. §1101

et seq. That statute established a "comprehensive federal statutory scheme for regulation of immigration and naturalization" and set "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *DeCanas v. Bica*, 424 U.S. 351, 353, 359 (1976).

Although some changes were enacted to the provisions regarding admission of legal immigrants in 1965 and 1976, no significant changes were made prior to 1986 to address the issue of unlawful immigration to the United States. The Immigration Reform and Control Act of 1986 represented a broad and sweeping reform of the U.S. immigration laws. IRCA was, as President Ronald Reagan observed, "the product of one of the longest and most difficult legislative undertakings of recent memory."[3] The most comprehensive change in the country's immigration policy in 35 years, IRCA created a scheme of graduated employer sanctions to discourage the employment of unauthorized workers; provided for a mass legalization of undocumented aliens who had been present in the United States for a specified period of time; substantially reformed the H-2 Visa program for temporary and seasonal workers; established a nonimmigrant visa waiver program; and instituted a variety of other changes to immigration enforcement. *See, e.g.*, Pub. L. No. 99-603, §§101, 115, 116, 201, 301, 313 (1986).

2. From the outset of the lengthy legislative process that led to the passage of IRCA, Congress considered and explicitly rejected the imposition of criminal sanctions on unauthorized workers. The history of IRCA began in 1971 with "[e]xtensive i[n]vestigative and

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[3] Statement of the President Upon Signing S. 1200, Nov. 10, 1986, *reprinted in* 1986 U.S.C.C.A.N. 5856-1, 5856-1.

legislative hearings on the problem of undocumented aliens" held by the House Judiciary Subcommittee on Immigration. H.R. Rep. No. 99-682(I), at 52 (1986).[4] Congress heard evidence on and discussed many aspects of immigration policy, including border enforcement, visa violations, agricultural worker programs, admission of refugees, and the employment of unauthorized workers. *See*, *e.g.*, *Hearings Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, pt. 1, 92d Cong., 5, 7, 85 (1971).

During those hearings, witnesses and members of Congress repeatedly discussed a proposal to impose criminal sanctions on both employers who knowingly hire unauthorized aliens and on aliens who engage in unauthorized work. *See*, *e.g.*, *id.* at pt. 1, 85 (asking witness about proposal for "imposition of criminal penalties . . . both on the employer of the illegal entrant and on the entrant himself").[5] Although some witnesses expressed support for the proposal to criminally sanction unauthorized workers, many others opposed it, supporting only

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[4] *See also* S. Rep. No. 99-132, at 18-26 (1985) (discussing the 15-year history of IRCA beginning with the 1971 House hearings); Nancy Humel Montwieler, *The Immigration Reform Law of 1986: Analysis*, *Text*, *and Legislative History* 3-18 (1987) (same).

[5] *See also Hearings Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, pt. 1, 92d Cong., 155-56 (1971) (statement of Rep. Dennis) (discussing imposition of criminal sanctions on unauthorized workers); *id.* at pt. 1, 88-89 (discussing "suggestions of making the employer and the illegal worker criminally responsible"); *id.* at pt. 1, 106 (colloquy between Rep. Dennis and Joseph I. Flores, Assistant Regional Manpower Administrator for the Department of Labor, regarding possible criminal sanctions on unauthorized workers); *id.* at pt. 1, 108-09 (same); *id.* at pt. 1, 113 (statement of Labor Department supporting proposal for criminal sanctions on both employers and unauthorized workers).

criminal sanctions on knowing employers.[6] Some witnesses pointed out that there were administrative immigration consequences for unauthorized workers, making criminal consequences for unauthorized work unnecessary and inappropriate. Mel Sherman, Director of the International Institute of Los Angeles argued:

> [Y]ou know that there is a severe penalty against the illegal immigrant: he will be deported, and he can lose his salary. Often he has social security money taken from his pay; he receives no benefits from that money that is taken from his pay. There are already many penalties against the illegal immigrant, and I don't think there is any need for further criminal sanctions.

Id. at pt. 1, 225; *see also id.* at pt. 1, 89 (testimony of Joseph Sureck, Immigration and Naturalization Service Regional Counsel) ("we shouldn't attempt to penalize the

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[6] Thomas Pederson, the Immigration and Naturalization Service District Director for Detroit indicated that he did not think that "imprisonment is the answer" in relation to the unauthorized worker. *Hearings Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, pt. 3, 92d Cong., 919 (1971). Asked for his view on the proposal to "attach a criminal penalty to the nonimmigrant who is here lawfully, but is not eligible for employment, and unlawfully takes it," Sigmund Arywitz, the Executive Secretary Treasurer of the Los Angeles County AFL-CIO, stated:

> [I]t is making the victim the person who is punished. After all, when a person is not working, he is hungry and he needs a job; and he is offered a job, and he takes it. He is taking care of his family, even if his family is back in the home country, and is trying to meet their needs. They are not equally guilty.
>
> Here, you have the man struggling for bread, and you have the other man who wants to take advantage of him, by paying him less, by having him under intimidation, by keeping him afraid of being found . . . .

Id. at pt. 1, 210.

employee at all under that situation, because I believe we have other remedies").

Congressman Peter W. Rodino, Chair of the Subcommittee on Immigration and ultimately a chief House sponsor of IRCA, repeatedly expressed the view that criminal sanctions on unauthorized workers were unwarranted. Montwieler, at 11. In an exchange with witness Joseph Flores, from the Department of Labor, Congressman Rodino asked:

> RODINO: You would make some distinction though—wouldn't you—between the penalties that are imposed on the employer and on the illegal alien; one is looking to improve his lot in life, while the other is trying to put someone in human bondage, you might say? Knowing the illegal alien is looking for an opportunity to improve his economic circumstances, the employee [sic] takes advantage of him, and by so doing sets in consequence a chain of events whereby he not only misuses this individual, but he deprives other American citizens of a job. He is doing it for his own personal gain—if you will—and nothing more. You would say—wouldn't you—that insofar as emphasis on penalties, that he should be the one who should be more severely handled?
>
> FLORES: The employer?
>
> RODINO: Yes.
>
> FLORES: Yes.

Id. at pt. 1, 109. In a later hearing, Congressman Rodino emphasized:

> . . . I think that all of us have got to recognize that while the illegal alien has violated our law, nonetheless it seems to me that all the cases indicate that this is a poor individual who is seeking to improve his lot in

> life. He seems to want to find a place where he will be able to improve his conditions and help himself and his family. . . .
>
> [T]o impose a criminal penalty, on this poor individual, who is really victimized in many cases . . . would seem to further violate his human dignity.

Id. at pt. 3, 919-20.

As a direct result of the Subcommittee's hearings, the first bill proposing sanctions on knowing employment of unauthorized workers was introduced on May 8, 1972. *See* H.R. Rep. No. 92-1366, at 1-2 (1972). Congressman David Dennis proposed an amendment in the Judiciary Committee that would have made a second incident of an employee engaging in unauthorized work a misdemeanor. *See id.* at 15. It was rejected. *Id.* The final bill provided for a graduated series of sanctions on employers that knowingly employ unauthorized workers, but did not include criminal sanctions on employees. *See* H.R. 16188, 92d Cong. (1972). In the floor debates on the final version of the bill, Congressman Rodino affirmed that Congress had "avoided imposing any additional criminal sanctions on the alien who enters illegally and obtains employment, or on the non-immigrant who accepts unauthorized employment in violation of his status." 118 Cong. Rec. 30,155 (1972); *see also* 119 Cong. Rec. 14,184 (1973) (statement of Rep. Dennis) (noting that bill originally considered in subcommittee contained criminal sanctions on employees, but they were removed). The bill, as well as a similar bill containing employer sanctions that was proposed in the next Congress, passed the House but was not taken up by the Senate. 119 Cong. Rec. 14,184, 14,208-09 (1973); Montwieler, at 4.

3. Having considered, and rejected, criminal sanctions on employees, Congress continued to consider immigra-

tion reform bills that would impose employer sanctions. *See*, *e.g.*, H.R. 8713, 94th Cong. (1975). In 1978, Congress established the Select Commission on Immigration and Refugee Policy to make a comprehensive study of the immigration policy of the United States and offer administrative and legislative recommendations. Pub. L. No. 95-412, §4(a) (1978). The Select Commission included, among others, Congressman Rodino and Senator Alan Simpson, who became the chief Senate sponsor of IRCA. *See U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views By Commissioners*, vii (Mar. 1, 1981), *available at* http://www.eric.ed.gov/PDFS/ED211612.pdf (list of Commissioners).

The Commission's final report offered a comprehensive set of recommendations for immigration law reform that coupled sanctions for employers that hire unauthorized workers with legalization for certain unlawful immigrants, as well as reform of policies for the admission of lawful immigrants. *See id.* at xv-xxxii. The Commissioners discussed the possibility of criminal penalties "that could be imposed on those who seek undocumented/illegal employment," but ultimately rejected them. *Id.* at 65-66. The Select Commission's recommendations formed the basis for the further legislative proposals for immigration reform that led to IRCA. *See* 132 Cong. Rec. 32,410 (1986) (statement of Sen. Simpson) (IRCA was the Select Commission's "basic work product").

4. In 1985, the two bills that would eventually merge into IRCA were introduced. The legislative history demonstrates Congress' continued belief that criminal sanctions for unauthorized work are inappropriate. Congress was aware that detention and fines for unautho-

rized workers had previously been proposed and rejected. Senator Simpson noted that such proposals were "not something that is new," but dismissed them as too "harsh." *Immigration Reform and Control Act of 1985, Hearings Before the Subcommittee on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong., 56, 59 (1985); *see also id.* at 57 (statement of Dr. Lawrence H. Fuchs) (detention for unauthorized workers had "been proposed before").

Instead, the Congress that passed IRCA echoed the view of Congressman Rodino that unauthorized workers must not be so severely handled as the employers that hire them. As stated in the Committee Reports accompanying IRCA, Congress recognized that aliens enter the United States and accept unauthorized employment for "the best of motives": "to seek a better life for themselves and their families." H.R. Rep. No. 99-682(I), at 46; S. Rep. No. 99-132, at 3.[7] Congress was concerned that, as a result of their insecure status, many of these workers are "victimized" by unscrupulous employers. H.R. Rep. No.

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[7] *See also* H. Rep. No. 99-682(I), at 63 (noting that there are "severe economic 'push factors' in the various developing countries" that lead aliens to enter the country illegally); *Hearings Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong., 247 (1985) (statement of Rep. Scheuer) ("illegal aliens have good reasons for coming here, reasons that every one of us would respect" because the "push factors from their own home countries are powerful," including "unemployment" and "underemployment"). This view of unauthorized workers was also stated forcefully in the report of the Select Commission:

> The Select Commission's determination to enforce the law is no reflection on the character or the ability of those who desperately seek to work and provide for their families. Coming from all over the world, they represent, as immigrants invariably do, a portion of the world's most ambitious and creative men and women.

U.S. Immigration Policy and the National Interest, at 12.

99-682(I), at 49.[8] Senator Simpson, chief Senate sponsor of IRCA, noted that such exploitation was encouraged because, although it was unlawful to engage in unauthorized work and an unauthorized worker was subject to administrative immigration consequences, it was not unlawful prior to IRCA for an employer to employ unauthorized workers. *Immigration Reform and Control Act of 1985*, *Hearings Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong., 3 (1985) (statement of Sen. Simpson).

Congress also concluded that, as a practical matter, a focus on greater interior enforcement to identify unauthorized workers would be unacceptably "intrusive," S. Rep. No. 99-132, at 8, and "inconsistent with our immigrant heritage," H.R. Rep. No. 99-682(I), at 49; *see also* S. Rep. No. 99-132, at 8 ("reliance on direct enforcement alone would require massive increases in enforcement in the interior—in both neighborhoods and work places").

Congress thus chose what it considered to be a "humane" and "balanced" policy of graduated civil and criminal sanctions on employers without criminal sanctions on unauthorized workers. *E.g.*, H.R. Rep. No. 99-682(I), at 46 (employer sanctions are the "most humane,

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[8] *See also*, *e.g.*, *Immigration Reform and Control Act of 1985*, *Hearings Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong., 6 (1985) (statement of Fr. Theodore Hesburgh, chair of the Select Commission on Immigration and Refugee Policy) (there is a "great deal of exploitation" of unauthorized workers); 132 Cong. Rec. 29,988 (1986) (statement of Rep. Mazzoli) (unauthorized workers "are vulnerable to exploitation" and are "prey[ed]" upon by "unscrupulous employers"); 131 Cong. Rec. 24,308 (1985) ("aliens are often subject to inhumane and oppressive treatment by unscrupulous employers who know full well that the worker will not report to law enforcement authorities any violations for fear of being deported").

credible and effective way to respond"); 131 Cong. Rec. 24,316 (1985) (statement of Sen. Dole) (IRCA "takes a humane approach toward solving our immigration problems by placing the emphasis on penalizing those employers who would knowingly hire illegal aliens" and is "well-constructed and carefully balanced legislation"); 132 Cong. Rec. 29,989 (1986) (statement of Rep. Mazzoli) (IRCA represents a "humane" approach to immigration reform); 131 Cong. Rec. 23,718 (1985) (statement of Sen. Simpson) ("employer sanctions" are the only "humane basis" for immigration reform); *Immigration Reform and Control Act of 1985, Hearings Before the Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong., 3 (1985) (statement of Sen. Simpson) ("employer sanctions" are "balanced and reasonable approach"); *id.* at 47 (employer sanctions are the "humane" approach); *id.* at 59 (same); *see also* H.R. Rep. No. 99-682(I), at 104 (statement of Attorney General Edwin Meese III characterizing bill as "fair and balanced" approach); Statement of the President Upon Signing S. 1200, Nov. 10, 1986, *reprinted in* 1986 U.S.C.C.A.N. 5856-1, 5856-4 (IRCA is method of "humanely regain[ing] control of our borders").

5. The reform of immigration policy Congress created in IRCA, in combination with the INA, is a rational, "comprehensive scheme" for discouraging unauthorized employment and unlawful immigration. *Hoffman Plastic*, 535 U.S. at 147. The central provision of IRCA is a series of graduated civil and criminal sanctions on employers that knowingly hire unauthorized workers. Pub. L. No. 99-603, §101; 8 U.S.C. §1324a(a). These provisions were designed to deter employers "from hiring unauthorized aliens," which would, "in turn,[] deter aliens from entering illegally or violating their status in search of employment." H.R. Rep. No. 99-682(I), at 46. Under IRCA, it is unlawful for an employer to "hire, or to

recruit or refer for a fee, . . . an alien knowing the alien is an unauthorized alien," 8 U.S.C. §1324a(a)(1)(A), or "to continue to employ the alien . . . knowing the alien is (or has become) an unauthorized alien." *Id.* §1324a(a)(2). 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).

An employer that knowingly hires or continues in employment an alien who is unauthorized to work is subject to increasing civil fines. *Id.* §1324a(e)(4)(A). An employer that engages in a "pattern or practice" of knowingly hiring unauthorized aliens is subject to criminal sanctions. *Id.* §1324a(f)(1). Such an employer is subject to a fine of up to $3,000 with respect to each such alien and may be "imprisoned for not more than six months for the entire pattern or practice, or both." *Id.*

IRCA also created a new "I-9" process for determining a prospective employee's work-authorization status. It is unlawful for an employer to "hire for employment in the United States an individual without" verifying his or her authorization to work in the United States. *Id.* §1324a(a)(1)(B). An employer must attest on an I-9 form that it has verified that the employee is authorized to work by examining certain designated documents that separately or in combination demonstrate authorization to work in the United States. *See* §1324a(b)(1)(A).[9] An employer that fails to comply with these paperwork requirements is subject to a civil fine. *Id.* §1324a(e)(5).

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[9] Specifically, an employer must either examine the U.S. passport or resident alien card of an applicant for employment, or examine a social security card or other document evidencing employment authorization coupled with a document establishing the identity of the individual (such as a state-issued driver's license or identification card). 8 U.S.C. §1324a(b)(1)(B)-(D).

At the same time, an employer that complies in good faith with the verification requirements has established a defense to the charge that it knowingly employed an unauthorized alien. *Id.* §1324a(a)(3).[10]

To ensure the integrity of the system for verification of employment authorization, Congress also enacted certain criminal penalties for the creation and use of forged documents establishing authorization to work in the United States. *See* Pub. L. No. 99-603, §103(a); 18 U.S.C. §1546(a) (prescribing criminal penalties for the forgery, counterfeiting, or use of a forged "document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States"). Employees are also required to attest under penalty of perjury that they are authorized to work in the United States, and there are criminal penalties for those who make a false attestation. *See*, *e.g.*, 8 U.S.C. §1324a(b)(2); 18 U.S.C. §1546(b)(3). Congress directed that employees' attestations may be used and retained only for purposes of assuring compliance with specified federal laws. 8 U.S.C. §1324a(b)(5); *see also id.* §1324a(b)(4); 8 C.F.R. §274a.2(b)(4). In addition, Congress has enacted civil penalties for those who use forged, altered, or falsely made documents in the work-authorization verification process. 8 U.S.C. §1324c(a), (d)(3).

6. The effect of this scheme is that where an employer fails to verify the work authorization of an alien in good faith and knowingly hires an unauthorized alien, it is sub-

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[10] In 1996, Congress established three "pilot programs" for status verification in which employers could "[v]oluntar[il]y elect[]" to participate. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, §§401, 402. The only pilot program still in existence is an Internet-based program called "E-Verify." *Id.* §403. Employers that choose to participate in the program must still use the I-9 form. *Id.*

ject to increasing sanctions, including criminal penalties. An unauthorized worker, however, is not subject to criminal sanctions merely for seeking or obtaining work. Only when employees make or use false documents or provide a false attestation are they subject to federal criminal sanctions (and employees' attestations may only be used by the federal government in enforcing certain federal statutes, 8 U.S.C. §1324a(b)(5)). Congress' comprehensive scheme for regulation of unauthorized workers thus does not permit (and, indeed, Congress rejected) criminal sanctions for unauthorized work alone. This approach to unauthorized work is consistent with a broader pattern in the INA, which includes a determination by Congress not to criminalize unlawful presence in the United States. *Criminalizing Unlawful Presence: Selected Issues*, Congressional Research Service Report RS22413, at 1 (May 3, 2006) (under federal law, "unlawful presence is only a ground for deportation and is not subject to criminal penalty").

Congress has instead regulated unauthorized work through a complex set of administrative immigration consequences. An alien who engages in unauthorized work (as well as one who enters unlawfully) may be removable. 8 U.S.C. §1227(a)(1)(C)(i). Whether an alien is removable is determined in federal removal proceedings, and such federal proceedings are the "sole and exclusive procedure for determining whether an alien may be . . . removed from the United States." *Id.* §1229a(a)(3). An alien may apply, however, for various forms of relief from removal, *id.* §1229a(c)(4), including asylum, *id.* §1158, cancellation of removal, *id.* §1229b, and adjustment of status to that of a lawful permanent resident, *id.* §1255.

In addition, although aliens who have engaged in unauthorized work are generally barred from adjusting their status to that of a lawful permanent resident, §1255(c)(2),

Congress has enacted exceptions to this rule. *See*, *e.g.*, 8 U.S.C. §1255(c)(2) (excepting immediate relatives of U.S. citizens from the bar to adjustment of status for aliens who engage in unauthorized work); §1255(k) (permitting an alien who is eligible for certain employment-based visas to adjust status to that of a lawful permanent resident despite having engaged in unauthorized work); §1255(i) (permitting certain aliens who have engaged in unauthorized work, entered without inspection, or who otherwise failed to maintain lawful status to adjust status to that of a lawful permanent resident if they were the beneficiary of a relative petition under §1154 or an application for a labor certification under §1182(a)(5)(A) filed before April 30, 2001); Nicaraguan Adjustment and Central American Relief Act ("NACARA"), Pub. L. No. 105-100, §202 (1997), Adjustment of Status for Certain Nationals of Nicaragua and Cuba, 63 Fed. Reg. 27,823 (May 21, 1998) (permitting adjustment of status of certain Nicaraguan and Cuban nationals); Haitian Refugee Immigration Fairness Act ("HRIFA"), Pub. L. No. 105-277, §902 (1998), Adjustment of Status for Certain Nationals of Haiti, 64 Fed. Reg. 25,756 (May 12, 1999) (permitting adjustment of status of certain Haitian nationals); Chinese Student Protection Act, Pub. L. No. 102-404, §2 (1992) (permitting adjustment of status of certain Chinese nationals). These exceptions evidence congressional priorities in setting the immigration policy of the United States, including a focus on family unity (§1255(c)(2), (i)), attracting immigrants with special skills (§1255(i), (k)), and providing safe haven to those fleeing certain countries (NACARA).

B. Arizona's Severe Criminal Sanctions For Unauthorized Workers Are Preempted By Congress' Comprehensive Scheme For Regulating Unauthorized Workers

Section 5(C)'s criminal sanctions for unauthorized work impose a sanction that Congress carefully excluded

from its comprehensive scheme for regulating unauthorized employment, and reflect an attempt by Arizona to implement its own immigration policy. They are thus preempted.

1. There is "clear evidence," *Buckman*, 531 U.S. at 352, that "Congress intended to centralize all authority over" the solicitation or acceptance of unauthorized employment "in one decisionmaker: the Federal government." *Freightliner Corp v. Myrick*, 514 U.S. 280, 286 (1995). As set forth above, Congress granted the Attorney General the sole authority to determine who is unauthorized to work and created a complex and nuanced scheme of employer sanctions and administrative immigration consequences for unauthorized workers, administered by the federal government, designed to deter unlawful immigration while achieving other important goals of federal immigration policy.

S.B. 1070 has no place in this carefully calibrated scheme. As this Court has recognized, "[w]here a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, then [a] pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action." *Isla*, 485 U.S. at 503. Here, Congress has taken "action" by creating civil and criminal sanctions for knowing employment of unauthorized workers; civil and criminal sanctions for false attestations of authorized status; civil and criminal sanctions for misuse and forgery of work authorization documents; and a complex set of administrative immigration consequences for unauthorized work that contain carefully considered exceptions. *See supra* Part I.A.5-6. Congress has thus not, contrary to Petitioners' contentions, been "silent with respect to penalties on unauthorized workers." Pet. Br. 53-54,

55.[11] Congress has spoken with a comprehensive scheme regulating unauthorized workers that specifically excludes criminal sanctions for unauthorized work and that contains exceptions even from some administrative immigration consequences.

For this reason, Petitioners' reliance on *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002), is flawed. Pet. Br. 55. *Sprietsma* held that "the Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats" did not bar state law tort suits for injuries that might have been averted by a propeller guard. *Id.* at 65. It nonetheless recognized that a decision not to impose a federal requirement would have "as much preemptive force as a decision *to* regulate" if it reflected a federal "determination that the area is best left *un*regulated," but found that the Coast Guard had made no such determination. *Id.* at 66. Here, by contrast, IRCA reflects a congressional determination to regulate employment of unauthorized aliens primarily by imposing sanctions on employers and on employees who commit fraud, and by *not* imposing criminal sanctions on unauthorized aliens who merely work or seek employment. Arizona may not undermine that determination.

2. Arizona's criminal sanctions on unauthorized workers also "frustrate" the purposes of Congress. *CSX Transp.*, 507 U.S. at 663. Arizona's criminal sanctions on

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[11] Nor do *amici* contend that Congress meant "to leave those who unlawfully seek employment entirely immune" or to enact "a congressional policy that no consequences should follow from unauthorized work by aliens." Pet. Br. 55, 57. But Congress did make a considered judgment that, as part of an overall federal immigration policy, unauthorized work should only lead to *criminal* consequences when coupled with fraud of some kind, and that some aliens should be exempt from some of the administrative immigration consequences for unauthorized work. *See supra* Part I.A.5-6.

unauthorized employees are—in contradiction to Congress' view that *employer* sanctions must be the centerpiece of any "humane" or "credible" policy to deter unlawful immigration—substantially harsher than federal law permits even against knowing *employers* of unauthorized workers. Section 5(C) provides for up to six months of imprisonment, a $2,500 fine, and three years probation for a *single* instance of knowingly applying for, soliciting in a public place, or performing work without authorization. S.B. 1070 §5(C), (F); Ariz. Rev. Stat. §13-707(A)(1). No federal criminal sanctions may be imposed on a knowing employer unless a prosecutor establishes a "*pattern or practice*" of violations. 8 U.S.C. §1324a(f)(1) (emphasis added). The employer may be imprisoned for no more than six months for the "entire pattern or practice," regardless of how many individual unauthorized workers it has hired. *Id.* The severity of Arizona's chosen penalties frustrates Congress' objective of deterring unlawful immigration while decreasing the imbalance between the consequences for employers and employees that had led to exploitation. *CSX Transp.*, 507 U.S. at 663.

Moreover, Section 5(C) runs roughshod over Congress' calibrated scheme of administrative sanctions. Congress has not just remained "silent," Pet. Br. 53-54, on unauthorized workers, but repeatedly rejected calls for criminal sanctions for unauthorized work, specifically created criminal sanctions for misuse and forgery of work authorization documents, and affirmatively acted to exempt certain immigrants from some administrative immigration consequences for unauthorized work. *See supra* Part. I.A.5-6. Under Section 5(C), immigrants may be subject to severe criminal sanctions despite Congress' determination that criminal sanctions are not appropriate and, indeed, that in some cases even denial of eligibility to become a legal resident is inappropriate. Where the federal government has struck a "delicate balance of

statutory objectives," it "can be skewed by" more severe state enforcement of federal law. *Buckman*, 531 U.S. at 348; *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003) (State law pre-empted where it sought "to use an iron fist where the" federal government "ha[d] consistently chosen kid gloves."); *Crosby*, 530 U.S. at 380 (State law pre-empted where it was inconsistent with the federal government's "calibration of force."). Arizona may not adopt severe sanctions that undermine the delicate balance Congress struck.[12]

3. Section 5(C)'s criminal sanctions, which fall exclusively on foreign nationals, also intrude on Congress' supreme power "in the general field of foreign affairs, including power over immigration, naturalization and deportation." *Hines*, 312 U.S. at 62. This Court has recognized that:

> One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government. . . .

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[12] In arguing that the provisions of S.B. 1070 are not preempted, Petitioners' *amicus* American Unity Legal Defense Fund misunderstands the significance of Arizona's sanctions being more severe than those Congress chose. *Amicus* argues that Congress wanted vigorous, not tempered, enforcement of the immigration laws. Brief of Amicus American Unity at 8-9. The question is not, however, whether the sanctions actually contained in the immigration laws should be vigorously enforced, but whether Arizona can choose to impose different and more severe sanctions that Congress has determined have no part in its comprehensive immigration scheme.

Id. at 64 (internal quotation marks omitted). Because the regulation of foreign nationals is so closely intertwined with Congress' authority over foreign affairs, "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Torao Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948). "Where [the federal government] acts, and the state also acts on the same subject, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." *Hines*, 312 U.S. at 66. Whatever might be the result had Congress not acted to comprehensively regulate unauthorized work, because it has done so, Arizona's law "must yield." *Id.*

Petitioners erroneously contend, relying on *DeCanas v. Bica*, 424 U.S. 351 (1976), and *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968 (2011), that, even though Congress has acted to regulate comprehensively unauthorized work by foreign nationals, Arizona retains the authority to regulate employment within its state by imposing criminal sanctions on unauthorized aliens. *See* Pet. Br. 54. This Court has never held, however, that a state is free to impose sanctions directly on unauthorized *aliens*, rather than only on employers doing business in the state. *Cf. DeCanas*, 424 U.S. at 363 ("the predominance of federal interest in the fields of immigration and foreign affairs" was not implicated because "the state law . . . operates only on local employers"); *id.* at 352, 357 (state statute imposing sanctions on "*employer*" that "knowingly employ[s] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers" (emphasis added)); *Whiting*, 131 S.Ct. at 1976 (statute "allow[ing] Arizona courts to suspend or revoke the licenses necessary to do business in the State if an employer knowingly or intentionally employs an unau-

thorized alien"). Section 5(C), by contrast, imposes sanctions directly (and only) on foreign nationals.

Having adopted a statute that regulates only foreign nationals in an area already comprehensively regulated by Congress, a state cannot escape preemption simply by pointing to some tangential effect on a local state interest. In *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Insurance Commissioner of California argued that a disclosure statute aimed at insurance companies that issued policies to Holocaust survivors was justified by "'legitimate consumer protection interests' in knowing which insurers have failed to pay insurance claims." *Id.* at 425. This Court noted, however, that the limitation of the law to "policies issued by European companies, in Europe, to European residents, at least 55 years ago . . . raises great doubt that the purpose of the California law is an evaluation of corporate reliability in contemporary insuring in the State." *Id.* at 426. As it was apparent that the state statute's true purpose was to regulate foreign affairs, and to "use an iron fist where the President ha[d] consistently chosen kid gloves," the statute was preempted. *Id.* at 427.

S.B. 1070 itself shows that the sanctions are not aimed at the regulation of employment but were intended primarily to regulate in the area of immigration. The plain wording of the statute states that the provisions of S.B. 1070 "are intended to work together to discourage and deter the unlawful entry and presence of aliens" and make "attrition through enforcement the public policy of all state and local government agencies in Arizona." S.B. 1070 §1. Arizona legislators who supported the bill vigorously stated that their primary goal was to deter and punish unlawful immigration. Representative Steve Montenegro emphasized that "what this bill does is that it tries to go to the root of the problem by trying to deter

illegal immigration to the state." Third Reading of S.B. 1070, Arizona House of Representatives, April 13, 2010. Representative David Gowan stated that the bill would send a message to aliens: "Stop crossing the border illegally." Third Reading of S.B. 1070, Arizona House of Representatives, April 13, 2010. Senator Ron Gould argued that the bill was designed to protect the state of Arizona from "foreign invasion." Final Reading of S.B. 1070, Arizona Senate, April 19, 2010. Where Congress has adopted a comprehensive scheme for regulating the behavior of foreign nationals, Arizona is not free to adopt its own policy for "deter[ring] the unlawful entry and presence of aliens." S.B. 1070 §1.

Petitioners also mistakenly argue that Congress' interest does not predominate simply because Arizona's statute applies only to persons the federal government has declared are ineligible to work in this country. Pet. Br. 56. But the federal government's predominant interest in the regulation of foreign affairs and immigration is not eviscerated simply because an alien is unlawfully present in the United States. The regulation of immigration encompasses the regulation of those who enter unlawfully, overstay a visa, or violate other visa restrictions. Aliens who initially enter unlawfully or overstay a visa may become lawful residents of the United States, and it is undisputed that the federal government's authority to determine the circumstances under which they may do so (or under which they may be removed) is exclusive. 8 U.S.C. §1229a(a)(3) (federal removal proceedings are "sole and exclusive procedure for determining whether an alien may be . . . removed from the United States"). This is particularly true in areas of immigration law that directly implicate the treaty obligations of the United States: for example, aliens who are placed in removal proceedings may be eligible for asylum or withholding of removal if they establish that they are refugees, or for

relief under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. 8 U.S.C. §1158; *see also* 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6223 (1968).

Arizona's argument, instead, is simply a variation on the contention that because Congress has made unauthorized work unlawful, Arizona can impose any sanction on such work, no matter how severe or how clearly inconsistent with a comprehensive congressional scheme for the regulation of immigration. As demonstrated above, however, even in an area in which the authority of Congress is not generally exclusive, a state statute is preempted when it creates a sanction that Congress rejected in comprehensively regulating the field. Arizona has not only chosen a sanction that Congress rejected, it has done so in an area, the regulation of foreign nationals, in which federal power is at its greatest. Section 5(C) is therefore impliedly preempted.

II. *WHITING* DOES NOT GOVERN THIS CASE

Petitioners and their *amici* mistakenly argue that *Chamber of Commerce of the U.S. v. Whiting*, 131 S.Ct. 1968 (2011), requires that Section 5(C) not be preempted. In *Whiting*, this Court held that an Arizona statute requiring the revocation of business licenses of employers that knowingly employ unauthorized aliens was not preempted by IRCA. *Whiting*, however, does not support the contention that Section 5(C) is saved from preemption.

First, *Whiting* addressed only the Legal Arizona Workers Act of 2007, an Arizona statute providing for the revocation of state licenses from *employers* that "knowingly employ an unauthorized alien." Ariz. Rev. Stat. §23-212(A), (F)(2). *Whiting*, 131 S.Ct. at 1970. It did not address the authority of Arizona to impose sanctions on

unauthorized aliens. *Whiting* thus did not have reason to consider whether Arizona had the authority to impose criminal sanctions on unauthorized aliens, rather than on local employers. As the power of a state to regulate its alien inhabitants is severely circumscribed, *Whiting* does not dictate the result in this case. *See Hines*, 312 U.S. at 66; *Takahashi*, 334 U.S. at 420.

Second, unlike in *Whiting*, no savings clause preserves Arizona's authority to impose criminal sanctions on unauthorized aliens. IRCA contains an express preemption clause governing the scope of preemption of state statutes imposing employer, but not employee, sanctions. Section 1324a(h)(2) provides that "[t]he 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." The Legal Arizona Workers Act of 2007, upheld in *Whiting*, required the revocation of "licenses" of employers that knowingly employ unauthorized aliens. Ariz. Rev. Stat. §23-212(A), (F)(2). This Court held that Arizona's law requiring revocation of licenses was a "licensing law." *Whiting*, 131 S.Ct. at 1981. It therefore "f[ell] well within the confines of the authority Congress chose to leave to the States." *Id*. As the express preemption provision does not address sanctions on *employees*, and as Section 5(C) is undisputedly not a licensing law, the savings clause cannot save Section 5(C) from preemption.

Petitioners misconstrue the relevant analysis by arguing that because IRCA's express preemption provision speaks of state laws imposing sanctions on "those who employ, or recruit, or refer for a fee for employment, unauthorized aliens" but not laws imposing sanctions on unauthorized aliens, such laws are not preempted. But the existence of an express preemption provision 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, 869-872 (2000); *see also Buckman*, 531 U.S. at 352-53; *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008); *Freightliner*, 514 U.S. at 289; *Wyeth*, 555 U.S. at 609 (Alito, J., dissenting); *Rush Prudential HMO v. Moran*, 536 U.S. 355, 392-93 (2002) (Thomas, J., dissenting); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 547-48 (1992) (Scalia, J, dissenting). When, as here, a state statute stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67, it is preempted regardless of whether there is also an express preemption provision that preempts other state statutes or rules. *See Geier*, 529 U.S. at 872, 886 (finding state tort action impliedly preempted despite conclusion that action was not preempted by express preemption provision).

That Congress focused only on state employer sanctions laws is logical. At the time IRCA was enacted, a number of states prohibited the employment of, for instance, people "not entitled to lawful residence in the United States" and imposed various sanctions on employers that violated the law.[13] These statutes were brought repeatedly to Congress' attention over the course of the legislative debates leading to IRCA.[14] Indeed, the California statute that this Court held

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[13] Cal. Lab. Code §2805 (1984); *see also*, *e.g.*, Conn. Gen. Stat. §31-51k (1972); Fla. Stat. §448.09 (1973); Kan. Stat. Ann. §21-4409 (1977); La. Rev. Stat. Ann. §23:995 (1985).

[14] *See*, *e.g.*, H.R. Rep. No. 94-506, at 7 (1975) ("many states have recognized the need for criminal sanctions against employers of illegal aliens"); *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).

in *DeCanas* was not preempted was one of the state statutes imposing penalties on employers for hiring unauthorized workers. *DeCanas* led quickly to calls for preemption of such state statutes, and it was shortly followed by the first IRCA precursors containing preemption provisions. *See* S. 2242, 95th Cong. §5(a)(3) (1977); H.R. 9531, 95th Cong. §5(a)(3) (1977). Congress did not legislate against a similar background of state sanctions on employees. And Congress early on in the legislative process dismissed the notion of imposing criminal sanctions on unauthorized aliens merely for seeking or performing work. *See supra* Part I.A.1-4. Congress thus had no occasion to expressly preempt state laws of the kind now enacted by Arizona, and the express preemption provision sheds no light on whether Section 5(C) is preempted.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

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