No. 09-115

IN THE

Supreme Court of the United States

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

v.

MICHAEL B. WHITING, *et al.*,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Amicus Curiae Service Employees International Union ("SEIU") is an international labor organization that represents more than two million working men and women employed in the private and public sectors. Many of SEIU's members are foreign-born American 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 on "immigration status."[1]

This case presents an important question concerning the meaning of the express preemption provision and its licensing exception in the employer sanctions section of the Immigration Reform and Control Act of 1986

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

("IRCA"), namely, the nature and extent of IRCA's preemptive force on State and local laws that, like that federal law, impose sanctions on employers who hire unauthorized aliens.[2] The SEIU represents workers employed in nearly every state and locality in the United States. The SEIU therefore has a strong interest in the uniform application of federal law prohibiting the employment of unauthorized aliens, as well as in the enforcement of those provisions of IRCA that protect workers from unlawful discrimination on the basis of national origin or citizenship during the employment verification process.

STATEMENT

On July 2, 2007, the Governor of Arizona signed into law the Legal Arizona Workers Act, Ariz. Rev. Stat. §§ 23-211 to 23-216. Among other things, the Arizona law: (i) prohibits employers in the State from "knowingly employ[ing] an unauthorized alien," *id.* § 23-212(A); (ii) provides that where an employer violates that prohibition, "the [state] court … may order the appropriate [state] agencies to suspend all licenses … that are held by the employer for not to exceed ten business days," *id.* § 23-212(F)(1)(d); and (iii) provides further that for a second violation, "the [state] court *shall* order the appropriate [state] agencies to permanently revoke all licenses that are held by the employer," *id.* § 23-212(F)(2) (emphasis added).

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[2] *Amicus* submits this brief to address only the first question presented in this case: "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)." Cert. Pet., i. *Amicus* supports the position of petitioners on the other questions but does not write separately on them.

In this regard, the Arizona law defines the critical term "license" as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in th[e] state," *id.* § 23-211(9)(a), and in so doing adds that the term "license" includes "[a]rticles of incorporation" and "a certificate of partnership, a partnership registration or articles of organization," but excludes "[a]ny professional license," *id.* § 23-211(9)(b)&(c).

Petitioners sought to enjoin the Arizona law from going into effect, contending that the law's employer sanctions provisions are preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. 99-603, 100 Stat. 3359. Specifically, Petitioners argued that the Arizona law is preempted by IRCA's express preemption provision, 8 U.S.C. § 1324a(h)(2), and is not saved by that provision's parenthetical exception for "licensing and similar laws." *Ibid.* The district court rejected this argument, concluding that the Arizona law "falls within the plain meaning of IRCA's savings clause," and denied Petitioners' request for an injunction. *Ariz. Contrs. Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036, 1045-46 (D. Ariz. 2008).

On appeal, the Ninth Circuit held that the term "license" in the parenthetical exception to IRCA's preemption provision refers to any "permission, usually revocable, to commit some act that would otherwise be unlawful." Pet. App. 17a (quoting *Black's Law Dictionary* 938 (8th ed. 2004)). On this basis, the Ninth Circuit concluded that the Arizona law's "broad definition of 'license' is in line with the terms traditionally used and falls within the savings clause." *Ibid.*

SUMMARY OF ARGUMENT

Amicus address the first question presented in this

case: whether the Legal Arizona Workers Act's sanctions on employers who hire unauthorized aliens are preempted by IRCA's express preemption provision or saved by that provision's licensing-law exception.

When IRCA's preemption provision and that provision's licensing exception are construed together with the text of the law as a whole, it is apparent that the licensing exception saves only those State and local laws that are the same in nature, purpose, and effect as the State and local licensing laws Congress saved from preemption in the IRCA "Conforming Amendments to [the] Migrant and Seasonal Agricultural Worker Protection Act," ("AWPA") IRCA § 101(b), 100 Stat. 3359, 3372. AWPA is a federal licensing statute that is designed to, among other things, protect farmers and other agricultural business persons who do not hire their own employees—but who instead must rely on labor contractors or brokers to supply them with qualified workers—from unfit suppliers of such labor. The State and local licensing laws saved from preemption by the IRCA Conforming Amendments have the following characteristics:

First, the State or local licensing law may impose a sanction on an employer for employing, recruiting or referring unauthorized aliens only on the basis of a prior determination by the appropriate Federal enforcement authority that the employer's action was in violation of IRCA.

Second, the sole sanction that may be imposed by the State or local licensing law is denial, suspension or revocation of the license; the State or local law may not impose other civil or criminal sanctions, such as fines or imprisonment, for IRCA violations.

Finally, the State or local licensing law must address employment issues as a central factor in determining

> the licensee's "'fitness to do business [],' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. No. 99-682, pt. I, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662. In other words, the licensing law must be one that, like the farm labor contractor laws, is centrally concerned with the licensee's fitness to engage *in the particular business of* hiring, recruiting or referring employees. A law licensing entities that engage in the hiring of labor for supply to others, or in the brokering of laborers, would be the paradigmatic example of such a law.

Because the Arizona law does not have the first or last of these characteristics, it is not a law of the type that is saved by the licensing exception to the IRCA general preemption provision and therefore is preempted.

ARGUMENT

I. THE LICENSING EXCEPTION TO THE IRCA PREEMPTION PROVISION SAVES FROM PREEMPTION ONLY THOSE STATE AND LOCAL LICENSING LAWS THAT ARE THE SAME IN NATURE, PURPOSE, AND EFFECT AS THE STATE AND LOCAL LICENSING LAWS CONGRESS SAVED FROM PREEMPTION IN THE IRCA "CONFORMING AMENDMENTS"

The Immigration Reform and Control Act of 1986 ("IRCA") both makes it "unlawful for a person or other entity … to hire, or to recruit or refer for a fee, for employment … an unauthorized alien" in specified circumstances, 8 U.S.C. § 1324a(a), and establishes a finely balanced enforcement scheme that accommodates important competing interests.

In particular, the IRCA enforcement scheme accommo-

dates the interests of employers in being free from strict liability, harsh penalties and burdensome regulation by, *inter alia*, including a scienter requirement (that the employer "knowing[ly]" hired an unauthorized alien), *id.* § 1324a(a)(1)(A); imposing moderate, rather than severe, penalties on violators, *id.* § 1324a(e)(4); and limiting the employer's affirmative duty to ascertain an employee's immigration status to the initial hiring phase of the employment relationship, *id.* § 1324a(b). And, IRCA accommodates the interests of employees who face the risk of discrimination on the basis of alienage by balancing § 1324a's ban on knowingly hiring unauthorized workers with § 1324b's prohibition against discrimination in employment on the basis of national origin or citizenship status. *Id.* § 1324b(g)(2)(B). In that regard, IRCA establishes a carefully calibrated scale of "civil money penalt[ies] for hiring, recruiting, and referral violations," 8 U.S.C. § 1324a(e)(4), that is precisely balanced with the civil money penalties for violations of IRCA's employment discrimination provision. 8 U.S.C. § 1324b(g)(2)(B).

Congress proceeded in this nuanced fashion on the understanding that a contrary regime that heavily penalized the employment of unauthorized aliens and did not equally penalize discrimination against authorized aliens would improperly skew employer decisionmaking: employers, acting out of economic self-interest, would be tempted to minimize their risk of being subjected to IRCA's employer sanctions by rejecting foreign-seeming job applicants without troubling to determine whether each particular applicant was or was not authorized to work in the United States. And Congress, in recognition that IRCA's carefully calibrated and balanced remedial scheme could not survive if the States and localities were free to strike their own balance of the competing interests informing the statute, expressly provided that IRCA "preempt[s] any State or local law imposing civil or criminal sanctions … upon those who

employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

At the same time, IRCA's preemption provision contains a parenthetical exception saving State or local sanctions for employing, recruiting or referring for a fee unauthorized aliens imposed "through licensing and similar laws." *Ibid.*[3] The critical question presented in this case is whether, as the Ninth Circuit believed, that is an expansive exception that overrides the general preemptive effect of IRCA so as to allow States and localities to freely adopt their own broadly applicable regimes for regulating unauthorized-alien hiring that are incompatible with IRCA's regulatory regime. The answer to that question is that the IRCA licensing exception does not allow the States and localities to adopt their own such regimes.

It is a well-settled principle of statutory construction that where a general provision is subject to an exception the "act is to be given such construction as will permit both the enacting clause and the proviso to stand and be construed together with a view to carry into effect the whole purpose of the law." *White v. United States*, 191 U.S. 545, 551 (1903), citing 1 Kent, *Commentaries on American Law* 463 (1826) ("The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail.").

The Ninth Circuit did not even pay lip service to its obligation to construe IRCA's preemption provision and

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[3] IRCA's preemption provision states:

> "Preemption. 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).

its exception together with a view to carrying into effect the whole purpose of the law. Instead, the Ninth Circuit sought only to construe the term "licensing" in isolation. And the Court of Appeals, relying entirely on a single dictionary definition, held that the term "licensing" encompasses all State or local laws concerning "a governmental body's process of issuing a license" – in the sense of granting "a permission … to commit some act that would otherwise be unlawful" – and that all such laws "fall[] within the savings clause" and are "therefore exempt[] … from express preemption." Pet. App. 17a (internal quotations, brackets and citations omitted).

Under the Ninth Circuit's reading of IRCA's preemption provision and its exception, State and locals laws may *not* impose *any* sanction "upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens" through *non*licensing laws, but States and localities *may* freely impose the most severe possible sanctions on employers so long as they do so through any of the myriad State or local laws granting businesses "permission … to commit some act that would otherwise be unlawful." *Ibid.* That reading of the licensing exception is untenable, for it negates IRCA's preemption provision in practical terms. It does so by granting State and local governments *carte blanche* to proceed on a totally arbitrary basis to impose sanctions that are discordant with IRCA's carefully calibrated and balanced remedial scheme on *virtually all employers* "for hiring, recruiting, and referral violations," 8 U.S.C. § 1324a(e)(4), inasmuch as virtually every employer is a "licensee" in the all but infinitely expansive sense of that term that Arizona adopted by including any business that must have articles of incorporation or other such generic permissions to do business within the ambit of its law.

In sum, the Ninth Circuit's reading of the statute ignores the rule that exceptions are not be read to under-

mine the enacting clause but rather so as to "permit both … to stand … together," *White*, 191 U.S. at 551; "ignore[s] the rule that, because statutes are not read as a collection of isolated phrases, '[a] word in a statute may or may not extend to the outer limits of its definitional possibilities,'" *Abuelhawa v. United States*, 556 U.S. ___, 129 S.Ct. 2102, 2103 (2009) (citations omitted), quoting *Dolan v. Postal Serv.*, 546 U.S. 481, 486 (2006); and ignores the salient point that this Court has "stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *United States Nat. Bank of Ore. v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993), quoting *United States v. Heirs of Boisdoré*, 8 How. 113, 122 (1849).

The Ninth Circuit's error is not only manifest, it is unwarranted. For there is a way to read IRCA's preemption provision and its licensing exception in a manner that heeds the pertinent principles of statutory construction and that, in so doing, preserves rather negates the essence of Congress's judgment that IRCA's employer sanctions regulatory regime should be finely calibrated and balanced so as to avoid tempting employers into national origin or citizenship discrimination. As we show in what follows, under these principles, the proper construction of IRCA's general preemption provision and its licensing exception, taking the two "together with a view to carry into effect the whole purpose of the law," is this: the licensing exception saves from IRCA preemption only those State and local "licensing and similar laws" that are the same in nature, purpose, and effect as the State farm labor contractor licensing laws Congress saved from preemption, as compatible with IRCA's carefully calibrated and balanced remedial scheme, in IRCA's "Conforming Amendments to [the] Migratory and Seasonal Agricultural Worker Protection Act," IRCA § 101(b), 100 Stat. 3359, 3372.

AWPA is a federal licensing law that is designed to, among other things, protect farmers and other agricultural business persons who do not hire their own workers—but who instead rely on labor contractors or brokers to supply them with qualified workers—from unfit suppliers of such labor. AWPA, prior to IRCA, prohibited farm labor contractors from hiring, recruiting or referring unauthorized aliens, AWPA § 106(a), 96 Stat. 2589-90, while saving from federal pre-emption "appropriate State [farm labor contractor licensing] law and regulation," *id.* at § 521, 96 Stat. 2599. And, as developed below, IRCA's "Conforming Amendments" changed AWPA—and, by extension, the "appropriate" State laws saved from AWPA preemption—in ways that reveal the purpose and meaning of the licensing exception to IRCA's general preemption provision. In particular, as we develop below, the Conforming Amendments reveal that the State and local licensing laws that the IRCA Congress intended to save through the licensing exception have three characteristics:

> *First*, the State or local licensing law may impose a sanction on an employer for employing, recruiting or referring unauthorized aliens only on the basis of a prior determination by the appropriate Federal enforcement authority that the employer's action was in violation of IRCA.
>
> *Second*, the sole sanction that may be imposed by the State or local licensing law is denial, suspension or revocation of the license; the State or local law may not impose other civil or criminal sanctions, such as fines or imprisonment, for IRCA violations.
>
> *Finally*, the State or local licensing law must address employment issues as a central factor in determining the licensee's "'fitness to do business [],' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to

refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. No. 99-682, pt. I, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662. In other words, the licensing law must be one that, like the farm labor contractor laws, is centrally concerned with the licensee's fitness to engage *in the particular business of* hiring, recruiting or referring employees. A law licensing entities that engage in the hiring of labor for supply to others, or in the brokering of laborers, would be the paradigmatic example of such a law.

II. THE IRCA CONFORMING AMENDMENTS AND THEIR STATUTORY BACKGROUND

A. The Migrant and Seasonal Agricultural Worker Protection Act of 1983

IRCA's conforming amendments to the Migrant and Seasonal Agricultural Worker Protection Act, as we have indicated, provide the key to determining the scope and meaning of the IRCA general preemption provision's licensing exception. In order to understand the changes that the IRCA conforming amendments made to AWPA and their significance, it is first necessary to understand what AWPA as it was originally enacted provided.

AWPA, like its predecessor, the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), Pub. L. 88-582, 78 Stat. 920 (1964), comprehensively regulated farm labor contractors, defined as "any person … who, for any money or other valuable consideration paid or promised to be paid … recruit[s], solicit[s], hir[es], employ[s], furnish[es], or transport[s] any migrant or seasonal agricultural worker." AWPA, §§ 3(6) & (7), 96 Stat. 2584.

AWPA required farm labor contractors to obtain a certificate of registration from the Secretary of Labor and to carry the certificate of registration "at all times while

engaging in farm labor contracting activities." *Id.* at § 101(c), 96 Stat. 2587. The Secretary of Labor could "refuse to issue or renew, or … [could] suspend or revoke a certificate of registration" if a farm labor contractor failed to comply with the substantive requirements of the Act, such as the requirements relating to the payment of wages, *id.* at § 202, 96 Stat. 2591, and the provision of housing and safe transportation, *id.* at §§ 203, 401, 96 Stat. 2591, 2594, and the requirements relating to convictions for certain crimes, including designated felonies, *id.* at § 103(a)(5), 96 Stat. 2588.

AWPA also permitted the Secretary of Labor to institute administrative proceedings within the Department of Labor against a farm labor contractor's certificate of registration if the contractor violated AWPA's freestanding "prohibition against employing illegal aliens." *Id.* at § 106, 96 Stat. 2589-90. And, AWPA allowed the Secretary of Labor in those administrative proceedings to impose civil money penalties on farm labor contractors who employed unauthorized aliens. *Id.*, § 503, 96 Stat. 2596-97. In such actions, a Department of Labor administrative law judge would determine whether a farm labor contractor had in fact employed unauthorized aliens. *Ibid.*; *see also Garcia v. Sec'y of Labor*, 10 F.3d 276, 277 (5th Cir. 1993); *Counterman v. United States Dep't of Labor*, 776 F.2d 1247, 1248 (5th Cir. 1985) (reviewing ALJ decision under the FLCRA).

Of particular relevance here, AWPA – like its predecessor the FLCRA – provided that the federal farm labor contractor law "is intended to supplement state law, and compliance with this Act shall not excuse any person from compliance with appropriate State law and regulation." AWPA § 521, 96 Stat. 2599; *see also* FLCRA § 12, 78 Stat. 924. In *De Canas v. Bica*, 424 U.S. 351 (1976), this Court noted that this provision constituted "persuasive

evidence that the I[mmigration and] N[ationality] A[act] should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations in matters affecting employment of illegal aliens." *Id.* at 362. In other words, the *De Canas* Court concluded that the FLCRA "appropriate State law" provision constituted a non-preemption clause. Based on *De Canas*, prior to IRCA, at least eight States enacted statutes requiring the licensing or registration of farm labor contractors. *See* W. Gary Vause, *The Farm Labor Contractor Registration Act*, 11 STETSON L. REV. 185, 200 (1982). Some of these laws specifically included the knowing employment of an unauthorized alien as a ground for State action against a contractor's license or certificate of registration, *see, e.g.*, Or. Rev. Stat. § 658.440(2)(d) (1979); 43 Pa. Cons. Stat. § 1301.505 (1986), while others simply piggy-backed on federal farm labor contractor registration requirements, *see, e.g.*, Cal. Labor Code § 1690 (1986).

B. The Immigration Reform and Control Act's "Conforming Amendments to [the] Migrant and Seasonal Agricultural Worker Protection Act"

IRCA's "Conforming Amendments to [the] Migrant and Seasonal Agricultural Worker Protection Act," § 101(b), 100 Stat. 3372, harmonized IRCA's new general prohibition on the employment of unauthorized aliens with AWPA's preexisting prohibitions on the employment of illegal aliens by farm labor contractors. In so doing, Congress paid particular attention to two questions: What is the proper scope of authority of a farm labor contractor licensing body with regard to regulating the contractor's hiring of unauthorized aliens? And, what is the proper preemption rule with regard to State farm labor contractor licensing laws that parallel the federal licensing law in regulating the employment of unauthorized aliens?

As to the first question, IRCA's conforming amendments repealed the freestanding AWPA provision that made it a violation of AWPA for a farm labor contractor to "recruit, hire, employ, or use, with knowledge, the services of any individual who is an [illegal] alien[]," AWPA § 106(a), 96 Stat. 2589-90, repealed by IRCA § 101(b)(1)(B)(iii), 100 Stat. 3372. This amendement left farm labor contractors subject only to IRCA's prohibition of general application against "hir[ing], … recruit[ing] or refer[ring] for a fee … an unauthorized alien." 8 U.S.C. § 1324a(a). And, IRCA and its conforming amendments had two important effects on the Secretary of Labor's authority as licensor. Both result from AWPA provisions granting the Department of Labor only the administrative authority to adjudicate violations of, and levy civil penalties to enforce, rules of conduct unique to AWPA (as opposed to rules of conduct imported from other statutes), *see* AWPA § 503, 96 Stat. 2596 (civil money penalties may be imposed against "any person who commits a violation *of this Act*" (emphasis added)).

First, the Secretary of Labor could no longer make her own determination that a farm labor contractor had employed an illegal or unauthorized alien, but, pursuant to another of IRCA's conforming amendments, *see* IRCA § 101(b)(1)(B)(iii), 100 Stat. 3372, instead could only sanction a contractor that "*has been found* to have violated paragraph (1) or (2) of section 1324a(a) of Title 8," 29 U.S.C. § 1813(a)(6) (emphasis added), i.e., that has been found through the IRCA administrative adjudicatory process to "ha[ve] violated subsection (a) [of IRCA's employer sanctions provision]" by "hir[ing], recruit[ing] [or] refer[ring]" an unauthorized alien. 8 U.S.C. § 1324a(e)(3)).[4]

[4] IRCA delegated responsibility to the Attorney General to establish procedures for the administrative adjudication of complaints against employers for violations of IRCA's prohibition on the

Second, the Secretary of Labor could no longer levy civil money penalties on contractors who hired illegal aliens. Instead, after IRCA, the Secretary can only sanction a farm labor contractor who employs unauthorized aliens in violation of IRCA by "refus[ing] to issue or renew, or … suspend[ing] or revok[ing], a certificate of registration." 29 U.S.C. § 1813(a)(6).

As the Department of Labor helpfully summarized in its preamble to regulations implementing the IRCA changes to AWPA:

> "Enactment of IRCA made the prohibition against the knowing employment of unauthorized workers applicable to all employers. The prohibition became part of the Immigration and Nationality Act (INA) and was removed from [AW]PA. Determinations regarding the status of aliens are the responsibility of the Immigration and Naturalization Service (INS) and are subject to regulations issued by that agency. Accordingly, [AW]PA regulations are amended to reflect the changes required by IRCA. It should be noted, however, that a determination by INS that a farm labor contractor has knowingly employed an unauthorized alien is still a basis for DOL action regarding that contractor's certificate of registration." Migrant and Seasonal Agricultural Worker Protection Regulations, 54 Fed. Reg. 13326, 13326 (Mar. 31, 1989) (codified at 29 C.F.R. pt. 500).

That is, after IRCA, the Department of Labor can no

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employment of unauthorized aliens. IRCA § 101a(e), 100 Stat. 3365-66 (codified at 8 U.S.C. § 1324a(e)). Such complaints are heard by administrative law judges in the Office of the Chief Administrative Hearing Officer, a section of the Department of Justice's Executive Office for Immigration Review. 28 C.F.R. pt. 68. IRCA also required "the designation in the [Immigration and Naturalization] Service of a unit which has, as its primary duty, the prosecution of cases of violations of [8 U.S.C. § 1324a(a)]." IRCA § 101a(e)(1)(D), 100 Stat. 3366.

longer determine whether a farm labor contractor had employed illegal aliens, since such "[d]eterminations … are the responsibility of the Immigration and Naturalization Service (INS)." *Ibid.* And the Department of Labor can no longer issue civil money penalties against a farm labor contractor for employing unauthorized aliens, although IRCA made clear that it can still take "action regarding that contractor's certificate of registration." *Ibid.*

As to the second question, IRCA's conforming amendments to AWPA maintained AWPA's non-preemption clause for "appropriate State law and regulation" relating to the licensing of farm labor contractors. AWPA § 521, 96 Stat. 2599 (codified at 29 U.S.C. § 1871). Thus, IRCA's conforming amendments to AWPA's provisions express Congress's judgment to save from preemption, as compatible with IRCA's remedial scheme, State farm labor contractor licensing laws that conform to the AWPA and to IRCA itself with regard to licensors' authority to regulate the employment of unauthorized aliens. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648 (1990) ("Although [29 U.S.C. § 1871] permits States to supplement [AWPA]'s remedial scheme, it cannot be viewed as authorizing States to replace or supersede its remedies."). In contrast, IRCA's Conforming Amendments express Congress' judgment that State farm labor contractor licensing laws that do not so conform are not saved from preemption by the AWPA clause that saves "appropriate" State law and regulation. *Ibid.* ("[C]ongressional authorization of a federal remedy may affect the balance struck in state regulatory schemes.").

III. THE CORRECT READING OF THE LICENSING EXCEPTION IN THE IRCA PREEMPTION PROVISION TAKING PROPER ACCOUNT OF THE IRCA "CONFORMING AMENDMENTS" TO THE FARM LABOR CONTRACTOR LICENSING LAWS

As we will show in the succeeding sections, IRCA's con-

forming amendments to AWPA place two clear limits on the State farm labor contractor licensing laws that are saved from preemption by AWPA as amended by IRCA: (i) a limit on the imposition of licensing sanctions on an employer for the employment of unauthorized aliens to situations in which the employer "has been found to have violated [IRCA § 1324a(a)]" by the Federal agency charged with making such findings, 29 U.S.C. § 1813(a)(6); and (ii) a limit on the penalties that can be imposed against a farm labor contractor for employing unauthorized aliens to denial, suspension or revocation of a license.

Given that statutory guidance and the IRCA preemption provision's purpose, it follows that the IRCA preemption provision's licensing exception is to be read *in pari materia* with IRCA's conforming amendments to AWPA and governed by these same limits.

By the same token, given the guidance provided by the text of IRCA's preemption provision, IRCA's conforming amendments to AWPA, and the legislative history of federal farm labor contractor licensing law, it follows that the only "licensing" laws that are saved from IRCA preemption are licensing laws that, like AWPA and similar licensing laws regulating labor contractors and brokers, are centrally concerned with the licensee's fitness to engage *in the particular business of* hiring, recruiting, or referring employees.

A. The Required Predicate for "Imposing . . . Sanctions"

IRCA's conforming amendments to the AWPA licensing scheme and, by extension, to the "appropriate State [licensing] law[s] and regulation[s]" saved from AWPA preemption, limit the imposition of licensing sanctions for the employment of unauthorized aliens to situations in which the licensee "has been found to have violated

[IRCA § 1324a(a)]," 29 U.S.C. § 1813(a)(6), by the Federal agency charged with making such findings. The logic of IRCA as a whole and of its preemption provision in particular is that only State and local licensing laws that are in "conform[ity]" with IRCA in this regard are saved from preemption by the IRCA licensing exception.

IRCA amended AWPA and the "appropriate" State licensing laws saved by AWPA to ensure the integrity of the centralized Federal scheme for enforcing the prohibition on hiring unauthorized aliens created by IRCA. *See* Pet. Br. 28-34. IRCA was passed to ensure that "the immigration laws of the United States … be enforced vigorously and *uniformly*." IRCA, § 115, 100 Stat. 3384 (emphasis added). In that regard, IRCA created a carefully-crafted uniform process for adjudicating violations of IRCA's employer sanctions provisions. This process included prosecution by the Immigration and Naturalization Service, IRCA § 101a(e)(1)(D), 100 Stat. 3366, a hearing before an administrative law judge with expertise in matters relating to the employment of unauthorized aliens, *id.*, § 101a(e)(3), 100 Stat. 3366, the possibility of administrative appellate review by the Attorney General, *id.*, § 101a(e)(6), 100 Stat. 3367, and access to federal judicial review in the Court of Appeals, *id.*, § 101a(e)(7), 100 Stat. 3367. As the Department of Labor correctly recognized in repealing its own administrative process for judging whether a farm labor contractor had employed illegal aliens, after IRCA, "[d]eterminations regarding the status of aliens are the responsibility of the Immigration and Naturalization Service." 54 Fed. Reg. at 13326.

It follows from the detailed amendments to the Federal and State farm contractor licensing law, designed to protect the "uniform[ity]" of IRCA's centralized scheme for enforcing the prohibition on hiring unauthorized aliens, that IRCA's licensing exemption cannot properly be read

to save from preemption other State and local licensing laws that authorize their own processes for determining whether an employer hired unauthorized aliens. To the contrary, the conclusion that follows from reading IRCA's preemption provision and its licensing exception *in pari materia* with IRCA's conforming amendments to AWPA is that only State or local licensing laws that, like AWPA itself, only provide for the imposition of sanctions for IRCA violations where the licensee "has been found to have violated [IRCA § 1324a(a)]," 29 U.S.C. § 1813(a)(6), by the Federal agency charged with making such findings are saved from preemption.

B. The Type of "Sanctions" that May Be Imposed "Through Licensing and Similar Laws"

Under IRCA's conforming amendments to AWPA, the only sanction that may be imposed for IRCA violations through State or local farm labor contractor licensing laws is to "refuse to issue or renew, or … suspend or revoke" a license or registration, 29 U.S.C. § 1813(a)(6); a State or locality may not impose civil money penalties or imprisonment through its licensing laws. Again, there is every reason to conclude that only the State and local licensing laws that are in "conform[ity]" with IRCA in this regard are saved from preemption by IRCA licensing exception.

IRCA's amendments to AWPA stripped the Department of Labor of its authority to impose civil money penalties against farm labor contractors that employed unauthorized aliens and, by operation of AWPA's provision that saves only "appropriate State law[s]" from preemption, 29 U.S.C. § 1871, denied States the authority to issue civil money penalties against farm labor contractors for similar violations of State farm labor contractor licensing laws as well. The rationale for eliminating separate civil money penalties under AWPA and State farm labor contractor licensing laws

was to preserve the integrity of IRCA's carefully calibrated scale of civil money penalties. *See* Pet. Br. 6-8. In particular, IRCA precisely balanced its "civil money penalt[ies] for hiring, recruiting, and referral violations," 8 U.S.C. § 1324a(e)(4), with its civil penalties for violating IRCA's prohibition of employment discrimination based on national origin or citizenship status, 8 U.S.C. § 1324b(g)(2)(B).

Having conformed Federal and State farm labor contractor licensing law to IRCA's careful balance of civil penalties for employer sanctions violations and anti-discrimination violations by prohibiting civil money penalties for AWPA violations relating to the employment of unauthorized aliens, Congress most certainly did not intend the IRCA preemption provision's licensing exception to save from preemption State or local licensing laws that impose civil money penalties – including penalties well in excess of those authorized by IRCA – for hiring unauthorized aliens in violation of that licensing law.

Thus, IRCA's preemption provision and its licensing exception are properly to be read *in pari materia* with IRCA's conforming amendments as providing that to be saved from preemption a State or local licensing law may only permit the licensor to deny, suspend or revoke a license as a sanction for hiring unauthorized aliens and may not impose the sanction of civil money or criminal penalties.

C. The Type of "Licensing and Similar Laws" that are Saved from IRCA Preemption

IRCA's preemption provision and its licensing exception, when read against the background of "the provisions of the whole law, and … its object and policy," *United States Nat. Bank of Ore.*, 508 U.S. at 455, provides that the State and local licensing laws saved from IRCA preemption are the kind of licensing laws saved from AWPA

preemption as compatible with IRCA's remedial scheme in IRCA's conforming amendments to AWPA, i.e., licensing laws that make a regulated entity's employment practices a central factor in determining the entity's "'fitness to do business [],' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. No. 99-682, pt. I, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662. In other words, the licensing laws saved from preemption are the laws that are centrally concerned with the licensee's fitness to engage *in the particular business of* hiring, recruiting or referring employees—licensing laws for employers such as those in the business of labor contracting or brokering.

(i) While Arizona asserts that IRCA's preemption "savings clause is not tied to a limited definition of license," Opp. Cert. 15, the State then goes on to suggest, at least implicitly, that the savings clause is limited to State and local laws concerned with the granting of business licenses. That suggestion is certainly a sensible starting point for construing the savings clause, but it still leaves that clause at war with the IRCA preemption provision itself.

On Arizona's view, the licensing exception would give States and localities *carte blanche* to impose sanctions on any licensed employer that are vastly disproportionate to those provided for in IRCA. For example, while IRCA provides that the "civil penalty" for a first violation shall be "not less than $250 and not more than $2,000 for each unauthorized alien," 8 U.S.C. § 1324a(e)(4)(A), Arizona's interpretation would allow a State or local government to revoke any license held by the first-time violator, thereby putting the IRCA violator out of business. Indeed, on Arizona's view, nothing would prevent a State from taking the course pursued by South Carolina, "imput[ing] a[n] …

employment license … permit[ting] a private employer to employ a person in this State" upon "any person carrying on any employment," and then revoking this single-purpose license if the employer is found to have violated IRCA. *See* S.C. Code Ann. 41-8-20.

Arizona advances that view without offering any explanation—much less a rational one—as to why Congress would have intended to expose all licensed employers to draconian State and local sanctions for violating IRCA while protecting all unlicensed employer IRCA violators from any State or local sanction whatsoever. And Arizona's failure to do so is the plainest indication that there is no such explanation and that Congress could not possibly have intended that result.

Arizona's view is utterly incompatible with maintaining IRCA's meticulously balanced penalties for violations of its employer sanctions and anti-discrimination provisions. The IRCA conferees stated clearly that "[t]he antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context." H. Conf. Rep. No. 99-100 (1986), reprinted in 1986 U.S.C.C.A.N. 5840, 5842. In fact, Congress made the antidiscrimination provisions dependent on "the sanctions [being] in effect; if the sanctions are repealed …, the antidiscrimination provisions will also expire, the justification for them having been removed." *Id.* at 5842-43; *see* IRCA § 102(k)(1), 100 Stat. 3379. Obviously, neither IRCA's sanctions nor antidiscrimination provisions have been repealed. Rather, Congress has amended IRCA to precisely "conform[] [IRCA's] civil money penalties for anti-discrimination violations to those for employer sanctions," Immigration Act of 1990, Pub. L. 101-649, § 536, 104 Stat. 4978, 5055, making the graduated scales of penalties for first, second and repeat violations of each provision identical. *Compare* 8 U.S.C. §

1324a(e)(4)(A)(i)-(iii) *with* 8 U.S.C. § 1324b(g)(2)(B)(iv)(I)-(III).

There is no imaginable reason why Congress would have intended all employers who are subject to State or local business licensing laws – e.g., barbers, electrical contractors, restaurants, and commercial trucking firms – to be subject to disproportionately severe penalties for violating IRCA's employer sanctions provision (with no correspondingly heightened penalty for violating IRCA's anti-discrimination provisions), while entirely exempting from State and local sanctions employers not subject to state licensing – such as most retail, service and manufacturing firms. Arizona's reading of the exception to IRCA's preemption provision – as saving any business licensing law that includes sanctions for hiring unauthorized aliens – cannot be correct.

(ii) IRCA's preemption provision is expressly addressed to any "State or local law imposing civil or criminal sanctions … upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). The "licensing" exception to this provision is, therefore, best understood as limited to those licensing laws that grant permission to engage in a business activity for which hiring, recruiting or referring practices, including hiring, recruiting and referring practices with respect to unauthorized aliens, are central to the overall fitness determination.

Farm labor contractor licensing law provides the relevant paradigm. The fact that IRCA's conforming amendments to AWPA specifically preserved the authority of the Department of Labor – and thus the authority of the States – to "refuse to issue or renew, or … suspend or revoke a certificate of registration" of any farm labor contractor who "has been found to have violated [IRCA § 1324a(a)]," 29 U.S.C. § 1813(a)(6), demonstrates that

Congress understood that the hiring of unauthorized aliens is relevant to the fitness of farm labor contractors to engage in the business of "recruiting, soliciting, hiring, employing, furnishing, or transporting … migrant or seasonal agricultural worker[s]." 29 U.S.C. § 1802(6). The legislative history of federal farm labor contractor licensing further demonstrates why this is so.

Congress enacted the Farm Labor Contractor Registration Act to, among other things, address "irresponsible labor contractors" who "exploited … farmers." S. Rep. No. 88-202 (1963), reprinted in 1964 U.S.C.C.A.N. 3690, 3690; *see also* 128 Cong. Rec. S24090 (daily ed. Sept. 17, 1982) (statement of Chairman Hatch) ("The [FLCRA] hearings … showed that itinerant crew leaders at times victimized agricultural employers."). Because "the primary users of [seasonal farm] labor – farmers, growers, and packing shed operators have experienced great difficulty in obtaining a sufficient supply of agricultural labor [] directly[,] … the [farm labor] contractor has been permitted to exercise an inordinate amount of leverage over the workplace situation." S. Rep. No. 93-1295 (1974), reprinted in 1974 U.S.C.C.A.N. 6441, 6442. For example, a Department of Labor survey revealed farm labor contractors "accepting transportation advances from employers and failing to report to work or reporting with a smaller crew than contracted for." 1964 U.S.C.C.A.N. 3692. In other cases,

> "The contractor would agree to arrive with a crew on a designated date, and simply fail to show up because better opportunities presented themselves elsewhere. This would leave the farmer with no help to harvest his ripening crop. More common is the practice of leaving after the first picking when the second and third pickings become more difficult, and consequently less profitable." 1974 U.S.C.C.A.N. 6442.

Farm labor contractors' provision of unauthorized aliens to agricultural employers presented a particular problem because when a contractor supplied a farmer with illegal alien workers during peak season, the farmer was at risk of losing his work crew – and, as a result, his "ripening crop" – to an immigration raid. *See* P. L. Martin, *Good Intentions Gone Awry: IRCA and U.S. Agriculture*, 534 ANNALS AM. ACAD. POL. & SOC. SCI. 44, 49 (1994) ("Before IRCA, the INS enforced immigration laws in agriculture by having the Border Patrol drive into fields and apprehend aliens who tried to run away."). The loss of seasonal workers during peak season could be catastrophic, since many farmers "rel[ied] … heavily on labor contractors and maintain[ed] only a skeleton core labor force." REPORT ON THE COMMISSION ON AGRICULTURAL WORKERS 46 (Nov. 1992); *see also* 128 Cong. Rec. S24090 ("[A] farmer … would [] face financial ruin if he could not get help to harvest his crop in time"). One study quoted by the IRCA-required Commission on Agricultural Workers, *see* IRCA § 304, 100 Stat. 3431, for example, showed that the production of each acre of cantaloupes "require[d] 1 to 2 hours of 'regular' labor per month in the off-season, but 180 hours of 'temporary' labor at peak harvest." REPORT ON THE COMMISSION ON AGRICULTURAL WORKERS 46 n. 9, citing J. Mamer & A. Wilkie, SEASONAL LABOR IN CALIFORNIA AGRICULTURE: LABOR INPUTS FOR CALIFORNIA CROPS (1990).

Against this backdrop, AWPA, and analogous State laws, required farm labor contractors to make "a showing of moral and fiscal responsibility" in order to receive a certificate of registration, 1974 U.S.C.C.A.N. 6443, such as not having been convicted of certain crimes and maintaining required insurance. *See* 29 U.S.C. § 1813(a)(1)–(6). And, because Congress reasonably identified farm labor contractors' hiring, recruiting and referring practices

with respect to unauthorized aliens as critical to the fitness of farm labor contractors to "recruit[], solicit[], hir[e], employ[], furnish[], or transport[] migrant or seasonal worker[s]," 29 U.S.C. § 1802(6), IRCA's conforming amendments to AWPA permitted the Secretary of Labor (and State licensing authorities) to "refuse to issue or renew, or … suspend or revoke a certificate of registration" of any farm labor contractor who "has been found to have violated [IRCA § 1324a(a)]." 29 U.S.C. § 1813(a)(6).

As the legislative material makes plain, Congress saved State farm labor contractor licensing laws from preemption to ensure that State licensing authorities could deny, suspend or revoke the licenses of farm labor contractors who hired unauthorized aliens in order to protect the interests of those farmers and other agricultural business persons who used the contractors' services. Congress' focus on creating an exemption from IRCA's preemption regime for State licensing laws of this type supports the conclusion that the licensing exception to the IRCA general preemption provision was intended to save State and local licensing laws that address employment issues as a central factor in determining the licensee's fitness to engage in the particular business of hiring, recruiting or referring employees. That conclusion is reinforced by the proposition that a defined and delimited exception of that kind not only is consistent with how Congress drafted IRCA's conforming amendments to AWPA, but also accords IRCA's general preemption provision its proper scope and role in protecting IRCA's remedial scheme.

In this regard, two points warrant special emphasis.

First, whereas the class of economic entities that require some form of permission from a State or local government to operate as a business enterprise—and that therefore count as "licens[ees]" who, according to the Ninth Circuit, can freely be subject to draconian sanc-

tions for any act of employing unauthorized aliens—is so large as to encompass virtually the entire universe of employers in the United States, the class of economic entities who are labor contractors or brokers, and hence who, are engaged in the particular business of employing, recruiting or referring employees is relatively small and manageable.

This point is important because, given the extraordinary effort that Congress put into enacting a carefully balanced and uniform regulatory scheme that prohibited the employment of unauthorized aliens without simultaneously encouraging employment discrimination against foreign-seeming American citizens and lawful aliens, it would be absurd to read IRCA's licensing exception in such a way as to allow it to destroy the statute's preemption rule and, with it, the careful balance of interests that the rule was designed to preserve—particularly when there is another reading that keeps the exception within manageable bounds.

Second, and of equal importance, there is a principled justification for exempting from a rule of uniformity in the area covered by IRCA the class of business enterprises composed of companies that are in the very business of hiring employees to supply to others—the class composed of labor contractors. That justification is that, unlike in the case of the general run of IRCA-regulated employers, the hiring decisions made by labor contractors have a direct impact on other economic actors—the customers who purchase hired labor and who depend on labor contractors to provide them with a reliable and stable labor supply—and there is accordingly a discrete set of interests, independent of the interests balanced in IRCA generally but compatible with them, that regulations on the hiring practices of labor contractors operate to advance.

That this set of interests is discrete and independent of the interests balanced in IRCA generally is demonstrated by the fact that Congress had determined, well before it enacted the general ban in IRCA on employing unauthorized aliens, to enact the narrow and particularized ban on the hiring of such aliens by farm labor contractors. *See supra.* That this set of interests is compatible with IRCA and not destructive of its carefully balanced remedial scheme is demonstrated by the fact that Congress conformed AWPA to IRCA in the nuanced way that we have described *supra*, and did not opt to strip out of AWPA all AWPA-specific sanctions on AWPA licensees who violate IRCA.

Thus, reading the licensing exception to encompass State and local licensing laws that, like the federal farm labor contractor licensing law, regulate immigration-related employment practices *not* to set immigration policy generally, but rather to protect consumers of contracted-for labor from the types of sharp contractor practices that triggered pre-IRCA federal legislation in this area, accommodates an interest that, while not specifically accounted for in the substantive provisions of IRCA, is nevertheless compatible with IRCA. For that reason, it is not only State or local *farm* labor contractor licensing laws that are within the ambit of the licensing law exception, but any State or local contractor licensing law that regulates those in the particular business of supplying labor to others or of brokering labor and that does so, as does AWPA, in the interest of protecting the consumers of such purchased or brokered labor.

The sum of the matter is this. Reading the IRCA preemption provision and its licensing exception as allowing the States to regulate any employer of any kind to which they choose to give a business license is untenable, because it puts the exception at war with the preemption provision and authorizes the States to proceed in a scattershot and arbitrary way to cut a broad swath through

the carefully balanced and calibrated IRCA remedial scheme, and to do so without any justifying reason rooted in the statute. Conversely, reading the IRCA preemption provision and its licensing exception as allowing the States and localities to regulate through licensing laws only the hiring practices of labor contractors generalizes the lessons of the IRCA Conforming Amendments in a principled way that *does* have a justifying reason rooted in the statute, and that preserves the essence of the carefully balanced and calibrated IRCA remedial scheme.

(iii) Given the foregoing, the fact that the Arizona law permits state courts to determine whether an employer has hired unauthorized aliens *see* Pet. Br. 10-11 *and* that the Arizona law's definition of "license" reaches general purpose permissions to do business, such as articles of incorporation, that do not grant employers permission to engage in any specific business activity for which hiring, recruiting and referring practices with respect to unauthorized aliens is central to fitness – and hence do not resemble the labor contractor licenses granted by AWPA – are sufficient reasons to find the Arizona law preempted. That is because the Arizona law, by deeming virtually every business enterprise in the state to be a "licensee," simply substitutes Arizona's judgment as to an appropriate employer sanctions regime for Congress' finely calibrated judgment as expressed in IRCA, and thereby would, if upheld, make IRCA's general preemption provision all but a dead letter.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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