

No. 09-115

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IN THE  
**Supreme Court of the United States**

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

v.

CRISS CANDELARIA *et al.*,  
*Respondents.*

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

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**BRIEF FOR THE PETITIONERS**

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## QUESTIONS PRESENTED

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

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

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

**PARTIES TO THE PROCEEDING**

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

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

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

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## **OPINIONS BELOW**

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

## **JURISDICTION**

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

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

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

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

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

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

### STATEMENT OF THE CASE

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

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

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

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

#### **A. Federal Regulation Of Immigration.**

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>3</sup> These penalties have been increased by regulation to account for inflation. 8 C.F.R. § 274a.10.

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

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

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

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

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

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<sup>4</sup> See DHS, *Report to Congress on the Basic Pilot Program* 1 (June 2004), available at [http://www.nilc.org/immsemplymnt/ircaempverif/basicpilot\\_uscis\\_rprt\\_to\\_congress\\_2004-06.pdf](http://www.nilc.org/immsemplymnt/ircaempverif/basicpilot_uscis_rprt_to_congress_2004-06.pdf).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### C. Procedural Background.

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

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

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

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

### SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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<sup>11</sup> Emphases are added throughout unless otherwise noted.

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

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

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

**ARGUMENT****I. THE UNAUTHORIZED WORKER PROVISIONS OF THE ARIZONA ACT ARE PREEMPTED.****A. The Unauthorized Worker Provisions Are Expressly Preempted.**

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

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

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

8 U.S.C. § 1324a(h)(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **B. The Unauthorized Worker Provisions Are Impliedly Preempted.**

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

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

### **1. The Unauthorized Worker Provisions Conflict With IRCA’s Structure And Operation.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. ARIZONA’S E-VERIFY MANDATE IS IMPLIEDLY PREEMPTED.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**CONCLUSION**

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

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**STATUTORY ADDENDUM**

**8 U.S.C. § 1324b. Unfair immigration-related employment practices**

(a) Prohibition of discrimination based on national origin or citizenship status

(1) General rule

It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—

(A) because of such individual's national origin, or

(B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

(2) Exceptions

Paragraph (1) shall not apply to—

(A) a person or other entity that employs three or fewer employees,

(B) a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 703 of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-2], or

(C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or re-

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quired by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

(3) “Protected individual” defined

As used in paragraph (1), the term “protected individual” means an individual who—

(A) is a citizen or national of the United States, or

(B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 1160(a) or 1255a(a)(1) of this title, is admitted as a refugee under section 1157 of this title, or is granted asylum under section 1158 of this title; but does not include (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986, and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

(4) Additional exception providing right to prefer equally qualified citizens

Notwithstanding any other provision of this section, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is

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a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.

#### (5) Prohibition of intimidation or retaliation

It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. An individual so intimidated, threatened, coerced, or retaliated against shall be considered, for purposes of subsections (d) and (g) of this section, to have been discriminated against.

#### (6) Treatment of certain documentary practices as employment practices

A person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

#### (b) Charges of violations

##### (1) In general

Except as provided in paragraph (2), any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice (or a person on that person's behalf) or an

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officer of the Service alleging that an unfair immigration-related employment practice has occurred or is occurring may file a charge respecting such practice or violation with the Special Counsel (appointed under subsection (c) of this section). Charges shall be in writing under oath or affirmation and shall contain such information as the Attorney General requires. The Special Counsel by certified mail shall serve a notice of the charge (including the date, place, and circumstances of the alleged unfair immigration-related employment practice) on the person or entity involved within 10 days.

#### (2) No overlap with EEOC complaints

No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.], unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.

#### (c) Special Counsel

##### (1) Appointment

The President shall appoint, by and with the advice and consent of the Senate, a Special Counsel for Immigration-Related Unfair Employment Practices (hereinafter in this section referred to as the “Spe-

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cial Counsel”) within the Department of Justice to serve for a term of four years. In the case of a vacancy in the office of the Special Counsel the President may designate the officer or employee who shall act as Special Counsel during such vacancy.

### (2) Duties

The Special Counsel shall be responsible for investigation of charges and issuance of complaints under this section and in respect of the prosecution of all such complaints before administrative law judges and the exercise of certain functions under subsection (j)(1) of this section.

### (3) Compensation

The Special Counsel is entitled to receive compensation at a rate not to exceed the rate now or hereafter provided for grade GS-17 of the General Schedule, under section 5332 of Title 5.

### (4) Regional offices

The Special Counsel, in accordance with regulations of the Attorney General, shall establish such regional offices as may be necessary to carry out his duties.

## (d) Investigation of charges

### (1) By Special Counsel

The Special Counsel shall investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge. The Special Counsel may, on his own initiative, conduct investigations respecting unfair immigration-related employment practices and, based

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on such an investigation and subject to paragraph (3), file a complaint before such a judge.

### (2) Private actions

If the Special Counsel, after receiving such a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity, has not filed a complaint before an administrative law judge with respect to such charge within such 120-day period, the Special Counsel shall notify the person making the charge of the determination not to file such a complaint during such period and the person making the charge may (subject to paragraph (3)) file a complaint directly before such a judge within 90 days after the date of receipt of the notice. The Special Counsel's failure to file such a complaint within such 120-day period shall not affect the right of the Special Counsel to investigate the charge or to bring a complaint before an administrative law judge during such 90-day period.

### (3) Time limitations on complaints

No complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel. This subparagraph shall not prevent the subsequent amending of a charge or complaint under subsection (e)(1) of this section.

## (e) Hearings

### (1) Notice

Whenever a complaint is made that a person or entity has engaged in or is engaging in any such unfair immigration-related employment practice,

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an administrative law judge shall have power to issue and cause to be served upon such person or entity a copy of the complaint and a notice of hearing before the judge at a place therein fixed, not less than five days after the serving of the complaint. Any such complaint may be amended by the judge conducting the hearing, upon the motion of the party filing the complaint, in the judge's discretion at any time prior to the issuance of an order based thereon. The person or entity so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint.

### (2) Judges hearing cases

Hearings on complaints under this subsection shall be considered before administrative law judges who are specially designated by the Attorney General as having special training respecting employment discrimination and, to the extent practicable, before such judges who only consider cases under this section.

### (3) Complainant as party

Any person filing a charge with the Special Counsel respecting an unfair immigration-related employment practice shall be considered a party to any complaint before an administrative law judge respecting such practice and any subsequent appeal respecting that complaint. In the discretion of the judge conducting the hearing, any other person may be allowed to intervene in the proceeding and to present testimony.

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(f) Testimony and authority of hearing officers

(1) Testimony

The testimony taken by the administrative law judge shall be reduced to writing. Thereafter, the judge, in his discretion, upon notice may provide for the taking of further testimony or hear argument.

(2) Authority of administrative law judges

In conducting investigations and hearings under this subsection<sup>28</sup> and in accordance with regulations of the Attorney General, the Special Counsel and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated. The administrative law judges by subpoena may compel the attendance of witnesses and the production of evidence at any designated place or hearing. In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the administrative law judge, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(g) Determinations

(1) Order

The administrative law judge shall issue and cause to be served on the parties to the proceeding an order, which shall be final unless appealed as provided under subsection (i) of this section.

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<sup>28</sup> So in original. Probably should be “section”.

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(2) Orders finding violations

(A) In general

If, upon the preponderance of the evidence, an administrative law judge determines that any person or entity named in the complaint has engaged in or is engaging in any such unfair immigration-related employment practice, then the judge shall state his findings of fact and shall issue and cause to be served on such person or entity an order which requires such person or entity to cease and desist from such unfair immigration-related employment practice.

(B) Contents of order

Such an order also may require the person or entity—

(i) to comply with the requirements of section 1324a(b) of this title with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years;

(ii) to retain for the period referred to in clause (i) and only for purposes consistent with section 1324a(b)(5) of this title, the name and address of each individual who applies, in person or in writing, for hiring for an existing position, or for recruiting or referring for a fee, for employment in the United States;

(iii) to hire individuals directly and adversely affected, with or without back pay;

(iv)(I) except as provided in subclauses (II) through (IV), to pay a civil penalty of not less than \$250 and not more than \$2,000 for each individual discriminated against,

(II) except as provided in subclauses (III) and (IV), in the case of a person or entity

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previously subject to a single order under this paragraph, to pay a civil penalty of not less than \$2,000 and not more than \$5,000 for each individual discriminated against,

(III) except as provided in subclause (IV), in the case of a person or entity previously subject to more than one order under this paragraph, to pay a civil penalty of not less than \$3,000 and not more than \$10,000 for each individual discriminated against, and

(IV) in the case of an unfair immigration-related employment practice described in subsection (a)(6) of this section, to pay a civil penalty of not less than \$100 and not more than \$1,000 for each individual discriminated against;

(v) to post notices to employees about their rights under this section and employers' obligations under section 1324a of this title;

(vi) to educate all personnel involved in hiring and complying with this section or section 1324a of this title about the requirements of this section or such section;

(vii) to remove (in an appropriate case) a false performance review or false warning from an employee's personnel file; and

(viii) to lift (in an appropriate case) any restrictions on an employee's assignments, work shifts, or movements.

(C) Limitation on back pay remedy

In providing a remedy under subparagraph (B)(iii), back pay liability shall not accrue from a date more than two years prior to the date of the filing of a charge with the Special Counsel. Inte-

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rim earnings or amounts earnable with reasonable diligence by the individual or individuals discriminated against shall operate to reduce the back pay otherwise allowable under such paragraph. No order shall require the hiring of an individual as an employee or the payment to an individual of any back pay, if the individual was refused employment for any reason other than discrimination on account of national origin or citizenship status.

### (D) Treatment of distinct entities

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

### (3) Orders not finding violations

If upon the preponderance of the evidence an administrative law judge determines that the person or entity named in the complaint has not engaged and is not engaging in any such unfair immigration-related employment practice, then the judge shall state his findings of fact and shall issue an order dismissing the complaint.

### (h) Awarding of attorneys' fees

In any complaint respecting an unfair immigration-related employment practice, an administrative law judge, in the judge's discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact.

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(i) Review of final orders

(1) In general

Not later than 60 days after the entry of such final order, any person aggrieved by such final order may seek a review of such order in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business.

(2) Further review

Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment shall be final, except that the same shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(j) Court enforcement of administrative orders

(1) In general

If an order of the agency is not appealed under subsection (i)(1) of this section, the Special Counsel (or, if the Special Counsel fails to act, the person filing the charge) may petition the United States district court for the district in which a violation of the order is alleged to have occurred, or in which the respondent resides or transacts business, for the enforcement of the order of the administrative law judge, by filing in such court a written petition praying that such order be enforced.

(2) Court enforcement order

Upon the filing of such petition, the court shall have jurisdiction to make and enter a decree enforcing the order of the administrative law judge. In such a proceeding, the order of the administrative law judge shall not be subject to review.

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(3) Enforcement decree in original review

If, upon appeal of an order under subsection (i)(1) of this section, the United States court of appeals does not reverse such order, such court shall have the jurisdiction to make and enter a decree enforcing the order of the administrative law judge.

(4) Awarding of attorney's fees

In any judicial proceeding under subsection (i) of this section or this subsection, the court, in its discretion, may allow a prevailing party, other than the United States, a reasonable attorney's fee as part of costs but only if the losing party's argument is without reasonable foundation in law and fact.

(k) Termination dates

(1) This section shall not apply to discrimination in hiring, recruiting, or referring, or discharging of individuals occurring after the date of any termination of the provisions of section 1324a of this title, under subsection (l) of that section.

(2) The provisions of this section shall terminate 30 calendar days after receipt of the last report required to be transmitted under section 1324a(j) of this title if—

(A) the Comptroller General determines, and so reports in such report that--

(i) no significant discrimination has resulted, against citizens or nationals of the United States or against any eligible workers seeking employment, from the implementation of section 1324a of this title, or

(ii) such section has created an unreasonable burden on employers hiring such workers; and

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(B) there has been enacted, within such period of 30 calendar days, a joint resolution stating in substance that the Congress approves the findings of the Comptroller General contained in such report.

The provisions of subsections (m) and (n) of section 1324a of this title shall apply to any joint resolution under subparagraph (B) in the same manner as they apply to a joint resolution under subsection (l) of such section.

(l) Dissemination of information concerning anti-discrimination provisions

(1) Not later than 3 months after November 29, 1990, the Special Counsel, in cooperation with the chairman of the Equal Employment Opportunity Commission, the Secretary of Labor, and the Administrator of the Small Business Administration, shall conduct a campaign to disseminate information respecting the rights and remedies prescribed under this section and under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.] in connection with unfair immigration-related employment practices. Such campaign shall be aimed at increasing the knowledge of employers, employees, and the general public concerning employer and employee rights, responsibilities, and remedies under this section and such title.

(2) In order to carry out the campaign under this subsection, the Special Counsel—

(A) may, to the extent deemed appropriate and subject to the availability of appropriations, contract with public and private organizations for outreach activities under the campaign, and

(B) shall consult with the Secretary of Labor, the chairman of the Equal Employment Opportunity

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Commission, and the heads of such other agencies as may be appropriate.

(3) There are authorized to be appropriated to carry out this subsection \$10,000,000 for each fiscal year (beginning with fiscal year 1991).

**29 U.S.C. § 1801 (1985). Congressional statement of purpose**

It is the purpose of this chapter to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this Act; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.

**29 U.S.C. § 1802 (1985). Definitions**

As used in this chapter—

(1) The term “agricultural association” means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

(2) The term “agricultural employer” means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

(3) The term “agricultural employment” means employment in any service or activity included within the provisions of section 3( f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

(4) The term “day-haul operation” means the assembly of workers at a pick-up point waiting to be hired

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and employed, transportation of such workers to agricultural employment, and the return of such workers to a drop-off point on the same day.

(5) The term “employ” has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)) for the purposes of implementing the requirements of that Act [29 U.S.C. 201 et seq.].

(6) The term “farm labor contracting activity” means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.

(7) The term “farm labor contractor” means any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

(8)(A) Except as provided in subparagraph (B), the term “migrant agricultural worker” means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.

(B) The term “migrant agricultural worker” does not include—

- (i) any immediate family member of an agricultural employer or a farm labor contractor; or
- (ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii) and 214(c) of title 8.

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(9) The term “person” means any individual, partnership, association, joint stock company, trust, cooperative, or corporation.

(10)(A) Except as provided in subparagraph (B), the term “seasonal agricultural worker” means an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence—

(i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or

(ii) when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.

(B) The term “seasonal agricultural worker” does not include—

(i) any migrant agricultural worker;

(ii) any immediate family member of an agricultural employer or a farm labor contractor; or

(iii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii) and 214(c) of title 8.

(11) The term “Secretary” means the Secretary of Labor or the Secretary's authorized representative.

(12) The term “State” means any of the States of the United States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, and Guam.

**29 U.S.C. § 1803 (1985). Applicability of chapter**

(a) The following persons are not subject to this chapter.

(1) FAMILY BUSINESS EXEMPTION.—Any individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, which is owned or operated exclusively by such individual or an immediate family member of such individual, if such activities are performed only for such operation and exclusively by such individual or an immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes.

(2) SMALL BUSINESS EXEMPTION.—Any person, other than a farm labor contractor, for whom the man-days exemption for agricultural labor provided under section 13(a)(6)(A) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(6)(A)) is applicable.

(3) OTHER EXEMPTIONS.—(A) Any common carrier which would be a farm labor contractor solely because the carrier is engaged in the farm labor contracting activity of transporting any migrant or seasonal agricultural worker.

(B) Any labor organization, as defined in section 2(5) of the Labor Management Relations Act (29 U.S.C. 152(5)) (without regard to the exclusion of agricultural employees in that Act [29 U.S.C. 141 et seq.]) or as defined under applicable State labor relations law.

(C) Any nonprofit charitable organization or public or private nonprofit educational institution.

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(D) Any person who engages in any farm labor contracting activity solely within a twenty-five mile intrastate radius of such person's permanent place of residence and for not more than thirteen weeks per year.

(E) Any custom combine, hay harvesting, or sheep shearing operation.

(F) Any custom poultry harvesting, breeding, de-beaking, desexing, or health service operation provided the employees of the operation are not regularly required to be away from their permanent place of residence other than during their normal working hours.

(G)(i) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to detassel, rogue, or otherwise engage in the production of seed and to engage in related and incidental agricultural employment, unless such full-time students or other individuals are required to be away from their permanent place of residence overnight or there are individuals under eighteen years of age who are providing transportation on behalf of such person.

(ii) Any person to the extent he is supplied with students or other individuals for agricultural employment in accordance with clause (i) of this subparagraph by a person who is exempt under such clause.

(H)(i) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to string or harvest shade grown tobacco

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and to engage in related and incidental agricultural employment, unless there are individuals under eighteen years of age who are providing transportation on behalf of such person.

(ii) Any person to the extent he is supplied with students or other individuals for agricultural employment in accordance with clause (i) of this subparagraph by a person who is exempt under such clause.

(I) Any employee of any person described in subparagraphs (A) through (H) when performing farm labor contracting activities exclusively for such person.

(b) Subchapter I of the chapter does not apply to any agricultural employer or agricultural association or to any employee of such an employer or association.

**29 U.S.C. § 1811 (1985). Certificate of registration required**

**(a) Persons engaged in any farm labor contracting activity**

No person shall engage in any farm labor contracting activity, unless such person has a certificate of registration from the Secretary specifying which farm labor contracting activities such person is authorized to perform.

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**(b) Hire, employ, or use of any individual to perform farm labor contracting activities by farm labor contractor; liability of farm labor contractor for violations**

A farm labor contractor shall not hire, employ, or use any individual to perform farm labor contracting activities unless such individual has a certificate of registration, or a certificate of registration as an employee of the farm labor contractor employer, which authorizes the activity for which such individual is hired, employed, or used. The farm labor contractor shall be held responsible for violations of this Act or any regulation under this Act by any employee regardless of whether the employee possesses a certificate of registration based on the contractor's certificate of registration.

**(c) Possession and exhibition of certificate**

Each registered farm labor contractor and registered farm labor contractor employee shall carry at all times while engaging in farm labor contracting activities a certificate of registration and, upon request, shall exhibit that certificate to all persons with whom they intend to deal as a farm labor contractor or farm labor contractor employee.

**(d) Refusal or failure to produce certificate**

The facilities and the services authorized by the Act of June 6, 1933 (29 U.S.C. 49 et seq.), known as the Wagner-Peyser Act, shall be denied to any farm labor contractor upon refusal or failure to produce, when asked, a certificate of registration.

**29 U.S.C. § 1812 (1985). Issuance of certificate of registration**

The Secretary, after appropriate investigation and approval, shall issue a certificate of registration (including a certificate of registration as an employee of a farm labor contractor) to any person who has filed with the Secretary a written application containing the following:

- (1) a declaration, subscribed and sworn to by the applicant, stating the applicant's permanent place of residence, the farm labor contracting activities for which the certificate is requested, and such other relevant information as the Secretary may require;
- (2) a statement identifying each vehicle to be used to transport any migrant or seasonal agricultural worker and, if the vehicle is or will be owned or controlled by the applicant, documentation showing that the applicant is in compliance with the requirements of section 401 with respect to each such vehicle;
- (3) a statement identifying each facility or real property to be used to house any migrant agricultural worker and, if the facility or real property is or will be owned or controlled by the applicant, documentation showing that the applicant is in compliance with section 203 with respect to each such facility or real property;
- (4) a set of fingerprints of the applicant; and
- (5) a declaration, subscribed and sworn to by the applicant, consenting to the designation by a court of the Secretary as an agent available to accept service of summons in any action against the applicant, if the applicant has left the jurisdiction in

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which the action is commenced or otherwise has become unavailable to accept service.

**29 U.S.C. § 1813 (1985). Registration determinations**

**(a) Grounds for refusal to issue or renew, suspension, or revocation of certificate**

In accordance with regulations, the Secretary may refuse to issue or renew, or may suspend or revoke, a certificate of registration (including a certificate of registration as an employee of a farm labor contractor) if the applicant or holder—

(1) has knowingly made any misrepresentation in the application for such certificate;

(2) is not the real party in interest in the application or certificate of registration and the real party in interest is a person who has been refused issuance or renewal of a certificate, has had a certificate suspended or revoked, or does not qualify under this section for a certificate;

(3) has failed to comply with this Act or any regulation under this Act;

(4) has failed—

(A) to pay any court judgment obtained by the Secretary or any other person under this Act or any regulation under this Act or under the Farm Labor Contractor Registration Act of 1963 or any regulation under such Act, or

(B) to comply with any final order issued by the Secretary as a result of a violation of this Act or any regulation under this Act or a violation of the Farm Labor Contractor Registration Act of 1963 or any regulation under such Act; or

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(5) has been convicted within the preceding five years—

(A) of any crime under State or Federal law relating to gambling, or to the sale, distribution or possession of alcoholic beverages, in connection with or incident to any farm labor contracting activities; or

(B) of any felony under State or Federal law involving robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, prostitution, peonage, or smuggling or harboring individuals who have entered the United States illegally.

**(b) Administrative review procedures applicable**

(1) The person who is refused the issuance or renewal of a certificate or whose certificate is suspended or revoked under subsection (a) shall be afforded an opportunity for agency hearing, upon request made within thirty days after the date of issuance of the notice of the refusal, suspension, or revocation. In such hearing, all issues shall be determined on the record pursuant to section 554 of title 5, United States Code. If no hearing is requested as herein provided, the refusal, suspension, or revocation shall constitute a final and unappealable order.

(2) If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of intent to modify or vacate the decision of the administrative law judge shall be issued to the parties within thirty days after the decision of the adminis-

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trative law judge. A final order which takes effect under this paragraph shall be subject to review only as provided under subsection (c) of this section.

**(c) Judicial review procedures available**

Any person against whom an order has been entered after an agency hearing under this section may obtain review by the United States district court for any district in which he is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary. The Secretary shall promptly certify and file in such court the record upon which the order was based. The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5, United States Code. Any final decision, order, or judgment of such District Court concerning such review shall be subject to appeal as provided in chapter 83 of title 28.

**29 U.S.C. § 1814 (1985). Transfer or assignment; expiration; renewal**

**(a) Transfer or assignment prohibited**

A certificate of registration may not be transferred or assigned.

**(b) Expiration; renewals**

(1) Unless earlier suspended or revoked, a certificate shall expire twelve months from the date of issuance, except that (A) certificates issued under this Act during the period beginning December 1, 1982, and ending November 30, 1983, may be issued for a period of up to twenty-four months for the purpose of an order-

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ly transition to registration under this Act, (B) a certificate may be temporarily extended by the filing of an application with the Secretary at least thirty days prior to its expiration date, and (C) the Secretary may renew a certificate for additional twelve-month periods or for periods in excess of twelve months but not in excess of twenty-four months.

(2) Eligibility for renewals for periods of more than twelve months shall be limited to farm labor contractors who have not been cited for a violation of this Act, or any regulation under this Act, or the Farm Labor Contractor Registration Act of 1963 [7 U.S.C. 2041 et seq.], or any regulation under such Act, during the preceding five years.

**29 U.S.C. § 1815 (1985). Notice of address change; amendment of certificate of registration**

During the period for which the certificate of registration is in effect, each farm labor contractor shall—

(1) provide to the Secretary within thirty days a notice of each change of permanent place of residence; and

(2) apply to the Secretary to amend the certificate of registration whenever the farm labor contractor intends to—

(A) engage in another farm labor contracting activity,

(B) use, or cause to be used, another vehicle than that covered by the certificate to transport any migrant or seasonal agricultural worker, or

(C) use, or cause to be used, another real property or facility to house any migrant agricultural worker than that covered by the certificate.

**29 U.S.C. § 1816 (1985). Prohibition against employing illegal aliens**

(a) No farm labor contractor shall recruit, hire, employ, or use, with knowledge, the services of any individual who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment.

(b) A farm labor contractor shall be considered to have complied with subsection (a) if the farm labor contractor demonstrates that the farm labor contractor relied in good faith on documentation prescribed by the Secretary, and the farm labor contractor had no reason to believe the individual was an alien referred to in subsection (a).

**29 U.S.C. § 1851 (1985). Criminal sanctions**

**(a) Violations of chapter or regulations**

Any person who willfully and knowingly violates this Act or any regulation under this Act shall be fined not more than \$1,000 or sentenced to prison for a term not to exceed one year, or both. Upon conviction for any subsequent violation of this Act or any regulation under this Act, the defendant shall be fined not more than \$10,000 or sentenced to prison for a term not to exceed three years, or both.

**(b) Violations of section 1324a(a) of title 8**

If a farm labor contractor who commits a violation of section 106 has been refused issuance or renewal of, or has failed to obtain, a certificate of registration or is a farm labor contractor whose certificate has been suspended or revoked, the contractor shall, upon conviction, be fined not more than \$10,000 or sentenced to prison for a term not to exceed three years, or both.

**29 U.S.C. § 1852 (1985). Judicial enforcement**

**(a) Injunctive relief**

The Secretary may petition any appropriate district court of the United States for temporary or permanent injunctive relief if the Secretary determines that this Act, or any regulation under this Act, has been violated.

**(b) Control of civil litigation**

Except as provided in section 518(a) of title 28, United States Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under this Act, but all such litigation shall be subject to the direction and control of the Attorney General.

**29 US.C. § 1853 (1985). Administrative sanctions**

**(a) Civil money penalties for violations; criteria for assessment**

(1) Subject to paragraph (2), any person who commits a violation of this Act or any regulation under this Act, may be assessed a civil money penalty of not more than \$1,000 for each violation.

(2) In determining the amount of any penalty to be assessed under paragraph (1), the Secretary shall take into account (A) the previous record of the person in terms of compliance with this Act and with comparable requirements of the Farm Labor Contractor Registration Act of 1963, and with regulations promulgated under such Acts, and (B) the gravity of the violation.

**(b) Administrative review**

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(1) The person assessed shall be afforded an opportunity for agency hearing, upon request made within thirty days after the date of issuance of the notice of assessment. In such hearing, all issues shall be determined on the record pursuant to section 554 of title 5, United States Code. If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(2) If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary modifies or vacates the decision. Notice of intent to modify or vacate the decision of the administrative law judge shall be issued to the parties within thirty days after the decision of the administrative law judge. A final order which takes effect under this paragraph shall be subject to review only as provided under subsection (c) of this section.

#### **(c) Judicial review**

Any person against whom an order imposing a civil money penalty has been entered after an agency hearing under this section may obtain review by the United States district court for any district in which he is located or the United States District Court for the District of Columbia by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary. The Secretary shall promptly certify and file in such court the record upon which the penalty was imposed. The findings of the Secretary shall be set aside only if found to be unsupported by substantial evidence as provided by section 706(2)(E) of title 5, United States Code. Any final decision, order, or judgment of such District Court concerning such review shall be subject to appeal as provided in chapter 83 of title 28.

**(d) Failure to pay assessment; maintenance of action**

If any person fails to pay an assessment after it has become a final and unappealable order, or after the court has entered final judgment in favor of the agency, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

**(e) Payment of penalties into Treasury of United States**

All penalties collected under authority of this section shall be paid into the Treasury of the United States.

**29 U.S.C. § 1854 (1985). Private right of action**

**(a) Maintenance of civil action in district court by aggrieved person**

Any person aggrieved by a violation of this chapter or any regulation under this Act by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein.

**(b) Appointment of attorney and commencement of action**

Upon application by a complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action.

**(c) Award of damages or other equitable relief; amount; criteria; appeal**

(1) If the court finds that the respondent has intentionally violated any provision of this Act or any regulation under this Act, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to \$500 per plaintiff per violation, or other equitable relief, except that (A) multiple infractions of a single provision of this Act or of regulations under this Act shall constitute only one violation for purposes of determining the amount of statutory damages due a plaintiff; and (B) if such complaint is certified as a class action, the court shall award no more than the lesser of up to \$500 per plaintiff per violation, or up to \$500,000 or other equitable relief.

(2) In determining the amount of damages to be awarded under paragraph (1), the court is authorized to consider whether an attempt was made to resolve the issues in dispute before the resort to litigation.

(3) Any civil action brought under this section shall be subject to appeal as provided in chapter 83 of title 28.

**29 U.S.C. 1855 (1985). Discrimination prohibited**

**(a) Prohibited activities**

No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this Act, or has testified or is about to testify in any such proceedings, or because of the exercise, with just cause, by such

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worker on behalf of himself or others of any right or protection afforded by this Act.

**(b) Proceedings for redress of violations**

A migrant or seasonal agricultural worker who believes, with just cause, that he has been discriminated against by any person in violation of this section may, within 180 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this section have been violated, the Secretary shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown, to restrain violation of subsection (a) and order all appropriate relief, including rehiring or reinstatement of the worker, with back pay, or damages.

**29 U.S.C. § 1856 (1985). Waiver of rights**

Agreements by employees purporting to waive or to modify their rights under this Act shall be void as contrary to public policy, except that a waiver or modification of rights in favor of the Secretary shall be valid for purposes of enforcement of this chapter.

**29 U.S.C. § 1861 (1985). Rules and regulations**

The Secretary may issue such rules and regulations as are necessary to carry out this Act, consistent with the requirements of chapter 5 of title 5.

**29 U.S.C. § 1862 (1985). Authority to obtain information**

**(a) Investigation and inspection authority concerning places, records, etc.**

To carry out this Act the Secretary, either pursuant to a complaint or otherwise, shall, as may be appropriate, investigate, and in connection therewith, enter and inspect such places (including housing and vehicles) and such records (and make transcriptions thereof), question such persons and gather such information to determine compliance with this Act, or regulations prescribed under this Act.

**(b) Attendance and testimony of witnesses, and production of evidence; subpoena authority**

The Secretary may issue subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with such investigations. The Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any hearing or investigation provided for in this Act, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49, 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall be available to the Secretary. The Secretary shall conduct investigations in a manner which protects the confidentiality of any complainant or other party who provides information to the Secretary in good faith.

**(c) Prohibited activities**

It shall be a violation of this Act for any person to unlawfully resist, oppose, impede, intimidate, or interfere with any official of the Department of Labor assigned to perform an investigation, inspection or law enforcement function pursuant to this Act during the performance of such duties.

**29 U.S.C. § 1863 (1985). Agreements with Federal and State agencies**

**(a) Scope of agreements**

The Secretary may enter into agreements with Federal and State agencies (1) to use their facilities and services, (2) to delegate, subject to subsection (b), to Federal and State agencies such authority, other than rulemaking, as may be useful in carrying out this Act, and (3) to allocate or transfer funds to, or otherwise pay or reimburse, such agencies for expenses incurred pursuant to agreements under clause (1) or (2) of this section.

**(b) Delegations of authority pursuant to written State plan**

Any delegation to a State agency pursuant to subsection (a)(2) shall be made only pursuant to a written State plan which—

(1) shall include a description of the functions to be performed, the methods of performing such functions, and the resources to be devoted to the performance of such functions; and

(2) provides assurances satisfactory to the Secretary that the State agency will comply with its description under paragraph (1) and that the State agency's performance of functions so delegated will be at least comparable to the performance of such functions by the Department of Labor.

**29 U.S.C. §1871 (1985). State laws and regulations**

This chapter is intended to supplement State law, and compliance with this chapter shall not excuse

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any person from compliance with appropriate State law and regulation.

**29 U.S.C. §1872 (1985). Transition provision**

The Secretary may deny a certificate of registration to any farm labor contractor, as defined in this Act, who has a judgment outstanding against him under the Farm Labor Contractor Registration Act of 1963 (7 U.S.C. 2041 et seq.), or is subject to a final order of the Secretary under that Act assessing a civil money penalty which has not been paid. Any findings under the Farm Labor Contractor Registration Act of 1963 may also be applicable to determinations of willful and knowing violations under this chapter.

**Immigration Reform and Control Act of 1986  
(IRCA), Pub. L. No. 99-603, 100 Stat. 3359.**

**Sec. 101. Control of unlawful employment of  
aliens.**

\* \* \* \*

(b) CONFORMING AMENDMENTS TO MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT.—(1) The Migrant and Seasonal Agricultural Worker Protection Act “29 USC 1801 note” (Public Law 97-470) is amended—

(A) by striking out “101(a)(15)(H)(ii)” in paragraphs (8)(B) and (10)(B) of section 3 (29 U.S.C. 1802) and inserting in lieu thereof “101(a)(15)(H)(ii)(a)”;

(B) in section 103(a) (29 U.S.C. 1813(a))—

(i) by striking out “or” at the end of paragraph (4),

(ii) by striking out the period at the end of paragraph (5) and inserting in lieu thereof “; or”, and

(iii) by adding at the end the following new paragraph:

“(6) has been found to have violated paragraph (1) or (2) of section 274A(a) of the Immigration and Nationality Act.”;

(C) by striking out section 106 (29 U.S.C. 1816) and the corresponding item in the table of contents; and

(D) by striking out “section 106” in section 501(b) (29 U.S.C. 1851(b)) and by inserting in lieu thereof “paragraph (1) or (2) of section 274(A)(a) of the Immigration and Nationality Act”.

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(2) The amendments made by paragraph (1) shall apply to the employment, recruitment, referral, or utilization of the services of an individual occurring on or after the first day of the seventh month beginning after the date of the enactment of this Act.

\* \* \* \*

**2010 Ariz. Sess. Laws ch. 113, § 7, amending  
Ariz. Rev. Stat. § 23.212 by adding:**

K. It is an affirmative defense to a violation of subsection A of this section that the employer was entrapped. To claim entrapment, the employer must admit by the employer's testimony or other evidence the substantial elements of the violation. An employer who asserts an entrapment defense has the burden of proving the following by a preponderance of the evidence:

1. The idea of committing the violation started with law enforcement officers or their agents rather than with the employer.
2. The law enforcement officers or their agents urged and induced the employer to commit the violation.
3. The employer was not predisposed to commit the violation before the law enforcement officers or their agents urged and induced the employer to commit the violation.

L. An employer does not establish entrapment if the employer was predisposed to violate subsection A of this section and the law enforcement officers or their agents merely provided the employer with an opportunity to commit the violation. It is not entrapment for law enforcement officers or their agents merely to use a ruse or to conceal their identity. The conduct of law enforcement officers and their agents may be considered in determining if an employer has proven entrapment.

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**2010 Ariz. Sess. Laws ch. 113, § 8, amending  
Ariz. Rev. Stat. § 23.212.01 by adding:**

K. It is an affirmative defense to a violation of subsection A of this section that the employer was entrapped. To claim entrapment, the employer must admit by the employer's testimony or other evidence the substantial elements of the violation. An employer who asserts an entrapment defense has the burden of proving the following by a preponderance of the evidence:

1. The idea of committing the violation started with law enforcement officers or their agents rather than with the employer.
2. The law enforcement officers or their agents urged and induced the employer to commit the violation.
3. The employer was not predisposed to commit the violation before the law enforcement officers or their agents urged and induced the employer to commit the violation.

L. An employer does not establish entrapment if the employer was predisposed to violate subsection A of this section and the law enforcement officers or their agents merely provided the employer with an opportunity to commit the violation. It is not entrapment for law enforcement officers or their agents merely to use a ruse or to conceal their identity. The conduct of law enforcement officers and their agents may be considered in determining if an employer has proven entrapment.

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**2010 Ariz. Sess. Laws ch. 113, § 9, amending Ariz. Rev. Stat. § 23.214(A) by adding [in brackets]:**

A. After December 31, 2007, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the e-verify program [and shall keep a record of the verification for the duration of the employee's employment or at least three years, whichever is longer].