

No. 09-115

IN THE
Supreme Court of the United States

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

v.

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

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

**BRIEF *AMICI CURIAE* OF REPRESENTATIVE
ROMANO L. MAZZOLI, SENATOR ARLEN
SPECTER, AND REPRESENTATIVE HOWARD L.
BERMAN IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI¹

Amici, Representative Romano L. Mazzoli, Senator Arlen Specter, and Representative Howard L. Berman are a group of current and former Members of Congress who were directly involved in the drafting and passage of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.

Representative Romano L. Mazzoli represented Kentucky's Third Congressional District in the United States House of Representatives from 1971 through 1995 as a member of the Democratic Party. He was the co-author and co-sponsor of IRCA, which is also known as the Simpson-Mazzoli Act. For twelve years, Representative Mazzoli served as Chairman of the House of Representatives' Immigration, International Law and Refugees Subcommittee. Representative Mazzoli was a leader on immigration reform throughout his tenure in Congress.

Senator Arlen Specter has represented the Commonwealth of Pennsylvania in the United States Senate since he took his oath of office in 1981.

1. The parties' letters granting blanket consent for the filing of amicus briefs are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Senator Specter has been a member of the Senate Judiciary Committee since he joined the Senate. Senator Specter voted for the passage of IRCA in 1986 as a member of the Republican Party. He has been an active participant in legislative debates concerning immigration reform for almost thirty years, including cosponsoring the bi-partisan Comprehensive Immigration Reform Act of 2006.

Representative Howard L. Berman has represented California's Twenty-eighth Congressional District in the United States House of Representatives as a member of the Democratic Party since 1983. Representative Berman serves as Vice Chair of the House Judiciary Committee and as a member of the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. Representative Berman has co-sponsored immigration reform proposals and took an active role in the debate over immigration reform legislation that culminated in IRCA's passage by testifying in front of various committees, including the Rules Committee and the Subcommittee on Labor Standards. Representative Berman voted in favor of IRCA in 1986.

Amici support the argument of the Petitioners and the United States that IRCA was intended to preempt laws like the Legal Arizona Workers Act, 2010 Ariz. Legis. Serv. Ch. 113 (S.B. 1070) ("the Arizona Law"). *Amici* explain that IRCA was designed to create a uniform federal system to regulate the employment of unauthorized workers, displacing preexisting state laws. Congress included

only a limited exception for licensing laws. Congress did not intend that the licensing exception would authorize laws such as the Arizona Law. Rather, it was intended to be narrow and to apply only where there has first been a finding *under the federal IRCA process* that an employer has violated IRCA. Only in that situation could states and localities penalize employers through suspension or cancellation of their business licenses. Thus, the licensing exception was designed to leave states free to punish violators of IRCA, not to supplant IRCA with their own freestanding regulation of employment practices. In contrast, Arizona's reading of the "licensing" exception would eviscerate the preemption provision, allowing every state and city to pass its own freestanding law addressing employment of undocumented workers, and thus permitting the exception to swallow the rule. For these reasons, *amici* urge the Court to reverse the decision of the Court of Appeals for the Ninth Circuit with instructions to vacate the judgment of the district court.

SUMMARY OF ARGUMENT

Congress enacted IRCA with the knowledge that immigration is a matter of national concern over which Congress has plenary power. Congress was also aware of this Court's ruling in *DeCanas v. Bica*, 424 U.S. 351 (1976), that the Immigration and Nationality Act, as written at the time, did not preempt harmonious state laws imposing sanctions on employers who knowingly hired illegal

immigrants. It was with that knowledge that Congress in IRCA expressly preempted states and localities from imposing their own schemes of sanctions on employers for employing unauthorized workers.

Congress was also mindful of the traditional authority of states and localities to control the licensing of businesses. And Congress was cognizant that states in the past had relied on federal law in adjudicating such licensing decisions. In particular, Congress had in mind that states and localities in the past had predicated licensing decisions on a finding that a company had violated federal law, particularly with respect to farm labor contracting. Accordingly, in order not to tread on states' authority to regulate business licensing, and in order to preserve the schemes that had been utilized in the past and that were predicated on violations of federal law, Congress took care to allow states and localities to restrict, deny, or revoke business licenses based on a violation of IRCA.

Congress did not, however, intend to provide free rein to the states to create new immigration laws penalizing businesses simply by calling those laws "licensing laws." Congress included an exception for state and local licensing laws in order to permit states and localities to impose license-based penalties on businesses for violating IRCA, not for violating new state laws. Congress did not intend for the exception to swallow the rule. An interpretation that leaves the Arizona Law intact does just that, and in so doing, goes well beyond that which

Congress had in mind in carving out a limited exception to its comprehensive federal scheme.

ARGUMENT

I. When Congress Passed IRCA, It Was Aware of Existing State Laws Imposing Employer Sanctions for Violations of State Law and Intended to Preempt Those Laws Expressly.

In enacting IRCA, Congress was not writing on a blank slate. Members of Congress were acutely aware of the preexisting legal landscape, which largely relied on State labor laws to regulate the employment of undocumented workers. Indeed, at the time Congress was considering the national immigration reform, at least 11 different states had labor laws on the books making it illegal for employers to hire unauthorized aliens.² *See, e.g.*, H.R. Rep. No. 94-506, at 7 (1975) (“[M]any states have recognized the need for criminal sanctions against employers of illegal aliens.”); 130 Cong. Rec. 16,202 (1984) (statement of Rep. Lungren) (“A number of the States of the Union have now on their books employer sanctions, although there has been a question by the courts whether they have jurisdiction to do that because they are looking to the Federal

² *See* Cal. Lab. Code § 2805 (1984); Conn. Gen. Stat. Ann. § 31-51k (1972); Del. Code Ann. tit. 19, § 705 (1977); Fla. Stat. Ann. § 448.09 (1977); Kan. Stat. Ann. § 21-4409 (1977); Me. Rev. Stat. Ann. tit. 26, § 871 (1977); Mass. Gen. Laws Ann. ch. 149, § 19C (1976); Mont. Code Ann. § 41-121 (1977); N.H. Rev. Stat. Ann. § 275-A:4-a (1976); Vt. Stat. Ann. tit. 21, § 444a (1977); Va. Code Ann. § 40.1-11.1 (1977).

Government for some authority, which do have criminal sanctions”); 130 Cong. Rec. 16,223 (statement of Rep. Richardson) (1984) (“Eleven States have had experience with sanctions”); 130 Cong. Rec. 16,223 (1984) (statement of Rep. Berman) (“In 1971, California passed an employer sanction law known as the Dixon-Arnett Act. It made it illegal to knowingly employ illegal aliens in California if that employment had an adverse effect on resident workers.”); *Immigration Reform: 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); *Illegal Aliens: Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, pt. 1, 92d Cong. 149-62 (1971) (statement of Hon. Dixon Arnett, California State Assemblyman).

Whether State laws were effective was a matter of serious debate in Congress. Many argued that the states were ineffective in enforcing employer sanctions. *See, e.g.*, 130 Cong. Rec. 16,223 (statement of Rep. Berman) (“We have about a 2-year history in California where that law was enforced and many experiences with it which I think point out the danger of, first, thinking that employer sanctions are the answer to the problem, and, second, thinking there are not a great deal of negative side effects.”); 130 Cong. Rec. 16,222 (statement of Rep. Edwards) (stating that there was “no enthusiasm” for enforcing existing State laws imposing employer sanctions); 130 Cong. Rec. 16,223 (statement of Rep. Richardson) (“Eleven States have had experience

with sanctions and the conclusion is that all of them have been unsuccessful.”).

In this debate between imposing a uniform scheme of federal employer sanctions versus enforcing then-existing federal and state labor laws and state sanctions, those favoring the federal scheme of employer sanctions prevailed. In June 1986, the House of Representatives voted down Rep. Roybal’s amendment to HR 1510—a precursor to HR 3810—which proposed to replace the proposed federal employer sanctions with additional federal funding for enforcement of existing labor laws. In discussing the proposed amendment, Rep. Lungren of California and Rep. Mazzoli of Kentucky pointed out that, even though an amendment could have been offered to improve “labor condition enforcement without knocking out employer sanctions at the same time,” such an amendment was never offered: “The fact of the matter is another amendment could have been presented to us which only went to the addition of protection of labor sanctions. . . . We do not have that here. In order to get to that point you have to get rid of the employer sanctions altogether.” 130 Cong. Rec. 16,224 (statements of Rep. Lungren & Rep. Mazzoli). The House, by an overwhelming majority, voted down Rep. Roybal’s amendment.

Instead, Congress included language that 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). The

express preemption provision that appears in IRCA and its predecessor bills was a direct response to this Court's holding in *DeCanas v. Bica*, 424 U.S. 351 (1976), that the federal Immigration and Nationality Act did not preempt harmonious state laws and regulations imposing sanctions on employers who knowingly hired illegal immigrants. That decision almost immediately prompted requests for Congress to pass federal preemption legislation. *See, e.g., Immigration 1976: Hearings on S. 3074 Before the Subcomm. on Immigration & Naturalization of the S. Comm. on the Judiciary*, 94th Cong. 25 (1976) (statement of Leonard F. Chapman, Jr., Commissioner, INS). By including the express preemption provision in the proposed immigration reform bills, Congress thus intended to make it clear that, by enacting federal employer sanctions for knowing hiring of illegal immigrants, Congress intended to preempt state and local laws legislating in the same area. The employer sanctions set forth in IRCA were intended to displace, not supplement, the then-existing system of state laws that sought to serve the same purpose.

II. The Exception in IRCA's Preemption Provision for "Licensing and Similar Laws" Was Not Intended to Permit Laws Like the Legal Arizona Workers Act.

Congress did not intend to allow States to enact their own employer sanctions laws simply by calling them "licensing laws." Indeed, there is no evidence that Congress contemplated anything even remotely

resembling the Arizona Law when it crafted IRCA's preemption provision.

It was not until 1985 that a bill even included the licensing exception. The previous two Senates had passed versions of employer sanctions legislation that included preemption language with no exceptions whatsoever. *See* S. 529, 98th Cong. (1983); S. 2222, 97th Cong. (1982). The licensing exception first appeared in a House bill introduced in 1985, the Comprehensive Immigration Reform and Control Act of 1985. *See* H.R. 1061, 99th Cong. (1985). Subsequently, all immigration reform bills introduced in the 99th Congress that proposed employment sanctions contained the licensing exception that appeared in the version of IRCA that became law.

The context of the congressional debate in which this language was introduced makes clear that it was primarily directed to the industries that were known for hiring undocumented workers—*e.g.*, agricultural and farm contracting—particularly given problems with hiring illegal immigrants in seasonal farming operations. Indeed, this same concern was reflected in Congress's amendment of the Migrant and Seasonal Agriculture Worker Protection Act, Pub. L. No. 97-470, tit. I, 96 Stat. 2588 (1983), codified at 29 U.S.C. §§ 1801 *et seq.*, as part of IRCA; Congress provided in IRCA that farm labor contractors' licenses could be revoked, and farm labor contractors could be sanctioned, upon the finding that they violated the newly enacted IRCA's employer sanctions provisions. *See* 29 U.S.C. §§ 1813(a)(6),

1851(b). Without the licensing exception, states and municipalities would have been preempted from restricting the license of a labor contractor found to have violated IRCA. Congress thus inserted the licensing exception in order to permit States to regulate the licenses of these employers, but only as a consequence of having violated IRCA. The point of the exception was not to give the states free rein to punish employers, but rather to clarify that they could still impose their own licensing-related sanctions for violations of the federal statute.

The same understanding is reflected in the July 16, 1986 Report of the House Committee on the Judiciary recommending the passage of H.R. 3810, H.R. Rep. No. 99-682(I), at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662. There, Congress made clear that the licensing exception in 8 U.S.C. § 1324a(h)(2) requires an underlying violation of federal law. It explained that the penalties established in IRCA were “intended to specifically preempt state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens,” with one exception:

They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to re-issue 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, reprinted in 1986 U.S.C.C.A.N. at 5662 (emphasis added). Congress

thus limited the exception to permit states to utilize licensing regulation to punish employers who violated “this legislation,” *i.e.*, IRCA.

In light of this legislative history, the Arizona Law necessarily falls outside the licensing exception, and is therefore preempted by IRCA. First, the Arizona Law does not suspend, revoke or refuse to reissue a license to any person “who has been found to have violated the sanctions provisions in [IRCA].” *Id.* Rather, it imposes sanctions on a finding of a violation of the Arizona Law, without requiring any finding that the employer violated the sanctions provisions of IRCA.

Second, the Arizona Law goes beyond the limited licensing exception. As shown above, the limited licensing exception contemplated State and local laws that condition the issuance of a license on refraining from hiring, recruiting or referring undocumented aliens. In particular, Congress had in mind state laws regulating the issuance of licenses for farm labor contractors and those engaged in such activities as, for instance, forest tree cutting. *See* H. R. Rep. No. 99-682(I), at 58, reprinted in 1986 U.S.C.C.A.N. at 5662. Congress crafted the exception with the knowledge that an exception ought not swallow the rule. *See, e.g., United States v. Locke*, 529 U.S. 89, 106 (2000) (explaining that the Court does not “give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law”); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (“It is presumable that Congress legislates with knowledge

of our basic rules of statutory construction.”). The Arizona Law, however, is not a “licensing law.” It does not set forth all requirements for issuing and maintaining a farm labor contractor license, or a forest tree cutting license. Rather, it is a State labor law that Congress expressly preempted in IRCA.

In conclusion, Congress enacted IRCA for the express purpose of creating a “uniform[]” system of regulating the employment of unauthorized workers. IRCA § 115. The legislators who crafted the law worked to ensure that it would strike the right balance between strengthening enforcement of the immigration laws, protecting the rights of authorized workers, and avoiding an undue burden on the business community. In light of the substantial effort that went into striking the right balance, Congress intended that IRCA would be a comprehensive, national system for regulating the employment of unauthorized workers. That is why Congress expressly stated that IRCA 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). Congress did not contemplate that states and localities would be permitted to pass new legislation that would create their own prohibitions against employing unauthorized workers, create their own methods for adjudicating violations, and impose their own, more severe sanctions for violating state law, all by simply calling it a “licensing law.” That is precisely what the Arizona Law has done. In

so doing, Arizona has upset the balance Congress struck and contravened Congressional intent.

CONCLUSION

Amici respectfully submit that the decision below should be reversed, with instructions to vacate the judgment of the district court.

Respectfully submitted,

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