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 FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Immigration Reform Law Institute (IRLI) is a legal non-profit 501(c)(3) corporation specializing in immigration law. *Amicus Curiae* frequently assists State and local governments in the drafting of legislation to deter unlawful immigration. This legislation includes employer sanctions in accordance with 8 U.S.C. § 1324a(h)(2) and E-verify laws. Petitioners recognize this interest. *See* Pet. Cert. Br. 15.

Amicus Curiae has an interest in the Court having a well-informed and accurate understanding of Congress's purpose and objective in enacting the Immigration Reform and Control Act and its relation to the States' traditional powers concerning licensing.

SUMMARY OF ARGUMENT

The question presented is whether Arizona's licensing scheme that imposes sanctions on employers who hire unauthorized aliens is preempted through

[1] Pursuant to this Court's Rule 37.6, *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

the Court's express and implied preemption doctrines. Arizona's licensing scheme is saved from preemption because it falls within the savings clause of 8 U.S.C. § 1324a(h)(2), which permits State and local governments to prescribe employer sanctions through "licensing and similar laws," and comports with the purpose and objective of the Immigration Reform and Control Act of 1986 (IRCA).

When enacting IRCA, Congress did so with the purpose and objective of curtailing unlawful immigration through the use of employer sanctions, leaving to States and local governments the authority to enact analogous legislation "through licensing and similar laws." Petitioners are correct that the legislative history reveals that IRCA sought to "balance" multiple interests, but they mischaracterize those interests and their relative importance within the scheme of employer sanctions and section 1324a(h)(2)'s savings clause, and exclude the interests of State and local governments. Pet. Br. 20-46.

The use of legislative history for preemption analysis requires more than selective quotations from the House Report to ascertain the preemptive intent of section 1324a(h)(2). *See Harrison v. PPG Industries, Inc*., 446 U.S. 578, 592 (1980). Instead, legislative history – for the purpose of preemption analysis – requires the historical inquiry be conducted in a manner that incorporates "additional information" and places it in context. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 611 (1997).

IRCA's legislative history is important because it establishes that Arizona's licensing scheme is in harmony with IRCA's purpose and objective and 8 U.S.C. § 1324a(h)(2)'s savings clause, and is thus not preempted. *Northwest Central Pipeline Corp. v. State Corporation Comm'n*, 489 U.S. 493, 515 n.12 (1989). However, should the Court find the history of IRCA's purpose and objective to be inconclusive, the result remains the same under the presumption against preemption, and Arizona's licensing scheme is saved from preemption, express or implied. As the Court held in *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008), when the purpose and objective of a federal statute is "susceptible [to] more than one plausible reading," the presumption against preemption requires that the Court should "accept the reading that disfavors pre-emption."

ARGUMENT

I. THE PRESUMPTION AGAINST PREEMPTION REQUIRES EXAMINATION OF IRCA'S LEGISLATIVE HISTORY IN THE CONTEXT OF ITS PURPOSE AND OBJECTIVE

When Congress establishes a uniform statutory scheme, the "appropriate inquiry" for preemption analysis is whether the concurrent State regulation is "consistent" with the "purposes and objectives" of that scheme. *United States v. Locke*, 529 U.S. 89, 115 (2000). In this case, the uniform statutory scheme is the 1986 Immigration Reform and Control Act

(IRCA), Pub. L. No. 99-603, 100 Stat. 3359, which imposes civil and criminal sanctions on employers that unlawfully hire unauthorized aliens. When enacting IRCA, Congress expressly preempted State and local governments from "imposing civil or criminal sanctions ... upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens," but saved from preemption "any State or local law" that imposes sanctions "through licensing and similar laws[.]" 8 U.S.C. § 1324a(h)(2).

The express language of 8 U.S.C. § 1324a(h)(2) affirms that Congress intended to save from preemption the traditional State power of imposing "licensing" sanctions on businesses that knowingly employ unlawful aliens. Petitioners agree with this statutory interpretation, but want the Court to limit the definition of "license" to "'fitness to do business laws,' such as state farm labor contractor laws," Pet. Br. 25 (quoting H.R. Rep. No. 99-682(I), at 58, *reprinted in* 1986 U.S.C.A.N. 5649), and to bar States from establishing any "alternate investigatory and adjudicatory systems" to enforce their respective licensing scheme, *id*. at 39.

This statutory interpretation cannot survive. Neither this Court's preemption doctrine nor IRCA's legislative history support Petitioners' reading of 8 U.S.C. § 1324a(h)(2)'s savings clause. Petitioners are correct that legislative history is an important judicial tool in determining a statute or statutory scheme's purpose for either express or implied preemption analysis. *Wyeth v. Levine*, 129 S. Ct. 1187,

1195 (2009) ("In order to identify the "purpose of Congress," it is appropriate to briefly review the history"). However, the presumption against preemption applies when addressing questions of express or implied preemption. *Cipollone v. Liggett Group*, 505 U.S. 504, 518, 523 (1992); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Altria Group, Inc.*, 129 S. Ct. at 543. The presumption requires that the Court begin with the "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This assumption "applies with particular force when Congress has legislated in a field traditionally occupied by the States" such as business licenses and articles of incorporation. *Altria Group, Inc.*, 129 S. Ct. at 543.

The presumption against preemption also applies when examining legislative history. The Court works under the presumption that "federal legislation threatening to trench on the States' arrangements for conducting their own governments [is to] be treated with great skepticism, and read in a way that preserves the States' chosen disposition of its own power[.]" *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004).

Indeed, the examination of legislative history can sometimes reveal that Congress had a narrower purpose than the "strict language" of the statute. *Id*. ("If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of

Congress' displacement of the state law remains."). However, it is the rare case where the "plain meaning" and "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters*., 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

This is why the legislative history is important in preemption analysis. It requires that the intent of Congress be "clear and manifest" to rebut the presumption against preemption. *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 485 (2005) (citations omitted); *see also Medtronic, Inc.*, 518 U.S. at 486 ("Also relevant ... is the structure and purpose of the statute as a whole ... the way in which Congress intended"). This presumption applies to both express and implied preemption challenges. It is not enough for Petitioners to claim that they have conducted a legislative history, and assert a "plausible alternative reading" of 8 U.S.C § 1324a(h)(2). *See Bates*, 544 U.S. at 485. Instead, Petitioners must affirmatively show that either the "statutory structure [or] legislative history points to a commitment by Congress" to preempt the State legislation in question. *Nixon*, 541 U.S. at 141; *see also Wisconsin Pub. Intervenor*, 501 U.S. at 611-612 (legislative history should provide a "clear and manifest indication that Congress sought to supplant local authority").

To paraphrase, if Petitioners cannot provide legislative history that affirmatively conveys Congress's clear and manifest purpose was to limit the

States' power to employ "licensing and similar laws," the statute is "susceptible [to] more than one plausible reading," and the Court should "accept the reading that disfavors pre-emption." *Altria Group, Inc.*, 129 S. Ct. at 543 (citations omitted).

II. IRCA'S LEGISLATIVE HISTORY REVEALS THAT CONGRESS'S PURPOSE AND OBJECTIVE WAS TO CONTROL THE BORDER THROUGH EMPLOYER SANCTIONS

In enacting IRCA, the purpose and objective of Congress was to establish "penalties for employers who knowingly hire undocumented aliens, thereby ending the magnet that lures them to this country." H.R. Rep. No. 99-682(I), at 45-46. Congress enacted IRCA believing that "employer sanctions" were the "principal means of ... curtailing illegal immigration[.]" *Id*. at 46. Congress elaborated on this purpose and objective in the House Report:

> Employment is the magnet that attracts aliens here illegally or ... leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this ... will deter aliens from entering illegally or violating their status in search of employment.

Id.; *see also* Sen. Rep. No. 99-132, at 1. Conversely, Petitioners argue that in establishing IRCA's employer sanctions scheme, Congress sought to "balance multiple, sometimes competing, objectives," including

"deterring illegal immigration, protecting applicants from discrimination, accommodating privacy concerns, and minimizing burdens on employers." Pet. Br. 2. Petitioners argue that the Arizona Statute disrupts IRCA's balance and "fundamental purpose of establishing a national and "uniform" system of regulating alien employment[.]" *Id*. at 17. In making this argument, Petitioners claim that "IRCA's history and structure" shows Congress's "clear" purpose for including a savings clause was so that "States could rely on federal determinations of compliance with federal immigration laws when issuing business licenses or permits to farm labor contractors." *Id*.

In conducting their legislative history analysis, Petitioners never cite to the contemporaneous legislative debates concerning IRCA. Instead, Petitioners rely solely on Part I of House Report 99-682, which states:

> The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent 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. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which

> specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. Rep. No. 99-682(I), at 58. Petitioners' textual and historical analysis of the House Report fails for three reasons. First, Petitioners failed to read the entire House Report in the context of IRCA's purpose and objective, which is to curtail illegal immigration through the utilization of employer sanctions. *Id*. at 47 ("Since most undocumented aliens enter this country to find jobs, the Committee believes it is essential to require employers to share the responsibility to address this problem."). Second, Petitioners focus solely on the phrase "fitness to do business laws," but completely ignore the context of the phrase within the paragraph. *Compare* Pet. Br. 24-28, *with* Res Br. 39-43. The words "further" and "such as" are key to interpreting the paragraph. They demonstrate that Congress was merely providing additional examples of State laws that it intended not to preempt, rather than, as Petitioners incorrectly suggest, an exhaustive list. H.R. Rep. No. 99-682(I), at 58; *see infra* pp. 20-21.

Third, and most importantly, Petitioners' view that the Court should base its interpretation of 8 U.S.C. § 1324a(h)(2) on the non-statutory phrase "fitness to do business laws" does not provide a "fair understanding of congressional purpose," *Cipollone*, 505 U.S. at 530, and would undermine the cornerstone principle that "the purpose of Congress is the ultimate touchstone in every pre-emption case,"

Medtronic, Inc., 518 U.S. at 485 (citations omitted). The legitimate use of legislative history requires more than the selective quotation of five words in a House Report, presented out of context, to ascertain the preemptive intent of Congress. *See Harrison*, 446 U.S. at 592 ("it would be a strange canon of statutory construction that would require Congress to state in committee reports ... that which is obvious on the face of a statute."). Instead, the correct and "common sense" use of legislative history in preemption analysis is to incorporate "additional information rather than ignoring it." *Wisconsin Pub. Intervenor*, 501 U.S. at 611; *see also United States v. Fisher*, 6 U.S. 358, 386 (1805) (Marshall, J.) ("where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived."); *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 284 (1987) (when examining a statute's language "against the background of its legislative history" it must be done in "historical context.").

Petitioners ignore that the purpose and objective of Congress was to provide a statutory scheme of employer sanctions as a means "to curtail[ ] future illegal immigration[.]" H.R. Rep. No. 99-682(I), at 46. The congressional record unequivocally reflects this historical fact. When IRCA was presented to the Senate in 1985, its chief architect Senator Alan K. Simpson stated, "We all know that employer sanctions [are] the very key to immigration reform." 131 Cong. Rec. 23718 (1985). Senator Simpson repeated this formulation of the purpose and objective of

employer sanctions after the publication of the House Report, stating that there cannot be "effective control of our borders without having employer sanctions[.]" 132 Cong. Rec. 33212 (1986).

Senator Steve Symms supported IRCA for the same reason, stating, "[E]mployer sanctions provisions are an attempt to halt illegal immigration into the United States" by transferring part of the "responsibility for law enforcement from the Government over to the private sector." 131 Cong. Rec. 23718 (1985). Some members of Congress did express concerns that IRCA's employer sanction provisions would unfairly shift the responsibility "to the private sector" and "hamper economic activity and growth[.]" *Id*. at 23719.[2] However, these concerns were the viewpoint of the minority voting against IRCA.

The majority did not view IRCA's employer sanctions as an unreasonable burden on employers, as Petitioners now claim. Pet. Br. 8, 18, 43. As Senator Mack Mattingly stated, "The well-being of our citizens requires ... a serious effort to gain control of our borders," and "employer sanctions will ... contribute to this control." 131 Cong. Rec. 24306 (1985). Attorney General Edwin Meese III made a similar statement:

> As long as the American job market remains open to them, illegal aliens will continue

[2] *See also* 132 Cong. Rec. 32221, 33242 (1986) (statements of Sen. McClure).

> illegal entry, smuggling, fraudulent visas ... We continue to support effective methods to require employers to share in the responsibility to help solve this problem.

H.R. Rep. No. 99-682(I), at 103. The record is emphatic that Congress drafted IRCA's employer sanctions to "drop significantly" the "availability of American jobs to illegal workers[.]" 131 Cong. Rec. 24308 (1985) (statement of Sen. Hatfield). Members of Congress viewed IRCA's employer sanctions scheme as the "humane approach" in "solving our immigration problems by placing the emphasis on penalizing those employers who would knowingly hire illegal aliens[.]" *Id*. at 24316 (statement of Sen. Dole); *see also id*. at 23718 (statement of Sen. Simpson) (without employer sanctions there "is no immigration reform, at least on the humane basis that Senator Kennedy and I have tried to do it").

In pursuing this "humane approach,"[3] Congress did seek to "balance" multiple interests. As Senator Bob Dole stated, "[IRCA] is well-constructed and carefully balanced legislation – the product of years of discussion and debate over a highly complex, emotional issue." *Id*. at 24316. However, Petitioners have mischaracterized this "balance" by excluding State participation as a factor, except in narrow licensing circumstances. Pet. Br. 24-28. Not only does the plain

[3] The alternative, inhumane approach, would have required direct enforcement at the border and in the interior. *See* Sen. Rep. No. 99-132, at 7-8.

meaning of 8 U.S.C. § 1324a(h)(2) conflict with Petitioners' interpretation of IRCA's "balance," but a statement by IRCA's chief architect, Senator Simpson, expressly refutes it:

> I want to say to my colleagues that this bill ... shows that such a subject [like immigration reform] can be dealt with in a way which balances the very real needs of many interest groups in this country – business, labor, *heavily impacted State and local governments*, and many others – keeping paramount the fundamental obligation of all Members of Congress, to serve the interests of the American people as a whole and their descendents ... [IRCA] contains most importantly, provisions intended to reduce the problem of illegal immigration. I say "most importantly" since the potential benefits and protections ... will not be available in practice if those statutory standards cannot be enforced.

131 Cong. Rec. 24318 (1985) (emphasis added). The inclusion of the interest of "State and local governments" is reflected in the text of 8 U.S.C. § 1324a(h)(2). It expressly permits "any State or local law" that imposes employer sanctions "through licensing and similar laws[.]" 8 U.S.C. § 1324a(h)(2). Neither Petitioners nor their accompanying *amici* have produced any legislative history contemporaneous

with the enactment of IRCA[4] to refute the conclusion that the States were an important part of the "balance" Congress struck in 1986.

Moreover, Petitioners' reading of 8 U.S.C. § 1324a(h)(2) contradicts IRCA's purpose and objective. Senator Simpson drafted IRCA so that its "statutory standards" – "intended to reduce the problem of illegal immigration" – would "be enforced." 131 Cong. Rec. 24318 (1985). Contrary to Petitioners' belief, Part I of House Report 99-682 contains nothing that contradicts this purpose and objective. *Compare* Pet. Br. 6-8, 17, 29-30, 34, 43-44, *with* H.R. Rep. No. 99-682(I), at 45-47, 56, 58, 68.

In fact, during the report's debate, members of both the House and Senate repeated that the main purpose and objective of IRCA was to establish a scheme for employer sanctions to deter illegal immigration and gain control of the border. For example,

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[4] The majority of the *amici curiae* briefs do not even touch upon the congressional debates concerning IRCA's employer sanctions scheme or House Report 99-682. *See* Br. Of Amicus Curiae United States at 16-23; Br. Of Amici Curiae Representative Mazzoli et al., at 8-13; Br. Of Amici Curiae National Immigration Justice Center et al., at 7-17; Br. Of Amicus Curiae Service Employers International Union at 5-11. Only the *amici curiae* brief by Business Organizations made an attempt to quote or cite to the Congressional Record. *See* Br. Of Amicus Curiae Service Employers International Union at 6-10. However, not once does that brief quote or cite to the debates touching upon IRCA's provisions, the House Report, or any debates from the 99th Congress. Instead, the brief by Business Organizations cites and quotes the debates of the 98th Congress. *Id*.

Representative Peter W. Rodino, Chairman of the Judiciary Committee, stated the conference report was "fair and balanced," clarifying his view that IRCA's "sanctions provisions are fair to decent and honest employers, [and] at the same time, ensure that repeat offenders will be subject to strong civil and criminal penalties." 132 Cong. Rec. 31631 (1986); *see also* H.R. Rep. No. 99-682(I), at 107 (statement of Rep. Rodino). Representative John Bryant supported the conference report, stating, "Strong employer sanctions are absolutely essential to turn off the jobs magnet that encourages people to enter the United States illegally." 132 Cong. Rec. 31640 (1986). Representative Charles Schumer supported the employer sanction scheme because "[u]ntil and unless employers are threatened with ... penalties, there is little hope that the United States will be able to stem the flow of illegals pouring into the United States." *Id*. at 31645. Even Representative Romano L. Mazzoli, who has joined an *amici curiae* brief in support of Petitioners,[5] stated that IRCA's employer sanction scheme has "universal application" to "bring some order and sense to our immigration policy by regaining control of our borders[.]"[6] *Id*. at 31633.

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[5] The *amici curiae* brief joined by Representative Romano L. Mazzoli, Senator Arlen Specter, and Representative Howard L. Berman does not once cite to or quote the 1985-86 House or Senate debates concerning IRCA. *See generally* Br. Of Amici Curiae Representative Mazzoli et al.

[6] *See also* 132 Cong. Rec. 31643 (1986) (statement of Rep. Lungren) ("We have retained employer sanctions. It is an

(Continued on following page)

The Senate debate on the House Report reveals more of the same.[7] Senator Howard M. Metzenbaum supported the conference report, stating:

> For once, we will have employer sanctions in place, and they are tough employer sanctions. Those sanctions are a key part of the bill. Without it, I do not think the bill would be worth passing. But you cannot have a policy of enforcing immigration control ... unless you have some control over those employers that sign the paychecks for the illegal immigrants[.]

Id. at 32412. IRCA's chief architect Senator Simpson also concurred with the conference report, stating "as long as you have employer sanctions" there will be those "who are going to oppose it." *Id*. at 33212. Responding to the minority opposition, Simpson emphasized that IRCA's employer sanctions scheme was "absolutely essential." *Id*. Many Senators followed Simpson's lead. Senator Pete Wilson knew that the minority viewed IRCA's scheme as "distasteful," but felt that it offered "the only device by which we may hope to reverse this tide" of illegal immigration. *Id*. at 33225. Meanwhile, Senator Alan Cranston

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important part of this bill; it is an indelible part of this bill."); *id*. at 31644 (statement of Rep. Bustamante) ("sanctions will keep a magnet from attracting these people here").

[7] Once the House Report was approved by the House of Representatives, it was sent to the Senate for approval. *See* 132 Cong. Rec. 33212-45 (1986). The report was approved by the Senate on October 17, 1986. *Id*. at 33245 (63 yeas, 24 nays).

stated that while IRCA left "unresolved or unfinished some major immigration related problems," he knew that its employer sanction scheme was viewed by the Senate as the "crux" and "key" to "deterring illegal immigration." *Id*. at 33234 (emphasis added).

III. THE CONFORMING AMENDMENTS TO AWPA DID NOT NARROW IRCA'S PURPOSE AND OBJECTIVE

When Senator Simpson proposed IRCA's employer sanctions scheme, he included conforming amendments to the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). *See* Sen. Res. 1200, 99th Cong. (1985) (enacted); 29 U.S.C. §§ 1801-1872. These amendments did not seek to conform IRCA's employer sanctions scheme according to the preexisting AWPA. Instead, the conforming amendments merely incorporated IRCA's employer sanctions scheme as a means to continue providing greater statutory protections to the farm labor industry. *See* Sen. Rep. No. 99-132, at 79-82. The plain reading of 29 U.S.C. § 1813 confirms this construction.

Conversely, Petitioners assert that the AWPA conforming amendments require this Court to read the 8 U.S.C. § 1324a(h)(2) savings clause narrowly. Pet. Br. 17, 26-34. Petitioners' interpretation of IRCA's statutory language and legislative history fails for two reasons. First, the language of 8 U.S.C. §§ 1324a and 1324b is structurally and statutorily dissimilar to AWPA. *Compare* 8 U.S.C. §§ 1324a,

1324b, *with* 29 U.S.C. §§1801-1872; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Second, and more importantly, the congressional debates reveal that the majority who voted in favor of IRCA sought to retain the greater statutory protections for the farm labor industry, with its migrant and seasonal agriculture workforce, under a distinct statutory scheme. This was part of the "balance" Congress struck when enacting IRCA.[8]

Indeed, the purpose and objective of the conforming amendments to AWPA were akin to IRCA's employer sanctions scheme in that both sought to control unlawful immigration. However, when enacting IRCA, members of Congress intended to maintain greater protections for the farm labor industry in regards to employer sanctions. Representative Edward R. Roybal voted against IRCA on this very point, stating:

> [Congress] voted for immigration reform with sanctions, but they did not. What they voted for is a farm labor bill, a bill that is designed to provide cheap labor for the farmers and growers of this country, a bill that

[8] 131 Cong. Rec. 24310 (1985) (statement of Sen. Bingaman) ("I believe S. 1200 does provide some flexibility to address the needs of the perishable crop industry"); *id*. (statement of Sen. Bingaman) ("Minority Americans, farmers, business owners and employers all have a stake in this legislation and I have tried to *balance* their concerns.").

> exempts them from sanctions, while it legalizes the men that work for them.

132 Cong. Rec. 31637 (1986) (debate over Part I of House Report 99-682). Roybal's argument did not sway the majority from maintaining the differing protections, i.e. conforming amendments, for the farm labor industry. Representing the majority voice, Representative Rodino responded to Roybal's objection, stating:

> [Previous bills] sought to reform our immigration laws on the backs of American farmworkers ... This time we have done it a different way. We have finally dealt with the asserted needs of agriculture in a fashion that protects the legal status and the rights and the dignity of farm workers, in a way that we can all be proud of[.]

Id. To paraphrase, the conforming amendments merely incorporated IRCA's newly created employer sanctions scheme into AWPA. Neither the text of AWPA nor IRCA's legislative history supports Petitioners and their accompanying *amici*'s argument that 8 U.S.C. § 1324a(h)(2)'s savings clause is somehow restricted by AWPA. Petitioners and their accompanying *amici* rely on a flawed reading of IRCA's amendments to the AWPA, and do not base their interpretation upon any substantiated or contemporaneous legislative history.

In fact, neither Petitioners nor their accompanying *amici* provide any evidence from the IRCA debates that supports their stance.[9] The single excerpt from the contemporaneous legislative history that they do incorporate, Part I of House Report 99-682, they present out of context. Petitioners rely solely on the phrases "fitness to do business laws" and "farm labor contracts" in making their argument that the AWPA limited IRCA's savings clause. Pet. Br. 17, 26, 32-34, 36. However, Petitioners' argument ignores the context of the phrase "such as" in the conference report. H.R. Rep. No. 99-682(I), at 58. It shows that Congress was giving two examples of State laws that it did not intend to preempt, rather than an exhaustive list. *Id*. ("Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws").

Petitioners also ignore the term "further" in the House Report, which illustrates that the explanation in the second sentence is in addition to what Congress intended in the first sentence. The first sentence broadly discusses "lawful state and local processes concerning the suspension, revocation, or refusal to reissue a license to a person who has been found to have violated this section." H.R. Rep. No.

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[9] *See* Pet. Br. 17, 26-34; Br. Of Amicus Curiae United States at 17-23; Br. Of Amici Curiae Representative Mazzoli et al., at 9-12; Br. Of Amici Curiae National Immigration Justice Center et al., at 7-17.

99-682(I), at 58. Nothing in this first sentence demonstrates that Congress sought to limit the business licensing exception to the narrow category of "farm labor contracts," as Petitioners advocate.

IV. IRCA'S ANTI-DISCRIMINATION PROTECTIONS DO NOT LIMIT OR NARROW STATE AUTHORITY TO IMPOSE EMPLOYER SANCTIONS "THROUGH LICENSING AND SIMILAR LAWS"

In addition to providing conforming amendments to AWPA, IRCA included anti-discrimination provisions to minimize any potential discrimination based upon alienage or citizenship. These amendments were not intended to "balance" IRCA by limiting or narrowing the authority of State and local governments to adopt employer sanctions in accordance with 8 U.S.C. § 1324a(h)(2). Instead, Congress included them as a contingency, in case widespread abuse was to occur as a result of employer sanctions. The legislative history reveals that IRCA's greatest anti-discrimination protection, and what "balanced" the employer sanctions scheme, was the requirement that they be "uniformly applied to all employers regardless of the number of employees." H.R. Rep. No. 99-682(I), at 56. Congress felt that the universal and equal application of the employer sanctions scheme "would be least disruptive to the American businessman and also minimize the possibility of employment discrimination." *Id*.

Congress did not believe "wholesale discrimination" would necessarily result because of IRCA's employer sanctions scheme, noting that the "GAO's recent study of sanction laws of other countries did not document such discriminatory impacts." *Id*. at 68. Nevertheless, the anti-discrimination provisions were incorporated as a contingent corrective measure, should "widespread discrimination" actually occur. These anti-discrimination provisions gave Congress the statutory authority to sunset employer sanctions should "widespread discrimination" occur, and also served as a deterrent, by "provid[ing] substantial protections against discrimination in the form of a uniform verification process for all new hires[.]" *Id*.

From the very outset, Senator Simpson informed the Senate that despite concerns that IRCA "will cause some employers to discriminate on the bases of national origin against certain U.S. citizens or aliens authorized to work in the United States," there was "[n]o convincing evidence or argument ... that such discrimination will occur, and the evidence that is available indicates that it would not." 131 Cong. Rec. 23317 (1985); *see also* Sen. Rep. No. 99-132, at 9. Simpson stated that members of Congress would hear hostile arguments concerning prospective discrimination "based on alienage," but assured them that Senator Ted Kennedy's anti-discrimination amendment would allow Congress to swiftly correct any deficiencies should "widespread discrimination" ever actually occur. 131 Cong. Rec. 23317-18 (1985);

IRCA § 101(a)(1) (codified at 8 U.S.C. § 1324a(j)(1)(c) (1986)).

Senator Kennedy confirmed Senator Simpson's interpretation of IRCA's anti-discrimination amendment. Kennedy stated he offered his anti-discrimination amendment because employer sanctions "might – I stress the word "might" – result in discrimination[.]" 131 Cong. Rec. 23320 (1985); *see also id*. at 23717 (statement of Sen. Kennedy) ("I stress the word "might," because we really don't know, and it is certainly not intended or anticipated by the sponsors of this legislation."). In particular, the amendment required the "General Accounting Office (GAO) [to] undertake an independent study" of the implementation of the employer sanction program, and provided Congress with the statutory vehicle to "sunset" employers sanctions "after 3 years, if the GAO finds that employer sanctions has resulted in a "widespread pattern of discrimination." *Id*. at 23321; IRCA § 101(a)(1) (codified at 8 U.S.C. § 1324a(j)(1)(c) (1986)). In other words, Kennedy's anti-discrimination amendment did not seek to narrow or limit IRCA's employer sanctions scheme. It merely sought to "force Congress to face the issue of discrimination squarely, *if it develops*." 131 Cong. Rec. 23321 (1985) (emphasis added); *see also id*. at 23717 (statement of Sen. Kennedy) (assuring "that Congress will act to rectify employer sanctions if a widespread pattern of job discrimination should develop").

Representative Barney Frank also implemented an anti-discrimination amendment that provided

protections against employers who discriminated on the basis of alienage or citizenship. *See* 8 U.S.C. § 1324b(a). The Frank Amendment did not limit or narrow State and local employer sanctions "through licensing or similar laws." Instead, the Frank Amendment sought to "prevent any discrimination ... by employers who are subject to sanctions for hiring illegal aliens." 132 Cong. Rec. 33237 (1986) (statement of Sen. Levin). Representative Rodino confirmed that this was the purpose of the Frank Amendment:

> [The Frank Amendment was] included ... to allay [many Hispanic organizations] concerns and to provide an immediate and effective remedy should discrimination occur ... it is based upon anticipated discrimination, rather than a historical pattern of past discrimination. Nevertheless, we included this provision to meet the concerns expressed about sanctions[.]

Id. at 31632; *see also id*. at 33223 (statement of Sen. Bingaman) (the civil rights provisions "protects against possible abuse."). The record thus indicates that Congress did not include these anti-discrimination amendments based on evidence that widespread discrimination would occur, or to minimize State and local employer sanctions "through licensing and similar laws." Congress included IRCA's anti-discrimination amendments to reassure powerful interest groups that, *should* their asserted fears of pervasive discrimination ever materialize, a remedy would be

available. Neither Representative Rodino nor any other member of the House of Representatives ever stated or suggested that IRCA's anti-discrimination provisions were intended to limit a State and local governments' authority to utilize sanctions "through licensing and similar laws." If anything, Part I of the House Report confirms that Congress included IRCA's anti-discrimination provisions as a contingency:

> The Committee does not share the view that wholesale employment discrimination will necessarily result from the enactment of sanctions ... Nevertheless, the Committee does believe that every effort must be taken to minimize this *potentiality* of discrimination.

H.R. Rep. No. 99-682(I), at 68 (emphasis added). Petitioners ignore the legislative record and materially mischaracterize IRCA's anti-discrimination provisions as providing a delicate "balance" that precludes State and local governments from imposing any further burdens on employers "through licensing and similar laws." *See* Pet. Br. 6-8, 18, 43-45; 8 U.S.C. § 1324a(h)(2). Petitioners assert the Arizona statute "upsets the balance" "struck by Congress ... in IRCA's detailed administrative scheme for investigating, adjudicating, and sanctioning unauthorized worker violations, with corresponding anti-discrimination protections[.]" Pet. Br. 18. In particular, Petitioners contend congressional concerns over employment discrimination are proof that Congress intended 8 U.S.C. § 1324a(h)(2)'s savings clause to be applied

narrowly, and that State and local employer sanctions "through licensing and similar laws" should not further burden employers or prospective employees. Pet. Br. 6-8, 43-45.

For support, Petitioners rely entirely on Part I of House Report 99-682, which states: "The antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in that context." Pet. Br. 45 (citing H.R. Rep. No. 99-682(I), at 49, 68) (emphasis added). Indeed, the anti-discrimination provisions did *complement* IRCA's employer sanctions provisions; but not in the way Petitioners suggest. The anti-discrimination provisions were put in place as a protection to *complement* employer sanctions *should* employment discrimination occur – not as a vehicle to narrow or limit State and local governments from imposing employer sanctions "through licensing and similar laws."

In other words, IRCA's legislative record reveals that Petitioners' historical characterization of IRCA's anti-discrimination provisions is false. The "balance" that Congress intended within IRCA's statutory scheme was not to limit or narrow the scope of "any State or local law" that imposes sanctions "through licensing and similar laws[.]" 8 U.S.C. § 1324a(h)(2). The anti-discrimination "balance" struck was the requirement that employer sanctions – whether they be federal, State, or local – are to be "uniformly applied to all employers regardless of the number of employees." H.R. Rep. No. 99-682(I), at 56. It was this universal and uniform application that would

"minimize the possibility of employment discrimination." *Id.*; *see also* Sen. Rep. No. 99-132, at 9 (the "employer is protected by the verification provision and will have no reason to discriminate."); 132 Cong. Rec. 31634 (1986) (statement of Rep. Mazzoli) ("Universal and mandatory verification of documents is ... required").

The statements of IRCA's chief architect, Senator Simpson, confirm that universal application to all employers was the most important anti-discrimination provision. Responding to concerns that repeat violators will never "hire anybody again who looks foreign," Simpson stated:

> We are asking here for the citizens of America and noncitizens and those who are authorized to work to present a document ... [The document requirement] says you are legal to work and that document is not intrusive ... It is presented at the time of new hire employment and it is presented by people who "look foreign" and by bald Anglo skinny guys like me, too. Anything else and you would truly have discrimination. That is the issue. I have been through that one plenty of times, and it is extraordinary to me to think that the issue of employers being the policemen of the country, that one went out the window a long time ago. If we do not ask employers of America to handle our withholding tax, who would? ... We have penalties against those employers who choose not

> to do that. That is what we are talking about.

132 Cong. Rec. 33223 (1986); *see also* H.R. Rep. No. 99-682(I), at 45-46.

V. ARIZONA'S LICENSING SCHEME IS NOT PREEMPTED BECAUSE IT COMPORTS WITH IRCA'S PURPOSE AND OBJECTIVE

When Arizona enacted the Legal Arizona Workers Act in 2007, it did so with the purpose and objective of discouraging "the further flow of illegal immigration through our borders." J.A. 397; *see also* Ariz. Rev. Stat. §§ 23-211 to 214. This purpose and objective is "consistent" with what Congress intended. IRCA sought to control illegal immigration and the border through employer sanctions, leaving to the States and local government the authority to enact analogous legislation "through licensing and similar laws." *See infra* pp. 7-17; *Locke*, 529 U.S. at 115 (for preemption the "appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are *consistent* with concurrent state regulation.") (emphasis added); 8 U.S.C. § 1324a(h)(2).

Arizona's employer licensing sanctions work in harmony with IRCA's purpose and objective in that they provide a means to suspend or revoke the licenses of employers that "knowingly" or "intentionally" employ "an unauthorized alien" in accordance with the verification responsibility of the executive

branch created by 8 U.S.C. § 1373(c). Ariz. Rev. Stat. §§ 23-212(A), 23-212.01(A).

Petitioners assert that Arizona's licensing scheme conflicts with IRCA's purpose of balancing "multiple, sometimes competing, objectives," including "deterring illegal immigration, protecting applicants from discrimination, accommodating privacy concerns, and minimizing burdens on employers." Pet. Br. 2. In other words, Petitioners claim that the Arizona statute disrupts IRCA's balance and "fundamental purpose of establishing a national and "uniform" system of regulating alien employment[.]" Pet. Br. 17.

This interpretation cannot survive the presumption against preemption. *See infra* pp. 7-28; *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 864 (9th Cir. 2009) ("nor [does] the legislative history [of IRCA] support[ ] plaintiffs' position."). IRCA's principal purpose and objective was to deter illegal immigration through the use of employer sanctions. The legislative and historical record conveys that Congress intentionally included vital State and local interests in the "balance" by providing an express licensing exception to utilize employer sanctions. *See infra* pp. 12-14. As Senator Simpson stated before Congress, IRCA's employer sanctions provisions sought to "balance" the "many interest groups in this country," including "business, labor, *heavily impacted State and local governments*, and many others[.]" 131 Cong. Rec. 24318 (1985) (emphasis added).

Petitioners' concerns about discrimination are overstated. They note that the Ninety-Ninth Congress incorporated anti-discrimination provisions in IRCA. Pet. Br. 18, 44-45. However, these modifications were never intended to prevent, narrow, or limit State and local governments from utilizing employer sanctions through "licensing and similar laws." Instead, the record shows that IRCA's anti-discrimination provisions were intended to give Congress the ability to sunset employer sanctions should widespread discrimination occur, *infra* pp. 21-23, and punish employers found to have engaged in discrimination based on alienage or citizenship, *infra* pp. 23-28.

Petitioners overlook IRCA's most important anti-discrimination device – the application of employment authorization verification requirements to all employers regardless of size. *See* H.R. Rep. No. 99-682(I), at 56; 132 Cong. Rec. 33223 (1986). Arizona's licensing scheme similarly applies universally and uniformly applies to all Arizona employers. *See* Ariz. Rev. Stat. §§ 23-211 to 214. To the extent that the Arizona statute is burdensome to employers as Petitioners claim, that burden accurately reflects IRCA's purpose and objective – controlling the borders through the penalty of employer sanctions. *See infra* pp. 7-17.

A. Arizona's Licensing Scheme Is Not Expressly Preempted

It is well-settled that the "purpose of Congress is the ultimate touchstone" in "every pre-emption case," including challenges based on express preemption doctrine. *Medtronic, Inc.*, 518 U.S. at 485 (citations omitted); *see also Wyeth*, 129 S. Ct. at 1194-95. As the legislative history reveals, Arizona's licensing scheme survives express preemption because it works in accordance with IRCA's purpose of deterring unlawful immigration through the use of employer sanctions. *See infra* pp. 7-28; *see also* Res. Br. 30-43.

All appellate courts that have considered the statutory language of 1324a(h)(2)'s savings clause agree that it should be interpreted according to its plain meaning, and that it does not expressly preempt State or local licensing laws, like Arizona's, that fall within this definition. *See Lozano v. Hazelton*, 2010 U.S. App. LEXIS 18835, at 99-109 (3d Cir. 2010); *Chicanos Por La Causa, Inc.*, at 863-64; *COC v. Edmondson*, 594 F.3d 742, 765-66 (10th Cir. 2010).

This Court has held that when Congress does not define the terms in a statutory scheme, the terms are usually ascribed their "ordinary or natural meaning." *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994). Given that Congress did not expressly define the terms "licensing and similar laws," the text of 8 U.S.C. § 1324a(h)(2) should be interpreted according to its plain meaning and save from preemption any State or local licensing laws addressing the

employment of unauthorized aliens. *Lozano*, 2010 U.S. App. LEXIS 18835, at 103. Arizona's licensing scheme easily fits within the "ordinary or natural meaning" of the term "license." *Fed. Deposit Ins. Corp.*, 510 U.S. at 476. *Merriam-Webster's Dictionary* defines a license as "a permission granted by competent authority to engage in a business or occupation or in an activity otherwise unlawful." MERRIAM-WEBSTER'S DICTIONARY (2010), *available at* http://www.merriam-webster.com/dictionary/license. Similarly, *Black's Law Dictionary* defines a license as "a permission, usually revocable, to commit some act that would otherwise be unlawful." BLACK'S LAW DICTIONARY (8th ed. 2004).

Here, Arizona's statutory scheme simply revokes the business licenses or articles of incorporation of employers who employ unauthorized aliens. *See* Ariz. Rev. Stat. §§ 23-211 to 214. Despite Petitioners' claims to the contrary, business licenses and articles of incorporation fall within the plain definition of a "license," and when such statutory language is plain and unambiguous, "the sole function of the courts ... is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). The fact that Petitioners offer a plausible alternative reading of 8 U.S.C. § 1324a(h)(2) is not enough to overcome the presumption against preemption, as the Court must "accept the reading that disfavors pre-emption." *Altria Group, Inc.*, 129 S. Ct. at 543 (quoting *Bates*, 544 U.S. at 449); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose

clearly, it will not be deemed to have significantly changed the federal-state balance.").

B. Arizona's Licensing Scheme Is Not Preempted By Implication Because It Supports IRCA's Purpose and Objective

When a State or local statute is not expressly preempted by federal law, the question that remains is whether the State or local statute is impliedly preempted. As with express preemption, the cornerstone for implied preemption analysis is congressional purpose. *Altria Group, Inc.*, 129 S. Ct. at 543. It requires that the Court ascertain "a fair understanding of congressional purpose," *Cipollone*, 505 U.S. at 530 n.27, as "revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc.*, 518 U.S. at 486. It also requires the Court to work under the presumption that the traditional "powers of the States [are] not to be superseded by [federal statute] unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. This presumption applies with "particular force" where "Congress has 'legislated ... in a field which the States have traditionally occupied,'" namely licensing schemes and employment. *Wyeth*, 129 S. Ct. at 1194.

There are two types of implied preemption – implied field preemption and implied conflict preemption. Implied field preemption occurs when State or local governments attempt regulation in a field which Congress has implied an intent to exclusively occupy. *English v. General Electric Co.*, 496 U.S. 72, 79 (1990).

Petitioners do not claim that IRCA is "field preempted," nor could they, given that Congress has expressly allowed States to participate in ensuring that employers do not employ unauthorized aliens "through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). Instead, Petitioners argue that the statute is "conflict preempted," which occurs when it is either "impossible ... to comply with both state and federal law," *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000), or where State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Petitioners do not claim that it is "impossible" to comply with both federal law and Arizona's licensing scheme. *See* Pet. Br. 37-44. Instead, Petitioners claim that Arizona's licensing scheme conflicts with IRCA's employer sanctions scheme in that it "disrupt[s] the careful balance that Congress struck among competing interests when it enacted IRCA." *Id.* at 37. In making this argument, Petitioners assert that IRCA left no room for the States to adopt "alternate investigatory and adjudicatory systems" for employer sanctions through "licensing and similar laws" such as

Arizona's licensing scheme. *Id*. at 39. Petitioners further assert Arizona's scheme upsets IRCA's policy objectives and balance in that it does not minimize burdens on employers, could potentially "cause employers to discriminate against prospective employees," and applies "a different system, with different adjudicatory standards and different penalties." *Id*. at 42-46.

These implied conflict preemption arguments are without merit, for Petitioners misstate the purpose and objective of Congress in enacting IRCA; the deterrence of illegal immigration through the use of employer sanctions. *See infra* pp. 7-17. More importantly, the legislative history of IRCA does not provide sufficient evidence of a *clear and manifest* preemptive purpose to bar State and local governments from prescribing employer sanctions through "licensing and similar laws." *See infra* pp. 7-28. Even if Petitioners or their *amici* had been able to identify some legislative history supporting their preemption claims, it is insufficient to defeat the presumption. *Nixon*, 541 U.S. at 141; *Mortier*, 501 U.S. at 611-12.

1. Arizona's Licensing Scheme Works In Harmony With IRCA

When applying conflict preemption to State regulatory schemes the Court will determine whether the State scheme is consistent with the purposes and objectives of the federal scheme, *Locke*, 529 U.S. at 115, and whether "*both* [the] state and federal

regulatory schemes may operate with some degree of harmony," *Northwest Central Pipeline Corp.*, 489 U.S. at 515 n.12. Petitioners' claim, that Arizona's licensing scheme disrupts IRCA's balance by adopting "alternate investigatory and adjudicatory systems" for "licensing and similar laws," is not sufficient to rebut the presumption against preemption. *Compare* Pet. Br. 37-42, *with Northwest Central Pipeline Corp.*, 489 U.S. at 519-22. Conflict preemption analysis does not solely rest on whether a "state law impacts on matters within [federal] control[.]" *Northwest Central Pipeline Corp.*, 489 U.S. at 518. Instead, the doctrine of implied conflict preemption assumes the State law impacts federal law in some manner, and presumes that a State law or scheme will be saved from conflict preemption. *Id*.

This presumption against preemption also applies when Congress includes a savings clause. A savings clause "reflects a congressional determination that occasional nonuniformity is a small price to pay" in implementing the purposes and objectives of a federal statutory scheme. *Geier*, 529 U.S. at 871. In other words, for conflict preemption analysis purposes, the inclusion of a savings clause infers that "[u]nless clear damage to federal goals [will] result" the Court should not preempt State laws that support Congress's purpose and objective. *Northwest Central Pipeline Corp.*, 489 U.S. at 522.

In this case, IRCA's legislative history shows that Arizona's licensing scheme works within the purposes and objectives of IRCA. *See infra* pp. 7-17. The only

question that remains is whether Arizona's licensing scheme fails to "operate with some degree of harmony" with IRCA. *Northwest Central Pipeline Corp.*, 489 U.S. at 515 n.12.

Indeed, there may exist a State licensing scheme that is "so extensive and disruptive" as to "give way to federal pre-emption." *Id*. at 518. However, the Arizona licensing scheme is not one of them. The Arizona scheme works in harmony with the purposes and objectives of IRCA. It utilizes federal tools such as relying on federal verification of work authorization status, applies uniformly to all employers in States, and provides employers with good faith defenses. For example, Ariz. Rev. Stat. §§ 23-212(B) and 23-212.01(B) both require that all complaints investigated by the "attorney general or county attorney" to be verified pursuant to 8 U.S.C. § 1373(c). In contrast to Petitioners' claims that Arizona's licensing scheme does not offer anti-discrimination protections or protect employers, Arizona's licensing scheme stipulates penalties for "false and frivolous" complaints, and provides defenses for employers, including an "affirmative defense," to employers that comply with 8 U.S.C. § 1324a(b). *See* Ariz. Rev. Stat. §§ 23-212(C), (I)-(K); Ariz. Rev. Stat. § 23-212.01(C), (I)-(K); *see also* Res. Br. 44-58.

Arizona's utilization of the E-verify program shows that Arizona's licensing scheme is working in "harmony" with the federal laws. Ariz. Rev. Stat. § 23-214. In addition to the I-9 system, Congress created the E-verify program as a federal tool for employers

to verify, at the time of hire, whether an employee is lawfully authorized to work. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996); Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 (2003). The fact that E-verify is not mandated at the federal level for all employers, does not preempt States from mandating its use through their historic police powers. *See* Res. Br. 58-67; *see also Gray v. Valley Park*, 2008 U.S. Dist. LEXIS 7238, at 57-58 (E.D. Mo. 2008).

2. Arizona's Licensing Scheme Does Not Stand as an Obstacle to IRCA's Balance

In obstacle conflict preemption cases the Court's "primary function is to determine whether" the State law at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. This legal principle maintains the "appropriate state/federal balance," places Congress on notice that it must "speak clearly" when exercising its authority, and "prevents federal judges from running amok" with the "potentially boundless doctrine of conflict pre-emption based on frustration of purposes[.]" *Geier*, 529 U.S. at 907 (Stevens, J., dissenting). It is a principle that "must be applied sensitively ... so as to prevent the diminution of the role of Congress reserved to the States while at the same time

preserving the federal role." *Northwest Central Pipeline Corp.*, 489 U.S. at 516.

Obstacle preemption turns on whether the goals of the federal statute are frustrated by the effect of the state law." *Pharm. Research & Mfrs. of Am. v. Wash*, 538 U.S. 644, 679 (2003) (Thomas, J., concurring). Nothing in the statutory text (or in the legislative history) demonstrates that Congress intended to preempt laws such as Arizona's licensing scheme.

Petitioners assert that obstacle conflict preemption should require this Court to preempt the Arizona law because Congress "balanced" multiple objectives in passing IRCA. Pet. Br. 44-46. While obstacle conflict preemption requires an inquiry into the purposes underlying a federal statute, the Court should proceed cautiously so as to not upset the "appropriate state/federal balance." *Geier*, 529 U.S. at 907 (Stevens, J., dissenting).[10] Properly applied, obstacle conflict preemption analysis requires the Court to examine whether the "state regulation is consistent with the structure and purpose of the statute as a whole," *Gade v. National Solid Waste Mgmt. Ass'n*,

[10] *See also Northwest Central Pipeline Corp.*, 489 U.S. at 516 ("conflict preemption analysis must be applied sensitively ... so as to prevent the diminution of the role of Congress reserved to the States while at the same time preserving the federal role."); *Wyeth*, 129 S. Ct. at 1208 (Thomas, J., dissenting) (cautioning that obstacle preemption should not turn into a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict.").

505 U.S. 88, 98 (1992), as "Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc.*, 518 U.S. at 486.

Petitioners' reading of IRCA's history is not consistent with IRCA's structure and purpose as a whole. Petitioners focus on selective excerpts of IRCA's legislative history as constituting Congress's purpose and objective as a whole. They argue that IRCA's purpose was to carefully balance burdens on employers and prevent discrimination, Pet. Br. 42-46, yet ignore that the legislative history reveals that Congress's principal purpose and objective was to establish an employer sanction scheme to control illegal immigration and the border through employer sanctions, leaving to the States and local government the authority to enact analogous legislation "through licensing and similar laws." *See infra* pp. 7-17; 8 U.S.C. § 1324a(h)(2).

Indeed, Congress did "balance" multiple interests, but this balance included State and local interests. *See* 8 U.S.C. § 1324a(h)(2); H.R. Rep. No. 99-682(I), at 58; 131 Cong. Rec. 24318 (1985) (statement of Sen. Simpson). This is why Petitioners' argument fails, for it does not take into account that when Congress includes a savings clause it is assumed that there will be some nonuniformity in the law. *Geier*, 529 U.S. at 871. While nonuniformity results in some friction between the State and federal schemes, this does not necessarily stand as an obstacle to the

"accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67.

CONCLUSION

Based on the legislative history concerning IRCA's purpose and objective, Arizona's licensing scheme is neither expressly nor impliedly preempted, and *amicus* respectfully asks that the Court uphold the decision of the Ninth Circuit.

Respectfully submitted,

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