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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF

There is no doubt, and Respondents raise none, that federal law centralizes authority for administering IRCA and IIRIRA exclusively in federal officials. Only federal officials may investigate and adjudicate violations of IRCA, impose civil and criminal penalties prescribed by IRCA, and manage the federal E-Verify system. 8 U.S.C. § 1324a(e); IIRIRA § 401. Federal law broadly preempts States from imposing "any" sanction "upon those who employ … unauthorized aliens"; the single, limited role preserved for States is that, parenthetically, they may supplement them with "licensing" sanctions. 8 U.S.C. § 1324a(h)(2).

Respondents interpret IRCA as permitting them to "do indirectly what they could not do directly," *Int'l Paper* v. *Ouellette*, 479 U.S. 481, 495 (1987)—on their view, so long as ultimately they target something they label a "license," IRCA is satisfied. Resp. Br. 28-29. On this view, they may with impunity enact substantive regulations governing the hiring of aliens, gerrymander a definition of "licensing" unlike anything in Arizona law or elsewhere, and create a new system for investigating and adjudicating alleged violations that bears no resemblance to traditional licensing authority.

Arizona's interpretation would transform a narrow savings clause meant to preserve limited state authority into a gaping loophole. Whether one calls this hiding elephants in mouseholes, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), exalting form over substance, *United States* v. *Eurodif*, 129 S. Ct. 878, 887 (2009), or simply ignoring Congress's intent, the result is the same: Whereas Congress crafted a comprehensive, balanced, and exclusively

federal system for verifying and enforcing employment status, 50 different States and every locality in the Nation now can enact their own shadow regimes under the guise of "licensing." Affirmance by this Court would bless the Balkanization currently underway, Business Organizations 10-20, contrary to Congress's clearly expressed intent.

Arizona's arguments about E-Verify are equally extraordinary. Although States cannot alter or administer the federal E-Verify program that Congress established as voluntary, Arizona orders employers to participate. The text of IIRIRA, however, demonstrates that Congress's intent was directly to the contrary. The decision of the Ninth Circuit should be reversed.

I. THE UNAUTHORIZED-WORKER PROVISIONS OF THE ARIZONA ACT ARE PREEMPTED.

A. The Unauthorized-Worker Provisions Are Expressly Preempted.

IRCA establishes a "comprehensive" and "uniform[ ]" federal scheme that regulates the employment of aliens. *Hoffman Plastic Compounds* v. *NLRB*, 535 U.S. 137, 147 (2002); IRCA § 115. Congress forbade States and localities from imposing sanctions "upon those who employ … unauthorized aliens," 8 U.S.C. § 1324a(h)(2), using the intensifier "any" to emphasize its broadly preemptive intent, see *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). It remains undisputed that, unless Arizona's unauthorized-worker provisions are saved from preemption, they fall within this express prohibition; the only question is whether the Arizona provisions are "licensing [or] similar laws." 8 U.S.C.

§ 1324a(h)(2). They are not. The independent regulatory system enacted by Arizona cannot reasonably be described as "licensing." Pet. Br. 20-37; U.S. Br. 10-26. Under IRCA, "licensing" laws are those that impose traditional "licensing" sanctions, Pet. Br. 24-28; *infra* 3-8, and nothing in IRCA authorizes States and localities independently to adjudicate unauthorized-worker violations, Pet. Br. 28-34; *infra* 9-12.

1. Before addressing these fundamental defects, we begin where Arizona does—with *De Canas* v. *Bica*, 424 U.S. 351 (1976). Arizona cites *De Canas* and other pre-IRCA decisions as proof that state statutes that "touch on immigration issues are not per se preempted." Resp. Br. 27. This is true, but irrelevant. The question here is whether state statutes imposing sanctions *for employing unauthorized aliens* (not those that "touch on immigration") are preempted *by IRCA*. *De Canas*, a pre-IRCA decision, does not answer this question.

To the extent *De Canas* is instructive, it favors Petitioners. *De Canas* rejected a field preemption argument because Congress in the Farm Labor Contractor Registration Act expressly preserved state authority to "regulate the employment of illegal aliens." 424 U.S. at 361; *Toll* v. *Moreno*, 458 U.S. 1, 13 n.18 (1982). IRCA took the opposite approach, expressly preempting States from regulating employment of illegal aliens. 8 U.S.C. § 1324a(h)(2). And, Congress amended the statute upon which *De Canas* relied to conform and subordinate it to IRCA's comprehensive scheme. IRCA § 101(b); see Pet. Br. 32-34; Mazzoli 7-8.

2a. A "licensing or similar law" is a registration or permitting process that conditions the right to engage in a business—such as farm labor contracting, a focus

of Congress's attention—on fitness to engage in that business. Pet. Br. 24-28; U.S. Br. 10-16. This interpretation accords with the common understanding of the term "licensing," standard usage in other federal statutes, and the structure and history of IRCA. Pet. Br. 24-26. It is how Arizona uses the term when drafting legislation, *id.* at 28, and how the term is used in the laws of Arizona, *id.*, and its *amicus* Missouri, see States A1-A52.

The Arizona Act is both under- and over-inclusive, strong evidence that this is not licensing in any traditional sense. It exempts professional licenses, Pet. Br. 22, which Arizona makes no effort to explain. (Its *amici* suggest that "[p]rofessionals … are unlikely to personally employ 'un-authorized aliens.'" States 13. But cf. Michael J. Sniffen, *Nominees Sunk by Tax and Nanny Problems for Years*, AP, Jan. 14, 2009.) Yet the Act *does* authorize the revocation of foundational corporate documents that are not commonly called or treated as "licenses," such as articles of incorporation. Arizona justifies this on the theory that a "license" under IRCA encompasses *any* State-granted right that relates to business authorization and that the State calls a "license." Resp. Br. 31-33. This is the same boundless definition embraced by the Ninth Circuit, and it finds no support in IRCA's language or history. Pet. Br. 21.

It certainly does not reflect the term's "plain meaning." Resp. Br. 31. The dictionaries Arizona quotes (like those on which Petitioners and the United States rely, Pet. Br. 26-27; U.S. Br. 15) define a "license" as "permission … to engage in some business or occupation." Resp. Br. 31 (quoting *Webster's Third New International Dictionary* 1304 (1993)). A "license" thus regulates *conduct* ("to engage") in a trade

("some business or occupation"). Pet. Br. 26-28. Articles of incorporation or partnership do not grant permission to engage in a particular trade or activity; they are general legal recognition of a company's existence. 1A *Fletcher Cyclopedia of the Law of Corporations* § 161 (2010); U.S. Br. 8-9, 15. Revoking articles of incorporation therefore denies the company the right to *exist*; a company whose license to engage in a particular business has been revoked remains able to engage in other activities, including other business. Unlike a corporation whose articles of incorporation are suspended or revoked, it does not lose the ability to own property, maintain limited liability, or fulfill duties owed to shareholders. Arizona responds that revoking a corporation's articles of incorporation is like revoking a true business license because as a practical matter a dissolved corporation cannot conduct business, Resp. Br. 32-33, and both consequences are severe, *id.* at 36. The same would be true of deporting or executing a business owner, but no one calls this "licensing."[1]

Arizona errs when it characterizes our argument as a quibble "about the organization of Arizona's State

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[1] Arizona's *amici* misunderstand Petitioners' position as limiting "licensing" to permission to engage in a "profession." States 3. Although professional licensure fits comfortably within the ordinary meaning of "licensing," so also do fitness-to-do-business laws governing businesses other than professions. Pet. Br. 27-28 (citing statutes governing firearms dealers and foreign air carriers).

Unlike statutes such as 8 U.S.C. § 1621(c), which defines "state and local public benefit[s]" to include "professional and commercial licenses," *see* Resp. Br. 33, IRCA regulates *employers*, which is all the more reason to think that Congress had in mind fitness to do business.

code." *Id.* at 35. The question is not whether Arizona should codify license-revocation authority all at once or separately in each "section[ ] in which the State's power to issue those licenses is specified." *Id.* Rather, the question is a substantive one—whether Congress would have thought that creating new state machinery for adjudicating a new state-law offense of hiring an unauthorized alien is "licensing." Arizona identifies no statute that defines "license" in this fashion. It relies (at 33) on cases that do not consider the meaning of the term "license," *e.g.*, *Bendix Autolite* v. *Midwesco Enters.*, 486 U.S. 888, 894 (1988), and even the provisions that those cases note in passing are substantially more limited than the Act—they deal with registration for out-of-state corporations to engage in particular conduct within the State, typically based on proof of good standing in the corporation's home State. *E.g.*, *id.* at 892 n.2; see, *e.g.*, Ohio Rev. Code § 1703.04(A)(3). In the federal statutes referred to by Arizona that actually address licensing, Resp. Br. 33, the term is never used in the broad sense that Arizona urges; those statutes concern instruments commonly thought of as licenses, such as professional and driver's licenses.

Arizona is left to defend its capacious interpretation of "licensing" on the theory that Congress intended "a full range of sanctions [to be] available." *Id.* at 37. But, Arizona never explains what a "full range" is, or provides any authority that Congress intended this at all, much less that States be the ones to impose the "full panoply." *Id.* at 29. This is with good reason—there is no evidence in IRCA of such an intent. Rather, Congress limited and calibrated the penalties that may be imposed for unauthorized-worker violations, and broadly preempted all other "civil or crimi-

nal sanctions." Pet. Br. 4-8; see AAJC 12-14; Business Organizations 6-10; Mazzoli 7-8; NIJC 7-25.[2]

b. IRCA's structure and history confirm that the savings clause is meant to preserve "'fitness-to-do-business laws,' such as state farm labor contractor laws," H.R. Rep. No. 99-682(I), at 58 (1986), which is what Congress had in mind. Pet. Br. 25-26; U.S. Br. 19-22. IRCA's preemption provision and savings clause built upon the registration scheme contained in AWPA. *Id.* That statute required businesses to obtain registration certificates before engaging in "farm labor contracting activity," and expressly permitted States to enact separate systems for registering farm labor contractors. 29 U.S.C. §§ 1802, 1811, 1816(a), 1871 (1985); see *De Canas*, 424 U.S. at 361 (discussing AWPA's predecessor statute). When IRCA was enacted, approximately 12 States had such laws, which typically did not independently prohibit (or adjudicate) hiring unauthorized workers, Pet. Br. 25 & n.13, and the savings clause was drafted with preserving these particular licensing laws in mind. This is evidenced by, among other things, IRCA's conforming amendments to AWPA. IRCA § 101(b); H.R. Rep. No. 99-682(I), at 58.

Arizona does not substantively address AWPA, and offers no explanation of these amendments. It derides this "evidence" as "thin," and mere "legislative

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[2] Nor is Arizona's broad standard necessary to avoid a claimed Tenth Amendment problem. Resp. Br. 37; States 4-6, 13. There is no hint here of "commandeer[ing]" state resources, *New York* v. *United States*, 505 U.S. 144, 161 (1992), and the Tenth Amendment poses no barrier to federal legislation otherwise within Congress's constitutional power, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537-48 (1985).

history," Resp. Br. 41, but it is neither. IRCA's conforming amendments to AWPA are law, and statutory interpretation is properly informed by the structure and history of the whole act. *MCI Telecomms.* v. *AT&T*, 512 U.S. 218, 226 (1994); 2A *Sutherland Statutes and Statutory Construction* § 46:5 (7th ed. 2010). That principle has particular force here, given the explicit link between IRCA and AWPA. Pet. Br. 32-34.

c. With little support for its boundless claim of authority to regulate employment-authorization status, Arizona resorts to the "presumption against preemption." Resp. Br. 34-38. It says its construction must be accepted because "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Id.* Even if the presumption did apply, but cf. U.S. Br. 25-26, Arizona and the Ninth Circuit fail to give the savings clause *any* real effect; on their theory, a State need only label its sanctions "licensing" to evade preemption. South Carolina has ably demonstrated the emptiness of such a requirement. S.C. Code Ann. §§ 41-8-20(A), 41-8-50(D)(2)-(4); see Pet. Br. 23. Arizona's interpretation conflicts with the common understanding of the term "licensing," and is demonstrably inconsistent with the statute's structure and history, *supra* 3-8—including the balance that Congress struck by prohibiting illegal hiring, while minimizing burdens on employers, and preventing discrimination. Pet. Br. 42-46; see *Riegel* v. *Medtronic*, 552 U.S. 312, 325 (2008) (rejecting interpretation of preemption provision that would allow state laws to "disrupt[ ] the federal scheme"). Arizona's interpretation would let States directly regulate employment-status verification, contrary to every statutory indication that Con-

gress meant to prohibit precisely this outcome. To apply the presumption against preemption in the fashion that Arizona advocates would be to nullify Congress's intent.

3a. The Arizona Act also is preempted because IRCA's reference to "licensing" laws does not confer upon States the authority to adjudicate unauthorized-worker violations. Pet. Br. 28-34. According to Arizona, IRCA's savings clause permits it to establish and enforce its own unauthorized-worker prohibitions. Resp. Br. 36. This interpretation finds no support in the statutory language. The savings clause allows for the imposition of "sanctions" under limited circumstances. 8 U.S.C. § 1324a(h)(2). Nothing on its face authorizes States to craft and enforce new regulatory systems aimed at governing employment-authorization status.

Arizona therefore has matters backwards when it argues that States are not forbidden from establishing new mechanisms for investigating and adjudicating immigration-status violations because, it says, "[t]he savings clause itself … says nothing." Resp. Br. 36, 47. But it is plain—and Arizona does not dispute—that without the savings clause, the unauthorized-worker provisions of the Arizona Act fall within IRCA's broad preemption of "sanctions … upon those who employ … unauthorized aliens." Pet. Br. 20-21. The relevant question, therefore, is not whether IRCA preempts the Arizona provisions in the first instance—it does—but whether it expressly *preserves* them from preemption. If, as Arizona asserts, the savings clause is "silent" about whether States may create new substantive prohibitions against hiring unauthorized workers,

and regulatory machinery for enforcing that prohibition, such "silence" demands preemption. Indeed, Arizona's sweeping enactment looks nothing like traditional licensing authority, which may require licensees to comply with specified laws, but would not typically attempt to adjudicate violations of those laws—particularly when those laws are outside the licensor's core competence. *Id.* at 31-32 & n.19. Arizona makes no argument to the contrary, nor offers a single counterexample to validate its approach.

Interpreting the savings clause as granting States authority to enact unauthorized-worker prohibitions would be inconsistent with IRCA's enforcement provisions. IRCA vests exclusive investigatory and adjudicatory authority in federal officials. *Id.* at 29-30; U.S. Br. 23-26. Nothing in IRCA conceives of these procedures as "licensing," and nothing in IRCA suggests that States may supplement or supplant IRCA's federal regulatory and enforcement scheme. The reason the savings clause itself "says nothing" about state investigation and adjudication, Resp. Br. 36, is that IRCA already denies them any such role.

b. IRCA's history confirms that Congress did not intend to authorize States to undertake their own adjudication of unauthorized-worker violations in the guise of business "licensing."

First, at the same time IRCA created a substantive prohibition and an enforcement system, it eliminated even other *federal* authority to regulate work-authorization status. IRCA repealed similar provisions in AWPA, see IRCA § 101(b), which had been actively enforced by the Department of Labor, see Pet. Br. 29-33; SEIU 11-16. Having determined that IRCA should be the sole enforcement mechanism for

unauthorized-worker violations, Congress cannot have intended to invite 50 States and thousands of localities to proliferate disuniformity in this fashion.

Second, this interpretation is supported by the key committee report, which points to "state farm labor contractor laws" under AWPA—confirming the limited purpose of the exception. The savings clause preserves state laws "concerning the suspension, revocation, or refusal to reissue a license to any person who has been found to have violated the sanctions provisions *of this legislation*." H.R. Rep. No. 99-682(I), at 58 (emphasis added). Thus, when there has been a violation *of IRCA*, States may sanction licensees for "hiring, recruiting or referring undocumented aliens." *Id.* Far from "ambiguous," Resp. Br. 42-43, this makes clear that the savings clause empowers States only to tack on "licensing" sanctions following an adjudicated violation of federal law. Pet. Br. 34; U.S. Br. 19-20. Arizona does not purport to adjudicate violations of IRCA, and does not argue that it could; it would circumvent this difficulty through the artifice of creating new state-law prohibitions "modeled after IRCA." Resp. Br. 1.

Third, this interpretation is confirmed by the two sets of state laws that existed at the time of IRCA's passage and that provide the context for Congress's action. Pet. Br. 25-31 & nn.13, 16. One set, which Congress meant to preserve, provided for sanctions against registration certificates held by farm labor contractors, and typically did not undertake independent adjudication of a federal-law violation. *Id.* The other laws (like the one at issue in *De Canas*), which Congress was aware of and meant to preempt, independently prohibited the employment of unauthorized workers, and in many cases created separate

enforcement and sanctions systems. *Id.*; Mazzoli 5-8; *supra* 7. Arizona does not contest Petitioners' showing that Congress intended to preserve some of these laws and preempt others; it simply does not respond.

Far from "untenable," Resp. Br. 37, therefore, it is faithful to IRCA's text, structure, and history to interpret IRCA as preempting States from independently adjudicating unauthorized-worker violations. The contrary interpretation advanced by Arizona would undermine the "uniform[ity]" of the federal system.

4. In the end, nothing about the Arizona Act resembles "licensing." Pet. Br. 34-36. The Act does not regulate permission or fitness to do business; it does not provide for the issuance of any registration or certification[3]; and its operation is wholly divorced from any supervisory board or traditional licensing authority. Finally, it imposes penalties, ranging from injunctions to corporate dissolution, that do not relate in any way to a "license." Pet. Br. 34-36. Instead, in both form and effect, the Act is substantive immigration regulation. Indeed, the first sentence of the response brief acknowledges that Arizona's purpose is "to ensure that workers who are hired by Arizona employers are legally authorized to work in this country." Resp. Br. 1. Arizona's *amici* are even more explicit—because of what they perceive as federal inaction to "secure the border," ACLJ 10, and their dis-

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[3] Arizona's argument that a "licensing" law need not address "issuance" of licenses misses the point. Resp. Br. 35. Even if issuance procedures are not *necessary* to constitute "licensing," they are without doubt a typical and important component of it, Pet. Br. 34-36, and their absence here is powerful evidence of the true nature of Arizona's statutory regime.

agreement with federal enforcement priorities, American Unity 2-3, they say that IRCA should be interpreted to authorize action by States and localities. But a statute is not "a nose of wax to be changed from that which the plain language imports," *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518 (1926), and the word "licensing" does not authorize every State and locality in the country to enact substantive immigration policies and procedures.

B. The Unauthorized-Worker Provisions Are Impliedly Preempted.

The unauthorized-worker provisions of the Arizona Act also are impliedly preempted. They establish a shadow regulatory system that is inconsistent with IRCA's "comprehensive" regime, and they disrupt the careful balance struck by Congress. Pet. Br. 37-47; U.S. Br. 23-26.[4]

1. IRCA centralizes investigatory and adjudicatory power in the federal government. The statute di-

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[4] Arizona suggests (at 44) that the existence of the savings clause imposes some heightened burden to show preemption. On the contrary, an express preemption provision or savings clause does not "bar the ordinary working of conflict pre-emption principles." Pet. Br. 37 (citing cases).

Similarly, two of Arizona's *amici* ask for a "high[er] burden of proof" because this is a facial challenge. Eagle Forum 11-12; Pearce 9-11. But they identify no factual record that could or should be developed. This case presents a facial conflict between provisions of federal and state law, of a type this Court routinely decides. *E.g.*, *Chamber of Commerce* v. *Brown*, 554 U.S. 60, 66-69 (2008); *Cal. Coastal Comm'n* v. *Granite Rock*, 480 U.S. 572, 579-80 (1987). It depends on no "speculation" about enforcement. *Cf. Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 450, 454-55 (2008).

rects the U.S. Attorney General to define the individuals "authorized" to be employed, vests "authority in investigations" in federal officials, requires hearings to be conducted before federal ALJs, and provides for review in the federal courts of appeals. 8 U.S.C. § 1324a(e); see Pet. Br. 37-42; U.S. Br. 23-25. The result is a comprehensive federal system that depends on specialized federal expertise. NIJC 9-25. There is no role for States in this federal process, and Arizona does not contend otherwise. Instead, it argues, it can enforce a similar prohibition if reenacted under state law. Resp. Br. 44-53. Specifically, it asserts that the investigation and adjudication provisions of the Arizona Act "are reasonable measures to implement sanctions that are within IRCA's savings clause," and that they "careful[ly] incorporat[e] … federal laws and standards." *Id.* at 44, 52. Neither assertion is correct.

a. Even were it true that Arizona's new system for investigating and adjudicating unauthorized-worker violations constitutes "licensing," the enactment of such a system conflicts with Congress's decision to centralize enforcement in a single federal regulatory structure. Arizona's presupposition that it may implement whatever procedures it wishes, in order to impose sanctions, turns preemption on its head—Arizona cannot use methods that conflict with Congress's. *Riegel*, 552 U.S. at 325. Nor has it ever been thought *necessary* to enact a regulatory structure like this to impose licensing sanctions; on the contrary, a licensing authority would not typically have the expertise or resources to independently adjudicate whether the prospective licensee violated the law of another jurisdiction, but instead would take notice of a previously adjudicated violation. Pet. Br. 31-32.

Arizona argues that "matters left unaddressed [in a federal regulatory scheme] are presumably subject to state law" and "[t]he mere existence of a federal regulatory or enforcement scheme … does not by itself imply pre-emption of state remedies." Resp. Br. 47. But the process for investigating and adjudicating unauthorized-worker violations is not "unaddressed" in IRCA. IRCA defines that process in detail, and vests authority over those procedures in federal officials. *Supra* 13-14; Pet. Br. 37-47; U.S. Br. 23-25. Nor is the question of remedies "unaddressed"; the scope of permissible state and local remedies is the very purpose of the preemption provision. It is bizarre to think that Congress, having left no room for States and localities to adjudicate IRCA violations, meant to permit every last town council to create new mechanisms to adjudicate newly created substantive immigration prohibitions.

Arizona also analogizes its Act to a state court exercising jurisdiction over a federal claim. Resp. Br. 48. But, that is not what is at issue here, and even Arizona does not argue that it is granted enforcement authority *under IRCA*. However appropriate state activity may sometimes be under a "decentralized scheme that preserves a broad role for state regulation," *Bates* v. *Dow Agrosciences*, 544 U.S. 431, 450 (2005), IRCA takes the opposite approach. There is no evidence that Congress was concerned with preserving state "prosecutorial discretion," Resp. Br. 52, a suggestion flatly at odds with Congress's conclusion that authority for investigating and adjudicating unauthorized-worker violations should be vested in expert federal agencies. It is not "merely … the comprehensive character" of the federal system that compels preemption, *id.* at 47, but the clear evidence that "Congress intended to centralize all authority over

the regulated area in one decisionmaker: the Federal Government." *Freightliner* v. *Myrick*, 514 U.S. 280, 286 (1995).

b. Arizona further argues that its scheme is not preempted because it "incorporat[es] … federal laws and standards." Resp. Br. 44. *First*, its expansive theory depends on no such limitation—it argues elsewhere that "no federal law requires" it to employ federal procedures. *Id.* at 48.

Second, Arizona's procedures conflict markedly with federal law. Pet. Br. 39-42; U.S. Br. 23-25. The Act directs county officials to obtain information regarding work-authorization status from federal officials pursuant to 8 U.S.C. § 1373(c), but § 1373(c) on its face provides for disclosure of something different—"immigration status." Pet. Br. 41-42. Arizona responds that sometimes the information provided under § 1373(c) might suffice, Resp. Br. 50 n.10, but this only confirms the incoherence of the Arizona scheme. Moreover, Arizona's Act empowers state courts to treat this federal "determination" as a mere "rebuttable presumption." Ariz. Rev. Stat. §§ 23-212(H)-(I), 23-212.01(H)-(I); see Pet. Br. 40; U.S. Br. 23-24. Nothing in the statute says this provision is only for the benefit of employers, Resp. Br. 49; but, whatever the rationale for this provision, the fact remains that it permits a state official to ignore the federal immigration system.

In further conflict with federal law, the Act asks employers to offer proof of compliance with E-Verify and I-9 procedures, but federal law explicitly precludes the use of such information for purposes other than compliance with federal law. Pet. Br. 42; U.S. Br. 24-25. Arizona responds that this prohibition binds only the federal government. Resp. Br. 50-51.

On the contrary, the provisions limit copying documentation for *any* purpose other than complying with IRCA, 8 U.S.C. § 1324a(b)(4), and prohibit use of the federal forms for any purpose other than enforcing designated federal criminal laws, *id.* § 1324a(b)(5). See 8 C.F.R. § 274a.2(b)(4); U.S. Dep't of Homeland Security, E-Verify Program Mem. of Understanding § II.C.13 (Sept. 2009) (JA 420-21). These express limitations on the use of such information confirm that Congress cannot have intended state adjudications like those Arizona proposes to undertake.

Third, even if Arizona's provisions did mirror IRCA, this would not save the Act. The "uniform[ity]" IRCA was designed to achieve encompasses not only standards for assessing work-authorization status and violations, but also their *application*—which Congress ensured by centralizing decision-making authority in federal officials. Pet. Br. 37-42; U.S. Br. 23-25. There is no reason to believe, and Arizona offers none, that Congress intended that States and localities—although precluded from enforcing IRCA itself—could nevertheless re-enact and enforce similar provisions as state or local law, much less to authorize them to disregard the findings of federal immigration authorities.

2. Perhaps most fundamentally, the Arizona Act badly disrupts the balance struck by Congress. Pet. Br. 42-47; U.S. Br. 25-26. Arizona does not dispute the extraordinary legislative effort that resulted in IRCA. Pet. Br. 3-4, 42-45; Business Organizations 5-10; Mazzoli 5-11. Nor does it dispute that IRCA reflects Congress's careful weighing of different interests—deterring illegal immigration, preventing unlawful discrimination, avoiding undue burdens on

employers, and protecting privacy (although Arizona's ardent *amici* do contend that Congress cared only about enforcement, *e.g.*, American Unity 15-16, 21).[5] Pet. Br. 6-8, 42-44; AAJC 12-14.

Rather, Arizona suggests, it "need not attempt to further all of the interests that Congress considered." Resp. Br. 53. If Arizona means to argue that disrupting a balance struck by Congress is no basis for preemption, see *id.* (no preemption unless "actual conflict"), then it is wrong as a matter of law. The disruption of Congress's careful efforts is ample basis for preemption when, as here, Congress considered the push and pull of various interests and decided upon a particular balance to achieve its goals. *Geier* v. *Am. Honda Motor*, 529 U.S. 861, 881-83 (2000); *Ouellette*, 479 U.S. at 494-96; Pet. Br. 42-46.

Importantly, Arizona never disputes that it has altered Congress's balance by elevating enforcement above all other considerations. Nor could it, given its past statements. See Pet. Br. 45. Instead, Arizona responds that it did not *entirely* ignore the other concerns that motivated Congress. Resp. Br. 53-56. Its discussion of those other concerns, however, only underscores how little attention Arizona gave them. For instance, Congress was deeply concerned about

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[5] Congress's sober consideration of these issues stands in contrast to the fulminations of Arizona's *amici*. Their suggestion that this case is about guaranteeing a flow of cheap labor, *e.g.*, NumbersUSA 27, or protecting "scofflaw employers," Pearce 3, is uninformed and unwarranted. The Chamber of Commerce, for instance, has been outspoken in promoting a legal workforce. The unfounded nature of these accusations is confirmed by the array of civil rights groups, unions, immigration attorneys and members of Congress aligned here, who surely are not motivated by a desire for illegal labor.

burdening employers, both out of concern for employers themselves, and for fear of discrimination that might result. Pet. Br. 42-44; Business Organizations 8-10; AAJC 12-14; NIJC 8-9. Arizona does not dispute that allowing every State and locality to enact regulatory systems governing unauthorized workers would create a massive burden on employers. It asserts only that the Arizona system contains "judicial proceeding[s]" meant to benefit employers, Resp. Br. 54-55, and that the Act gives local officials slightly less investigatory authority than they might otherwise have, *id.*—as though such litigation and investigation are not themselves immensely burdensome.

Ultimately, Arizona's contention is that by authorizing States to impose licensing sanctions, Congress itself disrupted the balance it otherwise intended to create. Resp. Br. 25, 55-56. To state this proposition is to refute it. In IRCA, Congress carefully calibrated sanctions, including by precisely offsetting unauthorized-worker sanctions with anti-discrimination penalties. Pet. Br. 6-8, 42-44. It broadly preempted all further sanctions, with a narrow carve-out for certain state licensing authority. That statutory structure provides no basis to conclude that Congress acted in self-negating fashion. On the contrary, the need for the licensing proviso to coexist with Congress's balancing is precisely why the term "licensing" must be given a sensibly limited interpretation, so that the provision does not "destroy itself." *AT&T* v. *Cent. Office Tel.*, 524 U.S. 214, 228 (1998); *supra* 6-7.[6]

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[6] Some of Arizona's *amici* (but not Arizona) similarly point to 8 U.S.C. § 1324, as evidence that Congress had a "single-minded focus on enforcement and punishment." *E.g.*, American Unity 21, 25-28 (quotations omitted). But § 1324 criminalizes "bring-

Arizona goes on to assert that States sometimes may regulate in areas touching immigration. Resp. Br. 56-57. To be sure, but this does not mean States may regulate *here*. In the instances Arizona identifies, federal law explicitly authorized State participation, *e.g.*, 8 U.S.C. § 1611, or broadly preserved State authority in the field, *e.g.*, *De Canas*, 424 U.S. at 360-61; cf. *Toll*, 458 U.S. at 13 n.18. Here, in contrast, federal law addresses the very subject Arizona wishes to regulate, and reflects a careful and comprehensive approach that would be disrupted by competing state regimes. Recognizing the preemptive effect of federal law in this context would not "rewrite IRCA's savings clause," Resp. Br. 58—it would preserve the true licensing sanctions Congress contemplated, while giving effect to the remainder of Congress's enactment. Arizona and its *amici* may disagree with the balance Congress struck, but Arizona must respect federal law. Because the Arizona Act "exert[s] an extraneous pull on the scheme established by Congress," *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001), it is preempted.

II. ARIZONA'S E-VERIFY MANDATE IS IMPLIEDLY PREEMPTED.

Arizona's E-Verify mandate also is preempted. Pet. Br. 47-51; U.S. Br. 26-34. E-Verify is explicitly and repeatedly defined as "voluntary," and the federal official authorized to administer it is expressly prohibited from "requir[ing] any person or other entity to participate." IIRIRA § 402(a).

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ing in" and "harboring" aliens, not the bare employment of unauthorized workers. *See Sys. Mgmt.* v. *Loiselle*, 91 F. Supp. 2d 401, 408 (D. Mass. 2000) (contrasting §§ 1324 and 1324a).

Arizona offers no reason to think States can modify this federal program. It acknowledges that E-Verify was established as a "pilot" program, to test as a possible alternative to the I-9 process, and that Congress repeatedly declined to make E-Verify mandatory. Nevertheless, it argues, it is not "impossible" for parties to comply with both the Act and IIRIRA. Resp. Br. 58-59. But impossibility is not the only form of implied preemption; a state law is preempted when it "conflicts" with federal law. *Geier*, 529 U.S. at 869-72; *Buckman*, 531 U.S. at 348-51; U.S. Br. 27. The conflict here could not be more stark: Arizona makes E-Verify mandatory, while federal law gives employers the "voluntary" choice to "elect" to participate. IIRIRA § 402(a). The Arizona Act is thus preempted, even if an employer could theoretically comply with both. *Adams Fruit* v. *Barrett*, 494 U.S. 638, 649-50 (1996) (state law that denies right accorded under federal law is preempted); *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1210-11 (2009) (Thomas, J., concurring in judgment) (same).

Arizona seeks to distinguish *Geier* and *Buckman*, Resp. Br. 64-66, which found preemption in analogous circumstances. But *Geier* was not only about "giving 'more time [to] manufacturers'" or the functioning of the "private marketplace," *id.*; it found preemption when, as here, state law intruded on a deliberate federal decision to provide a voluntary choice among an array of options. 529 U.S. at 878. Similarly, *Buckman* was not just about the State "interfer[ing] with the relationship between" the agency and regulated party, Resp. Br. 65-66, but also about the State imposing unwarranted burdens on a federal

system—as Arizona would do here. 531 U.S. at 347-50.[7]

Arizona argues that mandatory E-Verify poses no "obstacle" because Congress's goal "was not to establish a voluntary employee verification system, but to develop an effective one." Resp. Br. 60. But, even if so, "[t]he fact of a common end hardly neutralizes conflicting means." *Crosby* v. *NFTC*, 530 U.S. 363, 379 (2000). Congress made E-Verify voluntary in order to assess its acceptance in the business community, by measuring employer participation. Pet. Br. 47-51; U.S. Br. 26-34. This objective would be thwarted if States mandated participation: Congress would be denied the data by which to assess E-Verify's acceptance and feasibility.

Mandatory E-Verify also does little to promote a "lawful workforce." Resp. Br. 60. E-Verify continues to be error-riddled. Arizona offers certain statistics regarding E-Verify, *id.* at 60-63, but ignores the most problematic—for instance, that work-authorized individuals who were foreign-born were *20 times* more likely to receive an erroneous tentative nonconfirmation than U.S.-born individuals. Pet. Br. 49 n.27. Concern about discrimination has plagued E-Verify, see AAJC Br. 15-25, which is a central reason Congress made E-Verify experimental and voluntary.

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[7] That the federal government *could* handle the burdens imposed if E-Verify were made mandatory by all States, Resp. Br. 60-63, even if true, does not undercut the case for preemption. E-Verify is federally administered and subsidized, and there is no doubt that increased E-Verify participation will increase costs for the federal government. U.S. Br. 27-34. It is for Congress, not Arizona, to decide whether the federal government should assume those costs.

Most important, however, are the words of the statute. Congress said four times that the program is "voluntary." 8 U.S.C. § 1324a note. Another 20 or more times it spoke of "elect[ing]" to participate, and expressly empowered employers to "terminate" their "election." IIRIRA § 402(c)(4); U.S. Br. 29. Congress also affirmatively required DHS to "widely publicize" the "voluntary nature of the pilot programs." IIRIRA § 402(d)(2). By what preemption theory Congress would require DHS to "widely publicize" a falsehood, Arizona does not say. Arizona's effort to mandate E-Verify violates the plain language of federal law, and therefore is preempted.

CONCLUSION

The Court should reverse the decision of the Ninth Circuit with instructions to vacate the judgment of the District Court.

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