No. 09-115

IN THE

Supreme Court of the United States

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

v.

CRISS CANDELARIA, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAW PROJECT, SERVICE EMPLOYEES INTERNATIONAL UNION, AND LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

The *amici curiae* listed below are non-profit organizations that share a common interest in the

[1] No person other than the *amici curiae* or their counsel has made any monetary contribution to the preparation or submission of this brief. Further, no counsel for any party authored this brief in whole or in part. Counsel of record for all parties have consented to the filing of this brief, and the letters of consent have been filed with, or will be sent to, the Clerk.

right of employees, including immigrant employees, to be free from discrimination and arbitrary treatment by employers:

- National Employment Law Project
- Service Employees International Union
- Legal Aid Society - Employment Law Center

Amici share the view of the 1986 Congress, which enacted the Immigration Reform and Control Act ("IRCA"), that if sanctions against employers for hiring unauthorized aliens substantially exceed the sanctions against employers for discriminating against aliens who are authorized to work in the United States, many employers, out of economic self-interest, will engage in discrimination against authorized applicants for work who look or sound foreign. *Amici* all have a demonstrated interest in preventing the adoption or enforcement of state or local laws, including the Legal Arizona Workers Act, that, by imposing ruinous sanctions on employers who hire unauthorized aliens, undermine the balance struck by the IRCA Congress between the need to deter employers from hiring unauthorized aliens and the need to deter employers from engaging in discrimination against authorized aliens who may look or sound foreign.

The specific interest of each amicus is as follows:

The **National Employment Law Project** ("NELP") is a non-profit organization that has worked for 40 years to advance the workplace rights of low-wage workers, including immigrant workers. Both directly and through its network with local community groups, labor unions and legal services organizations, NELP has advocated for thousands of immigrant workers to ensure their labor and

employment rights are upheld. NELP staff members have written, lectured, litigated, and engaged in policy advocacy on behalf of low-wage immigrant workers throughout the United States.

The **Service Employees International Union** ("SEIU") is an international labor organization that represents more than 2 million members employed in the private and public sectors, including many who are immigrant aliens authorized to work in the United States. As set out in SEIU's Constitution, it is an essential part of SEIU's mission to act as an "advocacy organization for working people" and to oppose, not only "discrimination based on gender, race, ethnicity, religion, age, sexual orientation and physical ability," but also discrimination on "immigration status."

The **Legal Aid Society - Employment Law Center** ("LAS-ELC") is a San Francisco-based nonprofit public interest law firm that, for over 35 years, has litigated on behalf of the workplace rights of communities of color, women, individuals with disabilities, and the working poor. LAS-ELC has substantial expertise in the area of immigrant workers' rights.

SUMMARY OF ARGUMENT

The Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§ 1324a *et seq.*, was the product of years of deliberations and of difficult compromises that carefully balanced myriad competing policy and political concerns touching on the question of the rules of conduct and the sanctions that should be imposed in the area of employment of unauthorized aliens.

Of particular importance from the perspective of the employment-rights and labor *amici* here, Congress balanced section 1324a's ban on knowingly hiring unauthorized workers with section 1324b's prohibition against discrimination in employment on the basis of alienage, *id.* 1324b(a)(1). Indeed, Congress balanced those provisions with perfect precision, in that Congress imposed the exact same graduated scale of penalties on offenders of each section. Congress did so out of the concern that a regime that penalized the employment of unauthorized aliens without equally penalizing discrimination against authorized aliens, would skew employer decisionmaking: employers, acting out of economic self-interest, would be tempted to minimize their risk of being subjected to IRCA's employer sanctions by rejecting foreign-seeming job applicants without troubling to determine whether each particular applicant was or was not authorized for work.

The sanctions provisions of the "Legal Arizona Workers Act," Ariz. Rev. Stat. §§ 23-211 to 23-216, destroy Congress' careful balance by, on the one hand, imposing the "business death penalty"—revocation of one's license to do business—on employers who hire unauthorized aliens, but, on the other hand, imposing no penalty at all on those who discriminate against authorized aliens. The Arizona statute thus will skew employer decisionmaking in the precise manner that Congress sought to avoid and will stand as a significant obstacle to the accomplishment of the IRCA Congress' intended purposes.

Notwithstanding the obstacle that the Arizona statute poses to IRCA's purposes, the Ninth Circuit upheld it against Petitioners' preemption challenge by giving the most expansive reading possible to the

seven-word parenthetical savings clause set out in IRCA's express preemption provision. *See Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), Pet. App. 1a-25a.

In adopting an interpretation of IRCA that would make it so easy to upset IRCA's delicate balance, the Ninth Circuit disregarded controlling precedents of this Court that establish two basic principles applicable to statutes such as IRCA that contain an express preemption clause with a "savings clause" exception: First, where a broad reading of the savings clause would allow states to thwart the purposes of the substantive provisions of the statute, the Court should, if possible, construe the savings clause narrowly so as to avoid that threat. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). Second, where such a narrowing construction is unavailable and hence the state law is saved from *express* preemption, the Court will test the law in question under ordinary *implied* conflict preemption principles and invalidate the state law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal statute. *Geier v. Honda Motor Co.*, 529 U.S. 861, 872 (2000).

On a proper application of those principles, the Arizona statute cannot survive Petitioners' preemption attack.

ARGUMENT

The writ should be granted because this case presents a question of exceptional national importance, and the Ninth Circuit's decision conflicts with this Court's precedents both in the areas of statutory construction generally and in the specific area of

construing federal statutes to determine their preemptive effect on state and local laws.

1. The Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§ 1324a *et seq.*, was the product of years of deliberations and of difficult compromises that carefully balanced myriad competing policy and political concerns touching on the question of the rules of conduct and the sanctions that should be imposed in the area of employment of unauthorized aliens. *See* Pet. at 5-16, 12-13. Thus, while Congress prohibited employers from hiring unauthorized aliens, it included a strict *scienter* requirement (that the employer "knowing[ly]" hired an unauthorized alien), 8 U.S.C. § 1324a(a)(1)(A); imposed relatively mild penalties for initial infractions, *id.* § 1324a(e)(4); and, of particular importance from the perspective of the employment-rights and labor *amici* here, balanced section 1324a's ban on knowingly hiring unauthorized workers with section 1324b's prohibition against discrimination in employment on the basis of alienage, *id.* 1324b(a)(1).

In this last regard, it is worth emphasizing that section 1324a's ban on knowingly hiring unauthorized workers is not merely balanced in some general way by section 1324b's prohibition against alienage discrimination, it is balanced with *perfect precision*, in that Congress imposed the exact same graduated scale of penalties on offenders of each section. Thus, first offenders of the knowing-hiring prohibition face penalties of $250 to $2000, 8 U.S.C. § 1324a(e)(4)(A)(i), as do first offenders of the prohibition against discrimination, *id.* § 1324b(g)(2)(B)(iv)(I). The perfect parallelism continues with second and third offenders as well ($2000 - $5000 for second offenders of each section, and $3000 - $10,000 for third offenders of

each section). *Compare id.* § 1324a(e)(4)(A) with *id.* § 1324b(g)(2)(B)(iv).

This precise balance does not appear in IRCA by coincidence. It exists because Congress, aware that Title VII does not prohibit discrimination on the basis of alienage, *see Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973), was concerned that a regime that penalized the employment of unauthorized aliens, without *equally* penalizing discrimination against authorized aliens, would skew employer decision-making: employers, acting out of economic self-interest, would be tempted to minimize their risk of being subjected to IRCA's employer sanctions by rejecting foreign-seeming job applicants without troubling to determine whether each particular applicant was or was not authorized for work. *See* H.R. Rep. No. 99-682, pt. I, at 56 (1986).

The sanctions provisions of the "Legal Arizona Workers Act," Ariz. Rev. Stat. §§ 23-211 to 23-216, destroy that balance by, on the one hand, imposing what Arizona's then-Governor Janet Napolitano candidly called the "business death penalty" on employers who hire unauthorized aliens, *see* Pls./Appellant's Excerpts of Rec. ("ER") 287, No. 07-17272 (9th Cir. filed March 31, 2008), but, on the other hand, imposing no such death penalty-or indeed any penalty at all-on those who discriminate against authorized aliens. Then-Governor Napolitano acknowledged that this was a "defect" in the Arizona law, *id.* (criticizing the absence of any "provision protecting Arizona citizens or legal residents from discrimination"), but she signed it nevertheless, *id.*

On the Ninth Circuit's understanding of the scope of IRCA preemption, the painstaking balance that the IRCA Congress struck can easily be undone, not

only by Arizona, but by any state or municipality dissatisfied with IRCA. That is because the Ninth Circuit gave the most expansive reading possible to the seven-word parenthetical savings clause set out in IRCA's express preemption clause. That clause provides as follows:

> The provisions of this section [§1324a] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1324a(h)(2). According to the Ninth Circuit, the parenthetical treats *any* form of permission by a state or local government to operate a business—including mere approval of a business' articles of incorporation—as a "licensing [or] similar law[]" and exempts such laws altogether from IRCA preemption.

2. In adopting an interpretation of IRCA that would make it so easy to upset IRCA's delicate balance among competing interests, the Ninth Circuit disregarded controlling precedents of this Court that address the precise problem posed in this case as to how to construe a statute that includes both an express preemption provision and a savings clause that exempts certain state laws from that express preemption provision.

Those precedents establish two principles: First, where a broad reading of such a savings clause would threaten to allow state regulation of a particular kind to thwart the purposes of the substantive provisions of the federal statute, the Court should, if possible, construe the savings clause narrowly so as to avoid that threat. *See Pilot Life Insurance Co. v. Dedeaux*,

481 U.S. 41, 54 (1987) (interpreting savings clause narrowly where "[t]he policy choices reflected in the . . . federal scheme would be completely undermined" if certain state-law remedies against insurance companies were deemed to fall within ERISA's savings clause for insurance regulation).

Second, where a narrowing construction of such a savings clause is unavailable and hence the state law at issue is saved from *express* preemption, the Court will nevertheless test the law in question under ordinary *implied* conflict preemption principles and invalidate the state law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal statute. *Geier v. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (internal quotation marks omitted); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995).

a. As to the first principle, it is plain that the expansive reading of the savings clause adopted by the Ninth Circuit would threaten to undermine the deliberate policy choices made by the IRCA Congress. That is because every employer in the United States that operates through a corporate or other limited-liability form of organization requires some type of local governmental permission, such as approval of its articles of incorporation or charter, to do business. Indeed, even sole proprietors can be required to obtain a state or local license to engage in their trade. Hence, on the Ninth Circuit's view that any form of permission to operate a business constitutes a "license" within the meaning of the savings clause, any state or local government could do what Arizona has done and upend Congress' deliberate policy choice to calibrate the penalties for the hiring of unauthorized aliens with identical penalties against

discrimination on the basis of alienage. Such an interpretation would make a hash of Congress' careful work and thus violate the interpretive principles governing savings clauses set out in *Pilot Life*.

Moreover, the Ninth Circuit's interpretation would cause the savings clause parenthetical to render insignificant the express preemption provision of which it is part and hence run afoul of the broader interpretive principle that a statute ought to be construed, if possible, so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). Because the only type of employers who would be subject to IRCA and who would not need some form of local government permission to do business would be non-business employers such as household employers of domestic labor—a type of employer employing only a minuscule fraction of the country's workforce—the Ninth Circuit's interpretation would leave the express preemption clause with no significant work to do. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (rejecting interpretation that left a provision of a federal statute with work to do only in an insignificant subset of the possible cases).

Here, the historical backdrop against which the phrase "licensing and similar laws" was enacted suggests a reading of that phrase that does *not* threaten to undermine IRCA's careful balances or to render IRCA's express preemption clause insignificant. Well before IRCA was enacted in 1986, Congress had enacted a separate federal law, the Farm Labor Contractor Registration Act of 1963 ("FLCRA"), P.L. 88-582, 78 Stat. 920 (reprinted in 1964 U.S. Code Congressional & Admin. News (88th Cong. 2d Sess.) at

1048-1054), a statute that comprehensively licensed and regulated farm labor contractors both to ensure that the seasonal laborers being contracted out by such middlemen were not deceived, placed in unsafe housing or otherwise exploited, and to ensure that the consumers of such contract labor-individual farmers-were not victimized by sharp practices. *See* S. Rep. No. 88-202 (1963) (summary) (reprinted in 1964 U.S. Code Congressional & Admin. News (88th Cong. 2d Sess. at 3690). Among the provisions in FLCRA intended to protect farmer-consumers from such middlemen was one that prohibited contractors from hiring and referring unauthorized aliens. FLCRA § 5(b)(6). FLCRA expressly provided that it was not intended to preempt similar state laws regulating farm labor contractors. *Id.* § 12.

In 1983, Congress updated and superseded FLCRA with a similar licensing statute, the Migrant & Seasonal Agricultural Worker Protection Act ("MSAWPA"), P.L. 97-471, 29 U.S.C. §§ 1801 *et seq.* Like FLCRA, MSAWPA, as part of its broad scheme of regulating licensed contractors to protect laborers and farmers, prohibited licensees from hiring or referring unauthorized aliens, *see* MSAWPA § 106, 96 Stat. 2589-90; and, also like FLCRA, MSAWPA provided that it was not intended to preempt similar state laws regulating farm labor contractors, *id.* § 521, 96 Stat. 2599.

The legislative history of IRCA makes it plain that the type of licensing laws Congress contemplated would be saved from IRCA's express preemption provision were state laws analogous to those that had been saved from FLCRA and MSAWPA preemption, *i.e.*, state laws that, through licensing, comprehensively regulated the provision of seasonal labor or

temporary labor (albeit not necessarily only seasonal or temporary *farm* labor) by middlemen: "[T]he 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, pt. I, at 58 (1986).

Thus the parenthetical in Section 1324a was meant only to extend, at most, to *bona fide* licensing laws (analogous to MSAWPA) that demonstrate, through their regulatory schemes, a genuine interest in regulating a broad range of employment-related business practices (rather than just immigration-related business practices), and that do not function merely as efforts to "improve" IRCA by toughening its sanctions on employers who hire unauthorized aliens.

The Arizona statute at issue here is not such a *bona fide* licensing law. It is, rather, a law whose sole purpose and effect is to prohibit the employment of unauthorized immigrants within the State of Arizona and hence to "correct" what Arizona's legislators believed were deficiencies in IRCA's sanctions regime. The fact that the law uses the loss of a business license as its primary sanction for violations does not make it a genuine licensing law within the meaning of the savings clause, particularly when the statutory term "licensing and similar laws" is considered, as it must be, in the context of the carefully balanced system of employer sanctions as a whole that Congress enacted through the IRCA. *See Pilot Life*, 481 U.S. at 51.

b. Even if, however, Section 1324a's parenthetical savings clause were read to be broad enough to encompass Arizona's statute, that would by no means

end the preemption inquiry. For this Court made it clear in *Geier* and *Freightliner* that even where a particular state regulation falls within the scope of a savings clause that constitutes an exception to an express preemption provision, the consequence is not that the regulation survives *all* preemption attacks, but only that it survives an attack predicated on *express* preemption. The challenger may still assert an *implied* preemption challenge, and the test as to whether the regulation is impliedly preempted because it stands as "an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal enactment is no different than in cases involving statutes that *lack* an express preemption clause coupled with a savings clause. As this Court has put it, a preemption clause and a "savings clause" exception, read together, impose no "special burden" on the party arguing for implied preemption, but rather are "neutral" as to that question. *Geier*, 529 U.S. at 870-71.

That conclusion makes particular sense here where the savings clause is part of an express preemption clause that purports only to set forth the scope of preemption of one *section* of IRCA (the employer sanctions section, § 1324a) and does not purport to set forth the scope of preemption for IRCA as a whole (which encompasses as well the crucial anti-discrimination section, § 1324b). *Compare International Paper Co. v. Oullette*, 479 U.S. 481, 493 (1987) ("the plain language of the provisions on which respondents rely by no means compels the result they seek. Section 505(e) merely says that '[n]othing *in this section*,' *i.e.*, the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act.").

The question whether the policy judgments reflected in IRCA's anti-discrimination section, when combined with those reflected in the employer sanctions section, add to the preemptive force of IRCA thus cannot, on a close textual analysis of the statute, be resolved by examination of §1324a(h)'s express preemption language in isolation. It can only be answered by applying traditional implied conflict preemption analysis. And, because for the reasons set forth *supra* at 6-8, as well as those set forth in the Petition at 24-25, the Arizona statute's sanctions provisions "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" of IRCA, including its antidiscrimination purposes and objectives, the Ninth Circuit seriously erred in upholding those provisions against Petitioners' implied preemption challenge.[2]

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[2] While *amici* NELP, SEIU, and LAS-ELC fully endorse the arguments stated in the Petition and in the brief of the Asian American Justice Center and its *amici* as to why the "E-Verify" provisions of the Arizona statute are federally preempted, we have confined our presentation to the points set forth in text to avoid burdening the Court with a duplicative submission.

CONCLUSION

For the foregoing reasons, NELP, SEIU, and LAS-ELC respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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