Chamber of Commerce of the United States v. Whiting: Giving the Green Light to States' Broad Use of Immigration-Related Employer Sanctions

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Recommended Citation
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I. INTRODUCTION

With the Legal Arizona Workers Act (LAWA) and S.B. 1070, Arizona has a growing reputation for laying the foundation for state crackdowns on illegal immigration. In the days following the Supreme Court’s decision in Chamber of Commerce of the United States v. Whiting, in which it upheld the Legal Arizona Workers Act, there were predictions that state efforts to enforce immigration would increase throughout the country.

1. See, e.g., Robert Barnes, Supreme Court Upholds Arizona Law Punishing Companies That Hire Illegal Immigrants, WASH. POST (May 26, 2011), http://www.washingtonpost.com/politics/supreme-court-upholds-ariz-law-punishing-companies-that-hire-illegal-immigrants/2011/05/26/AGhHG2BH_story.html (noting that eight states have already passed employment laws similar to Arizona’s, which suggests states are following Arizona’s method of decreasing illegal immigration through laws that would punish employers for hiring undocumented workers).

2. See, e.g., Supreme Court Upholds Arizona Law Penalizing Hiring of Illegal Immigrants, 79 U.S.L.W. 2602 (May 31, 2011) (speculating that because the Court held that the Arizona law was not preempted by federal law, states will have greater flexibility in enforcing immigration through state laws).
People expressed fears that racial discrimination against prospective employees would increase. There were even worries that the entire farming industry in the United States might collapse if similar laws were passed throughout the country.

This Comment argues that the Supreme Court erred in holding that federal immigration law does not preempt LAWA. The Arizona law’s definition of “license” not only prevents it from falling under the Immigration Reform and Control Act’s savings clause, but it also conflicts with the Immigration Reform and Control Act’s comprehensive scheme for immigration regulation through employer sanctions. Part II of this Comment examines federal immigration law, such as the Immigration Reform and Control Act of 1986 (IRCA), and state law such as LAWA. Part II also discusses the preemption doctrine. Part III argues that the Supreme Court’s preemption analysis did not properly take into account the context of IRCA, leading the Court to incorrectly hold that IRCA does not expressly preempt LAWA’s sanctioning provisions. Part III also asserts that the Supreme Court should have held that IRCA impliedly preempts LAWA’s employer sanctions. This Comment also advances that the Supreme Court should have held that LAWA’s mandate of E-Verify, a federal voluntary program, is impliedly preempted. Part IV of this Comment offers policy arguments in support of amending IRCA. Finally, Part V of this Comment concludes that to prevent a patchwork of state and


4. See Alicia Caldwell, Ag Industry Faces Labor Woes in Immigration Debate, ASSOCIATED PRESS, June 4, 2011, available at http://abcnews.go.com/US/wireStory?id=13760679 (presenting concerns that it would be nearly impossible to comply with E-Verify and maintain an industry in which eighty percent of all field workers are illegal immigrants, despite efforts to recruit legal workers).

5. See infra Parts III.A, III.B (arguing that a contextual analysis demonstrates that IRCA expressly preempts LAWA, and that IRCA impliedly preempts LAWA because the state law falls within an exclusively federal area of regulation and it conflicts with Congress’s comprehensive immigration reform).

6. Infra Parts II.A, II.B.

7. Infra Part II.C.

8. See infra Part III.A (showing that a contextual analysis of IRCA, including legislative history, does not support LAWA’s licensing provisions).

9. See infra Parts III.B.1-2 (arguing that because LAWA conflicts with the federal government’s comprehensive scheme of immigration it is both field and conflict preempted).

10. See infra Part III.B.3 (suggesting that Arizona’s mandate imposes unnecessary burdens on the federal government and is thus impliedly conflict preempted).

11. See infra Part IV (suggesting that Congress should amend IRCA’s savings clause because of the likelihood of increased state laws imposing immigration-related employer sanctions).
local immigration-related employment laws, Congress should amend IRCA in light of the Court’s decision and the increasing number of state and local immigration-related employment laws.\textsuperscript{12}

II. BACKGROUND

A. The Immigration and Nationality Act and the Immigration Reform and Control Act

Congress enacted the Immigration and Nationality Act (INA) in 1952.\textsuperscript{13} Considered a “comprehensive federal statutory scheme” for regulating immigration and naturalization, the INA regulates the entry, residency status, length of stay, removal, and naturalization of non-citizens.\textsuperscript{14} However, federal immigration regulations did not address the hiring of undocumented immigrants until the passage of IRCA.\textsuperscript{15} IRCA amended the INA to include provisions concerning the employment of unauthorized aliens, and its goals include discouraging illegal immigration with little employer disruption,\textsuperscript{16} while minimizing the possibility of employment discrimination.\textsuperscript{17} The Supreme Court has referred to IRCA as a “comprehensive scheme prohibiting the employment of illegal aliens in the United States.”\textsuperscript{18}

Under IRCA, it is unlawful for an employer to knowingly hire an unauthorized alien, or to hire an individual without complying with enumerated employment verification requirements.\textsuperscript{19} In addition, IRCA

\begin{itemize}
\item \textsuperscript{12} See infra Part V (concluding that Congress intended IRCA to be enforced uniformly).
\item \textsuperscript{14} DeCanas v. Bica, 424 U.S. 351, 353 (1976).
\item \textsuperscript{15} See Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 5, 7, 8, 20, 26, 29, 40, 42, and 50 U.S.C.); DeCanas, 424 U.S. at 360 (observing that the employment of immigrants was at most a “peripheral concern” of the INA).
\item \textsuperscript{16} See H.R. REP. No. 99-682, pt. 1, at 56 (1986) (suggesting that imposing employer sanctions will eliminate the availability of employment for undocumented aliens; and that because employer penalties only apply to acts of employment after the enactment of IRCA, compliance with IRCA is designed to be “the least disruptive” approach to business owners).
\item \textsuperscript{17} See S. REP. No. 99-132, at 8-9 (1985) (stating that IRCA’s I-9 employment verification system minimizes employment discrimination against minorities who “look or sound foreign,” but are in the United States legally because it provides employers who follow the proper procedure an affirmative defense against penalties for knowingly employing an illegal alien).
\item \textsuperscript{18} Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).
\item \textsuperscript{19} 8 U.S.C. § 1324a(a)(1)(A)-(B) (2006); see id. § 1324a(b) (setting forth the documents establishing employment authorization and identity and the employer’s
makes it unlawful to continue to employ a person if it becomes known that the employee is, or has become, an unauthorized alien. If an employer hires or continues to employ someone who is an unauthorized alien, an administrative law judge must issue an order requiring the employer to cease and desist its violations and pay a civil penalty. The amount of the civil penalty ranges from $375 to $16,000, depending on the number of previous violations committed by the employer. If an employer does not comply with the paperwork requirements for employment verification, an administrative law judge will issue an order requiring the employer to pay a civil penalty ranging from $110 to $1,100. Employers may be subject to criminal penalties of $3,000 for each unauthorized alien and/or up to six months' imprisonment if they engage in a pattern of knowingly hiring or continuing to employ an unauthorized alien. In addition, if an employer engages in "unfair immigration-related employment practices" such as discriminating based on citizenship or nationality, an administrative law judge shall issue an order against the employer and may impose civil penalties. Finally, IRCA explicitly "preempt[s] any State or local law [from] imposing civil or criminal sanctions (other than licensing and similar laws) upon those who employ . . . unauthorized aliens." At the heart of Chamber of Commerce of the United States v. Whiting is the provision's savings clause, which expressly indicates that in enacting IRCA, Congress did not intend to preempt state "licensing and similar laws."
B. The Legal Arizona Workers Act

1. General Overview

Enacted in 2007, LAWA defines who qualifies as an “unauthorized alien” and imposes sanctions on employers who knowingly or intentionally employ an unauthorized alien. Further, LAWA requires Arizona employers to verify employment eligibility through the E-Verify program. In a written statement upon signing the law, then-Arizona Governor Janet Napolitano stated that an impetus for signing the bill was Congress’s failure to provide comprehensive immigration reform.

LAWA requires the attorney general or county attorney to investigate a complaint that an employer knowingly or intentionally employed an unauthorized alien. In that investigation, the attorney general or county attorney must verify the immigration and work authorization status of the employee pursuant to 8 U.S.C. § 1373(c). If state or local law enforcement determines that the complaint is neither false nor frivolous, the attorney general or county attorney must notify both local law enforcement and United States Immigration and Customs Enforcement and must bring action against the employer. While the court may only consider the federal government’s determination of an employee’s status, this determination merely creates a “rebuttable presumption of the employee’s lawful status,” leaving open the court’s ability to reject the federal government’s determination that the worker’s employment is lawful.

29. See id. § 23-211(11) (utilizing 8 U.S.C. § 1324a(b)(3) to define an “unauthorized alien” as an alien who does not have the legal right or authorization to work in the United States); id. § 23-212 (detailing employer sanctions for knowingly employing an “unauthorized alien”); id. § 23-212.01 (detailing employer sanctions for intentionally employing an “unauthorized alien”).
32. ARIZ. REV. STAT. ANN. §§ 23-212(B), 23-212.01(B).
33. Id. §§ 23-212(B), 23-212.01(B).
34. Id. §§ 23-212(C)-(D), 23-212.01(C)-(D).
35. Id. §§ 23-212(H), 23-212.01(H) (stating that the court may take into
2. Employer Sanctions

LAWA designates varying degrees of sanctions for an employer who knowingly employs an unauthorized alien. 36 Once a person alleges that an employer violated the law by hiring an unauthorized alien, he or she may file a complaint to the attorney general or the county attorney. 37 If the superior court finds a violation, the court must (1) order the employer to discharge any unauthorized aliens; (2) issue an order subjecting the employer to a three year probationary period during which the employer must file quarterly reports to the county attorney listing each new employee hired; and (3) order the employer to file an affidavit stating that it has terminated applicable employees and that it will not “intentionally or knowingly employ an unauthorized alien” in Arizona. 38

Should an employer not file the affidavit with the county attorney within three days after the court order, appropriate agencies must suspend all designated business licenses held by the employer until the employer files the affidavit. 39 In addition, the court may order any appropriate agencies to suspend all business licenses for up to ten days based on evidence demonstrating various factors. 40 If an employer commits a second violation, the court shall order the appropriate agencies to immediately and permanently revoke all of the employer’s licenses. 41 LAW A provides a broad definition of “license,” which as applied, can devastate businesses by leading to what is commonly referred to as the “business death penalty,” since a second violation leads to permanent revocation of all licenses held by the employer. 42

LAWA also designates varying degrees of sanctions for an employer who intentionally employs an unauthorized alien. 43 The penalties closely follow those for knowingly employing an unauthorized alien, with few

consideration the federal government’s determination of an employee’s lawful status).

36. Id. § 23-212(F)(1).
37. Id. § 23-212(B).
38. Id. § 23-212(F)(1).
39. Id.
40. Id. § 23-212(F)(2).
41. Id. § 23-212(F)(2).
42. See id. § 23-211(9)(a)-(b) (defining “license” as “any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business” in Arizona, and including within its definition articles of incorporation, certificates of partnership, and grants of authority); id. §§ 23-212(F)(2), 23-212.01(F)(2) (ordering the permanent revocation of all licenses held by the employer upon a second violation of the law); see also David G. Savage, The Enforcer of Border Laws, L.A. TIMES (Nov. 23, 2008), http://articles.latimes.com/2008/nov/23/nation/napolitano23 (quoting Napolitano designating the penalty for a second violation a “business death penalty” since it would prevent a business from operating in Arizona).
43. ARIZ. REV. STAT. ANN. § 23-212.01.
exceptions.\footnote{Id. \S 23-212.01(F).} For a first violation, the probationary period is five years, and appropriate agencies must suspend all licenses for a minimum of ten days.\footnote{Id. \S 23-212.01(F)(1).} Similar to the sanctions for knowingly employing an unauthorized alien, a second violation of intentionally employing an unauthorized alien leads to the mandatory application of the "business death penalty."\footnote{Id. \S 23-212.01(F)(2).}

C. The Preemption Doctrine

1. General Overview

Known as the "Supremacy Clause," the second clause of Article VI of the United States Constitution establishes that the Constitution, federal statutes enacted in accordance with the Constitution, and federal treaties "shall be the supreme Law of the Land."\footnote{U.S. Const. art. VI, cl. 2.} The Supreme Court has long held that under the Supremacy Clause, a state law that interferes with or runs contrary to a federal law is preempted by it and is thus invalid.\footnote{See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 212 (1824) (holding that New York's licensing requirement for foreign vessels is preempted because it takes away federal privileges granted by Congress and is thus inconsistent with federal regulation of the coasting trade).}

Congress may expressly preempt state law by explicitly stating so in the language of the federal statute, or preemption may be implied depending on the federal statute's structure and purpose.\footnote{See generally Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (describing express and implied preemption, and stating that the Court's overarching task in any preemption case is examining the statute's structure and purpose).} Congressional intent is essential in determining whether a federal law preempts a state action.\footnote{See Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (stating that a finding of preemption requires examining the entire statute for its purpose and intended effects).} The Court further recognizes two main types of implied preemption: field preemption and conflict preemption.\footnote{See generally Gade, 505 U.S. at 98 (providing a brief explanation of implied field and conflict preemption).} Field preemption occurs when a state law attempts to regulate a field in which Congress intended federal regulation to be exclusive.\footnote{See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (noting that congressional intent to exclusively occupy a field may be inferred where federal regulation is "pervasive" or "so dominant" that it can be assumed federal law did not intend for state or local laws to supplement it).} Conflict preemption occurs when it is impossible to comply with both federal law and state law,\footnote{See Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (noting that an inquiry into congressional intent is unnecessary to find that a federal law preempts a state law when it is impossible to comply with both federal and state law).} or when a state
law presents an obstacle to executing the entire scope of Congress's purposes and objectives.\(^{54}\)

2. The Preemption Doctrine and Immigration Law

Regulating immigration is an exclusive power of the federal government.\(^{55}\) However, the Court has also expressed that this constitutional power does not automatically preempt every state or local law pertaining to immigrants.\(^{56}\) Even though *DeCanas v. Bica* seems to stand for the proposition that state laws may regulate immigration though employment practices because it is within states’ police powers to regulate employment relationships and because regulation of immigration is limited to determining admittance and conditions of remaining in the United States, *DeCanas* was decided ten years prior to the enactment of IRCA.\(^ {57}\) Thus, because IRCA instituted a carefully balanced, comprehensive regime for regulating immigration through employer sanctions laws, *DeCanas* might be decided differently today.\(^ {58}\) Nevertheless, *DeCanas*’ broader holding, that state and local laws are not automatically preempted if they deal with an immigration-related matter, is still valid law.\(^{59}\)

**D. Chamber of Commerce of the United States v. Whiting**

1. **Opinions Below**

In response to the enactment of LAWA, a diverse group of plaintiffs,

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54. *See* Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (stressing that when a state law impedes the purposes and objectives of Congress it violates Congress’s supremacy in the field of federal regulation); *see also* Int’l Paper Co. v. Ouellette, 497 U.S. 481, 494 (1987) (stating that a state law is preempted if it “interferes with the methods” a federal statute enumerates to reach its goal since Congress carefully balances both public and private interests in developing its methods).

55. *See* id. at 355-56 (stating that for a state law to be preempted it must be a regulation of immigration, which the Court defines as a determination of who can be admitted into the country and the conditions under which a non-citizen may stay).

56. *See* id. at 357-60 (suggesting that because the primary concern of the INA is with the terms and conditions of admittance into the country, and because employment is beyond the scope of the INA, there is no reason to withdraw the power to regulate employment of undocumented immigrants from the state).


58. *See DeCanas*, 424 U.S. at 359 (holding that for the INA to field preempt states from regulating in an area that impacts aliens, there must be a showing that Congress intended to exclude states from enacting regulations on the specific issue).
including non-profit corporations, chambers of commerce, trade associations, a community development corporation, and an immigration reform coalition, filed a pre-enforcement lawsuit challenging the Act on several grounds. First, the Plaintiffs argued that the Act violated IRCA's preemption clause. Second, they contended that the Act and IRCA conflicted with each other. Third, they asserted that the voluntary use of E-Verify under federal law prohibited Arizona from requiring employers to participate in the program. Finally, they contended that the Act violated both procedural and substantive due process of law, the federal Commerce Clause, Arizona’s constitutional separation of powers, and Fourth Amendment protections against unreasonable search and seizure. The District Court dismissed the action without prejudice for lack of standing.

The Plaintiffs refiled their complaint, dropping the Governor as a defendant, while adding the Arizona County Attorneys and the Director of the Arizona Registrar of Contractors, which presumably resolved the issue of standing. The District Court held that IRCA does not preempt LAWA. It also ruled that LAWA does not violate Arizona employers' right to procedural due process. Finally, the District Court held that LAWA does not violate the federal Commerce Clause.

The Ninth Circuit Court of Appeals affirmed the District Court’s rulings and held that IRCA neither expressly nor impliedly preempts LAWA.

60. See Ariz. Contractors Ass'n, Inc. v. Napolitano, 526 F. Supp. 2d 968, 976 (D. Ariz. 2007) (contending that the Act does not fall within IRCA’s savings clause).

61. See id. (asserting that LAWA is impliedly preempted by IRCA).

62. See id. at 976-77 (arguing that the mandatory use of E-Verify is impliedly preempted by IRCA).

63. See id. at 977 (contending that employers’ E-Verify participation requirements, including signing a Memorandum of Understanding which grants the federal government access to the employer's E-Verify and employment-related documents and to its employees for interviews, is a forced waiver of employers’ Fourth Amendment rights to be free from warrantless federal searches of employment records).

64. See id. at 985 (dismissing the action for lack of subject matter jurisdiction on grounds that there was no justiciable case or controversy against the Defendants, the Governor and the Attorney General of the State of Arizona, and the Director of the Arizona Department of Revenue, since they do not have authority to enforce LAWA).


66. See id. at 1046 (arguing that because the Act is a licensing law, it fits within the plain meaning of IRCA’s savings clause).

67. See id. at 1058 (concluding that the Plaintiffs failed to show that section 23-212(H) of the Arizona Revised Statutes does not meet minimal due process requirements).

68. See id. at 1061 (maintaining that because the Act does not regulate out-of-state employees, it does not violate the Commerce Clause).

69. See Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976, 985-86 (9th Cir. 2008) (finding that because the Act does not strive to define work eligibility and is only a licensing measure that enforces federal immigration laws, it falls within IRCA’s
The Ninth Circuit also held that LAWA does not facially violate employers' right to procedural due process. In an amended opinion, the Ninth Circuit addressed the Plaintiffs' argument that LAWA impliedly conflicts with IRCA because LAWA's potential sanctions are harsher than IRCA's, and concluded that there was an insufficient basis for holding that LAWA's sanctions impliedly conflict with IRCA.

2. Supreme Court of the United States Opinion

The Supreme Court heard the case to consider whether federal immigration law preempts the sanction and E-Verify provisions of LAWA. Affirming the Ninth Circuit's decision in a five to three vote, the Court held that IRCA does not preempt LAWA's "licensing" sanctions or its requirement that employers utilize the E-Verify program.

In its express preemption analysis, the Court utilized a broad definition of "license" to conclude that IRCA does not preempt LAWA. Further, the Court emphasized that because there is nothing in the statutory text to suggest that the "broad phrasing" of IRCA's savings clause does not support LAWA's "licensing" sanctions, it would not conclude that LAWA conflicts with IRCA.

LAWA's adoption of a significant amount of language from IRCA was a crucial factor for the Court to rule that it did not conflict with federal law. The Court also relied on general licensing laws

savings clause), amended by 558 F.3d 856 (9th Cir. 2009).

70. See id. at 988 (concluding that the district court correctly held that the Act provides sufficient due process because under LAWA, employers have an opportunity to be heard and to rebut an employee's unauthorized status in superior court before sanctions are imposed).

71. See Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 859-60 (9th Cir. 2009) (reasoning that because there have been no complaints filed under the Act, there is no record establishing the Act's effect on employers, thus the Plaintiffs' argument is too speculative).


73. See id. at 1987 (noting that Justice Kagan took no part in the consideration or decision of the case).

74. See id. at 1973 (holding that LAWA's licensing sanctions are not expressly preempted by IRCA because they fall within the plain text of IRCA's savings clause, and that LAWA's licensing sanctions and mandatory use of E-Verify are not impliedly preempted because they do not conflict with federal law).

75. See id. at 1977-79 (using definitions of "license" from the Webster's Third New International Dictionary and the Administrative Procedure Act to counter the Petitioners' argument that the Arizona law is not a licensing law).

76. See id. at 1980 (asserting that the Court will not read IRCA's savings clause narrowly unless there is a textual basis to do so, nor will it consider IRCA's legislative history, since only statutory text is authoritative). But see Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006) (arguing that interpretation of statutes requires reading the entire text as well as considering the purpose and context of the statute).

77. See Whiting, 131 S. Ct. at 1981-82 (providing that because LAWA utilizes crucial language and pertinent provisions from IRCA, it falls within the authority that
not being a major area of federal concern to argue that LAWA does not directly interfere with the operation of IRCA.\textsuperscript{78} The Court upheld LAWA’s E-Verify mandate on the ground that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) does not contain language that restricts state action such as requiring a person or business to participate in the program.\textsuperscript{79}

Justice Breyer dissented, arguing that IRCA preempts LAWA because an examination of LAWA demonstrates that it is not merely a “licensing” law, and thus IRCA’s savings clause does not apply.\textsuperscript{80} Justice Breyer maintained that IRCA balances competing goals, and that LAWA’s sanctions threaten IRCA’s carefully balanced and constructed objectives.\textsuperscript{81} Finally, Justice Breyer asserted that federal immigration law preempts LAWA’s E-Verify mandate because under federal law, the program is voluntary.\textsuperscript{82} Justice Sotomayor also dissented, contending that the Court’s reading of IRCA’s savings clause runs contrary to its “comprehensive scheme” for prohibiting unauthorized workers.\textsuperscript{83} Justice Sotomayor additionally argued that federal law impliedly preempts LAWA’s E-Verify provision.\textsuperscript{84}

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\textsuperscript{78} See id. at 1983-84 (finding that IRCA operates unimpeded by LAWA since the latter regulates employers through licensing laws, which is not an area of uniquely federal regulation).

\textsuperscript{79} See id. at 1985-86 (reasoning that because IIRIRA’s E-Verify provision only explicitly refers to the Secretary of Homeland Security, the provision’s constraints merely limit the actions of the Secretary of Homeland Security).

\textsuperscript{80} See id. at 1987 (Breyer, J., dissenting) (arguing that Congress did not intend the licensing exception to be so broad that it would “eviscerate” IRCA’s preemption provision).

\textsuperscript{81} See id. at 1992 (asserting that the majority’s reading of LAWA’s licensing exception undermines Congress’s creation of a preemption provision to protect its careful balancing of sanctions and procedural protections when it enacted IRCA).

\textsuperscript{82} See id. at 1995-97 (explaining that mandating the use of E-Verify, which federal law makes voluntary, necessarily obstructs achieving Congress’s full purposes and objectives).

\textsuperscript{83} See id. at 1998 (Sotomayor, J., dissenting) (arguing that LAWA does not fall within IRCA’s savings clause, and that it is preempted because it creates a mechanism for state courts to determine if an employer has knowingly employed an unauthorized alien).

\textsuperscript{84} See id. at 2005-07 (detailing that by mandating the use of E-Verify, LAWA directly regulates the relationship between the federal government and private parties and interferes with Congress’s significant policy objectives).
III. ANALYSIS

A. The Supreme Court Should Have Held That IRCA Expressly Preempts LAWA Because a Contextual Analysis of IRCA Demonstrates That LAWA’s Licensing Provisions Do Not Fall Within IRCA’s Savings Clause.

A state law that imposes employer sanctions for knowingly employing an unauthorized alien must fall within IRCA’s savings clause to be valid, and thus the state law must be a “licensing or similar law” to avoid preemption. In determining whether LAWA’s employer sanctions fit within the bounds of IRCA’s savings clause, the Court should have referred to IRCA’s legislative history to determine the scope of the word “license” within IRCA’s savings clause. An examination of IRCA’s legislative history suggests that Congress intended a narrow definition of “license,” and thus the Court should have held that IRCA expressly preempts LAWA’s sanctions.

1. The Supreme Court Incorrectly Held That LAWA’s Licensing Provisions Fall Within IRCA’s Savings Clause Because the Court’s Statutory Interpretation Did Not Consider the Entire Text of IRCA, Including Its Purpose, Context, Goals, and Policies.

Because the Court relied almost solely on a dictionary and Administrative Procedure Act (APA) definition of “license” to conclude that IRCA’s savings clause supports LAWA’s employer sanctions, it incorrectly held that LAWA is not expressly preempted by IRCA. First, the Court’s reliance on the APA was problematic because IRCA and the APA are unrelated statutes. The APA does not definitively demonstrate that the meaning of “license” within IRCA’s savings clause supports LAWA’s use of employer sanctions because the APA does not strongly pinpoint the definition of non-procedural, isolated terms in unrelated federal statutes. Second, a dictionary definition of “license” does not

85. See 8 U.S.C. § 1324a(h)(2) (2006) (stating that a state law which imposes civil or criminal sanctions is preempted by IRCA unless the state law is a “licensing or similar law”).

86. Cf. Dolan v. U.S. Postal Serv., 546 U.S. 481, 486-87 (2006) (demonstrating that statutory context can determine whether a word in isolation requires a broad or narrow reading to avoid giving federal statutes an unintended reach).

87. See H.R. REP. No. 99-682, pt. 1, at 58 (1986) (suggesting that Congress intended the “licensing and similar laws” language in IRCA to be limited to “fitness to do business laws”).

88. Compare H.R. REP. No. 99-1000, at 85 (1986) (stating that the primary purpose of IRCA is to increase control over immigration), with H.R. REP. No. 1980, at 1, 18 (1946) (providing that the fundamental purposes of the APA are to improve fairness and to inform individuals of their rights under administrative law).

89. See Whiting, 131 S. Ct. at 1988 (Breyer, J., dissenting) (explaining that
sufficiently demonstrate Congress’s intent for the scope of the savings clause within IRCA’s preemption provision because the dictionary definition does not by itself establish that Congress intended a broad definition of “license.” Finally, the Court should have also considered IRCA’s legislative history to interpret the correct scope of IRCA’s savings clause because the plain language of the savings clause does not strongly support the Court’s reasoning that Congress intended “license” to apply to the broadest range of permissions.

The Court appropriately began its statutory interpretation with an analysis of the plain language of the statute. However, interpreting the word “licensing” in isolation should not provide a controlling interpretation of “license” within IRCA’s savings clause. Isolated words cannot take into account the object and policy of a statute, which is crucial in determining the scope of a word’s meaning. Because there is ambiguity concerning whether a broad or narrow definition of “license” applies to IRCA’s use of the word in its savings clause, the Court’s analysis should have gone beyond the plain language of the statute.

Because LAWA facially imposes its sanctions through “licensing” laws, the Court preceded its express preemption analysis by stating it would focus on the plain wording of IRCA. The Court argued that the APA statutory context must be used to determine the scope of the word “licensing” within IRCA’s savings clause, because dictionary and APA definitions do not adequately clarify Congress’s intent for the application of “license” within IRCA.

90. See Dolan, 546 U.S. at 486 (demonstrating that a dictionary definition is not controlling where it would broaden the applicability of the statute).

91. See id. at 486-87 (interpreting an isolated phrase requires evaluating the statute’s context and purpose where an ordinary usage definition implies a broad application of the phrase).


93. Cf. Dolan, 546 U.S. at 486 (demonstrating that although the definition of a phrase in isolation might provide a broad range of acts that apply to a statute, this definition would go beyond the statutory intent when considering the statute’s purpose and context).

94. See U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (providing that the Court has repeatedly stressed that isolated words or sentences do not provide a reliable guide to a statute’s plain meaning, and thus the Court must look to the whole statute, including its objective and policy (quoting United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1849))).

95. See id. (explaining that determining statutory meaning is a holistic task, therefore, at a minimum a statute’s meaning is derived from its language, punctuation, structure, and subject matter).

96. See Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1977 (2011) (asserting that the plain language of a statute provides the best proof of Congress’s preemptive intent when a federal statute contains an express preemption clause).
IMMIGRATION-RELATED EMPLOYER SANCTIONS

The definition of "license" supports LAWA's definition as falling within the bounds of IRCA's savings clause because LAWA's definition "largely" coincides with APA's definition. However, one problem with the Court's heavy reliance on the APA's definition of "license" to support its argument that LAWA falls plainly within IRCA's savings clause is the source of the definition itself. IRCA does not include a definition of "license" nor does the word appear again outside of the savings clause to provide a comparison of statutory usage.

While the APA does include a codified definition of "license," it is an unrelated statute and is not persuasive in supporting the argument that Congress intended the IRCA savings clause to apply broadly to any type of permission. When the Court has looked to the APA to clarify definitions in the past, it has routinely used the APA definitions to clarify procedural issues or to supply a procedural standard where the statute in question is missing one. Thus, utilizing the APA to pinpoint IRCA's definition of "license" does not correspond with Court precedent because "license" is an isolated noun that is contained in a statutory provision that has nothing to do with procedure.

Aside from improperly using the APA's definition of "license" as a tool for interpreting the plain meaning of IRCA's savings clause, the Court did not have a strong basis for concluding that the LAWA definition is "largely" duplicative of the APA definition of "license." A comparison of the two definitions shows that LAWA utilized key language from the federal definition to list the types of documents that are included within a general definition of "license." LAWA's definition of "license" includes

97. See id. at 1978 (demonstrating that Arizona's general definition of "license" generally repeats the language used in the definition of "license" as codified in the APA).

98. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 110 Stat. 3359 (1986) (codified in scattered sections of 5, 7, 8, 20, 26, 29, 40, 42, and 50 U.S.C.); see also Whiting, 131 S. Ct. at 1998-99 (Sotomayor, J., dissenting) (acknowledging that the lack of a definition of "license" and the lack of repeated use of the word in IRCA, combined with the broad range of licensing sanctions, generally results in a lack of textual clarity regarding the scope of IRCA's savings clause).

99. See Whiting, 131 S. Ct. at 1988 (Breyer, J. dissenting) (arguing that relying on APA to demonstrate congressional scope for the meaning of "license" within IRCA is futile since the definition of "license" within the APA does not provide a basis for knowing the scope of "license" that Congress intended in IRCA's savings clause). See generally H.R. Rep. No. 1980, at 1, 18 (1946) (providing that the APA was enacted in 1946 to regulate administrative procedure to improve efficiency and fairness within federal government operations).

“any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business” in Arizona.\footnote{101} The APA’s definition of “license” includes “the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exception, or other form of permission.”\footnote{102}

The Court’s use of the word “largely” is quite significant in comparing the federal definition of “license” to LAWA’s. While LAWA’s definition lists the same documents that are included in the federal definition, LAWA’s definition adds three elements that are not present in the federal definition: (1) the word “any”; (2) the phrase “or similar form of authorization”; and (3) the qualification “that is required by law and that is issued by any agency for the purpose of operating a business in this state.”\footnote{103} LAWA’s added qualifications are substantive additions to the APA definition of “license.” First, by adding “any” and the phrase “similar form of authorization,” LAWA’s qualifications expand the scope of the type of documents that might qualify as a license, because under LAWA, any document that is deemed close enough to a licensing document may be considered a “license.”\footnote{104} Second, by adding the qualification “that is required by law,” LAWA affixes legal implications to the definition of “license,” because under certain circumstances, if the court finds an employer knowingly employed an unauthorized worker, the employer may lose all authorizations required to lawfully operate a business in Arizona.\footnote{105}

Thus, while the APA and LAWA definitions are “largely” repetitive of each other with regard to their basic list of documents, to an Arizona business owner, the definitions are not “largely” repetitive with regard to the weight or significance of what falls under LAWA’s “licensing” law.

The Court also utilized the APA definition to assert that this codified definition of “license” provides a clear correlation with LAWA’s broad inclusion of articles of incorporation, certificates of partnership, and grants of authority to foreign companies to transact business within its definition of “license.”\footnote{106} Articles of incorporation are a component of a business’

\footnote{102. 5 U.S.C. § 551(8) (2006).}
\footnote{104. \textit{Cf.} Gonzalez v. Crosby, 545 U.S. 524, 530-31 (2005) (suggesting that a habeas petitioner’s filing of a Rule 60(b) motion is similar enough to a habeas application that it must be subject to the same procedural requirements).}
\footnote{105. \textit{See Ariz. Rev. Stat. Ann.} §§ 23-212(F)(2), 23-212.01(F)(2) (designating that upon the court’s finding of a second violation for knowing or intentionally employing an unauthorized worker, the court shall permanently revoke all licenses held by the employer).}
\footnote{106. \textit{See} Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1978 (2011) (suggesting that because the APA definition includes “registration” and
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corporate charters, thus the Court was not incorrect in asserting there might be a parallel between LAWA including articles of incorporation in its list of licensing documents and APA including charters in its definition of "license." Further, certificates of partnership can fall within the category of a type of registration. Finally, the cases to which the Court cites to support its argument that state-issued authorizations for foreign businesses to conduct business within the state have been referred to as "licenses" by the Court do refer to such grants of permission as "licenses." However, the problem remains that the Court depended on an unrelated statute to demonstrate that the meaning of "license" within IRCA's savings clause supports LAWA's use of "licensing" sanctions. The APA and IRCA are simply too different for the APA to provide a definitive scope of "license" within IRCA. Because the APA does not apply to employment-related licensing systems, its definition is not a part of a larger context that includes employment or immigration-related goals and purposes.

Finally, the Court utilized a Webster's Third New International Dictionary definition of "license" to support its argument that articles of incorporation and certificates of partnership fall within the definition of "license," reasoning that but for these documents, it would be unlawful for a corporation to engage in business and conduct transactions. While a

107. Cf United States v. Marine Bancorporation, Inc., 418 U.S. 602, 610-12 (1974) (inferring that corporate charters include articles of incorporation by stating that a bank that does not comply with the state's articles of incorporation requirements might be subject to loss of its corporate charter).

108. Cf Comm'r v. Tower, 327 U.S. 280, 285-87 (1946) (showing that despite the filing of a certificate of partnership as required by state law for record-keeping purposes, there was no actual partnership agreement).

109. See Whiting, 131 S. Ct. at 1978 (citing G.D. Searle & Co. v. Cohn, 455 U.S. 404, 413 n. 8 (1982), which discussed whether a tolling provision was intended to be a penalty to force foreign corporations to obtain a state license, and Rosenberg Bros. & Co. v. Curtis Brown, Co., 260 U.S. 516, 518 (1923), which concluded that because an out-of-state retailer never applied for a license to do business in New York under foreign corporation laws, the court did not have jurisdiction over the case).

110. Compare H.R. REP. NO. 99-1000, at 85 (1986) (suggesting that the primary purpose of IRCA is to reduce illegal immigration), with H.R. REP. NO. 1980, at 1, 16-17 (1946) (providing that the APA is intended to improve fairness in administrative procedure by providing a means for individuals to know their rights under administrative law and providing administrators with a simple procedural framework).

111. See Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006) (utilizing precedent that includes a holding regarding negligent operation of postal service vehicles under the Federal Torts Claim Act (FTCA) to support a determination that the statutory structure of the relevant FTCA subsection requires a narrow reading of "negligent transmission").

dictionary may be useful in understanding one plain meaning definition of a word in isolation, a dictionary definition of "license" is not sufficient to demonstrate Congress's intent for the scope of the savings clause within IRCA's preemption provision.113

The Court began its express preemption analysis by stating that its discussion would center on the plain wording of IRCA's savings clause since it contains the best evidence of Congress's intent.114 However, because the language of IRCA's savings clause is so limited, focusing solely on its plain wording necessitates only a limited analysis that relies on defining the word "license" in isolation.115 In its analysis, the Court did not utilize sources that sufficiently demonstrate that Congress intended the scope of "license" to reach its broadest possible limit.116 Because there is nothing in the plain language of the savings clause to support the Court's reasoning that Congress intended "license" to apply to the broadest range of permissions, the Court should have looked to IRCA's statutory context to determine what Congress intended the scope of "license" to be.117

2. A Contextual Analysis of IRCA Demonstrates That It Expressly Preempts LAWA's Licensing Sanctions Because IRCA's Legislative History Establishes That Congress Intended to Limit "License and Similar Laws" to "Fitness to Do Business Laws."

A contextual analysis of IRCA that includes its legislative history shows that IRCA expressly preempts LAWA's employer sanctions because the latter does not fit within IRCA's savings clause. The Court relied on a permission" that allows a business to "do some act, or to engage in some transaction which but for such license would be unlawful").

113. See Dolan, 546 U.S. at 486-87 (demonstrating that where statutory context suggests a narrow reading of a definition, a dictionary definition that provides a broader application of the word is not controlling).

114. See Whiting, 131 S. Ct. at 1977 (suggesting that because express preemption is in the statutory text, the plain wording best demonstrates the scope of the preemption provision).

115. See 8 U.S.C. § 1324a(h)(2) (2006) (providing that states are saved from federal preemption if they utilize "licensing and similar laws" to sanction employers for violating IRCA).

116. See Dolan, 546 U.S. at 486 (demonstrating that even though a dictionary definition of a word in isolation would permit the word transmission to apply to a broad range of negligent acts, statutory context shows Congress intended a narrow application).

117. See Whiting, 131 S. Ct. at 1988 (Breyer, J., dissenting) (arguing that only statutory context can determine whether Congress intended "license" to apply to a broad definition of that term, because a dictionary definition and unrelated statute cannot illuminate what Congress intended for the scope of "license" within IRCA); Dolan, 546 U.S. at 486 (demonstrating that where there is doubt concerning the scope of a definition of a word in isolation, statutory context and precedent can determine whether a word in isolation requires a broad or narrow reading to avoid giving federal statutes too broad a scope).
dictionary definition and an unrelated statute to support its argument that LAWA utilizes “licensing” laws to sanction employers, and thus falls within IRCA’s savings clause. However, the Court also acknowledged that some of the types of documents that fall within LAWA’s “licensing” sanctions might not actually be “licensing” laws at all. Because the Court provides this concession, it is apparent that it should have relied on statutory context to support its argument that IRCA does not preempt LAWA’s employer sanctions. A contextual analysis of IRCA further demonstrates that LAWA’s employer sanctions do not fit within IRCA’s savings clause and thus it expressly preempts the State’s “licensing” provisions.

The Court minimized the utility of IRCA’s legislative history and disregarded the reasons why it is necessary in determining the scope of “license” within IRCA’s savings clause. While IRCA’s savings clause does not receive much attention within its legislative history, one House of Representatives Report provides a basis for finding that LAWA’s employer sanctions do not fall within IRCA’s savings clause. House Report 682 indicates that Congress’s focus in creating IRCA’s preemption provision and savings clause was to allow states to have the power to suspend, revoke, or refuse to reissue a license to an employer who violates IRCA’s terms, but also that this power is limited to regulation involving fitness to engage in a particular business sector. While the legislative history that specifically discusses IRCA’s savings clause is limited, it nevertheless

118. See Whiting, 131 S. Ct. at 1980 (maintaining the Court is not required to utilize legislative history, thus the dictionary and APA definitions sufficiently support LAWA’s use of “license”).

119. See id. at 1978 (suggesting that even though articles of incorporation, partnership certificates, and grants of authority might not be licensing laws, the dictionary and APA definitions demonstrate they are, at a minimum, similar to licensing laws, and therefore fall within IRCA’s savings clause).

120. See Dolan, 546 U.S. at 486-87 (demonstrating that where a definition of an isolated word within a statute raises questions about the word’s applicable scope, statutory interpretation requires assessing the statute’s purpose and context, and considering applicable precedent). But see Whiting, 131 S. Ct. at 1980 (rejecting the use of legislative history to determine whether IRCA preempts LAWA because only statutory text provides an authoritative statement on a statute’s meaning).

121. See Whiting, 131 S. Ct. at 1980 (arguing that legislative history does not provide a controlling definition of statutory terms, and suggesting that because only one congressional report discusses the savings clause, there is not a compelling reason to utilize IRCA’s legislative history).

122. See H.R. REP. No. 99-682, pt. 1, at 58 (1986) (reiterating the basic language of IRCA’s preemption provision and savings clause, and suggesting that the Judiciary Committee intended the “licensing and similar laws” language in IRCA to mean “fitness to do business laws”).

123. See id. (stating that the penalties in IRCA are not intended to preempt lawful state processes, and providing examples of state farm labor contractor and forestry laws as two types of “fitness to do business laws” that fall under IRCA’s savings clause).
demonstrates that the Court wrongly concluded that LAWA’s “licensing” sanctions fall clearly within the savings clause.\textsuperscript{124} The Court rested its conclusion on sources that provided weak support for finding that IRCA’s savings clause broadly applies to LAWA’s definition of “license.”\textsuperscript{125} When plain meaning definitions create ambiguity concerning the scope of a definition’s reach, the Court must consider statutory context.\textsuperscript{126}

House Report 682 directly addresses the question at hand—the meaning of the word “license” within IRCA’s savings clause—and is therefore not only an appropriate component of IRCA’s statutory context, but it is also a necessary tool for determining whether LAWA falls within IRCA’s savings clause despite the Court’s reasons for dismissing its utility.\textsuperscript{127} The Court’s reasons for not relying on legislative history are not compelling, and they do not negate the relevance and usefulness of House Report 682. Further, the Court asserted that because it previously dismissed House Report 682, the document has no relevance in determining whether IRCA’s savings clause protects LAWA’s “licensing” provisions.\textsuperscript{128} The Court’s previous dismissal of the utility of House Report 682 was within the context of determining whether IRCA intended the National Labor Relations Board to have authority to award back pay to unauthorized workers.\textsuperscript{129} While the Court previously concluded that House Report 682 does not support awarding a back pay remedy to unauthorized workers, employee remedies were not an issue in \textit{Chamber of Commerce of the United States v. Whiting}. Thus, even assuming the Court was previously correct in dismissing the utility of House Report 682, that dismissal was limited to a very specific context that does not apply to IRCA’s preemption provision.

\textsuperscript{124} \textit{See} Int’l Paper Co. v. Ouellette, 479 U.S. 481, 495 (1987) (demonstrating that upholding a savings clause that would allow a state law to undermine a carefully constructed statute is analogous to allowing states to “do indirectly what they could not do directly”).

\textsuperscript{125} \textit{See} \textit{Whiting}, 131 S. Ct. at 1977-79 (utilizing the APA and Webster’s Dictionary definitions of “license” to assert that IRCA does not expressly preempt LAWA’s employer sanctions).

\textsuperscript{126} \textit{See} Dolan v. U.S. Postal Serv., 546 U.S. 481, 486-87 (2006) (demonstrating that courts must consider Congress’s purpose and statutory context where there is a possibility that the ordinary meaning and usage definition might be too broad).

\textsuperscript{127} \textit{See} \textit{Whiting}, 131 S. Ct. at 1980 (declining to use House Report 682 because it is not an authoritative statement on the statutory text, it does not add anything beyond the language of the statutory text, it is the only legislative history document pertaining to IRCA that discusses the savings clause, and it has been dismissed by the Court in a prior case).

\textsuperscript{128} \textit{See id.} at 1980 (pointing to a footnote where the Court previously dismissed House Report 682 on grounds that it was produced by politically divided Congress (citing Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149-50 n. 4 (2002))).

\textsuperscript{129} \textit{See Hoffman Plastic Compounds, Inc.}, 535 U.S. at 149-50 (arguing that authorizing back pay to undocumented workers counters IRCA’s provision that renders it unlawful to obtain employment with false documents).
A contextual analysis of IRCA suggests that LAWA's employer sanctions do not fit within IRCA's savings clause because IRCA's legislative history demonstrates that Congress intended the savings clause to apply narrowly to "licensing and similar laws."\textsuperscript{130} The Court's use of a dictionary definition and an unrelated statute to support its argument that LAWA falls within IRCA's savings clause ignored the question of scope that these definitions leave open. Therefore, the Court should have turned to IRCA's legislative history to clarify the scope of IRCA's savings clause.\textsuperscript{131}

B. IRCA Impliedly Preempts LAWA's Licensing Sanctions and E-Verify Requirement Because IRCA Is a Comprehensive Scheme for Federal Immigration and LAWA Conflicts with the Statute's Federal Exclusivity and the Full Achievement of its Objectives.

1. IRCA Is a Comprehensive Scheme for Immigration Regulation Through Employer Sanctions, Therefore It Impliedly Field Preempts LAWA's Licensing Sanctions.

The Court's holding that LAWA's "licensing" provisions do not conflict with IRCA ignores the statute's comprehensive regulation of employers hiring undocumented immigrants. Despite IRCA's enumeration of state powers to impose licensing sanctions upon an employer who employs unauthorized immigrants, immigration enforcement is not an area of regulation commonly left to the states.\textsuperscript{132} Thus, there is not a presumption against preemption if Arizona supersedes its powers to issue immigration-related sanctions through LAWA's "licensing" provision.\textsuperscript{133} Because immigration regulation is an area in which federal law is supreme, a state

\begin{itemize}
\item \textsuperscript{130} Cf. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 495-97 (1987) (demonstrating the use of legislative history to support the argument that the broad application of the savings clause in the Clean Water Act in the state law at issue would permit states to do indirectly what they could not do directly).
\item \textsuperscript{131} See Dolan, 546 U.S. at 485-86 (utilizing statutory context to determine the scope of "transmission" to consider whether Congress intended the phrase "negligent transmission" to apply to circumstances other than lost, late, or damaged mail).
\item \textsuperscript{132} See 8 U.S.C. § 1103(a)(1) (2006) (designating that the Secretary of the Department of Homeland Security shall have the authority to administer and enforce laws relating to immigration and naturalization and that determinations and rulings by the Attorney General regarding questions of law pertaining to immigration shall be controlling); \textit{id} § 1324a(h)(2) (2006) (preempting state or local laws from imposing civil or criminal sanctions against employers who hire unauthorized aliens with the exception of "licensing or similar laws").
\item \textsuperscript{133} See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947) (showing that despite an assumed presumption against preemption due to Congress legislating in a field historically left to the state's police powers, the law in question is preempted by federal law since it is clear Congress intended to eliminate dual state and federal regulation of a grain warehouse that obtains a federal license).
\end{itemize}
exercise of power must be subordinate to a federal law even in an area where concurrent power is appropriate. As a comprehensive scheme for preventing the employment of undocumented immigrants in the United States, IRCA provides the standard for prohibiting employers from hiring undocumented immigrants. Thus, the Court should have held that IRCA impliedly preempts LAWA, because Congress left no room for state regulation to augment it.

The Court maintained that LAWA is not field preempted by IRCA, because Congress did not intend for IRCA to allocate authority exclusively to the federal government. While the Court maintained that LAWA is simply a “licensing” law and that Arizona is therefore exercising the authority that Congress explicitly preserved for it, the Court’s reasoning relied on an incomplete analysis. Because immigration law is an area in which state or local laws must not interfere, an analysis of whether IRCA preempts LAWA must take into consideration a wide range of factors, including whether the federal legislation is in an area where the federal interest is so strong that Congress intended for it to occupy the field. The Court’s conclusion that Congress did not intend for IRCA to be exclusive and that as a “licensing” law LAWA falls squarely within IRCA’s savings clause rests on the assumption that LAWA’s sanctions are indeed pursued through licensing laws. Instead, the Court should have

134. See Hines v. Davidowitz, 312 U.S. 52, 61-63 (1941) (explaining that because immigration is included in the field of foreign affairs, the Constitution establishes that federal statutes creating immigration regulations trump state laws that interfere with the federal law).
135. See Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147-48 (2002) (designating IRCA as a comprehensive scheme that brought the employment of undocumented immigrants to the forefront of immigration law and policy); Hines, 312 U.S. at 66-68 (explaining that where Congress legislates a complete scheme of regulation in an area of law where it has superior authority over states, Congress creates a standard of regulation with which state laws cannot interfere).
136. See Hines, 312 U.S. at 72-74 (reasoning that because Congress added to the comprehensive scheme of federal immigration an intricate alien registration system, Pennsylvania’s Alien Registration Act is preempted because it enforces additional regulations and therefore interferes with the federal law).
137. See Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1983-85 (2011) (explaining that because IRCA preserved states’ authority to impose licensing sanctions, it was not intended to prevent states from exercising any authority).
138. See Hines, 312 U.S. at 62-63 (emphasizing that even if a state can legislate in a particular area of immigration law, the state’s power must be subordinate to federal immigration law concerning the same subject since the Constitution makes clear that Congress has supremacy in the field of foreign affairs, including power over immigration).
139. See id. at 66-67 (stating that while there is no rigid test for determining whether a state law conflicts or curtails a federal law, the Court must consider Congress’s purpose and goals within the context of whether the legislation is in a field that Congress traditionally occupies).
140. See Whiting, 131 S. Ct. at 1981 (stating that the Petitioners’ argument that LAWA necessarily conflicts with IRCA is without reason since Congress expressly
considered whether Congress intended IRCA to be a comprehensive scheme for regulating immigration.\(^{141}\)

The Court did not analyze whether the structure and provisions of IRCA demonstrate that Congress intended it to be a comprehensive plan for controlling immigration through employer sanctions. This approach was wrong because the Court should have considered congressional intent in its statutory interpretation.\(^{142}\) Instead, in dismissing the argument that LAWA necessarily conflicts with federal law because Congress intended IRCA to be exclusive, the Court stated that LAWA implements sanctions through licensing laws, thus the Arizona law is doing exactly what Congress expressly allows it to do.\(^{143}\) Even though the Court designated LAWA’s sanctions as “licensing” laws, LAWA nevertheless adds to IRCA’s employer sanctions provisions, despite IRCA explicitly stating that enforcement of immigration laws in the United States should occur through a nationwide, uniform system.\(^{144}\) LAWA’s “licensing” sanctions encompass a broader scope of sanctions than do IRCA’s because under LAWA, an employer is subject to increased burdens and penalties.

First, under IRCA, an employer is only subject to civil or criminal fines, and sometimes criminal punishment, for knowingly employing an unauthorized immigrant.\(^{145}\) Under LAWA however, an employer is subject to the “business death penalty” under certain circumstances.\(^{146}\) Second, IRCA establishes a centralized system of filing complaints and investigating complaints that have a “substantial probability of validity,” and it even designates a federal enforcement unit whose primary duty is to prosecute employers for knowingly hiring an unauthorized immigrant.\(^{147}\) LAWA however, allows anyone to file a complaint anonymously, and it

allows states to impose employer sanctions through licensing laws).

\(^{141}\) See Hines, 312 U.S. at 66-68 (providing that because the Alien Registration Act is a “complete scheme of regulation” within immigration law, state law cannot interfere with it).

\(^{142}\) See, e.g., Gade v. Nat’l Solid Waste Mgmt. Ass’n, 505 U.S. 88, 96 (1992) (stating that Congress’s purpose is one of the most significant factors in determining whether a state law is preempted by federal law).

\(^{143}\) See Whiting, 131 S. Ct. at 1981 (explaining that because Congress included a savings clause in IRCA’s preemption provision, it did not intend to keep states from exercising the specific authority to impose sanctions through licensing laws).


\(^{146}\) See Ariz. Rev. Stat. Ann. §§ 23-212(F), 23-212.01(F) (Supp. 2011) (providing that the court must revoke all business licenses held by an employer upon committing a second violation for knowingly or intentionally hiring an unauthorized alien).

\(^{147}\) 8 U.S.C. § 1324a(e).
states that the local law enforcement must investigate the complaint and bring action against an employer if the attorney general or county attorney determines the complaint is "not frivolous." These differences in both the harshness of possible penalties and the adjudicatory process suggest that LAWA augments the federal scheme for employer sanctions that Congress devised in its enactment of IRCA, which runs contrary to precedent establishing that where Congress has superior authority in a given field and creates a complete scheme of regulation, states cannot enforce additional regulation.

While the Court did not utilize DeCanas v. Bica to bolster its conclusion that LAWA is not preempted by IRCA under the doctrine of implied field preemption, its discussion of DeCanas earlier in the Opinion suggests that underlying much of the Court's analysis is the proposition that states retain power to enforce employer relationships, including employment-related laws that impact undocumented immigrants. While the essential holding of DeCanas, that not every state or local measure relating to immigrants is automatically preempted by federal law, is still relevant law, DeCanas was decided ten years before the enactment of IRCA. Thus, the outcome of DeCanas would likely be different today, since IRCA added to the INA a comprehensive federal scheme of employer sanctions.

In addition to a structural analysis of the legislation in question, the Court has looked to legislative history to determine Congress's purposes and goals and to ascertain whether Congress intended a scheme of regulation so thorough that any state interference would necessarily conflict with it. Reviewing IRCA's legislative history strongly suggests that

148. ARIZ. REV. STAT. ANN. §§ 23-212(C), 23-212.01(C).
149. See Hines v. Davidowitz, 312 U.S. 52, 72-74 (1941) (holding that because Congress enacted a complete scheme of alien registration via the Alien Registration Act, the state's own alien registration system is preempted even though it does not conflict with the federal statute).
150. See Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1974 (2011) (articulating the proposition that because states have historic police power to regulate employment relationships, and because the federal government is not heavily involved in the employment of undocumented immigrants, a state law may prohibit the employment of undocumented immigrants (quoting DeCanas v. Bica, 424 U.S. 351, 356-60 (1976))).
151. See DeCanas, 424 U.S. at 355-56 (limiting immigration regulation to determining admission into the country and designating conditions for remaining in the country).
153. See Hines, 312 U.S. at 67-68 (utilizing legislative history to show that Congress, under its constitutional authority, carefully balanced many considerations in enacting the Alien Registration Act and thus provided a comprehensive national standard for alien registration).
Congress intended for a comprehensive federal system of preventing the employment of undocumented immigrants to be a part of its generally exclusive control of immigration. First, IRCA’s legislative history demonstrates that Congress’s purpose in amending the INA through IRCA was to control unauthorized immigration to the United States through employer sanctions. Second, reviewing IRCA’s legislative history suggests that Congress intended a uniform, national system of immigration enforcement through employer sanctions. Third, Congress’s methodical balancing of numerous policy considerations, such as deterring the employment of unauthorized workers, avoiding employer burdens, protecting employee privacy, and preventing employment discrimination, suggests that it intended IRCA to be a comprehensive system of immigration reform.

The Court failed to adequately demonstrate that Congress did not intend IRCA to be a comprehensive federal system of prohibiting employers from hiring undocumented immigrants and that as a result, a state law that interferes does not necessarily conflict with the federal law. The Court simply dismissed the Petitioner’s argument that Congress intended IRCA to be an exclusively federal system by turning to LAWA’s plain language and suggesting that because it is simply a “licensing” law, it does nothing to upset the balance of Congress’s scheme for immigration regulation. By reasoning that LAWA’s sanctions are more closely related to licensing regulations than immigration regulations, the Court dismissed the application of cases that support the argument that LAWA necessarily conflicts with federal law. However, this argument ignores the


155. See H.R. REP. No. 99-1000, at 85 (explaining that Congress intended that employers would be able to rely on the Act’s details on compliance with employee verification requirements).

156. See S. REP. No. 99-132, at 7-13 (1985) (demonstrating that while reducing incentives to enter the United States is one of two solutions to reducing the problem of illegal immigration, an effective employer sanctions program necessitates complex legislation).

157. See Hines, 312 U.S. at 72-74 (advancing that because the Alien Registration Act is a complete system of alien registration that was intended to be a part of a uniform, national system of immigration law, the Pennsylvania Alien Registration Act interferes with the federal law and is therefore preempted).

158. See Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1983-85 (2011) (suggesting that LAWA’s licensing sanctions more appropriately fall into the category of in-state licensing laws as opposed to immigration laws, and thus do not involve a uniquely federal area of regulation).

159. See id. at 1983-84 (stating that cases involving uniquely federal areas of regulation are inapplicable to the issue of whether IRCA preempts LAWA’s licensing
possibility that LAWA’s sanctions fall within federal immigration regulation and thus necessarily conflict with it. Simply calling a law a “licensing” law does not necessarily make the law fall within IRCA’s savings clause when the result is that a state can mold nearly any permission-related law into an employment-related “licensing” law.

IRCA is a complex scheme of immigration regulation that provides a standard for employment verification and employer sanctions among other provisions. Even though its savings clause allows states to impose licensing sanctions in the instance that employers knowingly employ unauthorized immigrants, this does not negate IRCA’s status as a complete federal system of immigration regulation.

2. LAWA Presents an Obstacle to Fully Achieving the Purposes and Goals of IRCA, Therefore It Is Impliedly Conflict Preempted by IRCA.

Even if Congress did not intend for IRCA to occupy the field of immigration-related employment regulation, LAWA conflicts with the purposes and goals of IRCA. The Court was wrong to ignore Congress’s careful balancing of varying purposes and goals in its enactment of IRCA. IRCA balances three competing goals—discouraging employment of unauthorized workers, preventing burdens on employers, and preventing discrimination against job applicants who appear foreign—and the statute’s preemption clause is intended to prevent states from upsetting this careful balance. Because LAWA does not protect employers from unnecessary burdens and is silent on issues pertaining to discrimination, LAWA only furthers one of IRCA’s objectives, deterring the employment of unauthorized workers. Thus, the Court should have

References

160. See Hines, 312 U.S. at 66-68 (showing that where Congress enacts a complete scheme of immigration regulation and provides a standard for enforcement, state laws can neither interfere with it nor augment it by enforcing additional regulations).

161. See Whiting, 131 S. Ct. at 1992-93 (Breyer, J., dissenting) (articulating that there is no evidence to demonstrate that Arizona has ever included corporate charters and partnership certificates within employment-related laws, and allowing it to do so authorizes states to undermine IRCA’s preemption provision).

162. See Hines, 312 U.S. at 66-67 (stressing that because regulation of immigration is a federal power, even where a state properly enacts a law pertaining to immigration under its powers, it must yield to federal law acting on the same issue).

163. See Whiting, 131 S. Ct. at 1989-92 (Breyer, J., dissenting) (demonstrating that the Court’s reading of the savings clause facilitates interference with Congress’s purposes and objectives because it allows states to undermine Congress’s reconciliation of competing objectives).

164. See Int’l Paper Co. v. Ouellette, 479 U.S. 481, 494-96 (1987) (showing that even if a state and federal law share the same goal, a state law is preempted if it upsets the balance of interests Congress included in the Act).

165. See ARIZ. REV. STAT. ANN. §§ 23-211 to 23-214 (Supp. 2011) (providing that LAWA pertains only to employer sanctions for knowingly or intentionally hiring an
held that IRCA impliedly preempts LAWA’s “licensing” sanctions because they interfere with the execution and achievement of Congress’s purposes and objectives in enacting IRCA.\textsuperscript{166}

\textit{a. LAWA Imposes Increased Burdens on Employers, thus It Conflicts with Congress’s Careful Balance of Objectives in Enacting IRCA.}

The Court should have concluded that LAWA conflicts with IRCA, because in addition to subjecting Arizona employers to increased burdens to remain in compliance with the law, LAWA also exposes Arizona employers to an increased risk of erroneous prosecution.\textsuperscript{167} To minimize burdens on employers, IRCA established both an employer verification system and centralized federal enforcement procedures.\textsuperscript{168} Also, it limits sanctions primarily to monetary fines of up to $16,000.\textsuperscript{169} LAWA contrarily creates a separate enforcement system, and in certain cases, imposes a “business death penalty” on an employer.\textsuperscript{170}

The Court suggested that because LAWA, as a “licensing” law, draws much of its language and general provisions from IRCA, Arizona is merely using the powers Congress specifically preserved for it in its enforcement of LAWA.\textsuperscript{171} However, the Court’s reasoning is problematic, because it omitted important elements of both IRCA and LAWA. IRCA carefully

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\textsuperscript{166}. See Hines, 312 U.S. at 66-67 (showing that where Congress, under its authority, regulates immigration, a state law acting on the same subject is preempted if it interferes with the federal standard).

\textsuperscript{167}. See Ouellette, 479 U.S. at 494-96 (showing that a state law is preempted for interfering with the methods a federal statute uses to reach a goal where the savings clause would preserve actions that would disrupt Congress’s balancing of interests).

\textsuperscript{168}. See generally H.R. REP. No. 99-682, pt. 1, at 56-62 (1986) (demonstrating that Congress designed its verification system to be the least disruptive approach for business owners and to protect employers from sanctions through good faith compliance with the system).

\textsuperscript{169}. See 8 U.S.C. § 1324a(e)(4) (2006) (establishing civil penalties up to $10,000); 8 C.F.R. § 274a.10(b)(1)(ii) (2011) (adjusting the civil penalties for offenses occurring on or after March 27, 2008).

\textsuperscript{170}. See ARIZ. REV. STAT. ANN. §§ 23-212(B)-(F), 23-212.01(B)-(F) (designating that the attorney general or county attorney shall investigate a complaint and shall notify certain federal and local government agencies if the complaint is deemed neither false nor frivolous, and that a county attorney will bring action for violation of hiring an unauthorized alien).

\textsuperscript{171}. See Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1981-82 (2011) (stressing that Arizona protects state and federal balance of interests by utilizing the federal definition of “unauthorized alien,” and providing that because the Arizona court cannot independently make a final determination of work authorization, LAWA does not conflict with IRCA at any stage).
incorporates employer verification requirements that are minimally burdensome for employers to comply with and that provide employers with reliance on a good faith defense for complying with the employee verification requirements designated by IRCA.\textsuperscript{7} While the Court maintained that LAWA provides employers with a good faith defense of compliance with the I-9 verification process equivalent to IRCA’s, it neglected to consider that under federal law, the I-9 is only applicable to federal enforcement of IRCA.\textsuperscript{173} Thus, under LAWA, an employer may not have the same protections it would be afforded under federal law, which demonstrates that LAWA conflicts with IRCA’s verification requirements.\textsuperscript{174}

While the Court stressed that under LAWA, Arizona courts may not independently make a final determination of work authorization and that the state court may only consider the federal government’s determination of worker authorization, the Court failed to address LAWA’s rebuttable presumption provision.\textsuperscript{175} A facial reading of LAWA demonstrates that a federal determination of a worker’s unlawful status is conclusive against the employer, but that the Arizona court may rebut a federal determination of a worker’s lawful employment status.\textsuperscript{176} Thus, while the Court was correct in stating that under LAWA, Arizona courts may not independently make a final determination of work authorization, its failure to consider LAWA’s rebuttable presumption provision is problematic when considering whether LAWA conflicts with IRCA.\textsuperscript{177}

\textsuperscript{172} See 8 U.S.C. § 1324a(b)(1)(A) (showing that employers only have to meet the burden of examining the documents and attesting that the documents appear to be genuine); id. § 1324a(a)(3) (stating that as long as an employer complies with IRCA’s verification requirements, the employer establishes a good faith defense for following IRCA’s statutory requirements).

\textsuperscript{173} See id. § 1324a(b)(5) (stating that the I-9 may only be used for enforcement of IRCA). Compare id. § 1324a(a)(3) (establishing a good faith defense for employers who follow IRCA’s verification requirements), with ARIZ. REV. STAT. ANN. § 23-212(J) (stating that complying with IRCA’s verification requirements establishes an affirmative defense against knowingly employing an unauthorized worker).

\textsuperscript{174} See Int’l Paper Co. v. Ouellette, 479 U.S. 481, 494-96 (1987) (showing that where a state law imposes discharge standards different from those imposed by the Clean Water Act, it interferes with Congress’s purposes and objectives and is thus preempted).

\textsuperscript{175} See ARIZ. REV. STAT. ANN. §§ 23-212(H), 23-212.01(H) (providing that the federal government’s determination of immigration status creates a rebuttable presumption that the state court may consider in its final determination of an employee’s lawful status).

\textsuperscript{176} See id.

\textsuperscript{177} See Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1991-92 (2011) (Breyer, J., dissenting) (suggesting that the rebuttable presumption provision will result in employers discriminating against individuals if they believe the individuals might be unauthorized to work, which conflicts with IRCA’s antidiscrimination protections).
IMMIGRATION-RELATED EMPLOYER SANCTIONS

The Court also neglected to view the different penalties an employer faces under LAWA as a reason for finding IRCA impliedly preempts LAWA, which is problematic because the employer sanctions are part of Congress's careful balance of purposes and goals in enacting IRCA.178 One difference between IRCA and LAWA is critical—under IRCA, a violation of knowingly hiring an unauthorized worker subjects an employer to penalties of up to $16,000, while under LAWA, an employer who knowingly or intentionally hires an unauthorized worker may lose all licenses specific to that business location.179 The Court minimized this distinction by stating that the “business death penalty” does not apply for simply hiring unauthorized workers, it applies to the “far more egregious” violation of knowingly or intentionally hiring an unauthorized worker a second time.180 The Court, however, failed to address why LAWA does not conflict with federal law when an Arizona employer loses all ability to do business for a second violation, while under federal law, the same employer would be subject to a fine of up to $6,500.181

b. LAWA Does Not Adequately Address Employer Discrimination, thus It Conflicts with Congress's Careful Balance of Objectives in Enacting IRCA.

LAWA does not include antidiscrimination provisions as part of its “licensing” sanctions against employers, and therefore LAWA upsets the balance Congress sought to achieve when enacting IRCA and impliedly conflicts with the federal law. In enacting IRCA, Congress sought to prevent employers from discriminating against job applicants who appear or sound foreign by including antidiscrimination provisions.182 The Court

178. See Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (holding that the state Alien Registration Act is preempted because it would subject individuals to burdens they would not be subject to under the comprehensive federal registration system).

179. Compare 8 U.S.C. § 1324a(e)(4) (stating that an employer who violates IRCA three or more times shall be fined up to $10,000), and 8 C.F.R. § 274a.10(b)(1)(ii) (increasing civil penalties to up to $16,000 for third or subsequent violations that occur on or after March 27, 2008), with ARIZ. REV. STAT. ANN. §§ 23-212(F), 23-212.01(F) (promulgating that upon a second violation of LAWA, the court shall permanently revoke all licenses).

180. See Whiting, 131 S. Ct. at 1984 (suggesting that because the business death penalty only occurs after a second violation, this sanction is fully justified).


182. See 8 U.S.C. § 1324b(g)(2)(B)(iv) (setting antidiscrimination fines at levels equivalent to fines for knowingly hiring an unauthorized worker); see also H.R. REP. No. 99-1000, at 87-88 (1986) (Conf. Rep.) (stating that IRCA's antidiscrimination provisions are a complement to the sanctions provisions, thus protecting against the concern that some employers might avoid hiring people they believe are foreign to avoid employer sanctions).
reasoned that because the Arizona law does not displace IRCA’s antidiscrimination provisions, and other anti-discrimination laws at both state and federal level are still applicable to protect against employer discrimination, LAWA does not upset Congress’s balance of interests. 183

This reasoning is problematic, however, because although other remedies exist for discrimination claims, Congress purposefully included antidiscrimination provisions within IRCA as a way to effectively reduce the problem of illegal immigration. 184

The Court should have found that LAWA significantly conflicts with IRCA because of its failure to balance employer sanctions with antidiscrimination protections, and therefore should have held IRCA impliedly preempts LAWA. By complementing sanctions provisions with antidiscrimination protections, Congress carefully balanced its desire to reduce illegal immigration with its desire to maintain protections against national origin discrimination by including a provision that is supplemental to Title VII. 185 Because LAWA only contains employer sanctions rather than complementing such sanctions with discrimination sanctions, the enforcement of LAWA undermines Congress’s elaborate system of sanctions provisions. 186 An interpretation of IRCA’s savings clause that would allow a disruption of this balance of interests runs contrary to precedent. 187 Even though both IRCA and LAWA are intended to reduce illegal immigration, Congress balanced this goal with others in establishing its methods for reducing illegal immigration. The Court should have reasoned that although other federal and state laws may protect against discrimination per se, a state law that imposes licensing sanctions for knowingly hiring an unauthorized worker should also include antidiscrimination provisions if it is not to interfere with the methods

183. See Whiting, 131 S. Ct. at 1984 (stating that under federal law, employers are still subject to IRCA’s sanctions and 42 U.S.C. § 2000e-2(a), which prohibits discrimination based on race, color, religion, sex, or national origin; and under state law, individuals are prohibited from discriminating on the basis of race, color, religion, sex, age, or national origin).

184. See H.R. REP. No. 99-682, pt. 1, at 68 (1986) (stating that even though the Committee does not necessarily believe discrimination will result from employer sanctions, the reasonable potential for discrimination necessitates that a remedy for employment discrimination be included in the legislation).

185. See H.R. REP. No. 99-1000, at 87-88 (explaining that IRCA’s antidiscrimination provisions broaden Title VII protections against national origin discrimination while employer sanctions are in effect because of concerns of discrimination against certain job applicants).

186. See Ouellette, 479 U.S. at 494-97 (demonstrating that, when analyzing whether a state law is preempted, the Court must consider the methods Congress used to achieve its purposes and goals).

187. See id. (showing that when a state law interferes with the methods Congress prescribed to reach the goals of the Clean Water Act, it is preempted even though they both share the goal of eliminating water pollution).
Congress established to reach its goals.  

3. LAWA’s E-Verify Requirement Conflicts with Federal E-Verify Requirements, Therefore It Is Impliedly Conflict Preempted.

The Court also should have held that LAWA’s E-Verify requirement is impliedly preempted because it conflicts with the uniquely federal interest involved in managing a federal resource. LAWA’s mandate of the use of E-Verify conflicts with the federal E-Verify program because it requires employers to participate in a program that is voluntary under federal law.

In its reasoning, the Court first noted that IIRIRA only limits what the Secretary of Homeland Security may do, therefore LAWA’s mandate does not conflict with federal law. Second, the Court reasoned that because the consequences of not using E-Verify are the same under both Arizona and federal law, Arizona’s use of E-Verify does not conflict with the federal scheme. Third, the Court gave a lengthy discussion of the federal government’s expansion of E-Verify in addition to its encouragement for the use of E-Verify.

However, not one of the Court’s reasons addresses the conflict between Congress keeping the voluntary nature of the program as part of the statute and LAWA making its use mandatory. Congress’s motives for deciding to keep E-Verify voluntary were both the cost of making it a mandatory program and a pattern of inaccuracies in the system.

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188. See id. at 494-95 (explaining that because the state law would allow International Paper Company to circumvent the federal permit program regulating the discharge of pollutants into bodies of water, it interferes with the Clean Water Act’s methods for eliminating water pollution, and is thus preempted).

189. See Buckman Co. v. Plaintiffs’ Legal Comm., 531 U.S. 341, 347 (2001) (stating that where a federal agency regulates a federal resource, federal law may preempt a state law that conflicts with it).


192. See id. at 1985-86 (recognizing that the only result of failing to comply with E-Verify under both Arizona law and federal law is the forfeiture of a rebuttable presumption of compliance with the law).

193. See id. at 1986 (explaining that while E-Verify was originally made available to only six states and was meant to last four years, Congress has extended E-Verify four times and has made it available in all fifty states; and that the Executive Branch has mandated participation for federal contractors).

194. See H.R. REP. No. 108-304, pt. 1, at 5-6 (2003) (stating the efficiency of E-Verify database is negatively impacted by inaccuracies in the INS database and that
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IV. POLICY RECOMMENDATIONS

The Court’s decision in Chamber of Commerce of the United States v. Whiting suggests that the Court will uphold state laws that attempt to broadly enforce unauthorized immigration through employer sanctions. Further, as predicted by various sources, states are increasingly passing laws similar to LAWA that utilize “licensing” sanctions to punish employers for hiring undocumented workers. In 2011, seventeen states and Puerto Rico enacted employment-related immigration laws, many of which impose employer sanctions for hiring unauthorized workers. Further, during the same period, eleven states enacted E-Verify legislation that mandates use of the program for employment verification.

As a comprehensive scheme for regulating immigration through employer sanctions, Congress carefully balanced several policy goals: discouraging illegal immigration through employer sanctions, minimizing employer burdens, and minimizing employment discrimination. While Congress did include a savings clause in its preemption provision, this clause was not likely intended to allow states to enact laws like LAWA that define “licensing” broadly and permit states to destroy businesses and

while a nationwide voluntary program would cost $11 million, the cost of a nationwide mandatory program would be $11.7 billion.


196. Cf Lozano v. Hazleton, 620 F.3d. 170, 221-24 (3d Cir. 2010), vacated, 131 S. Ct. 2958 (2011) (vacating and remanding for consideration in light of Whiting the Third Circuit’s holding that a Pennsylvania statute with language similar to LAWA was impliedly preempted by IRCA).

197. See, e.g., Barnes, supra note 1 (suggesting that states are following Arizona’s lead by passing immigration-related employer sanction laws).


199. NAT’L CONF., IMMIGRATION-RELATED LAWS, supra note 198, at 6.

200. See, e.g., S. REP. No. 99-132, at 8-9 (1985) (explaining that for employer sanctions to be a solution to the problem of illegal immigration, the law must include a verification system that is effective for employers and that avoids discrimination).
nullify Congress's careful balancing of policy interests, including minimizing discrimination.\footnote{See H.R. REP. NO. 99-682, at 58 (1986) (inferring "licensing and similar laws" should be limited to "fitness to do business laws" by providing examples of farming and forestry licenses).}

In light of the Court's decision in \textit{Chamber of Commerce of the United States v. Whiting}, Congress should amend IRCA and the INA to protect its balance of interests and maintain a uniform system of immigrant-related employer sanctions. Because neither IRCA nor the INA includes a definition of "license," the first step Congress could take is to add this word to the INA definitions codified at 8 U.S.C. § 1101. A codified definition that includes a clear scope of the word "license" as it should apply to IRCA's savings clause would allow courts to refer to this definition in future express preemption disputes rather than heavy reliance on dictionary definitions, unrelated statutes, and even legislative history.\footnote{See \textit{Chamber of Commerce of the United States v. Whiting}, 131 S. Ct. 1968, 1980 (2011) (maintaining the position that statutory text is Congress's authoritative statement on statutory interpretation (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005))).}

To protect its interests from interference from state laws, Congress might consider amending IRCA to include qualifications for states that choose to enact laws imposing immigration-related employer sanctions. One way for Congress to do this is to include an exception to the savings clause designating that "licensing and similar laws" shall not incorporate penalties that supersede federal penalties, diminish antidiscrimination protections, or circumvent federal procedural protections for employers.\footnote{Cf \textit{Employee Retirement Income Security Act of 1974 § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (2006) (providing an exception to the Act's insurance savings clause codified at § 1144(b)(2)(A) that states' employee-benefit plans shall not be utilized to regulate insurance-related activities that fall under the savings clause).}} An exception to IRCA's savings clause would protect Congress's careful balancing of its purposes and objectives, and it would also provide courts with a useful tool for implied preemption analysis.\footnote{Cf \textit{Metro. Life Ins. Co. v. Massachusetts}, 471 U.S. 724, 740-41 (1985) (demonstrating that the savings clause exception in § 1144(b)(2)(B) clarifies Congress's intent for the savings clause in § 1144(b)(2)(A) that the state law that regulates insurance-related activities is saved from preemption).}

\section*{V. Conclusion}

An examination of IRCA as a whole, including its legislative history, demonstrates that Congress intended a narrow definition of "license" to apply to its savings clause, which necessitates a conclusion that IRCA expressly preempts LAWA's sanctions.\footnote{See \textit{Dolan v. U.S. Postal Serv.}, 546 U.S. 481, 486 (2006) (asserting that where a statutory phrase in isolation could encompass a broad range of acts, statutory interpretation requires considering the purpose and context of the statute to accurately determine its scope).} A structural analysis of IRCA
compels a finding that Congress intended federal exclusivity in investigating and adjudicating claims that an employer knowingly hired an unauthorized worker, leading to the conclusion that IRCA impliedly field preempts LAWA. 206 LAWA interferes with IRCA by disrupting IRCA's carefully balanced policy objectives, supporting a determination that IRCA impliedly conflict preempts LAWA. 207 Finally, LAWA's E-Verify mandate is also impliedly preempted, because by mandating a program that is voluntary under federal law, it interferes with Congress's policy goals. 208

The Court's analysis should have led to the conclusion that federal law expressly and impliedly preempts LAWA's employer sanctions and E-Verify mandate. In enacting IRCA, Congress intended unvaried enforcement of its comprehensive scheme of employer sanctions. 209 Given Congress's intent for uniform enforcement and its careful balancing of objectives and policies, Congress would not have included a savings clause that would so easily allow states to undermine IRCA's preemption provision. 210

The Court's decision coupled with the increasing number of state laws similar to LAWA suggests that if Congress wishes to protect its careful balancing of goals and policies, it needs to amend IRCA to clarify the preemption provision. A codified definition of "license" in the INA's definition section could assist with express preemption analysis by delineating the scope of the savings clause. 211 Congress could also include a savings clause exception to assist in determining whether a state licensing law impedes the purposes and objectives of IRCA. 212 Failing to amend

determine the scope of the phrase).

206. See Hines v. Davidowitz, 312 U.S. 52, 61-63 (1941) (explaining that because immigration is included in the field of foreign affairs, the Constitution establishes that federal statutes establishing immigration regulations trump state laws that interfere with federal law).

207. See Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494-95 (1987) (showing that a state law disrupts Congress's balance of interests when it incorporates different methods than a carefully balanced federal law, and is thus preempted).


210. See Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1992 (2011) (Breyer, J., dissenting) (contending that a broad reading of the licensing exception allows states to indirectly do what they could not do directly, destabilizing Congress's purposes and objectives).

211. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996) (articulating that while express preemption analysis does not require going beyond the provision's language, the Court must identify the scope of the preemptive language to preserve congressional purpose).

212. See generally Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740-41
IRCA will result in a patchwork of state and local immigration-related employment laws, which counters Congress's goal of uniform enforcement of immigration laws when it enacted the statute.  

(1985) (utilizing a savings clause exception to show the state law at issue is saved from preemption).

213. See Immigration Reform and Control Act § 115 (stating Congress's goal of uniform enforcement of immigration laws).