

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 CHAMBER OF COMMERCE OF THE UNITED :
4 STATES, ET AL., :
5 Petitioners :
6 v. : No. 09-115
7 MICHAEL B. WHITING, ET AL. :
8 - - - - - x

9 Washington, D.C.
10 Wednesday, December 8, 2010
11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:01 a.m.

15 APPEARANCES:
16 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf
17 of Petitioners.
18 NEAL KUMAR KATYAL, ESQ., Acting Solicitor General,
19 Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting Petitioners.
22 MARY R. O'GRADY, ESQ., Solicitor General, Phoenix,
23 Arizona; on behalf of Respondents.
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1 P R O C E E D I N G S

2 (11:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 09-115, Chamber of
5 Commerce v. Whiting.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONERS

9 MR. PHILLIPS: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 In 1986, Congress converted what had been
12 before that time a merely peripheral concern of
13 immigration policy -- that is, how to regulate worker
14 authorization -- and converted it into a core concern of
15 immigration policy by the passage of the -- of the
16 Immigration Reform and Control Act.

17 This Court has characterized that change in
18 legislation as providing a comprehensive scheme for
19 dealing with those issues, and that characterization is
20 obviously apt because Congress provided for an
21 exhaustive and exclusively Federal method of bringing to
22 the attention of Federal authorities problems in worker
23 authorization, the method by which those matters should
24 be investigated, the method by which they should be
25 adjudicated, all of which are controlled as a matter of

1 Federal -- exclusive Federal activity; and, indeed, the
2 ultimate judicial review goes exclusively to the Federal
3 courts of appeals.

4 The sanctioning provisions are very explicit
5 and they're very clear and they are very balanced; and
6 for a good reason. Congress realized in this context
7 that if you over-enforce in one direction -- that is, if
8 you try to deter the hiring of unauthorized workers --
9 you run a very serious risk of causing employers to err
10 on the side of not hiring others who are in fact
11 authorized but who may fall into protected classes. And
12 so Congress very carefully calibrated the penalties on
13 both sides so that the employer essentially would play
14 it straight down the middle and hire the best people for
15 the job under these circumstances, while, of course,
16 complying if at all possible with the Federal
17 requirements.

18 And so it's against that backdrop --

19 JUSTICE SCALIA: Why -- why is that a
20 problem if, as -- as the Federal statute requires and
21 the State statutes require, you have to show an intent
22 to hire an unauthorized worker? Isn't -- isn't that
23 what the State statutes here require?

24 MR. PHILLIPS: Well, the State statute has
25 two components to it. One is knowing and one is intent.

1 But --

2 JUSTICE SCALIA: Right.

3 MR. PHILLIPS: But I don't see how that --

4 JUSTICE SCALIA: So -- so why is that a
5 problem for -- for the business? I mean he's safe so
6 long as he doesn't intentionally hire an unauthorized
7 worker.

8 MR. PHILLIPS: Well, I think part of the
9 problem is that there -- it is never 100 percent clear
10 precisely who is and who is not an authorized worker.
11 And I think what Congress said was -- I'm not going to
12 deal with this problem in the kind of granular way
13 you're looking at it, Justice Scalia, which is
14 specifically at each of the individual employment
15 decisions. I'm going to look at the generality of
16 situations, and realize that if you put in -- on one
17 side of the scale what Arizona has done here, which is
18 to say you can -- you can essentially have the death
19 penalty to the business, that is, complete eliminate the
20 business's right to exist, and, on the other side of the
21 scale, a \$250 fine, it would -- it would be pretty
22 remarkable to say, well, I -- you know, I'm going to
23 hide behind the intent and knowing requirements and,
24 instead, simply avoid if at all possible the risk of
25 Arizona's sanctions being imposed upon me.

1 JUSTICE SCALIA: Well, I think what Arizona
2 would answer to that is: Well, that's the only option
3 the Federal Government left us.

4 MR. PHILLIPS: Well, I'm quite sure that
5 that's what Arizona will say.

6 JUSTICE SCALIA: They excluded everything
7 else. We might have used reticulated penalties or, you
8 know, enforced the Federal law ourselves, but they
9 forbade that. But they did allow us to enforce the law,
10 immigration laws, through licensing, right? So it all
11 essentially comes down to -- to the licensing issue,
12 doesn't it?

13 MR. PHILLIPS: Right. It does ultimately
14 does come down to the "through licensing" laws and --
15 the -- the part of the -- and the fundamental problem,
16 obviously, with Arizona's scheme here is that this is
17 not a licensing law. This is a worker authorization
18 sanctioning law.

19 JUSTICE KENNEDY: Well, when I picked up
20 this -- this brief and looked at this case, I thought:
21 Oh, well, licensing, that's a defined term; I'll look in
22 Corpus Juris Secundum or ALR or something. But it
23 really isn't. Your brief indicates you start with
24 dictionaries, fair enough. You indicate what Federal
25 licensing laws are. But I see no limitation on what the

1 State can decide is a license in any jurisprudential
2 principle that you've cited.

3 MR. PHILLIPS: Right. Justice Kennedy, I
4 think the better way to try to -- to grapple with the
5 meaning of the licensing law or whether it ought to be
6 construed broadly to allow the State wide authority to
7 engage in supplemental enforcement in this, or narrowly
8 in order to say that what really ought to happen in this
9 context is, if you deal with a situation where the
10 Federal Government has enacted -- I'm sorry -- has
11 enforced a provision and imposed a penalty through the
12 Federal scheme, that then as a supplement to that the
13 State does in fact have the authority to add something
14 over and above what it -- what the Federal Government
15 has done.

16 But it seems to me quite remarkable to think
17 that Congress intended through a parenthetical referring
18 to "through licensing laws" to allow the State to adopt
19 an entire alternative shadow enforcement mechanism, a
20 non-administrative decision-making process, completely a
21 State-run operation; and even at the end, the sanction
22 is not -- is not imposed ultimately in effect by the --
23 by any regulating entity. It is ordered by a State
24 court.

25 JUSTICE SCALIA: That would be possible only

1 because nobody would think that, with this scheme in
2 place, the Federal Government would not enforce it. Of
3 course, no one would have expected that. But what
4 Arizona says has occurred here is that the scheme in
5 place has not been enforced, and Arizona and other
6 States are in serious trouble financially and for other
7 reasons because of -- of unrestrained immigration. And,
8 therefore, they had to take this very massive -- I agree
9 this step is massive, and one wouldn't have expected it
10 to occur under this statute, but expectations change
11 when the Federal Government has -- has simply not
12 enforced the immigration restrictions.

13 MR. PHILLIPS: Justice Scalia, I -- I
14 understand the point, and I understand the motivation
15 for why Arizona did what it did. But the -- the problem
16 is the statute was enacted in 1986, and that's when the
17 pre-emption standards were put in place. And the --
18 again, the notion -- if you look at the way the
19 structure of the statute -- and this also responds in
20 some ways to Justice Kennedy's question about how should
21 you read licensing, since it's not a self-defining
22 concept -- is if you -- is that, first, Congress said
23 very specifically that the immigration laws should be
24 enforced uniformly, which says that there shouldn't be
25 40,000 different localities offering up their view of

1 licensing and -- and the additional 50 States.

2 Second of all, and this part I think is
3 particularly telling in terms of this massive State
4 scheme that's been adopted, which is that under section
5 1324a(b)(5), which is in 134a of the -- of the appendix,
6 Congress specifically outlaws the use of the I-9 form.
7 And in some ways this goes to your question,
8 Justice Scalia, because it would be inconceivable that
9 the State can in fact enforce knowing and intentional
10 decision making without having access to the I-9 form,
11 because that's --

12 JUSTICE ALITO: Could I ask you this
13 question to get back --

14 MR. PHILLIPS: Sure.

15 JUSTICE ALITO: -- to the issue of whether
16 this is a licensing law? "Licensing" is not an unknown
17 term. States and municipalities issue all sorts of
18 licenses. For example, I think here in the District of
19 Columbia every business has to have a general business
20 license; isn't that right?

21 MR. PHILLIPS: That is true, Justice Alito.

22 JUSTICE ALITO: Now, if the District of
23 Columbia were -- after having enacted this requirement
24 some years ago, were to pass a new ordinance saying "and
25 if you knowingly hire an illegal alien, your general

1 business license can be forfeited," would that not --
2 would that cease to be a licensing law?

3 MR. PHILLIPS: Well, I -- I think the answer
4 to that specific hypothetical is that's still not a
5 licensing law, because it doesn't tie the grant of the
6 license to the revocation powers. I think Congress -- I
7 think Congress means for the States to adopt something
8 more specific than that, although I do think
9 eventually --

10 JUSTICE KENNEDY: Well, why is it -- this is
11 the same question you're answering. Why is it suddenly
12 not a license because the -- because the State imposes
13 an additional condition, where it was a license before?

14 MR. PHILLIPS: Well, I --

15 JUSTICE KENNEDY: And I --

16 MR. PHILLIPS: I think the question is
17 whether it is a licensing law within the meaning of what
18 Congress intended. I mean -- the -- the reality is,
19 Justice Alito, there -- there is no common definition of
20 "license," and various States and local --

21 JUSTICE BREYER: Actually, there is. I
22 mean, it seemed to me when I read this, it sounded a
23 little familiar, and I think whoever wrote it in Arizona
24 copied it out of the Administrative Procedure Act. I
25 mean, you read the definition of "license" in the

1 Administrative Procedure Act --

2 MR. PHILLIPS: But --

3 JUSTICE BREYER: -- and this is awfully
4 close.

5 MR. PHILLIPS: Right. I understand that,
6 Justice Breyer, and I agree with that. But the problem
7 is, is that the -- the Federal law, it doesn't talk
8 about actions with -- with respect to licenses. It
9 talks about licensing laws and --

10 JUSTICE BREYER: That's right. It might
11 have meant something different; Congress might have.
12 But what is, then -- I read the SEIU brief. I thought
13 that was pretty interesting. Is that something you
14 adopt as what the Congress did mean? I mean, what do
15 you think Congress did mean, and what evidence is
16 there -- if it didn't mean the APA definition, what
17 evidence is there for that?

18 MR. PHILLIPS: Well, the SEIU brief does a
19 very nice job of explaining the -- the particular focus
20 of Congress, obviously, on the -- on the Agricultural
21 Workers Protection Act, and in particular -- which, you
22 know, has tremendous significance in terms of narrowing
23 the State's authority here, because, obviously, in their
24 conforming amendments in that context --

25 JUSTICE SCALIA: It could have named that,

1 if that's all it meant.

2 MR. PHILLIPS: I'm sorry, Your Honor.

3 JUSTICE SCALIA: It could have named that,
4 that particular licensing scheme, if that's what it
5 meant. But it didn't name it; it said licensing
6 generally.

7 What did it intend to add to that? Barbers'
8 licenses?

9 MR. PHILLIPS: No, I think what --

10 JUSTICE SCALIA: Beauticians' licenses?

11 MR. PHILLIPS: Of course.

12 JUSTICE SCALIA: How would any of this have
13 anything to do with the immigration laws?

14 MR. PHILLIPS: Well, I think what it -- what
15 Congress actually had in mind and what's the most
16 natural reading of a licensing law is the fairly common
17 situation where somebody violates Federal law, usually
18 on the criminal side, and a State licensing entity finds
19 out about a conviction of a Federal crime, and says:
20 Oh, wait a second, we don't want people to have licenses
21 under these circumstances, and, therefore, they --

22 JUSTICE SCALIA: But they're saying --
23 that's exactly what they are saying. We -- we have --

24 MR. PHILLIPS: Well, no, no. But,
25 Justice Scalia, there's a vast difference between that

1 and what they're saying.

2 JUSTICE SCALIA: I think it's very common to
3 talk about authority to do business within a State as --
4 as a license. You say "licensed to do business in" so
5 many States. It's a common expression.

6 Now, I have -- maybe you'll persuade me
7 otherwise, but I have no doubt that insofar as this law
8 limits the authority to do business within the State, it
9 is a -- it is a licensing law. It's a little harder
10 extending licensing to formation of a corporation, but
11 when you issue a corporation charter you really do two
12 things. You create the corporation and enable the
13 limitation of liability that creates, and secondly, you
14 authorize that new creature to do business within your
15 State. So at least half of that corporation law is
16 licensing, it seems to me.

17 Now, if that's what I think, what --

18 MR. PHILLIPS: Actually, Justice Scalia, can
19 I stop you there?

20 JUSTICE SCALIA: Yes. Go on.

21 MR. PHILLIPS: Because I think, actually, if
22 you just -- if you just receive the articles of
23 incorporation, that doesn't actually in all States
24 necessarily give you the opportunity to do business. It
25 just simply gives you the right to exist, and you may

1 very well need to get a separate document in order to
2 actually do business in a particular State.

3 JUSTICE SCALIA: You -- but you do not need
4 the kind of a document that an out-of-State corporation
5 needs --

6 MR. PHILLIPS: No, you don't need that.

7 JUSTICE SCALIA: -- if you're an in-State
8 corporation.

9 Mr. PHILLIPS: That's true. That's true.
10 But the -- but the reality is that nobody, I think --
11 and common sense and common use of the term, thinks of
12 articles of incorporation or the charter of a
13 partnership or any of those as -- documents as
14 licensing, which suggests that the State --

15 JUSTICE SOTOMAYOR: Could I -- could I --

16 MR. PHILLIPS: I'm sorry?

17 JUSTICE SOTOMAYOR: -- just -- just focus
18 the questioning? Because we keep talking about whether
19 the APA-type definition of licensing is what Congress
20 intended or not, but you don't disagree that Congress at
21 least intended that if someone violated the Federal law
22 and hired illegal aliens and was -- undocumented aliens
23 and was found to have violated it, that the State can
24 revoke their license, correct?

25 MR. PHILLIPS: Right.

1 JUSTICE SOTOMAYOR: -- to do business?

2 MR. PHILLIPS: Yes. I don't disagree with
3 that, Justice Sotomayor.

4 JUSTICE SOTOMAYOR: So it really doesn't
5 matter whether they're revoking their right to do
6 business in the State. And they can only revoke their
7 charter or their articles of incorporation if they're --
8 if they were filed in that State. They wouldn't have
9 power to revoke a Delaware --

10 MR. PHILLIPS: Right. They can't do it --
11 they can't do it to Delaware, right.

12 JUSTICE SOTOMAYOR: All right. So it's
13 stopping them from doing business. So really the only
14 conflict you're talking about is not the power to stop
15 them from doing business, because you accept that this
16 saving clause gives them the power to do that, to revoke
17 the right to do business; what you're talking about is a
18 conflict in the adjudication of that issue.

19 MR. PHILLIPS: And --

20 JUSTICE SOTOMAYOR: Is that correct?

21 MR. PHILLIPS: Right, and the enforcement
22 and investigation.

23 JUSTICE SOTOMAYOR: All right. So I'm --
24 you know, how they define "license" or not is irrelevant
25 to me. Walk me through whether -- what expressly

1 pre-empts that adjudication right --

2 MR. PHILLIPS: Right.

3 JUSTICE SOTOMAYOR: -- or what implicitly
4 pre-empts that adjudication right.

5 MR. PHILLIPS: Right.

6 JUSTICE SOTOMAYOR: Because that is, for me,
7 what the center of this question is.

8 MR. PHILLIPS: Right. I think there are
9 three pieces of evidence that respond directly to what
10 you asked, Justice Sotomayor.

11 First is Congress, in section 115 of the
12 statute, specifically says enforcement should be
13 uniform, which suggests to me that this ought to be
14 exclusively a Federal investigation and -- and
15 adjudication process.

16 Two, the point I was making earlier about
17 the I-9 form. Those forms cannot be used in any
18 location --

19 JUSTICE SCALIA: Excuse me. Don't depart
20 from that. What does that mean, "enforcement shall be
21 uniform"?

22 MR. PHILLIPS: I'm sorry?

23 JUSTICE SCALIA: What does that mean,
24 "enforcement shall be uniform"?

25 MR. PHILLIPS: The enforcement of the

1 immigration laws shall be uniform. Congress stated that
2 as a -- as an overarching principle --

3 JUSTICE SCALIA: Is that any different
4 from --

5 MR. PHILLIPS: -- when it enacted section
6 115.

7 JUSTICE SCALIA: -- from what is the assumed
8 situation with respect to all Federal laws?

9 MR. PHILLIPS: Well, not necessarily.

10 JUSTICE SCALIA: Are Federal laws not to be
11 applied uniformly.

12 MR. PHILLIPS: Well, no, I -- I mean, I
13 think it depends on the circumstances. I can imagine a
14 lot of -- I mean, this is -- remember, we're talking
15 about immigration policy and immigration law here, and
16 in general, you would expect that to be pretty much
17 uniform. But this Court in De Canas had decided that
18 there are some elements of it that were not, and
19 Congress is simply reinforcing the basic notion that
20 enforcement of it ought to be uniform to --

21 JUSTICE ALITO: Doesn't the exception for
22 licensing mean that this isn't going to be completely
23 uniform? One -- one jurisdiction may take the position
24 that a restaurant that employs illegal aliens may lose
25 its restaurant -- its license to operate. Another one

1 may take the different position.

2 MR. PHILLIPS: Right.

3 JUSTICE ALITO: So it's not going to be the
4 same.

5 MR. PHILLIPS: But -- but, Justice Alito, I
6 think that's why it's terribly important to limit, to
7 narrow as much as possible -- and it's fully consistent
8 with congressional intent --

9 JUSTICE GINSBURG: Well, they say that
10 these --

11 MR. PHILLIPS: -- the need to get a full
12 sanction done by the Federal Government and then just an
13 add-on on the licensing side, rather than an entire
14 regime to enforce State law.

15 JUSTICE SOTOMAYOR: But this is -- it can't
16 be uniformity of sanction, because the court permitted
17 licensing sanctions.

18 MR. PHILLIPS: Right, there -- but only at
19 that point.

20 JUSTICE SOTOMAYOR: So let's go back to my
21 question of adjudication. What you're saying is what's
22 specifically pre-empted is the right to adjudicate --

23 MR. PHILLIPS: Investigate --

24 JUSTICE SOTOMAYOR: -- whether someone has
25 hired undocumented aliens, correct?

1 MR. PHILLIPS: Yes, Justice Sotomayor.

2 And -- and the last thing I would say with respect to
3 that was the conforming amendments with respect to the
4 Agricultural Workers Protection Act, there's a situation
5 where the Department of Labor, which used to engage in
6 adjudication as well, was divested of that authority.
7 It seems quite unlikely Congress meant to give that
8 authority to the States and take it from the Department
9 of Labor.

10 JUSTICE SCALIA: I don't see the problem in
11 -- in diverse adjudication. Wouldn't there be a Federal
12 question presented if a -- if a company claimed that it
13 was deprived of the ability to do business because of a
14 mistaken interpretation of Federal law, that the person
15 it hired was not an authorized person?

16 MR. PHILLIPS: But Arizona doesn't
17 purport --

18 JUSTICE SCALIA: Wouldn't that be a Federal
19 question that -- that could be --

20 MR. PHILLIPS: Well, Arizona doesn't purport
21 to be enforcing Federal law here. It has an independent
22 State law basis for the actions that it takes. So that
23 would not arise under Federal law, Justice Scalia.

24 JUSTICE SCALIA: Doesn't the State law basis
25 refer to the Federal law?

1 MR. PHILLIPS: No, it -- actually, I don't
2 think it --

3 JUSTICE SCALIA: I thought it tracked it.

4 MR. PHILLIPS: No, it -- well, it tracks it,
5 but it doesn't incorporate it. It doesn't purport to be
6 -- to be applying it. It's the same standards, but it's
7 still a matter of State law. It's not a Federal -- it's
8 not Federal -- it doesn't arise under Federal law.

9 I'd like to reserve --

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 General Katyal.

12 ORAL ARGUMENT OF NEAL KUMAR KATYAL

13 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING PETITIONERS

15 GENERAL KATYAL: Thank you,
16 Mr. Chief Justice, and may it please the Court:

17 Nearly a quarter of a century ago, Congress
18 declared Federal employer sanctions central, not
19 peripheral, to the policy of immigration law. Congress
20 broadly swept away State and local laws, pre-empting any
21 sanction upon those who employ unauthorized aliens, with
22 the sole exception being a mere parenthetical for
23 licensing and similar laws.

24 CHIEF JUSTICE ROBERTS: Just to pose there,
25 we've had a little discussion about what licensing laws

1 are, but we haven't talked at all about those last two
2 words, "and similar laws." It seems to me that whatever
3 wiggle room or ambiguity there may be in saying whether
4 this is a license or not, Congress swept pretty broadly.
5 It said, not just licensing laws, but licensing and
6 similar laws.

7 GENERAL KATYAL: First let me tell you,
8 Mr. Chief Justice, what we think a licensing law is and
9 then deal with the "similar" question.

10 We think a licensing law, as Congress
11 defined it in IRCA, was the traditional licensing laws
12 that were in place in 1986. Those were largely farm
13 labor contractor laws. They were aimed at fitness to do
14 business, and they had a few essential characteristics
15 in those laws. They --

16 CHIEF JUSTICE ROBERTS: I'm sorry. Let me
17 just -- I mean, businesses had to have licensing laws
18 pretty much across the board, right? You couldn't set
19 up a -- I don't know -- an electrical contracting
20 business if you didn't -- weren't licensed to do
21 business or met the requirements for an electrician. It
22 wasn't just agricultural work.

23 GENERAL KATYAL: Oh, absolutely. And -- but
24 I think that this licensing law looks very different
25 from the ones you were referring to or the farm labor

1 contractor ones, for a number of reasons. The first is
2 licensing laws issue licenses. They're generally about
3 the issuance of licenses, not simply ones in which
4 licenses are revoked. Second, they are ones in which
5 the issuance of the license, the criteria for issuance,
6 is the same as the criteria for revocation, because
7 they're --

8 JUSTICE SCALIA: Excuse me. You -- are you
9 saying, and I think the Petitioner here may have been
10 saying as well, that if you have a licensing law that
11 permits the revocation of the license, the revocation is
12 not a licensing law?

13 GENERAL KATYAL: No. What I'm saying is,
14 is that a --

15 JUSTICE SCALIA: Suppose I have a licensing
16 law which says if you do this, your license will be
17 revoked. Does that remain a licensing law?

18 GENERAL KATYAL: In general, that itself is
19 not a licensing law. The licensing laws share a number
20 of characteristics. Now, we can debate about whether
21 subtracting one or another of those characteristics --

22 JUSTICE SCALIA: Why make exception for
23 licensing laws therefore if you can't revoke a license
24 under it?

25 GENERAL KATYAL: Because -- because,

1 Justice Scalia, Congress wanted to preserve the States'
2 traditional power for licensing laws, which were about
3 fitness to do business. And what Arizona has done --

4 JUSTICE SCALIA: Once you're in, you can do
5 whatever you like. Do you think that is what Congress
6 meant? You can -- you can pass upon their fitness when
7 you issue the license, but once its issued, they can do
8 whatever they like; is that right?

9 GENERAL KATYAL: No. I think that the
10 criteria would be the same for issuance and revocation.

11 JUSTICE SCALIA: And revocation. Okay. So
12 that raises the question: What does it make -- why does
13 it make any difference if the revocation provision is
14 contained in the narrow licensing law or if there's a
15 general State law which says all licenses that -- that
16 are issued may be revoked for certain reasons?

17 GENERAL KATYAL: Because, Justice Scalia,
18 what Congress was trying to do was preserve the States'
19 and localities' traditional power for fitness to do
20 business. And one good indicia that fitness to do
21 business is not was what at issue in the particular law
22 is that they will let businesses operate, they will
23 license them without any care whatsoever as to whether
24 they have a history of violating the particular
25 provisions --

1 JUSTICE SCALIA: So they should just --
2 Arizona should just amend all its licensing laws to
3 require what they now require when the license is
4 issued, and to say, in each specific licensing law, that
5 it can be revoked for the same -- on the same grounds --

6 GENERAL KATYAL: Justice Scalia, that would
7 solve that problem.

8 JUSTICE SCALIA: That would solve the
9 problem.

10 GENERAL KATYAL: Now, there are other --

11 CHIEF JUSTICE ROBERTS: Even if they said --

12 GENERAL KATYAL: -- hallmarks of licensing
13 law.

14 CHIEF JUSTICE ROBERTS: Even if they said
15 "and you have to renew your license every year or every
16 6 months"?

17 GENERAL KATYAL: That is correct. That
18 itself, I don't think, is relevant to whether the
19 licensing law is -- the other hallmarks are that they
20 have discretionary adjudication by an expert body, that
21 it's not mandatory, that it is genuinely aimed at
22 qualifications to do business. It --

23 CHIEF JUSTICE ROBERTS: You don't disagree
24 that whether or not a company hires illegal workers is
25 related to quality or -- or ability to do business or

1 qualification?

2 GENERAL KATYAL: A State could certainly
3 make that part of its genuine fitness to do business
4 law. Now, here Arizona hasn't done that. And we know
5 that because the criteria for issuance of the license
6 are entirely divorced from the criteria for revocation
7 of the license. And if Arizona really believed,
8 Mr. Chief Justice, what you're saying, which is that
9 it's relevant to the -- the violation is relevant to
10 whether they can do business or not, they allow every
11 single one of these entities to get the license.

12 JUSTICE SOTOMAYOR: Your argument sounds to
13 me like look at the law and see what its purpose is. If
14 the purpose is to regulate undocumented aliens, then
15 it's struck down. If it happens to put its revocation
16 provisions in its licensing law, then it's okay.

17 GENERAL KATYAL: Justice --

18 JUSTICE SOTOMAYOR: It doesn't make much
19 sense --

20 GENERAL KATYAL: Justice Sotomayor, I'm not
21 talking about purpose. I'm saying look at the face of
22 the statute and see what is being --

23 JUSTICE SOTOMAYOR: The face of the statute
24 talks only about if you hire undocumented aliens, your
25 license is revoked.

1 GENERAL KATYAL: Right. So that looks like
2 a punishment statute. There are essentially two boxes
3 here. There is the --

4 JUSTICE SOTOMAYOR: But the -- the saving
5 clause says that it's okay. Civil or criminal sanctions
6 other than through licensing and similar laws. So, I
7 mean --

8 GENERAL KATYAL: Right. And this is not a
9 licensing law. Congress essentially had two boxes in
10 1986. One was the traditional fitness to do business
11 laws, and the other was what Congress --

12 JUSTICE SOTOMAYOR: If we disagree with you,
13 could you answer the question I posed to your adversary,
14 which is what makes the adjudication of status
15 pre-empted?

16 GENERAL KATYAL: Absolutely. The Federal
17 adjudication is expressly -- State adjudication of a
18 Federal violation is expressly pre-empted as well as
19 impliedly so for three reasons. The first is that
20 Congress, in developing IRCA and the comprehensive
21 scheme, set out a series of procedures, Federal
22 adjudication with an ALJ, all sorts of different
23 regulations to the jot and tittle. And what Arizona
24 does here is what 40,000 different localities can do if
25 this law is upheld, which is have --

1 JUSTICE SOTOMAYOR: At the time the statute
2 was passed, there were many, many State laws that
3 adjudicated revocation of licenses. Perhaps not many
4 had addressed the issue of hiring undocumented aliens,
5 but many State laws existed that independently
6 adjudicated revocations. What in the legislative
7 history or in the words of the statute show that
8 Congress intended in any way to limit those
9 adjudications?

10 GENERAL KATYAL: Well, it's undoubtedly the
11 case that without the parenthetical, the mere
12 parenthetical savings clause, that Arizona-like laws
13 would be swept away as sanctions, that these are
14 sanctions imposed. So the question is whether the
15 licensing law phrase saves that. And I think it saves
16 the Federal -- State adjudication, and I think the
17 answer to that is no, because to read the statute that
18 way is to permit all of those States to have their own
19 laws, and it's undoubtedly the case that Congress wanted
20 to sweep away the De Canas-style State statutes that
21 were in place that imposed sanctions on employers. And
22 so the --

23 CHIEF JUSTICE ROBERTS: Counsel, just so I
24 get -- make sure I understand your approach. You're
25 saying that Arizona had a law saying you have to have a

1 license to do business, and then it became aware of a
2 problem it wasn't aware of before -- it found out that a
3 lot of employers were employing child labor, and they
4 didn't know they would do that -- and they say we can
5 revoke your license if you're determined to have
6 employed child labor; that that would not be okay?

7 GENERAL KATYAL: Well --

8 CHIEF JUSTICE ROBERTS: But it would be okay
9 if, in the original licensing thing, they said "and you
10 can't employ child labor"?

11 GENERAL KATYAL: Well, I think that the
12 answer depends on what Congress was trying to get at.
13 In 1986, we know what Congress was trying to get at with
14 respect to State enforcement of immigration laws. They
15 broadly swept away the De Canas-style laws, and they
16 said, for the I-9 provision, which President Reagan
17 described as the keystone of the Act, that I-9 documents
18 can't be used in any procedure besides IRCA procedures.

19 JUSTICE KENNEDY: But the Chief Justice --
20 the Chief Justice can insist on the answer to his own
21 question, but it seems to me his question is why isn't
22 that still a licensing law?

23 GENERAL KATYAL: If it has independent
24 adjudication, it is swept away by the first parts of the
25 (h)(2) statute which say -- which say the provisions of

1 this section pre-empt any State or local law imposing
2 civil or criminal sanctions.

3 JUSTICE GINSBURG: But then, what --

4 JUSTICE KENNEDY: But in the child labor
5 example, why isn't that a -- an addition to a regulatory
6 licensing scheme so that it's a licensing law?

7 GENERAL KATYAL: Because if I understand --
8 I may not understand the hypothetical, but the word
9 "provisions" refers to the entire subset -- the entire
10 statute in IRCA, including the procedural protections --
11 the procedures that follow for Federal enforcement of
12 the immigration laws.

13 JUSTICE SCALIA: Would you --

14 CHIEF JUSTICE ROBERTS: But you had --

15 JUSTICE SCALIA: -- read that section again?

16 CHIEF JUSTICE ROBERTS: I was just going to
17 say you tried earlier to talk about the two boxes, and
18 you said something would be pre-empted by the first
19 clause. Anything -- civil and criminal sanctions are
20 allowed if they're imposed through licensing and similar
21 laws. There are not two boxes. The State can do what's
22 in the first part so long as it does it through
23 licensing or similar laws.

24 GENERAL KATYAL: Right. And our -- and our
25 position is that this is not a licensing law because it

1 doesn't bear any of the indicia of a traditional
2 licensing law, and --

3 CHIEF JUSTICE ROBERTS: Is it similar to a
4 licensing law?

5 GENERAL KATYAL: No, I don't think so, that
6 Congress -- Congress had in the -- when they used
7 "similar" meant to sidestep the schematic debate about
8 whether something is a certificate, as some of the farm
9 labor contractor statutes use that term, or a license.

10 JUSTICE SCALIA: No, no, that's all right.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Ms. O'Grady.

13 ORAL ARGUMENT OF MARY R. O'GRADY

14 ON BEHALF OF THE RESPONDENTS

15 MS. O'GRADY: Thank you. Mr. Chief Justice,
16 and may it please the Court:

17 Through their police powers, States
18 traditionally have the authority to regulate the conduct
19 of employers within their jurisdiction to determine what
20 conduct warrants issuance of a State license and to
21 determine what conduct justifies suspending or revoking
22 such a license. And although Congress pre-empted some
23 of our traditional authority when it enacted IRCA in
24 1986, it preserved significant State authority through
25 the savings clause that permits a State to impose

1 sanctions through licensing and similar laws.

2 JUSTICE GINSBURG: How do you answer the --
3 the anomaly that Arizona cannot impose a fine even in a
4 modest amount, but it can revoke someone's license to do
5 business?

6 MS. O'GRADY: Your Honor, we think that
7 looking at the savings clause -- we don't view it as an
8 anomaly. The structure that Congress established is one
9 that the State's authority is determined by the nature
10 of the sanction that we choose to impose. We don't have
11 the authority to -- they -- they took away our authority
12 to impose civil monetary and criminal sanctions but
13 preserved our authority to impose sanctions through a
14 similar law.

15 JUSTICE KENNEDY: But underlying Justice
16 Ginsburg's question is why would Congress want to do
17 that?

18 MS. O'GRADY: Well, I think it makes sense,
19 Your Honor, because in terms of licensing, it -- it
20 provides some accountability, because we are the
21 entities that establish policy for our licensees, and we
22 are the ones accountable for whether that business
23 remains in business or whether we're taking it away from
24 them. So it --

25 JUSTICE SCALIA: Perhaps Congress never

1 expected that the States would have to resort to such
2 massive measures, and they probably wouldn't have if --
3 if the law had been uniformly enforced and vigorously
4 enforced, right?

5 You -- you didn't -- didn't have any notion
6 of doing this sort of thing in 1986, did you?

7 MS. O'GRADY: Your Honor, certainly we
8 waited until 2007.

9 JUSTICE SCALIA: So maybe Congress wasn't
10 worried about it because it seemed very unlikely that
11 anything like that would occur.

12 MS. O'GRADY: Perhaps. But I think also
13 Congress was recognizing what this Court recognized in
14 De Canas, was that unauthorized employment has
15 significant local consequences, so they did not want to
16 fully pre-empt State law. They wanted to preserve State
17 authority --

18 JUSTICE BREYER: The main -- the main
19 anomaly seemed to me to be this, that in the Federal
20 Act, as -- that was the first point that the Chamber
21 made, that it's a fairly careful balance. There are a
22 group of people in Arizona, they may look as if they
23 come from Mexico or speak with an Hispanic accent, and
24 you're not certain whether they in fact are illegals or
25 that they're legal. Now, think of that category.

1 Congress has passed a statute that gives the
2 employer just as much incentive to verify, so there's no
3 discrimination, as to dismiss, so there's no illegal
4 hiring. It's absolutely balanced. A \$1,000 fine for
5 the one, a \$1,000 fine for the other.

6 So Arizona comes along and says: I'll tell
7 you what, if you discriminate, you know what happens to
8 you? Nothing. But if you hire an illegal immigrant,
9 your business is dead.

10 That's just one thing they do. Now, how can
11 you reconcile that intent to prevent discrimination
12 against people because of their appearance or accent --
13 how do you reconcile that with Arizona's law?

14 If you're a businessman, every incentive
15 under that law is to call close questions against hiring
16 this person. Under the Federal law, every incentive is
17 to look at it carefully.

18 MS. O'GRADY: Your Honor, a couple of
19 points. First, in terms of how our law works, we do
20 have a prohibition against investigating any complaint
21 that's based solely on race. So if we get a complaint
22 that says those people all look Mexican or Hispanic,
23 that does not get investigated under Arizona law, first.
24 We also have criminal penalties if frivolous complaints
25 are filed.

1 Beyond that, we have the use of E-Verify,
2 which is an added protection for employers to prevent
3 the hiring of unauthorized aliens. So if they use
4 E-Verify, if they're in good-faith compliance with the
5 I-9 process, they have no risk of exposure under Arizona
6 law, just as true under Federal law.

7 JUSTICE SOTOMAYOR: I'm -- doesn't it
8 frustrate the congressional intent when the Federal law
9 says that the I-9 can be used for no purpose other than
10 the Federal adjudication of whether a violation has
11 occurred or not? Doesn't it frustrate that law to have
12 the States raise a defense that depends on forcing
13 someone to disclose something that the Federal law
14 protects?

15 I mean, this is a vicious circle. Federal
16 law says you can't do the I-9 for -- you can't use it
17 for any purpose other than the Federal adjudication.
18 Now you're creating a defense that says you have to
19 supply us with something that Federal law otherwise
20 protects from disclosure.

21 MS. O'GRADY: Your Honor, we don't think
22 that the Federal law prohibits the use of an I-9 -- of
23 the I-9 -- an employer's use of the I-9 in a State
24 proceeding, that these can be used under the Federal
25 proceeding or under the State.

1 But, beyond that, if at some point in an
2 actual enforcement action it was determined that Federal
3 law did have that impact, they would still have that
4 defense available to them. They would just have to, you
5 know, prove it up in a different way other than use the
6 form.

7 JUSTICE SOTOMAYOR: That doesn't answer my
8 point. Doesn't it frustrate Federal law when the
9 Federal law says that I-9 can be used for no purpose
10 other than the Federal adjudication of the status of
11 employees? I think that's --

12 MS. O'GRADY: Here -- here's what the law
13 says: It may not be used for purposes other than for
14 enforcement of this chapter. And we believe that
15 a State enforcement action, under the authority for
16 preserving sanctions through licensing and similar laws,
17 would fall within that. So we think they should be able
18 to use that; the employer should be able to use that.

19 JUSTICE ALITO: Isn't there -- isn't there a
20 difference between saying it may not be used for any
21 purpose other than for enforcement of this chapter and
22 other provisions of Federal law, on the one hand, and
23 saying, on the other hand, it may not be used for any
24 purpose other than in a Federal proceeding? The
25 enforcement -- the I-9 certainly could be used in a

1 Federal proceeding by the employer. Would that then --
2 would that be used for the enforcement of the Federal
3 law? I wouldn't think so.

4 MS. O'GRADY: That's true, Your Honor.
5 That's -- that --

6 JUSTICE BREYER: Is the I-9 -- I do have a
7 question on the I-9. I'm not certain. I thought under
8 Federal law that if the employee -- the employer isn't
9 certain, but the employee says here's my Social Security
10 card, here's the driver's license. The employer looks
11 at that, he's home free; is that right?

12 But under Federal -- under your law, under
13 Arizona law, he's not home free, and, moreover --
14 because he -- it may -- he's not home free. He still
15 could be prosecuted. Is that right or not?

16 MS. O'GRADY: No, that's not right, Your
17 Honor.

18 JUSTICE BREYER: So if he shows the driver's
19 license -- under -- under Arizona law, if the -- if he
20 shows a driver's license and Social Security card, the
21 worker, the employer looks at it, the employer cannot be
22 prosecuted?

23 MS. O'GRADY: Well, Your Honor --

24 JUSTICE BREYER: Yes or no?

25 MS. O'GRADY: We would need the evidence

1 that the person knowingly employed the unauthorized
2 alien and a good-faith defense through use of a --

3 JUSTICE BREYER: All right. So -- I thought
4 in reading it that it creates some kind of presumption,
5 but he is not home free?

6 MS. O'GRADY: No, Your Honor. The -- the
7 substantive --

8 JUSTICE BREYER: But under Federal law he is
9 home free.

10 MS. O'GRADY: The substantive requirements
11 under Arizona law and Federal law are the same. We're
12 imposing no new obligations. And --

13 JUSTICE BREYER: So then he's home free?
14 Look, I don't -- I'm trying to understand. Maybe it's
15 not enough time to explain it, but I thought Federal law
16 requires this E-9 business or whatever that E review is.
17 And I was worried about the E review which it seemed to
18 require because it seemed to me in 20 percent of the
19 cases where the notice is this guy is not authorized; we
20 don't have any record that he's authorized to work -- 20
21 percent of those are wrong, and he is authorized to
22 work.

23 So the employer who follows that is really
24 going to fire 20 percent of the people who will be
25 absolutely entitled to work. And so I'd just like you

1 to address those points, as you wish.

2 MS. O'GRADY: Okay. And let me walk through
3 how our law works to see if this addresses the concern.
4 So the -- Arizona doesn't change anything in terms of
5 the use of the I-9. We retain the same defense that's
6 in the Federal law for good-faith compliance with the
7 I-9. We do require employers to use E-Verify, although
8 we don't impose a sanction on that employer if they
9 don't use E-Verify.

10 JUSTICE GINSBURG: Can you explain that,
11 E-Verify, because this is a Federal resource, and the
12 Federal Government has said we want this to be
13 voluntary. How can Arizona take a Federal resource,
14 which the Federal Government says is voluntary except in
15 certain circumstances, and turn it into something that's
16 mandatory?

17 MS. O'GRADY: We think the -- that question
18 is answered by looking at -- into the conflict
19 pre-emption analysis, because Congress didn't address
20 the role of the States with regard to E-Verify. And we
21 aren't --

22 JUSTICE GINSBURG: I don't -- I don't get
23 into any pre-emption or not, but it's -- Arizona wants
24 to use a Federal resource. And the Fed makes it
25 available if the employer can use it voluntarily, but

1 not mandatorily. How can -- how can Arizona set the
2 rules on the use of a Federal resource?

3 MS. O'GRADY: Your Honor, we can -- as long
4 as it's not a burden to the objectives of Congress, we
5 think that we can require employers within our
6 jurisdiction to use E-Verify.

7 JUSTICE SCALIA: Do -- do you make it
8 mandatory?

9 MS. O'GRADY: Well, our statute says you
10 shall use E-Verify. We don't impose a penalty against
11 employers who fail to use it. The consequences are the
12 same as they are under Federal law.

13 JUSTICE SCALIA: You just -- you just don't
14 get the safe harbor. Isn't that the only consequence?

15 MS. O'GRADY: That's right. You don't get
16 the safe harbor under E-Verify. Now -- for the use of
17 E-Verify. We did add after this lawsuit was filed some
18 additional requirements similar to what they have under
19 the Federal system, where you can't get State contracts,
20 you can't get State grants.

21 JUSTICE KENNEDY: But you are taking the
22 mechanism that Congress said will be a pilot program
23 that is optional, and you are making it mandatory. It
24 seems to me that's almost a classic example of a State
25 doing something that is inconsistent with the Federal

1 requirement.

2 MS. O'GRADY: Well, again, we look at the
3 test for conflict pre-emption in terms of, does this
4 make it impossible to comply with Federal law? No, it's
5 really a question of are we interfering with
6 Congress's -- excuse me -- the Federal Government's
7 ability to achieve its goals? And the goal in
8 developing E-Verify is to have a more effective
9 verification system.

10 JUSTICE BREYER: If they fail to do it, then
11 they cannot receive any, quote, "grant, loan, or
12 performance-based incentive," end quote, from the State.
13 That's what the law says, isn't it?

14 MS. O'GRADY: That's what -- and that was
15 added after this lawsuit was filed.

16 JUSTICE BREYER: All right. I would think
17 then the answer to Justice Scalia's question is, yes,
18 there is that penalty. It isn't simply hortatory.

19 MS. O'GRADY: Well, there's no penalty in
20 terms of --

21 JUSTICE BREYER: You don't go to jail.

22 MS. O'GRADY: -- you get fined --

23 JUSTICE BREYER: What you do is you lose any
24 grant, loan, or performance-based incentive. Is that
25 right?

1 MS. O'GRADY: That's true under current law.
2 That's not what the plaintiffs challenged --

3 JUSTICE SCALIA: Does this lawsuit challenge
4 that?

5 MS. O'GRADY: That -- it does not, Your
6 Honor. They just challenged subsection (A) --

7 JUSTICE SCALIA: You're under the old law,
8 and the only -- the only sanction is you lose the safe
9 harbor, if that's a sanction.

10 MS. O'GRADY: That's right. That's right,
11 Your Honor.

12 JUSTICE SOTOMAYOR: So, in answer to
13 Justice Breyer's earlier question, in fact, relying on
14 the I-9 does not provide a safe harbor, because under
15 the E-Verify system, you can't just rely on the I-9
16 forms and statutes; you have to rely on the E-Verify.

17 MS. O'GRADY: Well, Your Honor, we have the
18 same -- it's modeled after the Federal law. So, just as
19 Federal law has a defense for employers who in good
20 faith follow I-9, so does the State law. I --

21 JUSTICE ALITO: The Federal law and the
22 State law do seem to be exactly the same on this point,
23 but I have -- I don't understand how these two
24 provisions fit together when E-Verify is used.

25 Suppose an employer -- the first thing the

1 employer does is receive the forms from the employee,
2 from the I-9 process. He looks at the forms. Well,
3 they reasonably seem to be authentic. So that employer
4 now has the good-faith defense that's provided under --
5 by the I-9 process, under both Federal law and State
6 law.

7 But, under both Federal law and State law,
8 the employee -- employer either must or may also use the
9 e-verification system. The employer gets back a notice
10 of non-authorization. But what -- and that creates,
11 supposedly, a rebuttable presumption under both systems
12 that the employee is not authorized to work.

13 How does that fit together? If you have a
14 complete defense for having used the I-9 process in good
15 faith, the whole e-verification process seems to be
16 irrelevant under both Federal law and State law. I
17 don't understand how they fit together.

18 MS. O'GRADY: And, Justice Alito, we haven't
19 wrestled that in practical application, and I'm not
20 aware of them reaching that point under the Federal
21 system, either, but -- because it does seem at some
22 point, if you -- that the system should work, that if
23 you have used I-9 and you get back a final
24 non-confirmation, not a tentative non-confirmation, that
25 that employee is unauthorized, that that, you know,

1 seems like it should carry greater weight in an
2 enforcement action. But as a -- as an -- on an
3 as-applied basis, I'm not sure how that plays out in an
4 actual enforcement action.

5 CHIEF JUSTICE ROBERTS: Could you -- I
6 wasn't quite sure what she meant. Judge Schroeder, in
7 her opinion for the court, emphasized that this statute
8 was being evaluated on its -- on its face and that --
9 she said in as-applied, particular challenges might
10 arise.

11 How would that work? If we determine this
12 is not pre-empted, how would -- on its face, how would
13 an as-applied challenge come about?

14 MS. O'GRADY: I think, Your Honor, perhaps
15 if we -- perhaps in terms of what are the outer limits
16 of our definition of "license" and their saying that we
17 are outside the definition of licensing and similar laws
18 in a particular case, perhaps that would be an
19 as-applied-type challenge.

20 I think some of the I-9 concerns are perhaps
21 more appropriately resolved in a -- in a direct case
22 where that issue has arisen on an as-applied basis, and
23 I think she was concerned about some of the real
24 implementation questions that were wrapped into the
25 legal challenge.

1 But, for the most part, I think the general
2 framework of our statute is appropriate for -- in this
3 challenge.

4 JUSTICE SCALIA: So you think after this
5 case we could look forward to cases, one by one, for all
6 the various types of licenses? Those would be
7 as-applied challenges and would not have been resolved
8 by this case.

9 MS. O'GRADY: Your Honor, my hope is that
10 we've got --

11 JUSTICE SCALIA: We're really wasting our
12 time here, aren't we?

13 MS. O'GRADY: My hope is, Your Honor, that
14 we get sufficient guidance --

15 JUSTICE SOTOMAYOR: Wouldn't -- wouldn't it
16 be easier, if that's Justice Scalia's concern, to take
17 the Solicitor General's position, that if you're
18 adjudicating good faith or intent differently in any way
19 from the Federal Government, that it's pre-empted?
20 Isn't that what waiting for an as-applied challenge
21 means, whether or not you are putting different
22 requirements on proving good faith?

23 MS. O'GRADY: No, Your Honor, and -- because
24 I was trying to give some examples of the kinds of
25 things that may come up as a practical matter, but I

1 think we can get the guidance from this Court. I hope
2 that we can proceed in implementation, but --

3 JUSTICE SOTOMAYOR: Well, let -- then let me
4 ask the question directly. If Arizona's system does not
5 permit a employer to rely on non-suspect documents, the
6 I-9 documents that are permitted employers to rely on --
7 the Arizona system says, no, you can't rely on those.
8 Is that pre-empted or not?

9 You can't rely on I-9, or the Arizona system
10 says -- on the I-9 documents. Or the Arizona system
11 says you can't hire someone who hasn't been approved
12 under the e-verification system. Is that pre-empted?

13 MS. O'GRADY: I think those would both be
14 problems. I think we need to be consistent with the --
15 the structure and the obligations that are imposed under
16 Federal law in terms of our sanctions provisions.

17 JUSTICE SCALIA: So, are you -- are you
18 conceding that any variation from the Federal standards
19 for -- for criminal and civil liability is automatically
20 precluded?

21 I mean, as I read the exception, it's an
22 exception for State licensing and similar laws. And it
23 doesn't say "so long as those licensing and similar laws
24 go no further than what the Federal Government has
25 done." I mean, we often allow States to impose

1 regulatory requirements that go beyond the regulatory
2 requirements that the Federal Government has imposed,
3 and that is not automatically considered to be
4 pre-empted. So why -- why are you conceding that
5 Arizona cannot go a whit beyond what the Federal
6 Government says?

7 MS. O'GRADY: Because I think what Congress
8 preserved for us was our ability to impose sanctions,
9 including the suspension and revocation of State laws.
10 But I do think they established a uniform national
11 standard. I don't think we could, for example,
12 establish a -- a strict liability offense in Arizona.
13 We'd have to have a scienter requirement as they have in
14 Federal law.

15 JUSTICE BREYER: Now, what I was trying to
16 get is -- what I was looking at specifically is Federal
17 law says, if you look at the driver's license and Social
18 Security card -- those are I-9 docs -- then the employer
19 has established an affirmative defense and has not
20 violated the law. That's what it says. You know the
21 cite -- 27a or whatever. Okay? That's the Federal law.

22 Arizona law that I was reading -- maybe
23 there's another place I should read -- is it says, on
24 determining whether he's an unauthorized alien, the
25 court -- the court shall consider the Federal

1 Government's determination. It creates a rebuttable
2 presumption. That means it might be rebutted. Okay?

3 So I see a difference there. And the reason
4 that that's relevant is because, my first question, if
5 you are an employer, prior to your law, it's 50/50. I
6 better verify because if I'm discriminating, you know,
7 da, da, da. And it's not that hard. I just look at the
8 driver's license and I look at -- I'm home free, and the
9 Social Security card, and if I hire an illegal
10 immigrant, the same thing, da, da, da. Okay? So same
11 both ways.

12 Your law: Employer, look at the driver's
13 license and Social Security, you are not home free.
14 Employer, if it turns out that you've been hiring this
15 illegal immigrant and he's not an American, your
16 business is finished. But what happens if I
17 discriminate? Under our law? Nothing.

18 Now, that was the original point they made.
19 That's why I brought up this question of difference in
20 standards. And I want to be absolutely clear what your
21 answer to that is.

22 MS. O'GRADY: And I'm hoping I am being
23 clear, Justice Breyer. We have the same standards as
24 Federal law. We have the same I-9 defense that's in
25 Federal law.

1 JUSTICE BREYER: Well, where? Where is it
2 in the statute, then? Because what I read were the
3 words "rebuttable presumption," and I might be reading
4 the wrong words.

5 MS. O'GRADY: Okay.

6 JUSTICE BREYER: So tell me where it is.

7 MS. O'GRADY: Okay. Let me get to it, and
8 let me explain our rebuttable presumption while I find
9 the specific statutory cite for our I-9 process.

10 JUSTICE ALITO: Well, it's on page 184 to
11 185 of the appendix to the petition, isn't it?

12 MS. O'GRADY: Yes. And 178a is the
13 provision: For the purposes of this section, employer
14 that establishes it has complied in good faith with the
15 requirements of 8 U.S.C. 1324a(b) establishes an
16 affirmative defense, et cetera. So that's the provision
17 that provides the I-9 defense.

18 JUSTICE BREYER: Okay. So the --

19 MS. O'GRADY: The rebuttable presumption
20 issue -- and this is how that comes into play. We have
21 to, in bringing an enforcement action, have to rely --
22 the State, in making its case, has to rely on
23 information from the Federal Government regarding
24 whether someone is authorized or unauthorized. We have
25 to rely on that information from the Federal Government.

1 We bring our action in State court if we have
2 verification from the Federal Government that that
3 person is unauthorized. We have additional information
4 that we've established the scienter requirement, then we
5 bring our action. But the employer has an opportunity
6 to rebut the evidence that we've presented in a State
7 court proceeding. It may be, you know, that person
8 doesn't work for us or some other type of evidence. So
9 that's the role of that rebuttable presumption, Your
10 Honor.

11 JUSTICE BREYER: Okay, thank you. I see
12 that.

13 MS. O'GRADY: Certainly. So in terms of the
14 prior adjudication --

15 JUSTICE KENNEDY: Just so you know, I
16 interpret your answer as confirming the implication of
17 Justice Breyer's question, that there is a very
18 substantial difference in Federal and State law on this
19 point. I mean, you've told about -- you know what
20 lawsuits are about. If you're -- if you're home free by
21 a driver's license and Social Security inspection under
22 Federal law and you're not under State law, that is a
23 difference --

24 MS. O'GRADY: And our standards are the
25 same. And it's subsection (J) in which we have the I-9

1 affirmative defense in our State law and our Federal --

2 CHIEF JUSTICE ROBERTS: So you think you are
3 home free under State law?

4 MS. O'GRADY: To the extent that you would
5 -- should be home free and you'd have the benefit of
6 that good-faith defense.

7 CHIEF JUSTICE ROBERTS: It's an affirmative
8 defense under both.

9 MS. O'GRADY: Yes, Your Honor. But having
10 the --

11 JUSTICE BREYER: The main point -- I mean,
12 I'll check that. I think maybe I was mistaken, perhaps,
13 in that I was looking at the other section.

14 MS. O'GRADY: That's right.

15 JUSTICE BREYER: But then we're still stuck
16 with this enormous discrepancy in penalty. I mean, I'm
17 characterizing it as enormous, but it seems like the --
18 you know, it's even on discrimination versus under the
19 Federal law. It's not even -- your business is out to
20 lunch, gone, and on the other side it has nothing. What
21 about that one?

22 MS. O'GRADY: I think, Your Honor, that that
23 is the natural consequence of the savings clause that
24 Congress itself adopted.

25 JUSTICE BREYER: The savings clause itself,

1 the word "licensing" -- not everyone looks at this, but
2 I did look at the legislative history. And when you
3 look at that paragraph on page 39 of the red brief, it
4 seems to me that that paragraph says what it means. It
5 says precisely what it is. It says -- the first thing
6 it says is that, look, if you're found to have violated
7 this -- where is it? It's page -- there it is.

8 Suppose somebody has been found to have
9 violated the sanctions provision in the Federal
10 legislation. Now, you've found -- he has been found by
11 the Federal Government. Then what the State does, it
12 can revoke his license. Okay? That's one thing. And
13 the second thing it says it wants -- doesn't want to
14 pre-empt "'fitness to do business laws,' such as State
15 farm labor contracting laws or forestry laws." In other
16 words, it's thinking of some precise set of licenses,
17 and that's why this licensing thing was there. And the
18 very next part of this Federal law are conforming
19 amendments, and those conforming amendments apply to
20 departments of government that were concerned with
21 maintaining State farm labor contractor laws.

22 Now, I grant you, you have to go beyond the
23 text, but some of us do because we get enlightenment.
24 And going beyond that text, it seems to me we should
25 follow what that House report says. Now, what is your

1 response to that?

2 MS. O'GRADY: Well, first, of course, we
3 would focus on the text where Congress could have but
4 did not --

5 JUSTICE BREYER: Yes, I've got --

6 MS. O'GRADY: -- limit -- they didn't limit
7 it.

8 JUSTICE BREYER: I said yes, I've got broad
9 licensing -- but let's deal with the part where you look
10 at their explanation as to why they put those words
11 there.

12 MS. O'GRADY: Okay. First, the farm labor
13 contractor is simply an example, and I think it says
14 "such as" an example of the type of licensing provisions
15 that existed at this time that addressed that. So
16 that's not an all-inclusive universe of sanctions that
17 -- of -- of all the licensing laws that might be subject
18 to this. They also don't specifically say there has to
19 be a prior Federal adjudication. That sentence has
20 passive voice, "has been determined," without specifying
21 who is making that determination, and it specifically
22 refers to State and local processes that provide for the
23 suspension and revocation of State licenses.

24 And then the sentence goes -- then there's a
25 following sentence that says, you know, further, we

1 don't intend to disrupt laws such as these forestry and
2 other, you know, fitness to do business.

3 We think this is a fitness to do business
4 law in that we are establishing as a State standard that
5 if you engage in this conduct of knowingly employing
6 unauthorized aliens, we are going to have the ability to
7 take an action against that license that we have given
8 you to do business in our jurisdiction. So we think we
9 fit within that last sentence of the -- of the --

10 JUSTICE GINSBURG: Can you also explain the
11 I-9? You said it's the same as in the Fed. Home free
12 if you have documents, Social Security, driver's
13 license. But you also require the E-Verify. So how --
14 does the E-Verify information modify the I-9? How --
15 how do those two --

16 MS. O'GRADY: They work in our system, Your
17 Honor, as they do under the Federal law, under -- that
18 you get a rebuttable presumption if you -- in your favor
19 if you've used E-Verify, but the affirmative defense if
20 you've used I-9. And I am -- there is that caution; it
21 is good-faith use of -- of the I-9 system. We do have
22 examples where, for example, if an employer is
23 terminated because they are unauthorized and they show
24 up with a different name and different papers 2 weeks
25 later, you're not going to be able to establish your

1 good faith. So you're home free but subject to that
2 good-faith limitation. But we do incorporate the same
3 obligations that exist under Federal law.

4 And also I wanted to address more on the
5 farm labor contractors and the amendments. And what we
6 think that they were doing in those amendments was
7 simply dividing responsibility at the Federal level
8 between the Department of Labor and their processes that
9 pre-existed IRCA, and what they were establishing in
10 IRCA, and said we're not going to have these
11 determinations of whether they -- the farm labor
12 contractor has employed an unauthorized alien through a
13 Department of Labor process; we're going to instead use
14 the IRCA-established process.

15 But, importantly, what Congress did not
16 change in the agricultural worker regulations was the
17 provision that addresses State law. It said, before
18 IRCA and after IRCA, that those laws -- those Federal
19 laws only supplement the authority of the States and
20 that means that they preserved all of the State
21 authority that they had before IRCA in the area of farm
22 labor contractors. And that I think is reinforced by
23 the legislative history that -- that again reinforces
24 that those have been preserved through IRCA.

25 This is an area that has traditionally been

1 within the mainstream of State police power. We
2 acknowledge that Congress does have the authority to
3 pre-empt us, but they left important discretion in terms
4 of our ability to impose sanctions through licensing and
5 similar laws, and we are doing so by establishing this
6 scheme that provides for the suspension and revocation
7 of State licenses.

8 It's an important part of the balance that
9 Congress struck when it enacted IRCA by addressing what
10 State authority would exist after that congressional
11 enactment. We think the lower courts properly
12 determined the scope of that provision.

13 And unless there are further questions, I
14 thank you for your attention this morning.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Phillips, you have 3 minutes remaining.

17 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

18 ON BEHALF OF THE PETITIONERS

19 MR. PHILLIPS: Thank you, Mr. Chief Justice,
20 and, once again, may it please the Court:

21 I want to begin frankly where Justice
22 Sotomayor pointed me to before, which is the question of
23 whether or not there really is a basis for allowing the
24 States to independently investigate and to independently
25 adjudicate these matters. And what is the evidence that

1 Congress did not intend that?

2 Justice Breyer quoted from the House report,
3 recognizing not everybody accepts that, but it does seem
4 to me to articulate a very commonsense limitation that
5 says you have to have a Federal adjudication in the
6 first instance, and once you've got that, then the State
7 is allowed to add that sanction.

8 That -- that principle, it seems to me, is
9 reinforced by the limitation on what you can use the I-9
10 for. Justice Alito, you asked that question, but it
11 does seem to me quite clear that what Congress
12 envisioned in 1986 when it adopted this is you're going
13 to have an exclusively Federal enforcement scheme
14 including the adjudicatory process, and it is only in
15 that context that you are allowed to use the I-9. And
16 the notion that the State could adopt a standard of
17 intentional or knowingly, and not be able to have the
18 I-9 materials available, seems to me flatly at odds with
19 each other, and, therefore, it cannot be that Congress
20 intended under those circumstances to allow these
21 matters to be adjudicated in that particular fashion.

22 JUSTICE GINSBURG: What can -- Mr. Phillips,
23 what can the State do that would be complementary rather
24 than conflicting?

25 MR. PHILLIPS: I -- it seems to me the

1 easiest -- and of course, this has nothing to do with
2 what Arizona does -- but the easiest is, if a -- an
3 employer is convicted of -- of violating IRCA and a
4 criminal sanction, and he happens to be a barber, and
5 the State licensing law says if you're convicted of a --
6 of a Federal crime you will lose your license, it is
7 available to the State under those circumstances -- and
8 I think this is exactly what Congress had in mind -- to
9 issue a notice to show cause why that particular person
10 shouldn't have the license revoked and then go from
11 there.

12 JUSTICE SCALIA: Convicted by -- by a
13 Federal Government that hasn't gone after many
14 convictions.

15 MR. PHILLIPS: Justice Scalia --

16 JUSTICE SCALIA: That's the whole problem.

17 MR. PHILLIPS: Well, no. But,
18 Justice Scalia, it seems to me the whole question here
19 -- and first of all, I don't think pre-emption can be a
20 moving target. I think you have to decide it on a basis
21 of what Congress had in front of it in 1986. But
22 remember, Congress was balancing three, at least, very
23 difficult problems: minimizing burdens on the
24 employers, minimizing discrimination against people who
25 are permitted to be hired, and avoiding hiring people

1 who are not permitted to do so.

2 And how you properly reconcile that is very
3 difficult, but the one thing that seems to me clear is
4 that that was a choice Congress meant to leave to itself
5 and to the Federal Government to sort out and not to
6 give the States the opportunity to come in where they
7 did.

8 And to say one last word about E-Verify --

9 CHIEF JUSTICE ROBERTS: Well, except --
10 well, you're just kind of blinking over the savings
11 clause: except through licensing and similar laws. So
12 that's not a real reservation by Congress of this power
13 to itself.

14 MR. PHILLIPS: Well, if you -- if you
15 interpret the savings clause as I do, which means truly
16 as a supplement to Federal -- Federal adjudication, then
17 it is a very narrow limitation on that basis, because at
18 that point you've already invoked the entirety of the
19 Federal scheme, and it doesn't modify the balance on
20 those broader legal issues, Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 The case is submitted.

23 (Whereupon, at 12:02 p.m., the case in the
24 above-entitled matter was submitted.)

25

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